

IS OFFICIAL LEAGUE DATA A SAFE BET: BENEFITS AND CONCERNS WITH REQUIRING SPORTSBOOKS TO PURCHASE LEAGUE DATA FEEDS

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I. INTRODUCTION

A new gold rush began in American history on May 14, 2018 when the United States Supreme Court invalidated the Professional and Amateur Sports Protection Action (“PASPA”) in *Murphy v. NCAA*.² This decision allowed state legislatures to permit sports betting within their borders, essentially opening the floodgates to legalized sports betting in America.³ Consequently, bookmakers and sports fans, not gold miners with pick axes, are rushing in to cash out on an industry that will generate revenues of \$5.7 billion by 2024.⁴ But what is creating such a boom in this market? The answer is data. Sports data is the oil keeping the sports betting machine running.⁵

The legislative landscape for sports betting data, however, remains similar to the Wild West. With PASPA overturned, individual states with little experience in gaming law are responsible for crafting legislation absent federal guidance.⁶ Inconsistencies across state lines may place both consumers and sportsbooks at risk. In fact, the laws surrounding Official League Data (“OLD”) have significant repercussions on the sports betting market.⁷ OLD, in this context, is a mandate requiring all

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² *Murphy v. NCAA*, 138 S. Ct. 1461, 1484–85 (2018).

³ *Id.* (“Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”).

⁴ VIXIO REGULATORY INTELLIGENCE, *U.S. Sports-Betting Market to Hit \$5.7bn By 2024*, <https://vixio.com/gamblingcompliance/insights-analysis/u-s-sports-betting-market-to-hit-5-7bn-by-2024/> 2024 (last visited Mar. 19, 2021).

⁵ James Glanz & Agustin Armendariz, *When Sports Betting is Legal, the Value of Game Data Soars*, N.Y. TIMES, July 2, 2018, at A1 (“[D]ata has taken on that dominant role in betting.”).

⁶ *Murphy*, 138 S. Ct. at 1484–85.

⁷ See Zachary Zagger, *Sports Wagering Bill Is a Big Bet On Federal Oversight*, LAW 360 (Dec. 20, 2018, 10:15 PM), <https://www.law360.com/articles/1113700/sports-wagering-bill-is-a-big-bet-on-federal-oversight>.

sportsbooks to use data provided by the applicable sports league.⁸ While this mandate presents a number of practical benefits, it is not without its limits. Accordingly, whoever has control over this essential element dictates how the market operates.⁹

This comment proposes that states should require sportsbooks to use OLD in sports betting. Section II of this comment provides an overview of OLD's legislative history. OLD's Legislative History illustrates the differences between OLD and unofficial data and the variations in current OLD laws. Section III details why all states should enact laws requiring the use of OLD. First, it highlights two critical justifications for implementing this agenda. In that light, OLD mitigates errors when sportsbooks settle bets and prevents courtsiding. Next, it takes notice of a potential concern—a monopoly on data—and attempts to resolve it by defining the scope of the “commercially reasonable” standard used in data licensing agreements. Finally, this comment concludes that states should enact OLD laws mirroring Michigan's model.

II. BACKGROUND

OLD, i.e., data provided to sportsbooks by a respective league for the purposes of betting, has been a topic of legislative debate ever since sports betting became legal in the United States.¹⁰ Many leagues and sportsbooks lobby state legislatures with the hopes of enacting laws that require sportsbooks to use OLD.¹¹ This section overviews the history of OLD mandates, how sportsbooks use OLD, and the variations in state laws that have adopted the mandate.

A. THE EXPANSION OF THE OLD MANDATE

Efforts to adopt a mandate requiring the use of OLD have grown exponentially in a very short period of time. What started as an attempt

⁸ For purposes of this Comment, “Official League Data” is defined as any fact, statistic, metric, analysis, result, or outcome, relating to a sports event or competition that is obtained by the applicable sports governing body, including but not limited to a sports league, organization, or association, or an entity expressly authorized by the sports governing body to use or provide this information to a sports betting operator. *Infra* note 62.

⁹ Glanz, *supra* note 5.

¹⁰ *See, e.g.*, Tennessee Sports Gaming Act, TENN. CODE ANN. § 4-51-302(17) (2019).

¹¹ Zachary Zagger, *NBA Signs Sports Betting Sponsorship Deal With MGM*, LAW 360 (July 31, 2018, 8:45 PM), <https://www.law360.com/articles/1068793/nba-signs-sports-betting-sponsorship-deal-with-mgm>.

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by leagues to acquire “integrity fees” from sportsbooks quickly turned into an operational necessity.¹²

In March of 2018, sports leagues began lobbying state legislators with the hope of securing a one percent “integrity fee” on all bets, equal to roughly twenty-percent of all gross gaming revenue.¹³ The leagues believed it was fundamentally unfair for a sportsbook to profit from league infrastructure without making any sort of contribution.¹⁴ The leagues attempted to secure a royalty fee, but publicly maintained that they were seeking a partnership to preserve the integrity of sports and betting.¹⁵ Critics of the integrity fee saw through this veil, and recognized any such fees were essentially a form of taxation.¹⁶ Many feared that this “tax” would increase operation costs for legal bettors and would cause illegal offshore sportsbooks to flourish.¹⁷ Facing severe backlash from both the sportsbooks and state legislators, leagues have all but abandoned this effort.¹⁸

With the prospect of integrity fees long gone, leagues shifted their agenda to securing an OLD mandate for sportsbooks.¹⁹ OLD is an industry term for all data related to a sport, collected by the respective sports league, and sold to sportsbooks for betting purposes.²⁰ Unlike integrity fees, leagues have provided more substantive justification for an OLD mandate. They argue that data collected and provided by leagues are faster and more reliable than the same data collected by

¹² *Id.*

¹³ Darren Heitner, *MLB And NBA Are Testing Their Power With West Virginia's Sports Betting Bill*, FORBES (Mar. 12, 2018, 5:00 PM), <https://www.forbes.com/sites/darrenheitner/2018/03/12/mlb-and-nba-are-testing-their-power-with-west-virginias-sports-betting-bill/#372802c9499a>.

¹⁴ Zagger, *supra* note 11 (“[W]e should be compensated for our intellectual property and for our official data...”).

¹⁵ Zagger, *supra* note 11.

¹⁶ LEGAL SPORTS REPORT, *Sports Betting Integrity Fee*, <https://www.legalsportsreport.com/integrity-fee/> (last updated Jan. 11, 2020, 9:09 PM) (“Integrity fees . . . are basically taxes on legal sports betting”).

¹⁷ *Id.* (“If the cost of doing business increases for sportsbooks operating legally in the US via integrity fees, they’ll likely attempt to pass that cost on to consumers. That would make it more difficult for legal books to compete with offshore books that are serving Americans illegally already.”).

¹⁸ See Steve Ruddock, *How the MGM-NBA Deal All but Ends the Integrity Fee Debate*, LEGAL SPORTS REPORT (Aug. 9, 2018, 6:00 PM), <https://www.legalsportsreport.com/22645/mgm-nba-integrity-fees/>.

¹⁹ See LEGAL SPORTS REPORT, *Official League Data*, <https://www.legalsportsreport.com/official-league-data/> (last updated Jan. 11, 2020, 9:08 PM).

²⁰ *E.g.*, TENN. CODE ANN. § 4-51-302(17).

other providers.²¹ In turn, the use of OLD can resolve a host of sports betting integrity issues including inaccuracies in betting results and “courtsiding.”²² Although true “integrity fees” are a relic of the past, OLD shares a few key features with its predecessors.²³ Leagues still believe that sportsbooks should compensate them for data as a matter of intellectual property rights.²⁴ As OLD lobbying efforts continue, leagues are entering into partnership agreements with several sportsbooks to distribute these data feeds on their own terms.²⁵

In August 2018, Senators Hatch and Schumer proposed the “Sports Wagering Market Integrity Act of 2018” (“SWMIA”) to Congress; this bill created a federal framework for sports betting and contained a provision requiring sportsbooks to OLD.²⁶ In response, the American Gaming Association (“AGA”) wrote Senator Schumer on September 13, 2018, to caution him about his position on an OLD mandate.²⁷ The AGA characterized the mandate as an effort by federal and state legislators to force private actors into commercial agreements with one another.²⁸ It also forecasted that by allowing an entity to control the influx of official data, leagues would inflate prices and monopolize their facilities.²⁹

²¹ Wayne Parry, *Leagues finally cash in on sports betting by selling data*, ASSOCIATED PRESS (Jan. 7, 2020), <https://apnews.com/2fc27b7c558ceddd8669fb03acc15e3d> (quoting Scott Kaufman-Ross, senior vice president of fantasy and gaming for the National Basketball Association).

²² Courtsiding denotes the activity in which someone attends a live sporting event and disseminates real-time sports information during a broadcast delay to another for the purposes of live and proposition betting. Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH & ARTS 63, 66–67 (2015); see also BAKERHOSTETLER, *The Future of Legal Sports Gambling: What Everyone Needs to Know About Murphy v. NCAA*, 3 (2018), <https://www.bakerlaw.com/webfiles/Litigation/2018/Articles/FutureLegalSportsGambling.pdf>; see also Glanz, *supra* note 5.

²³ BAKERHOSTETLER, *supra* note 22, at 2.

²⁴ BAKERHOSTETLER, *supra* note 22, at 2.

²⁵ *E.g.* Zagger, *supra* note 11 (NBA and MGM Resorts enter into non-exclusive partnership agreement to provide official league data).

²⁶ See Sports Wagering Market Integrity Act, S. 3793, 115th Cong., § 103(b)(5) (2018).

²⁷ Letter from Sara Slane, Senior Vice President of Pub. Affairs, American Gaming Association, to Charles Schumer, Senate Democratic Leader, United States Senate (Sept. 13, 2018).

²⁸ See *id.* (“Using the power of government to impose costs, eliminate operators’ market-based choices, or make it harder for consumers to bet will directly undermine the goals we all share.”).

²⁹ *Id.* (“Mandating every sportsbook contract with only one official data company will allow individual, preferred data providers to set inflated, non-competitive monopoly prices for their services.”).

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Congress ultimately rejected the bill, but its framework for OLD has lived on and gained traction. Since then, three states—Illinois, Tennessee, and Michigan—have passed laws requiring the use of OLD in sports betting.³⁰ Furthermore, Senator Romney, is working to revive a federal sports betting bill, which many predict will include an official data provision.³¹

B. FUNDAMENTAL DIFFERENCES BETWEEN OLD AND UNOFFICIAL DATA

By their definitions alone, one may assume that the distinction between OLD and unofficial data is tantamount to splitting hairs. But these distinctions provide OLD users with a competitive advantage over those that do not use it. The main differences between OLD and unofficial data are who collects the data and how sportsbooks obtain it. But the types of data that OLD users have access to that unofficial data users do not also plays a pivotal role.

i. How sportsbooks use sports data

The three major types of sports bets in betting legislation are: 1) traditional; 2) live; and 3) proposition bets and current OLD laws separate these bets into tiers.³² For purposes of this Comment, Tier 1 refers to traditional bets, Tier 2 refers to live bets, and Tier 3 refers to proposition bets.

