

Seton Hall University

eRepository @ Seton Hall

Student Works

Seton Hall Law

2022

You Wanna Bet (Your Job)? The ADA's Exclusion of Compulsive Gambling in a Post-Murphy Era

Rachel Jacob

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the Law Commons

YOU WANNA BET (YOUR JOB)?
The ADA's Exclusion of Compulsive Gambling in a Post-Murphy Era

Rachel Jacob*

I. INTRODUCTION

[The] Super Bowl [is] a time of joy and anticipation for most sports fans. But not for all. Certainly not for Steven Delaney. He has no plans to watch the big game. Watching sports of any kind could suck him back in.

"I stay away from it all," [said] Delaney, 37, a truck driver from Ballston Spa, N.Y. . . . "I don't talk about sports. I don't read about sports. I don't want to know about the teams in the Super Bowl. It's a risk that I am not ready to take."

"I can lose everything," he added.

Delaney battles addiction. His compulsion, which nearly ruined his life: betting on sports . . . A former Jets fan who once had a podcast to discuss the team, Delaney developed a fantasy sports betting habit in 2007 with casual games against friends. It turned into an obsession by 2019. "It was all very accessible from my phone," he said. "I started doing it compulsively. I would win \$5,000 and say, 'Now I know what I am doing.' So then I would bet bigger and bigger. I would lose big and start chasing to get it back.

"It was like two people in my brain. Now I realize it was the addiction trying to fight against whoever I really am. I'd stop. Then I would say to myself: 'I have to get this money back. I have to get back to zero before my wife finds out and my family finds out.'"

He found the addiction easy to hide at first. Delaney said his wife, Kelly, could sit at his side but be unaware he was gambling away the family 401(k) on his phone.¹

Saul Malek grew up surrounded by sports.

He played soccer and Little League, and shot hoops at the neighborhood court. He was obsessed with the Houston Astros. When they won, he was ecstatic. Once when they lost, he whipped a belt at a wall so hard he chipped the paint.

* J.D. Candidate, 2022, Seton Hall University School of Law; B.A., cum laude, 2019, The George Washington University.

¹ Kurt Streeter, *The Rising Human Cost of Sports Betting*, N.Y. TIMES (Jan. 31, 2022), <https://www.nytimes.com/2022/01/31/sports/football/super-bowl-sports-betting.html>.

Mr. Malek joined a fantasy baseball league while in middle school. In college, an acquaintance connected him with a bookie. Winning his first bet — \$10 that the Royals would beat the Blue Jays — made him feel “like a big shot,” he said.

But he soon found that he needed “nonstop action.” He would find an online sports book and maybe win enough to pay a former bookie back. More often, though, he’d lose. Then he would block the bookie’s number, find a new sports book and repeat.

His parents bailed him out for hundreds of dollars several times, but he didn’t seek help until he “felt physically uncomfortable” one night after not placing a bet in time. He realized he didn’t have any close relationships left.

Mr. Malek, now 23 and living in Houston, said he had never considered that sports betting could escalate to an addiction that would lead him to lie, cheat and manipulate people for money. And yet he has come to have plenty of company as policy shifts and technological advances have made it easier than ever to wager money on sports.²

[Kaitlin] Brown grabs her phone and answers with her standard greeting: “Connecticut Council on Problem Gambling help line. Can I help you?”

The man gives his name . . . let’s call him Mike – and says he’s in his early 20s. Last October, as soon as Connecticut legalized sports gambling, Mike downloaded the FanDuel app and started betting ... and now he says he can’t stop. He says it’s just so easy now, 10 seconds away on his phone. He blew through thousands of dollars that his parents thought were going toward college. The man, like so many of the younger callers Brown talks to these days, says he dabbles in cryptocurrency and day trading, too.

“I can’t tell my parents about any of this,” he says. “I can’t talk to anybody about it. What do I do?”

[After listening to Mike and talking through his options, they] say goodbye, and Brown is as happy as you can be doing her job. Maybe deleting the apps will work for Mike. Maybe it won’t. The only thing she knows for sure is someone else will be calling soon.³

² Marie Fazio, It’s Easy (and Legal) to Bet on Sports. Do Young Adults Know the Risks?, N.Y. TIMES (April 1, 2021), <https://www.nytimes.com/2021/04/01/sports/sports-betting-addiction.html>.

³ Ryan Hockensmith, *Inside the life of a gambling help line worker*, ESPN (Feb. 9, 2022), https://www.espn.com/chalk/story/_/id/33237601/inside-life-gambling-help-line-worker.

What is a “gambling disorder”? Who does it affect? Why does it matter? The American Psychiatric Association (“APA”) defines gambling disorder as

persistent and recurrent problematic gambling behavior leading to clinically significant impairment or distress, as indicated by the individual exhibiting four (or more) of the following in a 12-month period:

- i. Needs to gamble with increasing amounts of money in order to achieve the desired excitement.
- ii. Is restless or irritable when attempting to cut down or stop gambling.
- iii. Has made repeated unsuccessful efforts to control, cut back, or stop gambling.
- iv. Is often preoccupied with gambling (e.g., having persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, thinking of ways to get money with which to gamble).
- v. Often gambles when feeling distressed (e.g., helpless, guilty, anxious, depressed).
- vi. After losing money gambling, often returns another day to get even (“chasing” one’s losses).
- vii. Lies to conceal the extent of involvement with gambling.
- viii. Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling.
- ix. Relies on others to provide money to relieve desperate financial situations caused by gambling⁴

Although only about two million American adults meet the criteria for severe gambling problems, as many as *10 million* Americans live with some form of gambling addiction.⁵ As many as 750,000 young people, ages fourteen to twenty-one, have a gambling addiction.⁶ The risk of developing such an addiction more than doubles for young adults in college settings.⁷ In addition, “[p]roblem gamblers carry an average of \$55,000 in debt and more than 20 percent end

⁴ Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) [hereinafter APA DSM-5].

⁵ National Council on Problem Gambling, *FAQ, Help and Treatment*, <https://www.ncpgambling.org/help-treatment/faq/> (last visited March 16, 2022); Denise-Marie Griswold, *Gambling Addiction Facts and Statistics*, THE RECOVERY VILLAGE, <https://www.therecoveryvillage.com/process-addiction/compulsive-gambling/related/gambling-statistics/> (last updated Nov. 18, 2020).

⁶ Addictions.com, *5 Alarming Gambling Addiction Statistics*, <https://www.addictions.com/gambling/5-alarming-gambling-addiction-statistics/> (last visited March 16, 2022).

⁷ *Id.*

up filing for bankruptcy.”⁸ Among all types of addictions, *disordered gambling has the highest suicide rate, with one and five problem gamblers attempting suicide.*⁹ These numbers and statistics will likely only increase in the years to come, as sports betting becomes “normalized.”¹⁰

This paper argues that the Americans with Disabilities Act (“ADA”) should be amended so that compulsive gambling (hereinafter “gambling addiction”) is no longer excluded for three key reasons. First, as illuminated by the excerpted stories above, the ubiquity of sports betting in the U.S. has significantly impacted the rates of gambling addiction, and has consequently revamped problems relating to discrimination in the workplace. Second, the history of the ADA suggests that the exclusion of gambling addiction was due to the stigma and misconceptions then associated with gambling. Since the ADA was enacted, however, the condition has been reclassified by the APA and now falls under the same category as alcohol use disorder. Finally, in contrast to the ADA, most States do not expressly exclude compulsive gambling in their disability discrimination laws. Moreover, without the explicit exclusion in state legislation, state courts can in theory recognize gambling addiction as a disability because it is clinically identified as a psychiatric disorder.