Traditional bets, which are based on fixed statistical odds, are placed on the general outcome of a sporting event before the commencement of the game.³³ This includes any bet made before the game began on the winner or on total points scored by the end of the game.³⁴ In contrast, live bets (also called in-play bets) are bets placed

³⁰ Sports Wagering Act, 230 ILL. COMP. STAT. , art. 25, § 45/25-25(g) (2019); Lawful Sports Betting Act, 2019 Mi. ALS 149 § 10(a) (2019); TENN. CODE ANN. § 4-51-316.

³¹ Tony Batt, *Former U.S. Presidential Nominee Mitt Romney Working on Sports Betting Bill*, GAMBLING COMPLIANCE (Sept. 6, 2019), https://mk0ideagrowthmd69e4g.kinstacdn.com/wp-content/uploads/2019/09/gamblingcompliance_-_former_u.s._presidential_nominee_mitt_romney_working_on_sports_betting_bill-_2019-09-06.pdf.

³² Compare 230 ILL. COMP. STAT. art. 25, § 45/25-10 (defining a Tier 1 bet as a traditional bet and a Tier 2 bet as a bet “that is not a [T]ier 1 [bet]”), with N.H. REV. STAT. ANN. § 287-I:1(XVI)-(XVIII) (2019) (defining a Tier 1 bet as a traditional bet, a Tier 2 bet as a live bet, and Tier 3 as any other bet). *But see* TENN. CODE ANN. § 4-51-302(28) (listing the different types of bets without using the tier system).

³³ See *How to Bet on Sports – The Different Types of Wagers*, GAMBLING SITES, (last visited Mar. 15, 2021), <https://www.gamblingsites.com/sports-betting/introduction/bets-wagers/> (last visited May 20, 2021).

³⁴ See *Id.*

from continuously updated statistical odds on the general outcome of a sporting event during the progression of the event.³⁵ This includes any bet made after a game started, but before it is finished, on the winner or on total points scored by the end of the game.³⁶ Because individuals place live bets throughout the progression of the event, the odds and ability to bet on an occurrence changes within seconds.³⁷ Finally, a proposition bet is a bet on the special occurrence of an event during the game.³⁸ Bettors may make these types of bets before the start of the event or during the actual progression of the event.³⁹ Because they deal with special occurrences, and not something as simple as the final score of a game, proposition bets are creative and allow individuals to bet on distinct events, such as which player will score the first point or what time the first scored point will occur.⁴⁰ In fact, some sportsbooks offer even more creative proposition bets, like whether the coin toss will land heads or tails, how long the pre-game national anthem will last, and what color Gatorade players will dump on the winning coach's head.⁴¹

But how do sportsbooks create these different types of bets? They do so by using sports data. Mainly, sportsbooks use data for the purposes of settling bets and making odds.⁴² They use this data to settle bets by determining whether an individual placing a bet predicted correctly on the factual outcome of an occurrence, or, more simply put, whether the bettor won or lost their bet.⁴³ Additionally, sportsbooks use this data to create statistical formulas that allow them to predict the occurrence of an event.⁴⁴ One can call this probabilities odds.⁴⁵ The more data a sportsbook has access to, and the more accurate the data is,

³⁵ *What Is In Play Sports Betting?*, THE LINES (Oct. 22, 2019), <https://www.thelines.com/betting/in-play/>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *How to Bet on Sports – The Different Types of Wagers*, *supra* note 33.

³⁹ *How to Bet on Sports – The Different Types of Wagers*, *supra* note 33.

⁴⁰ *See How to Bet on Sports – The Different Types of Wagers*, *supra* note 33.

⁴¹ Mike Rigz, *10 Ridiculous Super Bowl Prop Bets*, GRIDIRON EXPERTS (Jan. 29, 2019), <https://gridironexperts.com/10-ridiculous-super-bowl-prop-bets> (listing the ten most ridiculous NFL Super Bowl Proposition Bets).

⁴² *See* 230 ILCS, art. 25, § 45/25-25(f) (“Master sports wagering licensees may use any data source for determining the result of all tier 1 sports wagers.”); *see also How to Use Statistical Analysis When Betting on Sports*, GAMBLING SITES, (last visited May 20, 2021), <https://www.gamblingsites.com/sports-betting/strategy/statistical-analysis/>.

⁴³ *See generally How to Use Statistical Analysis When Betting on Sports*, *supra* note 42 (describing the various methods of statistical analyses used).

⁴⁴ *Betting Odds Explained – A Beginner’s Guide to Gambling*, MY BETTING SITES (last visited May 20, 2021), <https://mybettingsites.co.uk/learn/betting-odds-explained/>.

⁴⁵ *See id.*

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and the better informed their prediction will be—ergo, the more reliable the odds.⁴⁶

In an era of Big Data, sportsbooks have access to a wide variety of sports data. Most sportsbooks use a combination of (1) event data, (2) team or individual performance data, (3) proprietary and statistical or metric data, and (4) biometric and medical data when creating bets.⁴⁷ Event data encompasses all general facts and information collected concerning the sporting event itself.⁴⁸ Team or individual performance data includes any factual information about a team's or player's performance.⁴⁹

Proprietary and statistical or metric data is more complex than factual information. It is comprised of any proprietary and statistical or algorithmic methods of analysis of raw information that may be used to provide a competitive advantage to a team or to incorporate into a team's decision-making process.⁵⁰ It involves simple or advanced statistical analysis that integrates event data, team or individual performance data, or biometric or medical data.⁵¹ Major League Baseball ("MLB") is one of the leading organizations that utilizes proprietary data.⁵² MLB relies on "Sabermetrics," which is an empirical analysis that analyzes all relevant baseball information to evaluate past and future performance.⁵³ For example, MLB uses a Wins Above Replacement ("WAR") rating to determine how many wins a particular player will contribute over the season compared to another player.⁵⁴

⁴⁶ Ben Burd, *How Often Do Betting Odds Get It Right?* THE SPORTS ECONOMIST (Feb. 22, 2021), <https://thesportseconomist.com/how-often-do-betting-odds-get-it-right/>.

⁴⁷ William H. Williams, *On the Clock, Best Bet to Draft Cyberdefensive Linemen: Federal Regulation of Sports Betting from a Cybersecurity Perspective*, 13 BROOK. J. CORP. FIN. & COM. L. 539, 545–48 (2019); Christian Frodl, *Commercialisation of Sports Data*, 26 MARQ. SPORTS L. REV. 55, 56–57 (2015).

⁴⁸ See Frodl, *supra* note 47, at 57–58 (combining fixture data and event data). Event data includes time of game, weather conditions, final score of game, which team won, stadium information, etc.

⁴⁹ See Frodl, *supra* note 47, at 58–59. Team or individual performance data includes total number of wins/losses, points, goals, fouls, errors, assists, etc.

⁵⁰ Williams, *supra* note 47, at 546 (combining aspects of statistical data with team proprietary advanced statistical data analytics).

⁵¹ Williams, *supra* note 47, at 546.

⁵² See, *Advanced Stats*, MAJOR LEAGUE BASEBALL, (last visited May 20, 2021), <http://m.mlb.com/glossary/advanced-stats>; see also *A Guide to Sabermetric Research: A Primer on Statistics*, SOCIETY FOR AMERICAN BASEBALL RESEARCH, (last visited Mar. 22, 2021) <https://sabr.org/sabermetrics/statistics>.

⁵³ *Advanced Stats*, *supra* note 52.

⁵⁴ Steve Slowinski, *What is WAR?*, FAN GRAPHS (Feb. 15, 2010), <https://library.fangraphs.com/misc/war/>; see also *Wins Above Replacement (WAR)*, MAJOR LEAGUE BASEBALL, (last visited May 20, 2021), <http://m.mlb.com/glossary/advanced-stats/wins-above-replacement> (The MLB

Leagues may also hold proprietary data from exclusive equipment and sports technology they own that other entities do not have access to.⁵⁵ For example, the National Football League (“NFL”) tracks players’ running speed, location, and movement by inserting RFID chips into their equipment.⁵⁶ Similarly, MLB has sports technology allowing them to track the velocity and angle players hit or throw a baseball.⁵⁷ MLB later posts this data on their online MLB StatCast system.⁵⁸

Finally, an athlete’s biometric data is any measurable and distinguishable biological, physiological, or behavioral records used to identify an athlete including, but not limited to: height, heart rate, or vertical jump.⁵⁹ Alternatively, their medical data is any health information or injury reports.⁶⁰ Individual sports clubs and trainers traditionally use athletes’ biometric data to monitor health and wellness for strength and conditioning regimes.⁶¹

ii. How sportsbooks obtain sports data

Sportsbooks ultimately derive this sports data from either OLD providers or unofficial data providers. For purposes of this Comment, “Official League Data” is defined as:

any fact, statistic, metric, analysis, result, or outcome, relating to a sports event or competition that is obtained by the applicable sports governing body, including but not limited to a sports league, organization, or association, or an entity expressly authorized by the sports governing body to use or provide this information to a sports betting operator.⁶²

calculates WAR as: (The number of runs above average a player is worth in his batting, baserunning and fielding + adjustment for position + adjustment for league + the number of runs provided by a replacement-level player) / runs per win).

⁵⁵ See Williams, *supra* note 47, at 545.

⁵⁶ Williams, *supra* note 47, at 546.

⁵⁷ Lara Grow & Nathaniel Grow, *Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports*, 74 WASH & LEE L. REV. 1567, 1577 (2017).

⁵⁸ MAJOR LEAGUE BASEBALL, *Statcast Leaderboard*, http://m.mlb.com/statcast/leaderboard#avg-hit-velo,r,2019_ (last visited May 20, 2021).

⁵⁹ Williams, *supra* note 47, at 546–47; Kristy Gale, *The Sports Industry’s New Power Play: Athlete Biometric Data Domination. Who Owns it and What may be Done with it?*, 6 ARIZ. ST. U. SPORTS & ENT. L.J. 7, 11 (2016).

⁶⁰ Williams, *supra* note 47, at 542–43; Gale, *supra* note 59, at 11.

⁶¹ Williams, *supra* note 47, at 546.

⁶² 230 ILCS, art. 25, § 45/25-10; Tenn. Code Ann. § 4-51-302(17); Frodl, *supra* note 47, at 55; LAW INSIDER, *Definition of Official league data*, <https://www.lawinsider.com/dictionary/official-league-data> (last visited May 20, 2021).

Simply put, OLD is sports data collected by the applicable sports body—whether it be the relevant sports league or individual team organization, or an entity expressly authorized by these sports bodies to collect that data.⁶³ Currently, six major sportsbooks have partnership agreements with professional sports organizations in the United States to use OLD.⁶⁴ For example, MLB invests an immense amount of its resources compiling data for its StatCast system and later sells the rights to utilize that data for creating bets to DraftKings, FanDuel, and MGM.⁶⁵

Alternatively, a sports league may license the ability to collect and distribute its data to an independent data provider who then sells this data to a sportsbook.⁶⁶ Through this agreement, authorized data providers supply sportsbooks with an OLD feed that not only gives them access to past and live scores, updates, and statistics but also to a system that generates pre-game and live betting odds.⁶⁷ MLB currently licenses the ability to collect and distribute its data to sportsbooks to “Sportradar,” which is their exclusive supplier of real-time game statistics.⁶⁸ Not only does Sportradar work with leagues and sportsbooks to optimize their data collection systems, but their Intelligence & Investigation Unit also uses a fraud detection system to monitor and analyze the integrity of individual sporting events.⁶⁹

Typically, authorized data providers distribute OLD feeds as separate packages.⁷⁰ The more a sportsbook pays for its OLD package, the greater access it has to a variety of sports data sets. A real-time data package is Sportradar’s premier OLD package, which pulls game feeds continuously and ranges anywhere from \$100,000–\$2,000,000 per month per sport.⁷¹ Premium and Standard data packages pull game

⁶³ 230 ILCS, art. 25, § 45/25-10; Tenn. Code Ann. § 4-51-302(17); Frodl, *supra* note 47, at 56–57; LAW INSIDER, *supra* note 62.

⁶⁴ LEGAL SPORTS REPORT, *supra* note 19 (The six major sportsbooks with licensing agreements include BetStars, Caesars, DraftKings, FanDuel, MGM, William Hill).

⁶⁵ *E.g.*, Parry, *supra* note 21; MAJOR LEAGUE BASEBALL, *supra* note 58; Hilary Russ, *Major League Baseball and FanDuel strike sports betting deal*, REUTERS (Aug. 15, 2019), <https://www.reuters.com/article/us-baseball-fanduel-gambling/major-league-baseball-and-fanduel-strike-sports-betting-deal-idUSKCN1V51WL>.

⁶⁶ SPORTRADAR, *League Partnerships*, <https://sportradar.us/about-us/league-partnerships/> (last visited May 20, 2021).

⁶⁷ *Id.*

⁶⁸ *E.g., Id.*; SPORTRADAR, *supra* note 66.

⁶⁹ SPORTRADAR, *supra* note 66.

⁷⁰ *See e.g.,* SPORTRADAR, *API Packaging*, https://developer.sportradar.com/APLPackaging#Sport_packages (last visited Mar. 21, 2021); *see also* Matt Rybaltowski, *Here’s How Much ‘Official’ League Data Actually Costs*, SPORTSHANDLE (Mar. 12, 2019), <https://sportshandle.com/sports-betting-official-data-cost/>.

⁷¹ SPORTRADAR, *supra* note 70.

feeds every three to fifteen minutes and range from \$8,000–\$250,000 per month per sport.⁷² Finally, Basic OLD packages pull game feeds once per game and range from \$500–\$15,000 per month per sport.⁷³

In contrast, unofficial data is sports data collected by any person or entity not expressly authorized by the applicable sports body to collect or distribute that data.⁷⁴ These unauthorized “data scouts” typically obtain this data by recording events viewed during a sports broadcast, scraping the internet for game feeds and statistics, or courtsiding and distributing it to sportsbooks.⁷⁵ Courtsiding denotes the activity in which someone attends a live sporting event and disseminates real-time sports information during a broadcast delay to another for the purposes of live and proposition betting.⁷⁶ Courtsiders look to take advantage of a broadcast delay by placing a bet on an event that already happened before the sportsbook receives the updated data feed.⁷⁷ Some compare the practice to insider stock trading.⁷⁸ Today, this issue has been most prevalent in tennis, cricket, and basketball.⁷⁹ As it stands, there is nothing per se illegal about the methods unauthorized data scouts use to obtain this data.⁸⁰

Depending on the provider, sportsbooks may be limited in the types of data they can access. Because unauthorized data scouts only have access to public information recorded from broadcasts and league websites, sportsbooks using this data are at a disadvantage compared to those with the entirety of data a league itself provides.⁸¹

⁷² SPORTRADAR, *supra* note 70.

⁷³ SPORTRADAR, *supra* note 70.

⁷⁴ See Glanz, *supra* note 5.

⁷⁵ See Glanz, *supra* note 5.

⁷⁶ Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH & ARTS 63, 66–67 (2015).

⁷⁷ BAKERHOSTETLER, *supra* note 22 at 3.

⁷⁸ Tania Michaelian, *Courtsiding May Become a Serious Issue Regulators Will Need to Tackle in the Future*, BETTING USA (July 29, 2019), <https://www.bettingusa.com/courtsiding-serious-issue/>.

⁷⁹ BAKERHOSTETLER, *supra* note 22 at 3–4.

⁸⁰ BAKERHOSTETLER, *supra* note 22 at 4.

⁸¹ See Parry, *supra* note 21 (quoting several executives of the National Basketball Association, National Hockey League, and National Association for Stock Car Auto Racing on the advantages of OLD including NBA executive’s statement that “[t]he speed of that data is incredibly important. We have hundreds of lead changes. You can be one to two plays behind if you collect data off a broadcast feed. A player that hits a couple of 3-pointers can meaningfully change the odds.”).

C. VARIATIONS IN CURRENT OLD LEGISLATION

While the OLD agenda is still relatively new, leagues have been successful, in some respects, in persuading legislators to adopt it. Nevertheless, there are major variations across each state. The most noticeable differences include the level of involvement by state gaming boards in implementing OLD requirements.

i. Sports Wagering Market Integrity Act

The Sports Wagering Market Integrity Act of 2018 (“SWMIA”) was the first piece of legislation to adopt the OLD agenda.⁸² The failed bill attempted to replace PASPA as a federal framework for the sports betting market.⁸³ Instead of preempting states from constructing their own policies, the main goal of the bill was simply to provide a uniform standard for ensuring the integrity of sports betting across the states.⁸⁴ Its original text presented a six-year trial period requiring the use of OLD for all sports bets made on or before December 31, 2024.⁸⁵ After this trial period, it allowed sportsbooks to forgo the OLD requirement so long as it could show that it obtained data of similar quality from a distributor the applicable state gaming board deemed appropriate.⁸⁶ The board would only certify that this data was of similar quality to OLD if it was “of substantially similar speed, accuracy, and consistency.”⁸⁷ In the end, the bill failed soon after it was introduced.

ii. Tennessee Sports Gaming Act

Tennessee became the first state to implement an OLD mandate with its enactment of the Tennessee Sports Gaming Act on May 24, 2019.⁸⁸ The law requires sportsbooks to “exclusively use official league data for purposes of live betting” and obtain this data by entering into a licensing agreement with a sports league, or authorized entity.⁸⁹ Further, it allows a sportsbook to opt out of using OLD if it can

⁸² S. 3793, 115th Cong. §§ 1 – 502 (2018).

⁸³ *See id.* § 2(1).

⁸⁴ *Schumer, Hatch Introduce Bipartisan Sports Betting Integrity Legislation*, SENATE DEMOCRATS (Dec. 19, 2018), <https://www.democrats.senate.gov/newsroom/press-releases/schumer-hatch-introduce-bipartisan-sports-betting-integrity-legislation>.

⁸⁵ S. 3793 § 103(b)(5)(A)(i).

⁸⁶ *Id.* § 103(b)(5)(A)(ii).

⁸⁷ *Id.* § 103(b)(5)(A)(ii)(I)(aa).

⁸⁸ Tennessee Sports Gambling Act, TENN. CODE ANN. §§ 4-51-301 – 4-51-330; LEGAL SPORTS REPORT, *supra* note 19.

⁸⁹ *Id.* § 4-51-302(17) (Official league data must be “obtained pursuant to an agreement with the relevant sports governing body of a sport . . . or an entity expressly authorized . . . to provide such information to licensees for purposes of live betting”).

demonstrate to the state gaming board that the sports league, or any other authorized entity, cannot provide an OLD feed “in accordance with commercially reasonable terms.”⁹⁰ The state gaming board ultimately defines the meaning of “commercially reasonable terms” and whether the licensing agreement has met this threshold.⁹¹

iii. Illinois Sports Wagering Act

Soon after, Illinois enacted the Illinois Sports Wagering Act, which legalized sports betting on June 28, 2019.⁹² The statute separates sports betting into two distinct tiers.⁹³ Tier 1 encompasses traditional sports bets placed before the event and determined solely by the final score or outcome.⁹⁴ Tier 2 encompasses any other sports bet that does not fit in Tier 1, including live bets and proposition bets.⁹⁵ Illinois requires the use of OLD for Tier 2 but not Tier 1 bets.⁹⁶

The Illinois law provides a greater degree of state intervention in the licensing of OLD for sports betting. It requires sports leagues or entities authorized to provide OLD to apply for a data provider license given by the State.⁹⁷ The sports league, or authorized entity, must then pay a licensing fee to the State, calculated as a certain percentage of the data sold to the sportsbook.⁹⁸ After the sportsbook decides it wants to offer Tier 2 betting and negotiates a deal to buy an OLD feed from the sports league, the league may notify the state gaming board that it wishes to supply the data to the sportsbook.⁹⁹ Within 30 days of the league notifying the board, the sportsbook must begin to use the OLD for Tier 2 bets unless the contract’s terms are not “commercially reasonable.”¹⁰⁰ If the state gaming board determines the terms are not “commercially reasonable,” the sportsbook may use any data it desires for Tier 2 bets.¹⁰¹

⁹⁰ *Id.* § 4-51-316.

⁹¹ *Id.*

⁹² 230 ILL. COMP. STAT. 45/25-25(a) (2020).

⁹³ *Id.* 45/25-10.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* 45/25-25(f)-(g).

⁹⁷ *Id.* 45/25-60(a)-(c).

⁹⁸ ILL. COMP. STAT. 45/25-60(c).

⁹⁹ *Id.* 45/25-25(g).