Part II of this paper will trace the history of both disability and gaming law in the U.S. This section will begin by describing the evolution of the ADA, and will then turn to the major developments made in gaming law in the last two decades—specifically, before and after the

⁸ Jack O’Donnell, *The Ugly Truth Behind All Those Fun Gambling Ads*, POLITICO (Feb. 13, 2022, 7:00 AM) [hereinafter *The Ugly Truth*], <https://www.politico.com/news/magazine/2022/02/13/ugly-truth-behind-fun-gambling-ads-00008380>.

⁹ John Doss, *Problem gamblers have highest suicide rate of any addiction disorder, studies show*, ABC NEWS 5 Cleveland (Sept. 9, 2021), <https://www.news5cleveland.com/news/local-news/problem-gamblers-have-highest-suicide-rate-of-any-addiction-disorder-studies-show>.

¹⁰ See, e.g., John Stonestreet, *Sports Gambling is a Bad Bet*, BREAKPOINT (Oct. 21, 2021), <https://breakpoint.org/sports-gambling-is-a-bad-bet/> (“No one has to place a bet, but the more it’s normalized, the more people will.”).

seminal Supreme Court decision, *Murphy v. National Collegiate Athletic Association*.¹¹ Part III will break into four subparts, each of which will help explain the legal and policy reasons why gambling addiction should not be excluded from the ADA’s protection.

II. THE EVOLUTION OF DISABILITY AND GAMING LAW IN THE U.S.

This section will first survey disability law in the U.S.—from its conception up until the ADA’s 2008 Amendments. This survey will illuminate how disability law has evolved towards more and better inclusion; though, as this paper will suggest in the proceeding sections, there are still gaps in protection for individuals with disabilities. This section will also examine the recent history of gaming law in the U.S., with a focus on the federal decriminalization of sports betting.

A. *From Stigma to Statute: The Rise of Disability Rights*

In parallel stride with the twentieth century Women’s Suffrage and Civil Rights Movements, individuals and organizations similarly banded together to advocate for the recognition of disability rights.¹² Though these rights developed in a piecemeal fashion,¹³ the efforts to raise social and political awareness of the plight of disabled Americans ultimately propelled the enactment of national legislation—prohibiting discrimination and guaranteeing rights and opportunities to people with disabilities in public and private spaces.¹⁴ Despite the

¹¹ 138 S. Ct. 1461 (2018).

¹² Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RIGHTS EDUCATION & DEFENSE FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/>; Northeast ADA Center, *A History of Discrimination and the ADA*, <https://northeastada.org/resource/a-history-of-discrimination> (last visited March 17, 2022); Anti-Defamation League, *A Brief History of the Disability Rights Movement*, <https://www.adl.org/education/resources/backgrounders/disability-rights-movement> (last visited March 17, 2022).

¹³ See, e.g., Temple University Institute on Disabilities, *Timeline of Historical Milestones in the Disability Rights Movement*, <https://disabilities.temple.edu/resources/disability-rights-timeline> (last visited March 17, 2022).

¹⁴ Mayerson, *supra* note 12 (“[t]he ADA owes its birthright not to any one person, or any few, but to the many thousands of people who make up the disability rights movement – people who have worked for years organizing and attending protests, . . . drafting legislation, speaking, testifying, negotiating, lobbying, filing lawsuits, being arrested. . .”).

seemingly comprehensive nature of this national legislation,¹⁵ the narrow definitions of who qualifies as “disabled” rendered the law ineffective to many, leading to significant amendments in 2008.¹⁶

i. The Steppingstones to the ADA

“The history of the ADA did not begin on July 26, 1990 at the signing ceremony at the White House. It did not begin in 1988 when the first ADA was introduced in Congress.”¹⁷ Rather, the ADA story originated in various cities and towns in the United States, where people and organizations challenged societal barriers—both tangible and intangible—that excluded them from their communities.¹⁸ The philosophy towards Americans with disabilities was, up until the 1970s, a combination of paternalism and fear, often resulting in segregation.¹⁹

However, the notion that separation was inherently unequal, as established in *Brown v. Board of Education*,²⁰ likewise spurred a change of philosophy toward Americans with disabilities.²¹ This change recognized the worth and potential of all persons and emphasized the need for people with disabilities to participate in mainstream, everyday life.²² First, after two lower court decisions²³ approved consent decrees involving education of children with

¹⁵ U.S. Dep’t of Just. Civ. Rights Div., Introduction to the ADA, Information and Technical Assistance on the Americans with Disabilities Act, https://www.ada.gov/ada_intro.htm#:~:text=The%20ADA%20is%20one%20of,to%20purchase%20goods%20and%20services (last visited March 17, 2022).

¹⁶ See Anti-Defamation League, *supra* note 12 (“deep-rooted assumptions and stereotypical biases were not instantly transformed with the stroke of a pen. People with disabilities still face prejudice and bias . . . [and the] promise of the ADA is yet to be fully realized . . .”).

¹⁷ Mayerson, *supra* note 12.

¹⁸ *Id.*

¹⁹ Laura Rothstein & Ann C. McGinley, *DISABILITY LAW: CASES, MATERIALS, PROBLEMS*, 10-11 (6th ed. 2017).

²⁰ 347 U.S. 483 (1954).

²¹ See Rothstein & McGinley, *supra* note 19.

²² *Id.*

²³ “These decisions established that where a state undertakes to provide education at public expense, it must do so on an equal basis for all children and it must provide procedural safeguards before there is exclusion or differing treatment.” *Id.*; *Pennsylvania Ass’n for Retarded Children (PARC) v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971); *Mills v. Board of Ed.*, 348 F. Supp. 866 (D.D.C. 1972).

disabilities, Congress passed the Education for All Handicapped Children Act (now known as the Individuals with Disabilities Education Act (IDEA)).²⁴ Second, the Rehabilitation Act was passed in 1973,²⁵ providing for nondiscrimination on the basis of disability.²⁶ Section 504 of this Act is most significant because it “reaches not only employment, but also institutions such as public schools, welfare providers, hospitals, [and] federally supported transportation.”²⁷ As such, section 504 became what is known as “the civil rights bill of the disabled.”²⁸

Courts interpreting the Rehabilitation Act broadly construed the term “handicapped individual” (and presumably “severe handicap” as well), thus allowing for inclusive coverage.²⁹ Prior to the Rehabilitation Act’s amendments, which largely reconciled incongruencies with the ADA, “handicapped individual” was defined as “any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services”³⁰ Notably, the Rehabilitation Act was previously silent as

²⁴ Education for All Handicapped Children Act, 89 STAT. 773 (1975); Individuals with Disabilities Education Act, 20 USCS § 1400 (1990).

²⁵ 29 U.S.C. § 705 et seq.

²⁶ See generally Rothstein & McGinley, *supra* note 19.

²⁷ *Id.*

²⁸ *Helen L. v. Didario*, 46 F.3d 325 n.11 (3d Cir. 1995) (“[t]he general prohibition against disability-based discrimination contained in § 504 was first proposed in the 92nd Congress as an amendment to Title VI of the Civil Rights Act of 1984 . . . [but] was ultimately enacted by the 93rd Congress as part of a pending Vocational Rehabilitation Act”).

²⁹ See, e.g., *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 285 (1978) (endorsing a broad interpretation of the definition of “handicapped individual”); *Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) (epilepsy); *Bolthouse v. Cont’l Wingate Co.*, 656 F.Supp. 620, 625-26 (W.D. Mich. 1987) (cerebral palsy); *Strathie v. Dep’t of Transp.*, 716 F.2d 227, 230 (3rd Cir. 1983) (hearing impairment); *Flowers v. Webb*, 575 F.Supp. 1450, 1456 (E.D.N.Y. 1983) (“mental retardation”); *Bentivegna v. United States Dep’t of Labor*, 694 F.2d 619, 621 (9th Cir. 1982) (diabetes); *Bey v. Bolger*, 540 F.Supp. 910, 927 (E.D. Pa. 1982) (heart disease); *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1377, 1387 (10th Cir. 1981) (multiple sclerosis); *Kampmeier v. Nyquist*, 533 F.2d 296, 299 n.7 (2d Cir. 1977) (vision in only one eye); see also H.R. Rep. No. 110-730, pt. 2, at 6 (Congress modeled the ADA definition of disability on the definition of “handicapped individual” contained in the Rehabilitation Act . . . which the courts had interpreted broadly to include persons with a wide range of physical and mental impairments.”).

³⁰ Rehabilitation Act, 87 Stat. 355 (1973), <https://www.congress.gov/bill/93rd-congress/house-bill/8070/text>.

to compulsive gambling and/or gambling disorders.³¹ This is perhaps what led courts to hold that such conditions could qualify as disabilities.³² Despite the Rehabilitation Act's significance as the first broad federal statute addressing discrimination against individuals with disabilities, the Act nevertheless faced criticism as to its efficacy.³³ Moreover, while the Act's coordination regulations³⁴ would later shape the ADA, at first, the Supreme Court did not afford them significant weight.³⁵

Aside from the Rehabilitation Act, there were several other federal statutes providing patchwork of protection for individuals with disabilities, including: The Architectural Barriers Act of 1968,³⁶ The Federal Aid Highway Act of 1972,³⁷ The Air Carrier Access Act of 1986,³⁸

³¹ The Rehabilitation Act has since changed the nomenclature from "handicapped individuals" to "disability," a decision made by Congress to reflect its awareness that individuals with disabilities find the term "handicapped" objectionable. *Didario*, 46 F.3d 325; Burgdorf, *The Americans with Disabilities Act Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. L. REV. 413, 522 n.7 (1991) [hereinafter Burgdorf, *Implications of a Second-Generation Civil Rights Statute*]. Additionally, the Rehabilitation Act now mimics the language in Title V of the ADA, which expressly excludes "compulsive gambling" from the definition of an individual with a disability. *See* 29 U.S.C. § 705(2)(F)(ii).

³² *See, e.g.,* *Fields v. Lyng*, 705 F. Supp. 1134 (D. Md. 1988); *Rezza v. Department of Justice*, 698 F. Supp. 586 (E.D. Pa. 1988).

³³ According to one scholar, "the weaknesses of section 504 arise from its statutory language, the limited extent of its coverage, inadequate enforcement mechanisms and erratic judicial interpretations." *See generally* *Didario*, 46 F.3d 325 (citing *Cook, The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 394-408 (1991) (The Rehabilitation Act and its regulations have been practically a dead letter as a remedy for segregated public services)); Burgdorf, *Implications of a Second-Generation Civil Rights Statute*, *supra* note 31.

³⁴ Although the Rehabilitation Act did not itself expressly mandate that regulations be promulgated, such regulations were later enacted pursuant to an Executive Order signed by President Carter. *See* *Southeastern Community College v. Davis*, 442 U.S. 397, 404 n. 4 (1979); Exec. Order No. 12250, 45 Fed. Reg. 72995 (Nov. 2, 1980); *see generally* *Didario*, 46 F.3d 325. These regulations required all federal agencies to issue regulations to "implement section 504 with respect to programs and activities to which it provides assistance." 28 C.F.R. § 41.4. A separate section of the regulations lists a number of general prohibitions against disability-based discrimination, and mandates that all recipients of federal financial assistance disability-based discrimination, and mandates that all recipients of federal financial assistance "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. § 41.5(d).

³⁵ *Mayerson, supra* note 12 ("[c]ontrary to established Court doctrine, the Section 504 regulations that had been issued by the Department of Health, Education and Welfare (HEW) were given little deference by the Court. Ironically the Court attributed this lack of deference to the fact that HEW had been recalcitrant in issuing the regulations.").

³⁶ 42 U.S.C. §§ 4151-4157 (requiring newly constructed federal government buildings to be accessible).

³⁷ 23 U.S.C. § 142 (mandating accessibility in federally assisted transportation programs and on federal highways).

³⁸ 49 U.S.C. § 1374 (prohibiting discrimination against people with disabilities by providers of air transportation).

The Fair Housing Act (as amended in 1988),³⁹ among others.⁴⁰ By the end of the 1980's, however, both houses of Congress recognized that

[T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities *and for the integration of persons with disabilities into the economic and social mainstream* of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.⁴¹

These conclusions ultimately led to the enactment of the ADA.⁴²

ii. The ADA

The ADA was passed in 1990 after extensive Congressional committee discussion and floor debate, and after two years of major efforts to pass a comprehensive antidiscrimination statute.⁴³ Title II and III of the ADA prohibit discrimination on the basis of disability in public services provided by state and local governmental authorities, and in programs of public accommodation provided by public parties, respectively.⁴⁴ Title IV addresses improvement in access to telecommunications.⁴⁵ This paper will focus primarily on Title I, which prohibits discrimination on the basis of disability in both public and private employment, and Title V, which contains the exclusion of compulsive gambling as a disability.

Title I provides that “no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation,

³⁹ 42 U.S.C. § 3601 et seq. (providing protection against discrimination on the basis of disability in house and requiring barrier-free design for certain multi-dwelling construction).

⁴⁰ Rothstein & McGinley, *supra* note 19 (“[o]ther federal statutes related to voter accessibility, telecommunications access, and a variety of other areas”).

⁴¹ *Didario*, 46 F.3d 325 (quoting S.Rep. No. 116, 20; H.R.Rep. No. 485(II), 50 (emphasis added)).

⁴² *Id.*

⁴³ Rothstein & McGinley, *supra* note 19; Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP.L. REV. 471, 472-475 (1991).

⁴⁴ *See generally* Rothstein & McGinley, *supra* note 19.

⁴⁵ *Id.*

training, and other terms, conditions, and privileges of employment.”⁴⁶ Qualified individual is defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁴⁷ Disability, in turn, is defined as an individual with “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁴⁸

Title V, entitled “Miscellaneous Provisions,” refines the definition of disability further.⁴⁹ Accordingly, “the term ‘disability’ *shall not* include (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (2) compulsive gambling, kleptomania, or pyromania; or (3) psychoactive substance use disorders resulting from current illegal use of drugs.”⁵⁰

iii. Restrictive Judicial Interpretations of the ADA

While the enactment of the ADA appeared to be a landmark victory for the disability rights movement, narrow judicial interpretations of who qualifies as an individual with a disability left many unprotected.⁵¹ Beginning with the “*Sutton* trilogy”,⁵² ADA litigation became preoccupied with the preliminary question of whether the plaintiff-employee was disabled, rather than the larger issue of whether the defendant-employer engaged in wrongful discrimination.⁵³

⁴⁶ 42 USC 12112.

⁴⁷ 42 USC 12111.

⁴⁸ 42 USC 12102.

⁴⁹ 42 USC 12201 (emphasis added).

⁵⁰ *Id.*

⁵¹ See *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Albertson’s, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999); *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999); see generally Allison Ara, *The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problems of Perceived Disabilities?*, 50 SANTA CLARA L. REV. 255 (2010) [hereinafter *Do the Amendments Cure the Interpretation Problems?*]; Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1 (2014).