¹⁰⁰ Although the legislators require “commercially reasonable terms” they do not explicitly indicate what is meant by this term. *Id.*

¹⁰¹ *Id.*

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iv. Michigan Lawful Sports Betting Act

The state of Michigan created arguably the most comprehensive framework for OLD with its enactment of the Lawful Sports Betting Act on December 20, 2019.¹⁰² The statute requires the use of OLD for Tier 2 live sports betting.¹⁰³ Similar to the Illinois Sports Wagering Act, sports leagues must notify the state of their desire to provide OLD, prompting sportsbooks to begin using OLD within sixty days.¹⁰⁴ Again, if a sportsbook can demonstrate to the state gaming board that the league will not provide OLD on “commercially reasonable terms,” the sportsbook can use any data feed that the board has approved.¹⁰⁵ The law conveniently provides a nonexclusive list of factors the state gaming board may consider when evaluating whether leagues are offering OLD on “commercially reasonable terms.”¹⁰⁶ It includes:

- (i) The availability of a sports governing body’s [T]ier 2 sports bet official league data to a sports betting operator for more than [one] authorized source.
- (ii) Market information regarding the purchase by operators of data from any authorized source including sports governing bodies or their designees for the purpose of settling sports [bets], for use in this state or other jurisdictions.
- (iii) The nature and quantity of data, including the quality and complexity of the process used for collecting the data.
- (iv) The extent to which sports governing bodies or their designees have made data used to settle [T]ier 2 sports bets available to operators.¹⁰⁷

In the event of a challenge to the commercial reasonableness of the licensing terms, the state gaming board must make a determination within 120 days, during which time the sportsbook may use any source of approved data.¹⁰⁸

v. New Hampshire Sports Betting Law

New Hampshire provides perhaps the most lenient standard for OLD in sportsbooks. New Hampshire enacted their sports betting law

¹⁰² 2019 Mi. ALS 149 (2019).

¹⁰³ *Id.* at § 10a(1)-(4).

¹⁰⁴ *Id.* at § 10a(3).

¹⁰⁵ *Id.* at § 10a(3)(a)-(b).

¹⁰⁶ *Id.* at § 10a(3)(b).

¹⁰⁷ *Id.* at § 10a(3)(b)(i)-(iv)

¹⁰⁸ 2019 Mi. ALS 149 § 10a(4).

within their preexisting lottery commission, on July 12, 2019.¹⁰⁹ Although making no specific mention of OLD, it does require sportsbooks to “publicly disclose the source of the data that will be used to determine the outcome of a [T]ier II or [T]ier III wager[s]” instead of outright requiring it.¹¹⁰ The fact that this law, and perhaps other state sports betting laws, deliberately leaves out a disclosure requirement on traditional bets may infer that there is only a necessity for OLD for live and proposition betting.

III. ANALYSIS

States should adopt laws requiring the use of OLD in sportsbooks. OLD is an effective solution to two core issues that sportsbooks struggle with—consistently settling bets and preventing courtsiding. It would be ill-advised to say, however, that this mandate is without its concerns. The most relevant of these includes a potential monopoly on sports data. While many fear that leagues and authorized data providers will leverage their positions in the betting market to control the influx of data, current OLD laws already attempt to combat this by imposing a “commercially reasonable” standard. With some careful adjustments to these provisions, state gaming boards and courts can ensure that leagues are unable to refuse to deal the data necessary for sportsbooks to operate. Ultimately, legislators, gaming boards, and courts must begin treating OLD as an essential facility that leagues are required to provide upon “commercially reasonable terms”.

This section begins by emphasizing the practical benefits of OLD. Its focus then shifts to addressing what courts and gaming boards must do to avoid a potential monopoly on OLD. Finally, it proposes a model framework that all state legislators should replicate when enacting or amending their own laws.

A. PRACTICAL BENEFITS OF IMPLEMENTING AN OLD MANDATE

Lobbyists promote OLD as the fastest and most accurate sports data on the market. Consequently, sportsbooks can use OLD as a practical means to address two major issues facing the sports betting industry today. Currently, sportsbooks struggle with consistently settling their bets with other sportsbooks and preventing courtsiding.¹¹¹

¹⁰⁹ RSA Tit. XXIV, ch. 287-I (2019).

¹¹⁰ *Id.* at § 11.

¹¹¹ See Craig Mauger, *Pro leagues score with Michigan's new sports betting law*, DETROIT NEWS (Jan. 7, 2020),

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i. OLD prevents inconsistent betting results across sportsbooks

When real money is at stake, individuals want to be confident that sportsbooks will settle their bets fairly and accurately. If an individual makes a bet on the Yankees to win, they expect that the sportsbook will pay them if the Yankees, in fact, do win. If they make a bet on Gleyber Torres to hit two singles before the sixth inning, they expect that the sportsbook will pay them if he does, in fact, hit two singles before the sixth inning. Similarly, sportsbooks want to be confident that the data they use to create odds are accurate to avoid faulty predictions, consequently causing them to lose money. If a sportsbook receives data stating that the Yankees win fifty percent of the time they play the Red Sox, this will severely distort their odds if they actually win seventy percent of the time they play the Red Sox. For these concerns, proponents claim that OLD is the one true source of accurate sports data because it contains the official ruling and recordation of both public and nonpublic information as it occurs in real time.¹¹²

In a hearing before the Kansas legislature last year, MLB's Senior Vice President, Bryan Seeley, addressed this issue head on.¹¹³ He indicated that two people placing identical bets with separate sportsbooks could receive different outcomes, depending on which data source the sportsbook decided to use to settle the bet.¹¹⁴ As Seeley highlights, the issue is settling bets based on the outcome of smaller, less significant, plays that are more prone to inconsistent rulings where a

<https://www.detroitnews.com/story/news/local/michigan/2020/01/07/pro-sports-leagues-scored-michigans-sports-betting-law/2805358001/> (quoting Joel Schuchmann, PGA Tour vice president of communications (“[OLD] helps ensure that all consumers receive the same results for their bets”); see also David Purdum, *How NBA sparked the American sports gambling gold rush*, ESPN (Nov. 1, 2018), https://www.espn.com/chalk/story/_/id/25145786/why-nba-other-professional-leagues-jumping-sports-gambling (quoting National Basketball Association (“NBA”) vice president and head of fantasy and gaming Scott Kaufman-Ross (“What happens is if you have unofficial data that is collected off the broadcast and then distributed, the broadcasts are delayed and so the data feed is delayed”))).

¹¹² LEGAL SPORTS REPORT, *supra* note 19 (quoting Dan Spillane, NBA Executive, during an in-person testimony); see also Letter from Dan Spillane, Senior Vice President, National Basketball Association, to New York Senate Standing Committee on Racing, Gaming, and Wagering (May 8, 2019).

¹¹³ Brett Smiley, *Opinion: The War Over Sports Betting Data: Lies, Half-Truths and Statistics: Part I*, SPORTSHANDLE (July 17, 2019), <https://sportshandle.com/sports-betting-data-war-analysis-part-one/> (alluding to the legislative hearing before the Kansas Legislature on legalized sports gambling).

¹¹⁴ *Id.* (“Two people placing the exact same bet with different bookmakers could receive different outcomes, simply based on which data the bookmaker is using to settle in-game wagers.”).

sportsbook must make a judgment call.¹¹⁵ For example, on a close play in baseball, one sportsbook may record the play as a hit where the other records it as an error.¹¹⁶ This would be detrimental for two individuals making the same proposition or live bet on the total number of hits in a game with different sportsbooks.¹¹⁷

Seeley made sure to refer to this issue in the context of live and proposition bets instead of traditional bets where there are minimal circumstances where a sportsbook cannot retrieve the correct final score or outcome of an event.¹¹⁸ The following reference to golf is a helpful clarification of this point. Surely, there is no difficulty in using Google or turning on the television to see that Tiger Woods won the 2019 PGA Master's Tournament to settle a traditional bet.¹¹⁹ Andy Levinson, a senior vice president with the PGA Tour, sees the necessity for OLD when making bets during the event or on a specific occurrence like an individual putt or drive.¹²⁰ There are over 30,000 shots in a golf tournament requiring data providers to collect multiple data points at once, like ball distance and location.¹²¹ Levinson and other supporters of OLD conclude that leagues and authorized data providers with significant investment in sports technology are the only entities that can achieve this.¹²² This is possibly why every single state thus far only requires OLD for live or proposition bets but never for traditional bets.¹²³

Those that believe an unofficial data provider can wait for the official ruling or fact-check the play against a league's official box scoring make two critical assumptions.¹²⁴ First, this assumes that every league will make a public ruling on each individual play and then decide to publish it on their website. A league may not publish the distance of

¹¹⁵ *Id.* (analyzing inconsistencies in unofficial data in terms of "batted ball[s]" and "errors" occurring throughout a game as opposed to the final outcome).

¹¹⁶ *Id.* ("Imagine some operators marking a batted ball as a hit and others scoring it as an error, followed by a cascading series of bets reliant on that original subjective outcome.").

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ PGA TOUR, *The Masters: Past Winners & Runners-up*, <https://www.pgatour.com/tournaments/masters-tournament/past-winners-and-runners-up.html> (last visited May 20, 2021).

¹²⁰ Parry, *supra* note 21 (quoting Scott Kaufman-Ross, senior vice president of fantasy and gaming for the National Basketball Association).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See e.g.*, 230 ILCS, art. 25, § 45/25-25(f)-(g); Tenn. Code Ann. §4-51-302(17); 2019 Mi. ALS 149 § 10a(1)-(4); *see also* RSA Tit. XXIV, ch. 287-I, § 11.

¹²⁴ Smiley, *supra* note 113 ("[Unofficial data provers] may simply look at box scores that appear on MLB.com, NBA.com . . .").

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every single homerun or individual golf swing by every player. Second, this also assumes that sportsbooks and individuals placing bets are willing to wait while the unofficial data source fact-checks individual rulings on each play. Bettors are impulsive and odds made for live bets change every second.¹²⁵ Having to wait for an unofficial fact-check seems like an inefficient way to ensure data accuracy where the market already proposes a better solution.

The small risk that a state gaming boards will take disciplinary action for incorrectly settling bets is likely not enough to entice those sportsbooks using unofficial data to self-regulate.¹²⁶ When an individual loses a bet due to discrepancies in data, he may decide to file a complaint with the sportsbook or a state gaming board in the most extreme of circumstances. This assumes that an individual who placed ten dollars on a bet he won, but was not awarded for, wants to file a complaint with the state gaming board against the sportsbook. Multiply that by another fifty thousand people who also placed that bet but refuse to file a complaint for ten dollars. In that case, the sportsbook would have cheated its customers out of a total of \$500,000. In fact, a little over one year ago a representative at FanDuel Sportsbook incorrectly calculated the odds of a NFL game using unofficial data.¹²⁷ One individual placed a \$110 live bet that paid out to \$82,600.¹²⁸ Initially, the sportsbook refused to pay out the money to any bettors, citing that their “house rules” exculpated them of this error.¹²⁹ After a parade of public backlash, FanDuel eventually decided to pay.¹³⁰ While this may seem like a small misstep for a sports betting giant like FanDuel, it is detrimental to midsized and smaller sportsbooks using unofficial data. Ultimately, refusing to impose any standard on the use of data could allow sportsbooks to take risks at the expense of its consumers.

ii. OLD inhibits the practice of courtsiding

When it comes to the transmission of data in sports betting, every second counts. Odds change continuously throughout an event and they change after every play in live betting.¹³¹ The NBA, in particular, has four statisticians per game with industrial grade laptops that transmit

¹²⁵ THE LINES, *supra* note 35.

¹²⁶ Smiley, *supra* note 113 (“[I]f there still is a variant outcome . . . [a] customer will take it out on the sportsbook”).

¹²⁷ Rybaltowski, *supra* note 70.

¹²⁸ Rybaltowski, *supra* note 70.

¹²⁹ Rybaltowski, *supra* note 70.

¹³⁰ Rybaltowski, *supra* note 70.

¹³¹ See GAMBLING SITES, *supra* note 33.

data outside of each stadium over a high-speed server.¹³² Data providers transmit OLD in less than a second.¹³³ To compare, sportsbooks can receive OLD three seconds faster than they can receive unofficial data.¹³⁴ For unofficial data providers that collect the data from television broadcasts or online streaming services, this delay gap grows anywhere from fifteen seconds to one minute.¹³⁵

While this difference in the transmission of data may appear facially insignificant, it ultimately determines the value of live betting platforms.¹³⁶ Scott Kaufman-Ross, senior vice president and head of fantasy and gaming with the NBA, highlighted that in professional basketball there are hundreds of lead changes.¹³⁷ A sportsbook obtaining unofficial data scraped off broadcast feeds may be a few plays behind, which could distort the accuracy of live betting odds.¹³⁸ In response, some sportsbooks choose to suspend their live betting to account for the delays in data transmission.¹³⁹ This means that these sportsbooks offer twenty percent less live bets than a sportsbook using OLD does.¹⁴⁰

Above all else, sportsbooks that take advantage of the speediness of OLD can ultimately use it to combat courtsiders.¹⁴¹ As earlier defined, courtsiding is the activity in which someone attends a live sporting event and disseminates real-time sports information during a broadcast

¹³² Purdum, *supra* note 111.

¹³³ Craig Mauger, *Pro leagues score with Michigan's new sports betting law*, DETROIT NEWS (Jan. 7, 2020), <https://www.detroitnews.com/story/news/local/michigan/2020/01/07/pro-sports-leagues-scored-michigans-sports-betting-law/2805358001/> (quoting Chris Dougan, chief communications officer for Genius Sports Group).

¹³⁴ LEGAL SPORTS REPORT, *supra* note 19.

¹³⁵ Jacob Feldman, *Why Online Streams Still Lag Behind Live TV – and What to Do About It*, SPORTS ILLUSTRATED (Oct. 25, 2018), <https://www.si.com/tech-media/2018/10/25/live-streaming-internet-tv-lagging-delay-explanation-fix-future> (citing the fluctuations in delay time between live sports action, television broadcasts, and online streaming services).

¹³⁶ Nic Couchman, *Faster than a Tweet – the Reasons Behind the Soaring Value of Live Data*, SPORTS BUSINESS (Oct. 10, 2019), <https://www.sportbusiness.com/2019/10/faster-than-a-tweet-the-reasons-behind-the-soaring-value-of-live-data/> (“[I]n ‘in-play’ betting in particular, real time data has become ‘the difference between a product having value and no value at all.’”).

¹³⁷ Parry, *supra* note 21.

¹³⁸ Parry, *supra* note 21.

¹³⁹ Purdum, *supra* note 111.

¹⁴⁰ Purdum, *supra* note 111.

¹⁴¹ Rodenberg, *supra* note 76, at 65–67 (reasoning that some sports leagues distribute their data to protect their investments and compete with third-party disseminators of data, or courtsiders).

delay to another for the purposes of live and proposition betting.¹⁴² Courtsiders look to take advantage of a broadcast delay by placing a bet on an event that already happened before the sportsbook receives the updated data feed.¹⁴³ Today, this issue is most prevalent in tennis, cricket, and basketball, and devastates the integrity of sports within both the United States and internationally.¹⁴⁴ After incidents of severe corruption at the Australian Open, the country of Victoria made it a crime, punishable up to ten years, to engage in courtsiding.¹⁴⁵ Unlike some of the international markets, however, the United States has been unable to prohibit courtsiding without implicating First Amendment freedom of speech issues.¹⁴⁶ While private sports leagues may prohibit the activity from their venue, federal and state governments have provided almost no protection to sportsbooks and leagues.¹⁴⁷ The inherently immoral activity is not justified simply because it is legal in the United States.

The most important question is whether a sportsbook can obtain and process game data faster than a courtsider can tweet or text the outcome of a play.¹⁴⁸ In most circumstances, broadcast delays prevent sportsbooks that use scraped unofficial data from doing so.¹⁴⁹ Therefore, sportsbooks should be inclined to utilize the speediness of OLD. The OLD mandate provides a greater level of protection for sportsbooks to combat courtsiders. In turn, this preserves the integrity of the sports betting market. As Dallas Mavericks owner Mark Cuban expressed in an email to ESPN, “if the data is real time, no one has an advantage over someone else.”¹⁵⁰

B. FRAMEWORK FOR AVOIDING A POTENTIAL MONOPOLY ON DATA

The major challenge of an OLD mandate is “like electricity in a city, oxygen in a submarine or rubber at a tire factory, whoever controls the crucial element determines how the entire system works.”¹⁵¹ Without

¹⁴² Rodenberg, *supra* note 76, at 65–67.

¹⁴³ Rodenberg, *supra* note 76, at 65–67.

¹⁴⁴ BAKERHOSTETLER, *supra* note 22; *see also* Tania Michaelian, *Courtsiding May Become a Serious Issue Regulators Will Need to Tackle in the Future*, BETTING USA (July 29, 2019), <https://www.bettingusa.com/courtsiding-serious-issue/>.

¹⁴⁵ Crimes Amendment (Sports Integrity) Act, No. 20 (2013).

¹⁴⁶ Rodenberg, *supra* note 76, at 96–101, Table 1 (outlining the scenarios in which the First Amendment would likely apply to the dissemination of real-time sports data).

¹⁴⁷ Rodenberg, *supra* note 76, at 96–101; *see also* Michaelian, *supra* note 144.

¹⁴⁸ *See* Couchman, *supra* note 136; Purdum, *supra* note 111.

¹⁴⁹ *See generally*, Couchman, *supra* note 136; Purdum, *supra* note 111.

¹⁵⁰ Purdum, *supra* note 111 (quoting Dallas Mavericks owner Mark Cuban).

¹⁵¹ Glanz, *supra* note 5.

data, a sportsbook cannot operate. In a scenario where leagues and authorized entities control the influx of data, these entities ultimately retain the power to fix prices and restrict access to the element sportsbooks revolve around.¹⁵² Consequently, requiring sportsbooks to obtain OLD from one or numerous sources creates a monopoly on data.¹⁵³ As the value of live betting continues to soar, what stops leagues or authorized data providers from drastically increasing their prices or outright refusing to deal OLD?

The Sherman Antitrust Act of 1890 is a federal statute that protects trade and commerce against unlawful restraints and monopolies.¹⁵⁴ Section 2 of the Sherman Antitrust Act makes it a felony for a person or entity to monopolize any trade or commerce.¹⁵⁵ Refusals to deal, which may in some circumstances constitute a restraint in trade, remain one of the most unsettled areas of antitrust law.¹⁵⁶ A refusal to deal occurs when a monopolist uses its power in one market to monopolize another market by refusing to do business with a competitor or refusing to sell a product or service to another without a legitimate business reason for doing so.¹⁵⁷ While an entity may generally choose whom it does business with, it must tread lightly when refusing to deal if it hopes to avoid antitrust liability under the Sherman Act.¹⁵⁸

As it stands today, there are limited antitrust theories available for victims of refusals to deal.¹⁵⁹ Arguably, the most remedial antitrust principle for sportsbooks who fall victim to a refusal to deal is the essential facilities doctrine.¹⁶⁰

¹⁵² Eric Ramsey, "Data Monopoly" Key to Leagues' Desired Control Over US Sports Betting, LEGAL SPORTS REPORT (Mar. 22, 2018, 1:15 PM), <https://www.legalsportsreport.com/19047/data-monopoly-key-to-leagues-controlling-sports-betting/>.

¹⁵³ *Id.*

¹⁵⁴ 15 U.S.C. Ch. 1 §§1-38 (1890) (hereinafter "Sherman Antitrust Act"); THE 100TH ANNIVERSARY OF THE SHERMAN ACT, 136 Cong Rec S 10137, Vol. 136, No. 94 ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.").

¹⁵⁵ *Id.* at § 2.

¹⁵⁶ FEDERAL TRADE COMMISSION, *Refusal to Deal*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal> (last visited May 20, 2021).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *See* 15 U.S.C. §§ 1-13.

¹⁶⁰ *Id.* at §§ 1-2 (annotations).

i. Treating OLD as an Essential Facility

Treating OLD as an essential facility to sports betting that must be accessible upon commercially reasonable terms, will prevent a sports league or authorized data provider from refusing to deal it. Generally, companies are under no obligation to share their data under antitrust laws but in narrow circumstances, refusals to deal can result in violations of Section 2 of the Sherman Act.¹⁶¹ The essential facilities doctrine requires a monopolist in control of an essential facility to make such a facility available on reasonable and non-discriminatory terms.¹⁶² The purpose of the essential facilities doctrine is to prevent the monopolist from extending their monopoly power from one market to another.¹⁶³ The doctrine was established by the Seventh Circuit Court of Appeals in *MCI Commc'ns Corp. v. American Telephone & Telegraph Co. (AT&T)*.¹⁶⁴ The elements of the essential facilities doctrine are "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."¹⁶⁵ Over time, the essential facilities doctrine has proven to be an effective framework for preventing monopoly powers from extending into relevant markets and will be invaluable for sportsbooks acquiring OLD.¹⁶⁶

In the event a sports league or authorized entity refuses to deal OLD, a sportsbook should notify the applicable state gaming board, who would decide to relieve the sportsbook of its obligation to use OLD, and possibly consider raising the issue to the state's Department of Justice. For the claim of refusing to deal an essential facility to be successful, the state gaming board, and subsequently the Department of Justice, would have to find that: (1) the applicable sports league or authorized entity is a monopolist controlling an essential facility; (2) the sportsbook cannot reasonably duplicate the essential facility; (3) the sports league or entity is not currently providing the sportsbook access to the essential facility;

¹⁶¹ Norman W. Hawker, *Open Windows: The Essential Facilities Doctrine and Microsoft*, 25 OHIO N.U.L. REV. 115, 121 (1999) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (quotations omitted)).

¹⁶² *Id.* (citations omitted).

¹⁶³ *Id.* (citations omitted).