⁵² Rothstein & McGinley, *supra* note 19 (*Sutton*, *Albertson’s* and *Murphy* because known as the “*Sutton* trilogy” because they were all decided around the same time based on the same reasoning).

⁵³ Jeffrey Douglas Jones, *Enfeebling the ADA: The ADA Amendments Act of 2008*, 62 OKLA. L. REV. 667 (2010).

Sutton involved twin sisters, both with correctable vision, who were denied positions as airline pilots.⁵⁴ The Court held that because the twins' impairment could be corrected through "mitigating measures", such as eyeglasses or contact lenses, they did not qualify as "disabled" under the ADA.⁵⁵ The Court reasoned that the 43 million individuals with disabilities cited in the ADA's findings by Congress could not have included all persons with corrected limitations. Congress "undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not [was] evidence [to the Court] that the ADA's coverage [was] restricted to only those whose impairments are not mitigated by corrective measures."⁵⁶ This reasoning was also employed in two other cases: *Albertson's, Inc. v. Kirkingburg*⁵⁷ and *Murphy v. United Parcel Service, Inc.*⁵⁸ In *Albertson's*, the plaintiff was denied a truck driving position at defendant's grocery chain due to vision deficiencies that affected his binocular acuity.⁵⁹ The *Albertson's* Court denied plaintiff's ADA discrimination claim because his brain had developed coping mechanisms for dealing with his limitations, and thus, much like the twins in *Sutton*, he did not qualify as "disabled."⁶⁰ In *Murphy*, the plaintiff was dismissed as a mechanic at the United Parcel Service because of his high blood pressure and his inability to drive commercial motor vehicles, a requirement found in his job description.⁶¹ The plaintiff's condition was mitigated when he took medication, and therefore, the *Murphy* Court found that he was not "substantially limited" in major life activities per the ADA's disability definition.⁶²

⁵⁴ 527 U.S. at 475-76.

⁵⁵ *Id.* at 488-89.

⁵⁶ *Id.* at 484-487.

⁵⁷ 527 U.S. 555 (1999).

⁵⁸ 527 U.S. 516 (1999).

⁵⁹ *Albertson's*, 527 US at 558-60.

⁶⁰ *Id.* at 565.

⁶¹ *Murphy*, 527 U.S. at 519-21.

⁶² *Id.* at 521.

The Supreme Court narrowed the application of the ADA further in *Toyota Motor Manufacturing v. Williams*.⁶³ Though the plaintiff in *Williams* was terminated due to her poor attendance record, she subsequently sued, arguing that her carpal tunnel syndrome and related impairments rendered her disabled from performing her automobile assembly line job and that she was entitled to reasonable accommodations.⁶⁴ In reversing the grant of partial summary judgment for the plaintiff, the Court defined both “substantial” and “major” as they pertain to the ADA’s definition of disability.⁶⁵ First, the Court concluded that “[s]ubstantially’ in the phrase ‘substantially limits’ suggests ‘considerable’ or ‘to a large degree.’”⁶⁶ The Court then interpreted “major life activities” as referring “to those activities that are of *central importance* to daily life.”⁶⁷ Putting these two definitions together, the Court held “that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives,” stressing the need for a more “demanding standard” for disability qualification under the ADA.⁶⁸

Lower courts, previously holding that epilepsy, diabetes, and cancer qualified for disability status, opted for more restrictive holdings following the *Sutton* trilogy and the *Williams*

⁶³ 534 U.S. 184 (2002).

⁶⁴ *Id.* at 187-190.

⁶⁵ *Id.* at 196-198.

⁶⁶ *Id.*

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.* at 198.

decision.⁶⁹ As a result, many individuals could not surpass the summary judgment stage of litigation.⁷⁰

iv. The Americans with Disabilities Act Amendments Act

Through the ADA Amendments Act (“ADAAA”), Congress sought to: (1) direct courts on how best to interpret the provisions of the ADA; (2) clarify the ADA’s “substantially limits” language; (3) expand the meaning of “major life activities”; and (4) refine the “regarded-as” prong of the ADA’s definition of disability.⁷¹

First, Congress expressly rejected the narrow judicial interpretations of the ADA through the enactment of the ADAAA.⁷² In its “findings and purposes” section, the Amendments Act emphasizes that the “holdings of the Supreme Court in [*Sutton*] . . . and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.”⁷³ As such, the stated purpose of the ADAAA was “to carry out the ADA’s objectives of providing “a clear and comprehensive national mandate for the elimination of discrimination” and “clear, strong, consistent, enforceable standards addressing discrimination” by reinstating a broad scope of protection to be available under the ADA.”⁷⁴ To further elucidate its legislative intent, Congress

⁶⁹ Rothstein & McGinley, *supra* note 19; Porter, *The New ADA Backlash*, *supra* note 51, at 11 (“many, if not most, of these impairments had been considered disabilities under the Rehabilitation Act, which is the statute after which the ADA was modeled”).

⁷⁰ *Id.*; see also Ara, *Do the Amendments Cure the Interpretation Problems?*, *supra* note 51, at 255-56 (“[f]urther, the circuits split over whether to interpret the ADA as granting reasonable accommodation to those who were “regarded as” disabled, or to restrict this grant to only those with actual disabilities.”).

⁷¹ See ADA Amendments Act of 2008, Pub. L. 110-325 (2008); Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 Nw. U. L. Rev. Colloquy 217, 217-18 (2008) [hereinafter *Introducing the New and Improved Americans with Disabilities Act*].

⁷² See ADA Amendments Act of 2008, sec. 2(a)(3)-(7), 122 Stat. at 3553-54.

⁷³ *Id.* at sec. 2(a)(4), 122 Stat. at 3553.

⁷⁴ *Id.* at sec. 2(b)(1), 122 Stat. at 3554.

explicitly instructs courts to construe disability “in favor of *broad coverage* of individuals under this Act, *to the maximum extent permitted* by the terms of this Act.”⁷⁵

Second, Congress addressed the *Williams* Court’s restrictive definition of “substantially limits.” Instead of providing a definition, however, the ADAAA instructs that the term be interpreted “consistently with the findings and purposes of the ADA Amendments Act of 2008.”⁷⁶ Congress directs the Equal Employment Opportunity Commission (“EEOC”) to revise its regulations to conform with the ADAAA, so that “substantially limits” no longer equates to “substantially restricts.”⁷⁷ In response to the *Sutton* trilogy, the ADAAA also provides that the determination of whether an impairment substantially limits a major life activity should be made without regard to the ameliorative effects of mitigating measures.⁷⁸

Third, the ADAAA supplemented the major life activities provision. Where previously silent, the definition of disability now includes a non-exhaustive list for major life activities: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” in addition to operating major bodily functions (i.e., neurological, immune system, bowel, bladder, respiratory functions).⁷⁹ Finally, Congress made significant changes to “regarded as” prong of the disability definition by providing that a plaintiff need only

⁷⁵ *Id.* at sec. 3(4)(A), 122 Stat. at 3555.

⁷⁶ *Id.* at sec. 4(B), 122 Stat. at 3555.

⁷⁷ *Id.* at sec. 2(b)(5), 122 Stat. at 3554; see also sec. 4(C), 122 Stat. at 3556 (“[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability”); sec. 4(D), 122 Stat. at 3556 (“[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active”).

⁷⁸ *Id.* at sec. 4(E)(i), 122 Stat. at 3556; but see sec. 4(E)(ii), 122 Stat. at 3556 (providing an exception for ordinary eye glasses or contact lenses).