¹⁶⁴ *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co. (AT&T)*, 708 F.2d 1081, 1133 (7th Cir. 1983) (citations omitted).

¹⁶⁵ *Id.*

¹⁶⁶ See e.g., Hawker, *supra* note 161, at 122–28; see also *MCI Commc'ns Corp.*, 708 F.2d at 1132–1133; *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1088 (D.C. Cir. 1998); *Delaware & H. R. Co. v. Conrail*, 902 F.2d 174, 179 (2d Cir. 1990).

and (4) it is feasible for the sports league or entity to give the sportsbook access to the facility.¹⁶⁷

1. Sports leagues are monopolists in control of an essential facility

To prove that a sports league or authorized entity is a monopolist in control of an essential facility, a state gaming board would have to answer (1) whether OLD in sports betting constitutes a facility; (2) whether the sports league or authorized entity has a monopoly in the sports betting market; and (3) whether OLD in sports betting constitutes an essential facility.¹⁶⁸

First, it is plausible to acknowledge that OLD constitutes a facility. Courts have found that, for purposes of the doctrine, the term “facility” extends to both tangible and intangible property.¹⁶⁹ Although data is intangible, the distribution of OLD is no less of a facility than the distribution of cable services, electricity, or cellular roaming data that courts characterize as facilities under the doctrine.¹⁷⁰

Second, sports leagues and their authorized entities quite literally have a monopoly under OLD laws. A monopoly power is the ability to exclude competition from or fix prices in that specific market.¹⁷¹ Here, state governments impose obligations on sportsbooks that prevent them in certain instances from buying data from any supplier other than the applicable sports league or authorized provider.¹⁷² The Federal Trade Commission refers to this as a requirement contract, or exclusive dealing.¹⁷³ Although these agreements do not inherently violate

¹⁶⁷ *MCI Commc'ns Corp.*, 708 F.2d at 1133.

¹⁶⁸ See Hawker, *supra* note 161, at 129.

¹⁶⁹ See *e.g.*, *MCI Commc'ns Corp.*, 708 F.2d at 1133 (applying the doctrine to interconnections of local cable services and facilities); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (applying the doctrine to the distribution of electric power); *Advanced Health Care Services, Inc. v. Radford Community Hospital*, 910 F.2d 139, 150–151 (4th Cir. 1990) (applying the doctrine to medical vendor requests for access to patients); *Sunshine Cellular v. Vanguard Cellular Systems, Inc.*, 810 F. Supp. 486, 497–98 (S.D.N.Y. 1992) (applying the doctrine to a data roaming agreement).

¹⁷⁰ See *id.*

¹⁷¹ *Morris Commc'n Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1293–1295 (citing *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)).

¹⁷² See 230 ILL. COMP. STAT. 45/25-25(f)–(g) (2020); TENN. CODE ANN. § 4-51-316 (2021); 2019 - 4916 Mich. Adv. Legis. Serv. 149 § 10a(1)–(4) (LexisNexis).

¹⁷³ FEDERAL TRADE COMMISSION, *Exclusive Dealing or Requirements Contracts*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/exclusive-dealing-or> (last visited Mar. 7, 2021); LEGAL INFORMATION INSTITUTE, *Exclusive Dealing Arrangement*, https://www.law.cornell.edu/wex/exclusive_dealing_arrangement (last visited Mar. 9, 2021).

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antitrust law, they may constitute impermissible monopolizations under certain circumstances. These few entities essentially become the gatekeepers for distributing data and potentially decide who may operate in a downstream market.¹⁷⁴ There are even instances of data monopolization in states without OLD laws currently in place. In fact, Sportradar's president, Matteo Monteverdi, recently revealed that his company holds ninety percent of New Jersey's market share for sports betting data.¹⁷⁵

Finally, OLD is essential to sports betting. For purposes of the doctrine, "essential" means that denial of access to the facility caused more than an inconvenience or slight economic loss.¹⁷⁶ Instead, it must have caused a severe handicap.¹⁷⁷ The Ninth Circuit Court of Appeals found that a facility is "essential" if control over it designates a power to eliminate competition in another market.¹⁷⁸ If a state requires the use of OLD, then denial of it would be detrimental to the complete operation of a sportsbook. Without it, a sportsbook cannot legally function.¹⁷⁹ OLD is not just essential to sports betting, it is obligatory. Again, as the gatekeepers of OLD, leagues have the power to pick and choose which sportsbooks they do business with, giving them control over who may operate in states that require OLD.

2. Sportsbooks cannot reasonably duplicate OLD

The second element of the doctrine requires a competitor's inability to duplicate the essential facility.¹⁸⁰ Certainly, if an entity had the ability to duplicate a facility it would not be considered "essential".¹⁸¹ This does not mean that the facility must be impossible to duplicate in a literal sense.¹⁸² The test is whether it is practically or

¹⁷⁴ See 230 ILL. COMP. STAT. 45/25-25(f)-(g) (2020); TENN. CODE ANN. § 4-51-316 (2021); 2019 - 4916 Mich. Adv. Legis. Serv. 149 § 10a(1)-(4) (LexisNexis).

¹⁷⁵ Matt Rybaltowski, *As Offshore Books Operate Unchecked, Demand for Sports Betting Data Knows No Boundaries. That's An Issue*, SPORTSHANDLE (MAR. 19, 2019), <https://sportshandle.com/sports-betting-data-distribution-offshore-sportsbooks/>.

¹⁷⁶ *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990).

¹⁷⁷ *Id.* at 569.

¹⁷⁸ *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991); see also *Advanced Health-Care Serv., Inc. v. Giles Mem'l Hosp.*, 846 F. Supp. 488, 498 (W.D. Va. 1944).

¹⁷⁹ See 230 ILL. COMP. STAT. 45/25-25(f)-(g) (2020); TENN. CODE ANN. § 4-51-316 (2021); 2019 - 4916 Mich. Adv. Legis. Serv. 149 § 10a(1)-(4) (LexisNexis).

¹⁸⁰ *MCI Commc'ns Corp. v. American Tel. & Tel. Co. (AT&T)*, 708 F.2d 1081, 1132 (7th Cir. 1983).

¹⁸¹ *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 257 (S.D.N.Y. 1995) (stating that an essential facility is "one for which there is no feasible alternative").

¹⁸² See *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990) (implying that literal duplication is not required if "would be [] impractical and

economically feasible for the competitor to duplicate the essential facility.¹⁸³ Here, sportsbooks would meet even the higher threshold of literal inability to duplicate if they are legally required to use it; a sportsbook duplicating data through scraping or courtsiding would be violating state law.

3. Sports leagues have refused to deal OLD

The third and perhaps most important element in terms of an essential facilities claim is that the monopolist denied a competitor access to use the essential facility. While an unequivocal refusal to deal is enough to satisfy this requirement, it is not necessary.¹⁸⁴ Instead, one need only show that the monopolist “refus[ed] to provide access on reasonable, nondiscriminatory terms.”¹⁸⁵

Here, two scenarios are possible. In one instance, a league’s commissioner may randomly decide that they do not want anyone compromising the integrity of their sport by “gambling” and subsequently cut off the entire supply of data to the betting market. In professional sports, this cause of action is less likely to occur since most leagues have embraced sports betting as a way to keep fans engaged with the sport.¹⁸⁶ For collegiate sports, however, this fear may seem more realistic with efforts to protect vulnerable student athletes from corruption.¹⁸⁷

The more likely scenario is that leagues will decide to raise the prices of their OLD feeds to an exorbitant rate to the point where it amounts to an outright refusal to deal. The key principle to this claim is access on “reasonable terms”.¹⁸⁸ State legislators are tailoring their OLD laws to include provisions that require sports leagues to provide their

unreasonable” to do) (quoting *Delaware & Hudson Ry. Co. v. Consol. Rail Corp.*, 724 F. Supp. 1073, 1079 (N.D.N.Y. 1989)).

¹⁸³ *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987) (“[I]t is sufficient if duplication of the facility would be economically infeasible.”) (quoting *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977)); *Sunshine Cellular v. Vanguard Cellular Sys., Inc.*, 810 F. Supp. 486, 497–98 (S.D.N.Y. 1992) (“[T]he plaintiff must merely demonstrate that ‘duplication of the facility would be economically infeasible.’”) (quoting *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990)).

¹⁸⁴ Hawker, *supra* note 161, at 138 (citing Gregory J. Werden, *The Law and Economics of the Essential Facility Doctrine*, 32 St. Louis U. L.J. 433, 456 (1987)).

¹⁸⁵ Hawker, *supra* note 161, at 138 (citations omitted).

¹⁸⁶ See Ramsey, *supra* note 152.

¹⁸⁷ See Ramsey, *supra* note 152.

¹⁸⁸ See *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 544 (9th Cir. 1991); see also *Advanced Health-Care Serv., Inc. v. Giles Mem’l Hosp.*, 846 F. Supp. 488, 498 (W.D. Va. 1944).

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data on “commercially reasonable terms.”¹⁸⁹ The concern is that none of these laws sufficiently define what “commercially reasonable terms” really means.¹⁹⁰ The term “commercially reasonable efforts” is considered the least demanding standard of effort behind “reasonable efforts” and “best efforts.”¹⁹¹ The commercial standard simply instructs courts to ask whether it makes sense from a business, economic, or efficiency standard to make the entity do something.¹⁹² At the same time, a business does not have to adhere to a provision, even if it is possible or reasonable to do so, as long as it is not reasonable in an economic sense.¹⁹³

Currently, state legislators and gaming boards do not have a firm understanding of how OLD is collected, processed, and transmitted from leagues to data providers to sportsbooks. Such an understanding is necessary to determine what is “commercially reasonable” from a business, economic, or efficiency standard. With such a vague standard that fails to highlight what gaming boards should look for when determining if OLD terms are “commercially reasonable,” it is easy for leagues to create unreasonable OLD agreements and enforce their terms because it is economically feasible. In turn, these take-it-or-leave-it agreements place sportsbooks at the mercy of the leagues.

The Michigan Lawful Sports Betting Act provides the most guidance on how gaming boards and courts assess whether OLD is offered on “commercially reasonable terms.”¹⁹⁴ Michigan legislators provide factors to consider, such as: the complexity of the data collection process, the nature and quantity of data, and the relevant market information regarding purchases of OLD.¹⁹⁵ As gaming boards begin to develop and understand the processes of transmitting data to sportsbooks, this critical element of the essential facilities doctrine will be easier to apply. For now, the guidelines set forth by Michigan provide the best direction for determining whether sports leagues have refused to deal OLD.

¹⁸⁹ 230 ILCS 45, art. 25, § 25–25(f)–(g); Tenn. Code Ann. § 4-51-316; 2019 Mi. ALS 149 § 10a(1)–(4).