⁷⁹ *Id.* at sec. 3(2)(A), 122 Stat. at 3555; sec. 3(2)(B), 122 Stat. at 3555; see also Porter, *The New ADA Backlash*, *supra* note 51 (“[t]hese bodily functions basically track many of the impairments that lower courts held were not disabilities under the original ADA: impairments such as diabetes (endocrine), HIV (immune system), cancer (normal cell growth), neurological (multiple sclerosis), and circulatory (high blood pressure)”).

establish that they were treated adversely “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”⁸⁰

In sum, the history—both legislative and judicial—leading up to the ADAAA lends support to the argument that the Americans with Disabilities Act has been and is evolving towards inclusion. As this paper will demonstrate, the ADA should be further amended to remove the compulsive gambling exclusion in order to better reflect and protect the growing number of individuals in the U.S. battling gambling addiction.

B. Gaming Law: Before and After Murphy v. NCAA

The legal parameters of sports betting in the U.S. appear to follow the whims of public opinion. Although once considered a serious threat to the integrity of sports, sports betting is now as ubiquitous as the sports themselves. The 180-degree change in public opinion cannot be understood, however, without an examination of the rise and fall of the Professional and Amateur Sports Protection Act (“PASPA”).

i. The Enactment of PASPA

The roots of PASPA can be traced as far back as the 1919 World Series.⁸¹ This scandal revolved around eight White Sox players who were accused of purposefully losing the World Series in exchange for money.⁸² The accusations ultimately proved true: a grand jury indicted the

⁸⁰ ADA Amendments Act of 2008, sec. 3(3)(A), 122 Stat. at 3555; *see also* Porter, *The New ADA Backlash*, *supra* note 51 (“[t]he focus is now on the employer’s motivation for its adverse action, rather than focusing on how serious the employer considered the plaintiff’s condition”); Long, *Introducing the New and Improved Americans with Disabilities Act*, *supra* note 71 (“if the plaintiff can show that the defendant, rightly or wrongly, perceived the plaintiff as having an impairment, and that this perception motivated the adverse action, the plaintiff is covered under the “regarded as” prong, regardless of how limiting the defendant perceives the impairment to be”).

⁸¹ *See generally*, John Thorn, *Forget What You Know About the Black Sox Scandal*, N.Y. TIMES (Oct. 9, 2019), <https://www.nytimes.com/2019/10/09/opinion/black-sox-scandal-1919.html> (“the scandal, which was uncovered almost a year later, has come to be seen as baseball’s “loss of innocence,” the cause of fans’ diminished feelings for the game they once adored and a mortal blow to the nation’s confidence as it entered the 1920s, a decade of disrespect for elders, contempt for institutions and worship of the fast life and the fast buck”).

⁸² *See* Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 1 (2018); Evan Andrews, *The Black Sox Baseball Scandal, 95 Years Ago*, HISTORY (Oct. 9, 2014), <https://www.history.com/news/the-black-sox-baseball-scandal-95-years-ago>.

eight players, finding that they had engaged in an illegal gambling conspiracy; however, none were convicted at trial.⁸³ Although the 1919 World Series scandal did shake public sentiment,⁸⁴ it was not enough to prevent states from pursuing avenues for the legalization of sports gambling.⁸⁵ Concerned with the imminent prospect of sports gambling expansion, several U.S. commercial leagues—Major League Baseball, the National Basketball Association, and the National Football League (the “Leagues”)—banded together, seeking a federal ban sports gambling.⁸⁶

The Leagues’ efforts prompted the introduction of PASPA, a federal bill aimed at preventing “the spread of State-sponsored sports gambling and [maintain] the integrity of our national pastime.”⁸⁷ PASPA was signed into law in 1992 with several “grandfather clauses” for the handful of states that already offered sports gambling.⁸⁸ The key provision of PASPA

⁸³ Edelman, *supra* note 82.

⁸⁴ *Id.* (“[a]lthough Major League Baseball’s 1919 gambling scandal led to strong public sentiment against sports gambling, the scandal did not affect public sentiment toward gambling more generally”).

⁸⁵ By the early 1990s, at least three other states explored launching sports gambling activities:

(1) In 1990, Illinois proposed to expand the powers of the Illinois Gaming Board to allow for traditional sports betting, with 20 percent of the gross profits from sports betting going to the state for building a new Chicago Bears stadium;

(2) Around the same time, California proposed to legalize sports betting to raise general tax revenue, allowing “racetracks, card clubs or anyone with a clean record who was willing to post a \$100,000 license fee to set up sports bookmaking operations in any California city that permits the wagering”; and

(3) In 1992, Florida proposed a bill allowing individuals located within the state to place bets on professional football games, which was ultimately undermined by the work of antigambling lobbyists, including perhaps, individuals who worked on behalf of the interests of U.S. commercial sports leagues.

Id. (internal citations omitted); *see also* Nat’l Football League v. Governor of Delaware, 435 F. Supp. 1372, 1379 (D. Del. 1977) (explaining that sports betting had been legal in Nevada since 1949); Joshua Winneker et al., *Sports Gambling and the Expanded Sovereignty Doctrine*, 13 VA. SPORTS & ENT. L.J. 38, 42 (2013) (discussing Montana’s 1973 publicly operated sports lottery); Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 289 (2011) (discussing Delaware’s state lottery that allowed individuals to bet a parlay on NFL games).

⁸⁶ Edelman, *supra* note 82.

⁸⁷ S. REP. NO. 102-248, at 3554–55 (1991); *see also* Edelman, *supra* note 82; Matthew T. Mierswa, Note, *Poor Man Wanna Be Rich, Rich Man Wanna Be King: The Battle to Legalize Sports Betting in the Garden State*, 38 SETON HALL LEGIS. J. 447, 450–51 (2014).

⁸⁸ Edelman, *supra* note 82 (“To ensure maximum legislative support, federal legislators included in PASPA a “grandfather” clause that allowed states that already offered sports gambling—namely, Nevada, Montana, Delaware, and Oregon—to maintain their already existing forms of gambling.”); Jeffrey Roeske, *Doubling Down on Sports Gambling: Why PASPA Would Fail A Constitutional Challenge*, 24 MARQUETTE L. REV. 463 (2014) (“what Congress ultimately created with PASPA was a culture that did not say gambling was something that needed to be eliminated but instead something that needed to be curtailed.”).

provided: “it shall be unlawful for . . . a governmental entity . . . or a person to sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate.”⁸⁹

Notably, New Jersey was among the few states for which PASPA provided an exemption.⁹⁰ The state had “one year to legalize sports betting and similarly enjoy ‘grandfather’ status,⁹¹ but ultimately refrained from exercising this option.⁹²

ii. *Murphy v. NCAA*

Twenty years after the enactment of PASPA, New Jersey passed a law authorizing sports gambling.⁹³ As a direct result, several U.S. commercial sports leagues sued the State of New Jersey, seeking to enjoin the law as a violation of PASPA.⁹⁴ In response, New Jersey asserted that PASPA was unconstitutional because it violated the Tenth Amendment’s anticommandeering doctrine by prohibiting the State from legalizing sports gambling.⁹⁵ The district court and Third Circuit, however, disagreed.⁹⁶ The Third Circuit panel concluded that “only an affirmative command, which forces the State to take new action (rather than refrain from acting), would constitute an anticommandeering violation, and PASPA did not impose such a command.”⁹⁷ Furthermore, according to the court, “a repeal of New Jersey’s current

⁸⁹ 28 U.S.C. § 3702 (2012).

⁹⁰ See 28 U.S.C. § 3704(a)(3).

⁹¹ *Id.*

⁹² Edelman, *supra* note 82.

⁹³ See 138 S. Ct. at 1471.