¹⁹⁰ *See id.*

¹⁹¹ Chambliss, Bahner & Stophel, P.C., *Best Efforts or Reasonable Efforts? – How Legal Efforts Standards Can Affect You*, JDSUPRA (June 28, 2013), <https://www.jdsupra.com/legalnews/best-efforts-or-reasonable-efforts-ho-22497/>.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ 2019 Mi. ALS 149 § 10a(3)(b).

¹⁹⁵ *Id.*

4. It is feasible for sports leagues to give access to OLD

The final element of the doctrine asks whether it is feasible for the monopolist to give access to the essential facility.¹⁹⁶ Even if it is feasible, a monopolist may still refuse to deal with the facility if it has a valid business justification for doing so.¹⁹⁷ Monopolists are not expected to go to extraordinary measures that make minimal commercial sense to provide its competition with a facility.¹⁹⁸ For example, if the monopolist is working with limited resources to supply the facility, or if the facility itself is limited, the monopolist is not required to stop what it is doing to make it available to others.¹⁹⁹

The question of practical feasibility is rarely in dispute. Leagues are not concerned with sending data feeds to those who pay fair price for it. No complaints are made about providing the data, as long as it goes through the right channels.²⁰⁰ In fact, leagues actually encourage sportsbooks to purchase OLD from them because it is a faster and more reliable process.²⁰¹ Additionally, distributing OLD is feasible because it is not a limited or finite resource like gas or oil. Data can be used and reused over and over again without limitation. Once the leagues have the data, there is no concern that their supply will run out.

Presumably, leagues would be more inclined to raise a valid business justification defense. Leagues may contend that they are limiting access to OLD to prevent sportsbooks from freeriding off their investment and to receive proper compensation for their “intellectual property”.²⁰² Freeriding essentially means obtaining a benefit from another’s investment without proper compensation.²⁰³ Leagues assert that all sportsbooks should compensate them for OLD because they are

¹⁹⁶ MCI Commc’ns Corp. v. American Telephone & Telegraph Co. (AT&T), 708 F.2d 1081, 1133 (7th Cir. 1984).

¹⁹⁷ See Hect v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977) (“[T]he antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant’s ability to serve its customers adequately.”) (footnote omitted).

¹⁹⁸ See Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1381 (9th Cir. 1992).

¹⁹⁹ *Id.*

²⁰⁰ *E.g.*, Zagger, *supra* note 11.

²⁰¹ Parry, *supra* note 21.

²⁰² Ethan Sanders, Aalok Sharma, Stinson LLP, *Who’s On First? – The Fight Over Official Sports Data After Murphy*, JDSUPRA (Mar. 12, 2019), <https://www.jdsupra.com/legalnews/who-s-on-first-the-fight-over-official-81726/> (citing Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1040) (“Sports leagues, who assert ownership over sports data as intellectual property, worry that sports betting platforms that use the data without compensation undermine the value of the leagues themselves.”).

²⁰³ *Id.*

essentially building an entire market off the leagues' success.²⁰⁴ Without sports leagues, there would be no sports betting. This contention, however, is both misguided and unsupported by case law.

Three famous sports data cases illustrate that leagues would likely fail in raising this defense: *Morris Commc'ns Corp. v. PGA Tour, Inc., N.B.A. v. Motorola, Inc.*, and *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P.*²⁰⁵ *Morris* introduces a permissible, yet limited, case of refusal to deal sports data to prevent freeriding.²⁰⁶ Whereas, *Motorola* and *CBC* constrain the business justification defense to certain types of sports data only.²⁰⁷

In *Morris*, the court dismissed a communications company's claim that the PGA Tour violated the Sherman Act for monopolizing the publication of its real-time golf scores.²⁰⁸ The PGA had created a proprietary tool called Real-Time Scoring System ("RTSS") that collected golf scores from its tours and posted them on its website.²⁰⁹ Because it is physically impossible for an individual to follow every player in the tour at once, the PGA assigned groups of workers to follow golfers during tournaments and record scores at the end of each hole.²¹⁰ These PGA recorders sent the scores immediately to a remote production truck that disseminated it to on-site media centers as live golf scores.²¹¹ The PGA also had a policy prohibiting fans and other individuals (aside from the PGA score recorders) from using cell phones and other recording technology.²¹² This made the RTSS the only source of tournament scores and the PGA's media center the only location to obtain these scores.²¹³ To access the PGA's media center to view the scores, entities had to agree to the PGA's terms and conditions, which included an On-Line Service Regulation ("OLSR").²¹⁴ The OLSR prohibited media companies from publishing the scores until thirty minutes after the actual live golf play or until the PGA posted the final

²⁰⁴ *See id.*

²⁰⁵ *Morris Commc'ns Corp., v. PGA Tour, Inc.*, 364 F.3d 1288, 1298 (11th Cir. 2004); *N.B.A. v. Motorola, Inc.*, 105 F.3d 841, 855 (2nd Cir. 1997); *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P.*, 505 F.3d 818, 822 (8th Cir. 2007).

²⁰⁶ *See Morris Commc'ns Corp.*, 364 F.3d at 1293–95.

²⁰⁷ *See Motorola, Inc.*, 105 F.3d at 846–47; *C.B.C. Distrib. & Mktg.*, 505 F.3d at 822.

²⁰⁸ *Morris Commc'ns Corp.*, 364 F.3d at 1288.

²⁰⁹ *Id.* at 1290–91.

²¹⁰ *Id.* at 91.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Morris Commc'ns Corp.*, 365 F.3d at 1290.

scores later on its website.²¹⁵ It also prohibited these organizations from later selling or broadcasting the compiled scores to others without buying a license from the PGA to do so.²¹⁶

Morris Communications, a media company, sued the PGA claiming that its OLSR violated Section 2 of the Sherman Act for monopolizing the sale of the compiled golf scores and related sports information.²¹⁷ The Eleventh Circuit held that PGA did not violate Section 2 of the Sherman Act by requiring media companies to purchase golf scores because it had a valid business justification of preventing media companies from freeriding off its proprietary technology.²¹⁸ The court found that the scores and data were a derivative product of PGA's proprietary RTSS system.²¹⁹ The court reasoned that the effort, money, and time spent by the PGA to create this proprietary product justified the restriction of access to its data without proper compensation.²²⁰ Under this theory of freeriding, Morris could not demand access to PGA's proprietary product for free just so it could turn around and sell it to others for payment.²²¹

In *Motorola*, the court lifted a permanent injunction placed on Sports Team Analysis and Tracking Systems ("STATS") and Motorola, Inc. that prohibited the sale of pagers that provide updated statistics and scores of NBA games during live play without the NBA's authorization to disseminate such information.²²² Here, Motorola and STATS created a paging device called SportsTrax that displayed (1) the teams' names, (2) scoring updates, (3) who possessed the ball, (4) free-throw play moments, (5) the game quarter, and (6) the time remaining in live NBA games as they were played.²²³ The system obtained this information from a data feed provided by STATS.²²⁴ STATS representatives viewed games on television or listened to games on the radio and recorded updates on their computers.²²⁵ They relayed these updates to a host computer that collected, analyzed, and reformatted the information then retransmitted it to individual pagers.²²⁶ Consumers subsequently

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 1292.

²¹⁸ *Id.* at 1295-96.

²¹⁹ *Id.* at 1296.

²²⁰ *Morris Commc'ns Corp.*, 365 F.3d at 1298.

²²¹ *Id.*

²²² *N.B.A v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997).

²²³ *Id.* at 843-44.

²²⁴ *Id.* at 844.

²²⁵ *Id.*

²²⁶ *Id.*

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received the updates approximately two minutes after the game.²²⁷ The NBA then developed an identical product to SportsTrax called Gamestats.²²⁸

The NBA brought suit alleging federal copyright infringement of its data but the court dismissed the claim holding that neither the underlying sports game nor the facts collected from its broadcast invoke copyright protections under the Copyright Act of 1976.²²⁹ For an underlying event to be copyrightable, it must be an “original work of authorship” like a movie, play, or musical, that is fixed in a “tangible medium of expression.”²³⁰ Furthermore, it is a longstanding principle that facts and ideas are not forms of expression shielded by copyright law.²³¹ Here, the underlying NBA game and individual plays were not originals work of authorship because they were neither fixed nor scripted.²³² While NBA teams have game plans and use playbooks, the individual plays often change and the natural flow of the game makes it so that games and player performance are no longer “authored.”²³³

In *CBC*, the court affirmed its declaration that the seller of fantasy sports products was entitled to use information about baseball players in its products.²³⁴ CBC was an online fantasy baseball platform that allowed individuals to simulate owning and managing a major league baseball team.²³⁵ Individuals paid CBC to join and manage actual players throughout the real season.²³⁶ The simulated players and their statistics were comprised of the actual names and performances of the real players that CBC licensed from MLB.²³⁷ After CBC’s license with the MLB to use player “names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data” expired, the MLB entered into an exclusive contract to license these rights to Advanced Media.²³⁸ In anticipation of litigation, CBC sought the courts’ judgment to determine a First Amendment right to use this information without the

²²⁷ *Id.*

²²⁸ N.B.A., 105 F.3d at 853.

²²⁹ *Id.* at 845–47 (citing Copyright Act, 17 U.S.C.S. §§ 101-1401, 102(a) (1976)).

²³⁰ *Id.* at 846–47.

²³¹ *Id.* at 847 (citing *Feist Publications, Inc. v. Rural Tel. Service, Co.*, 499 U.S. 340, 350 (1991) (quoting *Harper & Row, Inc. v. Nation Enter.*, 471 U.S. 539, 547–48 (1985))).

²³² *Id.* at 846–47.

²³³ *Id.* at 847.

²³⁴ *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P.*, 505 F.3d 818, 825 (8th Cir. 2007).

²³⁵ *Id.* at 820–21.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

MLB's authorization.²³⁹ The MLB Players Association joined the suit and counterclaimed that CBC violated the player's state law right of publicity.²⁴⁰

The Players Association ultimately satisfied the requirements of the right of publicity claim but, nevertheless, CBC's First Amendment rights preempted this.²⁴¹ Alongside literal speech, the First Amendment protects many expressive mediums of public value including artworks, musical creations, and stories.²⁴² All of the information used in CBC's platform was readily available in the public domain.²⁴³ Furthermore, CBC's creation of fantasy simulations was a form of expressive artwork because they were constructing something entirely new with information gathered from the league.²⁴⁴ The outcome may have been different if CBC was spitting back the information and not creating something original, such as a fantasy sport platform. Accordingly, CBC's licensed sports information is also an expression of speech protected by the First Amendment.²⁴⁵

In light of these cases, it is unlikely that either justification of preventing freeriding off OLD or safeguarding a league's intellectual property will succeed. The prevention of freeriding is limited to instances where entities take leagues' data free of charge and profit from it.²⁴⁶ If entities want data that only leagues have access to, they must properly compensate them.²⁴⁷ OLD laws already reflect this. These laws do not require leagues to give away their OLD for free.²⁴⁸ Instead, they still give the leagues commercial autonomy to enter into, and negotiate the terms of agreement for a "commercially reasonable" price.²⁴⁹ Without proper compensation, sports leagues can refuse to deal in order to protect their investments in data collection.²⁵⁰

This does not extend to a league's effort to protect their seemingly nonexistent "intellectual property." This term is used sparingly because

²³⁹ *Id.*

²⁴⁰ *C.B.C. Distrib. & Mktg.*, 505 F.3d at 820-21.

²⁴¹ *Id.*

²⁴² *Id.* at 819.

²⁴³ *Id.* at 821.

²⁴⁴ *Id.* at 820-21.

²⁴⁵ *Id.* at 821.

²⁴⁶ *See Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295-98 (11th Cir. 2004).

²⁴⁷ *Id.*

²⁴⁸ *See* 230 ILCS, art. 25-25(f)-(g); TENN. CODE ANN. § 4-51-316; 2019 Mi. ALS 149 § 10a(1)-(4).

²⁴⁹ *Id.*

²⁵⁰ *See Morris Commc'ns Corp.*, 364 F.3d at 1295-98.

a league's collection of sports data is not technically "intellectual property."²⁵¹ As *Motorola* illustrates, sports data compiled of raw facts are not copyrightable because they are not original works of authorship.²⁵² Like the system SportsTrax, sportsbooks use general sports facts and statistics to create bets.²⁵³ To settle a bet, a sportsbook needs to research the factual outcome of an event.²⁵⁴ For both traditional bets and live bets, this means using event data and performance data to settle the bet.²⁵⁵ This slightly differs in terms of proposition bets. A proposition bet about a factual occurrence, such as the score at half-time or number of goals scored by a player, invokes no intellectual property protection.²⁵⁶ Proposition bets on proprietary data or biometric data, however, may invoke some level of intellectual property protection.²⁵⁷ Sportsbooks allow proposition bets on a player's W.A.R. rating, or other sabermetric, originating from the MLB StatCast System's calculation of a proprietary algorithm.²⁵⁸ Similarly, sportsbooks will offer proposition bets on an athlete's biometric data in the future, as the Alliance of American Football and MGM had planned.²⁵⁹ A complex algorithm created by representatives of a sports league or the genetic makeup of an athlete constitutes an original form of authorship more than fact driven statistics, like the final score of game.²⁶⁰ Ironically, sportsbooks use of OLD to create odds and provide bets probably constitutes an "original work of authorship", like the fantasy sports platform in *CBC*.²⁶¹ Creating odds involves compiling and analyzing data using complex regression systems.²⁶² Sportsbooks use OLD to create entirely new metrics that ironically invoke more copyright protection than the factual sports data itself.

²⁵¹ See *N.B.A v. Motorola, Inc.*, 105 F.3d 841, 843 (2nd Cir. 1997).

²⁵² *Id.* at 847.

²⁵³ See *THE LINES*, *supra* note 35.

²⁵⁴ See *generally* *GAMBLING SITES*, *supra* note 33; *THE LINES*, *supra* note 35.

²⁵⁵ See *generally* *GAMBLING SITES*, *supra* note 33; *THE LINES*, *supra* note 35.

²⁵⁶ See *Motorola, Inc.*, 105 F.3d at 847 (holding that sports facts are not copyrightable); *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (holding that the First Amendment protects use of factual information available to the public).

²⁵⁷ See *Morris Comm'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1295-98 (11th Cir. 2004) (supporting the idea that sports leagues may monopolize data to prevent free-riding off their significant investments).

²⁵⁸ See *MAJOR LEAGUE BASEBALL*, *supra* note 54.

²⁵⁹ Darren Rovell, *Alliance of American Football will have Enhances In-Game Betting*, ESPN (Sept. 10, 2018), https://www.espn.com/chalk/story/_/id/24632798/alliance-american-football-enhanced-live-game-betting.

²⁶⁰ See *Motorola, Inc.*, 105 F.3d at 846-47; *C.B.C. Distrib. & Mktg.*, 505 F.3d at 821.

²⁶¹ *C.B.C. Distrib. & Mktg.*, 505 F.3d at 821.

²⁶² See *generally*, *GAMBLING SITES*, *supra* note 42.

In conclusion, leagues would have little success defending their monopoly of OLD. The essential facilities doctrine provides sportsbooks with an avenue to obtain OLD on reasonable terms and seek redress when leagues refuse to deal.

C. Crafting Model OLD Legislation

Current OLD legislation is on the right track to help stimulate the growth and prosperity of the new sports betting market. In light of the previous discussion, there are a few factors legislators should consider when enacting or amending their OLD laws.

Ultimately, it does not necessarily matter where the sports data originates as long as it is accurate, reliable, and fast. Legislators choose OLD because it is the only source of data proven to fulfill all three requirements.²⁶³ In today's global tech market, it is foolish to believe that leagues will remain the only proficient provider of data to sportsbooks. SWMIA predicted as much when it added in an OLD trial period provision.²⁶⁴ Going forward, legislators should require sportsbooks in every state to impose an OLD trial period. Individual gaming boards could determine the length of this trial period until their representatives feel comfortable establishing a system that qualifies sources of unofficial data as being "of substantially similar speed, accuracy, and consistency" to OLD.²⁶⁵ In doing so, gaming boards could consider: market research reports published by gaming agencies such as the AGA; comparable OLD standards; and the capabilities of authorized data providers.²⁶⁶ Legislators should also require each data provider, whether official or unofficial, to obtain a license from the state gaming board permitting them to distribute data to a sportsbook in their state, as Illinois does.²⁶⁷ Likewise, sportsbooks should clearly indicate on their platform where they obtain their data, in order to notify consumers whether they use OLD or unofficial data.²⁶⁸

The benefits of OLD are clear. In terms of the transmission of sports data, mitigating discrepancies in results and stopping courtsiding are of the utmost importance. Legislators may also prevent attempts by leagues or data providers to monopolize OLD by tightening their

²⁶³ See TENN. CODE ANN. § 4-51-302(17) (2021).

²⁶⁴ Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. § 103(b)(5) (2018).

²⁶⁵ *Id.*

²⁶⁶ See *Research & Resources*, AM. GAMING ASS'N, <https://www.americangaming.org/research/> (last visited Mar. 13, 2021); SPORTRADAR, *supra* note 66.

²⁶⁷ 230 ILL. COMP. STAT. ANN. 25 § 60(a)-(c) (LexisNexis 2020).

²⁶⁸ N.H. REV. STAT. ANN. § 287-I:11 (LexisNexis 2020).

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respective obligations to provide data on “commercially reasonable terms.”²⁶⁹ “Commercially reasonable” provisions are currently too ambiguous to provide sportsbooks with true protection against refusals to deal and unreasonable pricing.²⁷⁰ Leagues may exploit this vague standard or even collude with one another to manipulate state gaming boards into believing their arbitrary pricing structures are “reasonable.” Michigan provides the best protection against this. Their law provides a nonexclusive list of factors other states should incorporate:

- (i) The availability of a sports governing body’s tier 2 sports bet official league data to a sports betting operator for more than [one] authorized source.
- (ii) Market information regarding the purchase by operators of data from any authorized source including sports governing bodies or their designees for the purpose of settling sports wagers, for use in this state or other jurisdictions.
- (iii) The nature and quantity of data, including the quality and complexity of the process used for collecting the data.
- (iv) The extent to which sports governing bodies or their designees have made data used to settle tier 2 sports bets available to operators.²⁷¹

When considering these factors, gaming boards should focus mainly on the capability and cost differences between collecting OLD and unofficial data. If a sportsbook could obtain unofficial data of a similar quality to OLD at a lower price, there is no reason a league should be allowed to upcharge their data because it bears the label “official.” Following the Michigan model, a gaming board should make a determination of an OLD agreement’s “commercial reasonableness” within 120 days.²⁷² During this time, the sportsbook may use any source of approved data.²⁷³ Every state should adopt these key provisions to ensure integrity within the sports betting market.

²⁶⁹ See 230 ILL. COMP. STAT. ANN. 25 / § 25(f)-(g); TENN. CODE ANN. § 4-51-316 (2021); MICH. COMP. LAWS SERV. § 432.410a (LexisNexis 2020).

²⁷⁰ Current provisions do not provide a standard to determine what constitutes as “commercially reasonable terms.” See e.g., 230 ILL. COMP. STAT. ANN. 25 / § 25(f)-(g); TENN. CODE ANN. § 4-51-316 (2021); MICH. COMP. LAWS SERV. § 432.410a (LexisNexis 2020).

²⁷¹ MICH. COMP. LAWS SERV. § 432.410a (1)-(4) (LexisNexis 2020).

²⁷² *Id.*

²⁷³ *Id.*

IV. CONCLUSION

As sports betting has evolved in the United States, so has the mandate requiring the use of OLD. As it stands, OLD is a practical means to mitigate discrepancies in results across sportsbooks and to prevent courtsiding. Without it, both of these issues will remain a constant threat to consumers, sportsbooks, and the integrity of the market. Notwithstanding, the OLD mandate is not without attendant concerns. Current legislation does not account for the growing capabilities of unofficial data collection that may prove just as proficient as OLD.²⁷⁴ It also remains too vague in some of its key provisions and will allow leagues to extend their monopoly power over sports data.²⁷⁵ As a solution, state legislators should incorporate OLD trial periods that allow state gaming boards to adjust to the utilization of sports data on betting platforms. This will help identify when unofficial data may become an acceptable alternative.²⁷⁶ They should also adopt the Michigan model that lists out a set of nonexclusive factors to determine whether OLD agreements were entered into upon “commercially reasonable terms.”²⁷⁷ The future of the sports betting market in the United States is bright. It will remain prosperous if all states adopt OLD mandates.

²⁷⁴ See generally, 230 ILL. COMP. STAT. ANN. 25 / §§ 5-99 (LexisNexis 2020); TENN. CODE ANN. §§ 4-51-301-07 (2021); MICH. COMP. LAWS SERV. §§ 432.401-19 (LexisNexis 2020); N.H. REV. STAT. ANN. § 287-I:11 (LexisNexis 2020); Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. § 103(b)(5) (2018).

²⁷⁵ See 230 ILL. COMP. STAT. ANN. 25 / § 25(f)-(g); TENN. CODE ANN. § 4-51-316; MICH. COMP. LAWS SERV. § 432.410a (1)-(4) (LexisNexis 2020).

²⁷⁶ See Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. § 103(b)(5) (2018) (utilizing a trial period during which time a state gaming board may determine the sufficiency of certain sports data).

²⁷⁷ MICH. COMP. LAWS SERV. § 432.410a (1)-(4) (LexisNexis 2020).