⁹⁴ See generally HARV. L. REV., CONSTITUTIONAL REMEDIES, *Murphy v. National Collegiate Athletic Association* [hereinafter HARV. L. REV., *Murphy*], <https://harvardlawreview.org/2018/11/murphy-v-national-collegiate-athletic-association/> (last visited April 25, 2022).

⁹⁵ *Id.* (“that doctrine prohibits Congress from issuing direct orders to states because Article I does not enumerate that power and the Tenth Amendment reserves all unenumerated powers to the states. Although Congress can “requir[e] or prohibit[] certain acts,” it cannot directly “compel the States to require or prohibit those acts.”).

⁹⁶ Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 215 (3d Cir. 2013).

⁹⁷ HARV. L. REV., *Murphy*, *supra* note 94 (citing Nat’l Collegiate Athletic Ass’n, 730 F.3d at 215).

prohibition on sports gambling would not constitute an ‘authoriz[ation]’ in violation of PASPA.”⁹⁸ After this ruling, New Jersey attempted a similar, but subtly different legal maneuver: it *repealed* existing prohibitions on sports gambling.⁹⁹ The commercial sports leagues again sued, and the district court enjoined the law repealing existing laws, concluding that it was preempted by PASPA.¹⁰⁰ Sitting en banc, the Third Circuit affirmed, holding that the repeal “selectively remove[d] a prohibition [and] permissively channel[ed] wagering activity,” and was therefore an authorization.¹⁰¹

Ultimately, the Supreme Court reversed.¹⁰² The Court held that: (1) § 3702(1) of PASPA violated the anticommandeering doctrine by prohibiting states from authorizing sports gambling; and (2) the remaining provisions of PASPA could not be severed.¹⁰³ For purposes of this paper, the Court’s reasoning in *Murphy* is less critical than the holding itself: PASPA was deemed unconstitutional,¹⁰⁴ and as a result, states could legalize sports gambling.¹⁰⁵ In four short years since the *Murphy* decision, thirty-three states have made sports betting legal in some form— “[thirty] of which already have sports gambling live, and three more have the approvals needed but are working through the rollout.”¹⁰⁶ Five more states, including California, are expected to similarly legalize sports betting in 2022.¹⁰⁷

⁹⁸ *Id.*

⁹⁹ *Murphy*, 138 S. Ct. at 1472.

¹⁰⁰ Nat’l Collegiate Athletic Ass’n v. Christie, 61 F. Supp. 3d 488, 507 (D.N.J. 2014).

¹⁰¹ Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 832 F.3d 389, 396–97 (3d Cir. 2016) (en banc) (concluding that PASPA did not commandeer New Jersey because it issued no affirmative command).

¹⁰² *Murphy*, 138 S. Ct. at 1485.

¹⁰³ *Id.* at 1484.

¹⁰⁴ *But see* Edelman, *supra* note 82 (“the Supreme Court’s decision in *Murphy* did not serve as a public policy endorsement of state-sponsored sports gambling . . . The legal problem with PASPA, according to the Court, was merely that the statute sought to compel state action rather than disallow sports gambling directly”).

¹⁰⁵ *Murphy*, 138 S. Ct. at 1484–85 (2018) (“Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”).

¹⁰⁶ Chuck McMahon, *The States Most Likely to Legalize Sports Betting in 2022*, BOARDROOM (Apr 22, 2022), <https://boardroom.tv/sports-betting-legalization-by-state-2022/> (discussing the possibility sports betting legalization in California, Kansas, Maine, Massachusetts, Minnesota, Missouri, and North Carolina).

¹⁰⁷ *Id.*

III. AMENDING THE ADA TO INCLUDE GAMBLING ADDICTION

As explored in this section, there are several legal and policy reasons why gambling addiction should not be excluded from the ADA’s protection. This section will be broken into four subparts: Part A will emphasize how the legalization of sports betting and the widespread accessibility provided by new technology has exacerbated the prevalence of gambling addiction; in Part B, this paper will explain how the stigma attached to the term “gambling” has prevented society from recognizing its effects as disabling; Part C of this section will then address the potential claim for gambling addiction discrimination on the state level; and finally, Part D will conclude with a proposed framework for amending the ADA.

A. *The Ubiquity of Sports Betting*

In a post-*Murphy* era, gambling—and more specifically, sports betting—is everywhere. To compound the ubiquity of sports betting, technology has bolstered accessibility: people can place a wager with a click of a button on their mobile phones. With an increase of accessibility likely comes an increase of abuse, leading to higher numbers of problem gamblers. In turn, as this paper suggests, there will be an increase in workplace issues surrounding discrimination against gambling addicts, and therefore, a need for legal recourse.

i. The Allure and Grasp of Sports Betting

The effect of sports betting on gambling issues in the U.S. was recently surveyed by the National Council on Problem Gambling (“NCPG”).¹⁰⁸ The survey was intended to provide a baseline of research and was “conducted at the outset of what is likely to be the largest and fastest expansion of gambling in our nation’s history,” referring to the federal decriminalization

¹⁰⁸ National Council on Problem Gambling, *National Survey on Gambling Attitudes and Gambling Experiences*, 1 (2021), http://www.ncpgsurvey.org/wp-content/uploads/2021/03/NCPG_NGAGE-Natl_Detailed_Report-Public.pdf (“[i]n response to the Supreme Court ruling in the *Murphy* case, the National Council on Problem Gambling (NCPG) commissioned a national survey to measure the extent of gambling in the United States prior to the rapid expansion of sports betting”).

of sports betting in 2018. Among the NCPG’s key findings was that “[s]ports bettors appear to be at particularly high risk.”¹⁰⁹ Moreover, the rate of problem gambling and/or addiction is at least twice as high for sports bettors as compared to other gamblers.¹¹⁰

Some scholars credit the allure of sports betting to the interconnected relationship to sports themselves:

The increased integration of sports betting logos, signage and promotions within televised sports broadcasts and at live sporting fixtures has raised particular concerns that sports betting is becoming normalised amongst sports audiences. This marrying of sports and sports betting cultures has led to the ‘gamblification of sport’ and the ‘sportification of gambling,’ where sports fans are encouraged to gamble as an extension of their interest in sport, and betting is promoted as a healthy harmless activity akin to playing sport. There may be important complementarities in watching sports and betting on sports, with a key market for both activities being young adult males.¹¹¹

Others have emphasized the role of media, with the sports betting and gaming industry spending approximately \$488 million on advertising in 2021.¹¹² Such ads glamorize gambling

¹⁰⁹ *Id.* at 7.

¹¹⁰ National Council on Problem Gambling, *A Review of Sports Wagering & Gambling Addiction Studies Executive Summary*, https://www.ncpgambling.org/wp-content/uploads/2020/01/Sports-gambling_NCPGLitRvwExecSummary.pdf (last visited April 12, 2022) [hereinafter *Executive Summary*]; see also National Research Council, *Pathological gambling: A critical review*, 78 (National Academy Press 1999) (finding that problem and pathological gamblers were disproportionately involved in sports betting (among other games) compared with non-problem social and recreational gamblers).

¹¹¹ Nerilee Hing et al., *Demographic, Behavioural and Normative Risk Factors for Gambling Problems Amongst Sports Bettors*, 32 J. GAMBLING STUD. 625 (Sept. 5, 2015); see also Ken C. Winters & Jeffrey L. Derevensky, *A Review of Sports Wagering: Prevalence, Characteristics of Sports Bettors, and Association with Problem Gambling*, 43 J. of Gambling Issues 102, 106 (Dec. 2019) (“[c]ommon features of individuals who engage in sport betting frequently and who are classified as meeting the definition of problem gambling . . . include the following: male, young (young adults to approximately age 35), not married, full-time employed or studying, high level of education, engage in poly-gambling, have significant others and peers who also favour sports betting, frequent user of multiple online accounts with different operators, frequent use of multiple types of promotions, and show more impulsive responses to betting opportunities (e.g., spontaneous betting in the absence of reflection by the bettor)”).

¹¹² Mike Lukas, *Sports Betting Ad Spend Booming, but How Much is Too Much?*, WSN (Dec. 31, 2021), <https://www.wsn.com/betting/sports-betting-ad-spend-booming/>; Michael Martin, *Online betting companies are kicking off a Super Bowl ad blitz*, NPR (Feb. 13, 2022, 6:35 PM) [hereinafter *Super Bowl ad blitz*], <https://www.npr.org/transcripts/1079880190>; see also Eric Webber and Howard Gensler, *Should we ban sports betting ads during games? | Pro/Con*, THE PHILADELPHIA INQUIRER (Jan. 20, 2022) [hereinafter *Pro/Con*], <https://www.inquirer.com/opinion/commentary/sports-gambling-advertising-during-games-addiction-20220120.html> (“[a]bout 30 states have since legalized sports betting, most of which allow online sports betting. Naturally, a lot of that activity comes with extensive advertising for sports betting”); Rick Benson, *Should Gambling Ads in Sports Be Banned?*, ALGAMUS GAMBLING TREATMENT (Oct. 28, 2021), <https://www.algamus.org/blog/gambling-ads-sports-banned/> (“[g]ambling advertising in American sports began increasing in popularity in 2018 when the Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA)”).

yet minimize risks—if any are mentioned at all, they are infinitesimal.¹¹³ Moreover, these ads are as ubiquitous as the practice of sports betting itself: “[a]nyone who uses a computer, watches television, carries a smart phone or listens to the radio, likely has been exposed to Jerry Rice dumping Gatorade on a winning DraftKings bettor or some other celebrity-filled come-on.”¹¹⁴ Concerns surrounding sports betting advertising have been addressed internationally with bans during games and other restrictions.¹¹⁵ Sports betting ads are banned entirely in Italy, from “whistle-to-whistle” in the UK, and in connection to stadium names or affixed to sports jerseys in Spain.¹¹⁶ Given the apparent risk of enabling gambling addiction,¹¹⁷ especially among younger

¹¹³ See Webber and Gensler, *Pro/Con*, *supra* note 112; Benson, *Should Gambling Ads in Sports Be Banned?*, *supra* note 83 (“[g]ambling companies often don’t outline the risks involved in gambling, or how to gamble responsibly”).

¹¹⁴ O’Donnell, *The Ugly Truth*, *supra* note 8; see also Emily Stewart, *Sports betting: Pretty fun, probably terrible*, VOX (Feb. 24, 2022, 6:00 AM) (“I see actor J.B. Smoove’s face, who plays Caesar in the company’s ads, more than I see pretty much any of my family or friends”); Benson, *Should Gambling Ads in Sports Be Banned?*, *supra* note 83 (“[i]n the U.S., many sports teams in the NFL, NHL, and NBA have partnerships or sponsorships with online gambling companies, including DraftKings and FanDuel”).

¹¹⁵ Wayne Perry, *Sports betting ads: Industry weighs how much is too much?*, ABC NEWS (Dec. 2, 2021), <https://abcnews.go.com/Lifestyle/wireStory/sports-betting-ads-industry-weighs-81525358#:~:text=Italy%20has%20banned%20all%20gambling,between%201%20and%205%20a.m..>

¹¹⁶ *Id.*

¹¹⁷ Heather Gridley, *The increasing harm from advertising and promotion of gambling in sport*, 35 INPSYCH (June 2013), <https://psychology.org.au/publications/inpsych/2013/june/gambling> (“gambling research generally shows that an increase in exposure to gambling advertising and opportunities is a risk factor for the development of gambling problems”).

demographics,¹¹⁸ many have argued that sports betting advertising should likewise be regulated and/or restricted in the U.S.¹¹⁹

Perhaps best illustrating the correlation between the rise of gambling addiction and the (states’) legalization of sports betting post-*Murphy* is the toll on gambling disorder helplines and recovery centers.¹²⁰ For example, while “[p]eople who call gambling disorder help lines tend to do so only after years of battling the addiction, . . . help lines in at least 10 states have received a sharp uptick in calls from gamblers in their 20s and early 30s since January 2020.”¹²¹ Moreover, “1-800-GAMBLER,” the national problem gambling help line, has received 22,000 calls a month on average in 2021—nearly *double* the average monthly calls as compared to 2020.¹²²

In sum, the allure of sports betting has been far-reaching. The negative effects, however, have been a source of concern both domestically, and internationally—with empirical and normative evidence pointing to a strong and growing correlation with the rise of gambling addiction.

¹¹⁸ In contrast to alcohol or other forms of gambling advertising that recreate adult worlds with adult pleasures, sports betting cannot stop evoking a world familiar to children. In other words, if poker, casino, or slot machine advertising is rendered problematic is because the activities advertised are attached with negative connotations. However, sports betting and sport betting advertising are permanently associated with sport activities, which are largely considered harmless merit goods that can be actively performed or passively consumed (watching, reading, discussing) by children. Betting operators and advertisers alike may try to capitalize on that sentimental bond, exploring how traits such as team identification, territorial affiliation, loyalty, and peer pressure can lead to a more engaged betting conduct.

Hibai Lopez-Gonzalez, Ana Estévez, Mark D. Griffiths, *Marketing and Advertising Online Sports Betting: A Problem Gambling Perspective*, 41 J. SPORT AND SOCIAL ISSUES 256 (April 22, 2017), <https://doi.org/10.1177%2F0193723517705545>; see also Heather Gridley, *The increasing harm from advertising and promotion of gambling in sport*, *supra* note 88 (“[t]he proliferation of gambling advertising within sport has the effect of normalising it, . . . and particularly influencing the attitudes of children and young people. Betting odds, for example, have made their way into how people (young people particularly) discuss and experience sport . . .”).

¹¹⁹ See Webber and Gensler, *Pro/Con*, *supra* note 112; Benson, *Should Gambling Ads in Sports Be Banned?*, *supra* note 83.

¹²⁰ Rich Schapiro, *Sports betting skyrocketed in pandemic. Experts warn of a 'ticking time bomb'*, NBC News (May 15, 2021, 6:00 AM), <https://www.nbcnews.com/news/us-news/sports-betting-skyrocketed-pandemic-experts-warn-ticking-time-bomb-n1266518>.

¹²¹ *Id.*

¹²² See Webber and Gensler, *Pro/Con*, *supra* note 112.

ii. Technology's Exacerbating Role

Technology has become a catalyst gambling addiction: “bets can be made in real time, from your phone, mere feet away from where a game is being played. And the things you can bet on are becoming more granular every day.”¹²³ In fact, Internet/online gambling and mobile phone wagering have become the two most prevalent forms of sports betting.¹²⁴

In a recent review on these methods of sports betting and their connection to gambling addiction, several insights were drawn.¹²⁵ First, those seeking to alleviate psychological distress “may find online gambling to be particularly convenient, provide more privacy and be less socially demanding than attending a physical venue, allow greater ease of substance use while gambling, and allow solitary betting in extended sessions late at night.”¹²⁶ Second, as compared to individuals who used other modes of betting, mobile device bettors are more likely to become problem gamblers (22%).¹²⁷ Moreover, the accessibility of mobile betting allows for more expediency in gambling, a feature that is often appealing to those susceptible to impulsive betting opportunities.¹²⁸ Finally, live “in-play” betting is now considered a risk factor for problem gambling since it allows individuals to bet on hundred and potentially thousands of

¹²³Will Leitch, *Sports Gambling Is a Disaster Waiting to Happen*, THE ATLANTIC (Sept. 24, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/micro-betting-could-destroy-sports/620188/>; Schapiro, *supra* note 92 (“[d]espite the proliferation of online gambling, in which large sums of money can be lost with a few clicks on a smartphone, federal and state governments still devote few resources to tracking and treating people with gambling problems”); *see also* Hing et al., *supra* note 83, at 626 (“the Internet and mobile phones have enabled the expansion of sports betting services across national borders, with multinational corporate bookmakers offering such services while also providing convenience, easy access, anonymity, and competitive prices for consumers”).

¹²⁴Winters & Derevensky, *supra* note 83, at 108; *Executive Summary*, *supra* note 82 (45% of sports wagering now [takes] place through the internet); *see generally* Mark Griffiths, *Gambling Technologies: Prospects for Problem Gambling*, 15 J. GAMBLING STUD. 265-283 (1999).

¹²⁵ *Id.*

¹²⁶ *Id.* at 109; *Executive Summary*, *supra* note 82.

¹²⁷ *Id.*; *see also* Susan Sheridan Tucker, Pandemic, technology and gambling expansion are perfect storm for problem gamblers — Opinion, Minnesota Reformer (Sept. 24, 2021), <https://minnesotareformer.com/2021/09/24/pandemic-technology-and-gambling-expansion-are-perfect-storm-for-problem-gamblers-opinion/> (“game and app designers are furiously creating ways to absorb participants into the digital world rather than being present in the physical world. The massive amounts of data being collected from each player helps to inform the next iteration of game design”).

¹²⁸ *Id.*

discrete events during the game—any activity or performance that can be measured is now a potential wager opportunity.¹²⁹ Such betting shortens the lag between bet and reward, which in turn increases the speed and frequency of gambling, and thus the risk of problematic behavior.¹³⁰ The concerns surrounding the impact of technology on gambling addiction have only heightened since the start of the COVID-19 pandemic.¹³¹

In sum, technology tends to facilitate the development of gambling addictions and has proved particularly problematic for sports bettors.

iii. Gambling Addiction in the Workplace

With more states legalizing sports betting, and with more individuals engaging in problem gambling behavior, it is likely that there will be an increase of issues surrounding gambling addiction in the workplace.¹³²

¹²⁹ *Id.*; *Executive Summary*, *supra* note 82.

¹³⁰ *Executive Summary*, *supra* note 82.

¹³¹ Tucker, *supra* note 99 (“[w]e’re living in a perfect storm of an emerging gambling addiction problem. The COVID-19 pandemic left people trapped at home. Legal gambling is expanding at an unprecedented clip. And, technological advances are making games more attractive than ever”).

¹³² See generally, Kathleen V. Wade, *Challenging the Exclusion of Gambling Disorder as a Disability Under the Americans with Disabilities Act*, 64 DUKE L. J. 947 (2015); see also HR News, *How To Deal With Gambling in the Workplace*, (March 12, 2021), <https://hrnews.co.uk/how-to-deal-with-gambling-in-the-workplace/> (“[t]he past few years have seen a sharp uptick in the number of online casinos and betting sites, as well as the number of people engaging in this exciting yet dangerous activity. In fact, gambling became so accessible that many offices now unsuspectingly double as casinos”); *Gambling in the Workplace Toolkit*, Iowa Dep’t of Pub. Health, [https://idph.iowa.gov/Portals/1/userfiles/83/Prevention%20Tool%20Chest/Gambling%20In%20the%20Workplace%20Tool%20Kit%20\(EFR\).pdf](https://idph.iowa.gov/Portals/1/userfiles/83/Prevention%20Tool%20Chest/Gambling%20In%20the%20Workplace%20Tool%20Kit%20(EFR).pdf) (last visited April 25, 2022) (“[a]lthough it is not often recognized as so, problem gambling is a significant workforce issue. The effects of a gambling problem will almost always appear at work. The gambler often spends increasing amounts of time involved in gambling, placing bets, and using their personal phone and devices at work. In some cases a gambling problem leads to theft and crime in the workplace”); Porter Wright, *Are You Ready, Baby? March Madness = Workplace Madness*, Employer Law Report (March 14, 2014), <https://www.employerlawreport.com/2014/03/articles/employment-outtakes/are-you-ready-baby-march-madness-workplace-madness/> (“employees who choose not to participate because of moral or religious objections to gambling or those that have to refrain because of gambling addictions. These hurt feelings or feeling left out may result in legal liability. For example, an employee who objects to or refuses to gamble may bring a hostile work environment claim if co-workers or supervisors harass or ridicule the employee for the employee’s position. Employees who are left out of an employer-sponsored competition may claim they are being treated differently”).

Although society has a strong interest in rehabilitating those with gambling addictions, doing so may interfere or conflict with employment obligations.¹³³ Gambling addictions, for example, may result in less productive workforces, with those afflicted more often absent from work and more frequently losing their jobs.¹³⁴ For those seeking to treat their gambling addiction, the residential and inpatient programs may require a substantial time away from work, while group-therapy meetings (i.e., Gamblers Anonymous) may require flexible work scheduling.¹³⁵ Despite these realities, the ADA explicitly excludes compulsive gambling from discrimination protection,¹³⁶ and only about twenty-five percent of employers address gambling in the workplace through policies.¹³⁷

Additionally, the exclusion of compulsive gambling may, in effect, implicate other illegal forms of discrimination.¹³⁸ One scholar points out that the current exclusion creates a loophole through which employers can discriminate against individuals with both a gambling addiction

¹³³ *Id.* (“the estimated social costs associated with gambling in the United States range from \$32.4 billion to \$53.8 billion annually . . . [g]ambling addictions also burden social services systems through unemployment, put social and financial pressure on the addicts’ families, and increase the rates of certain crimes”); see also Bill Leonard, *Problem Gamblers Pose Workplace Safety and Security Risks*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (April 16, 2014), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/gambling-workplace.aspx> (“treatment for gambling addictions can be very effective, with a recovery rate as high as 75 percent for those who participate in rehabilitation programs”).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See discussion *supra* Section II.A.

¹³⁷ Leonard, *supra* note 105.

¹³⁸ See Wade, *supra* note 104 (“the exclusion as currently interpreted creates loopholes in cases of comorbidity that might make it harder for gambling addicts with other conditions protected under the ADA to succeed in employment-discrimination claims”); Gateway Foundation, *Gambling Addiction and Race: Who Is the Most Affected?*, <https://www.gatewayfoundation.org/addiction-blog/gambling-addiction-race/> (last visited April, 25, 2022) (“gambling addiction does not affect all races equally. Several studies have shown that problem gambling is more prevalent among certain races and ethnic groups. Specifically, Hispanic, Asian and Black people may be at a higher risk of developing a gambling addiction and its consequences”); Leslie Stephens, *Battling America’s Rising Gambling Addiction*, Anti-Racism Daily, <https://the-ard.com/2022/03/31/battling-americas-rising-gambling-addiction/> (last visited April 25, 2022) (“[a]lthough research is limited, studies suggest that Black adults in the United States are twice as susceptible to gambling addiction as white adults. Southeast Asian refugees have some of the highest rates of problem gambling, with the rate of gambling disorder as high as 59%, which may be caused in part by the stress of acculturation”); see also HR News, *supra* note 104 (“even though social gambling seems harmless, there is some legal risk to it as well, depending on your jurisdiction. For example, there are cases of employees suing their employer for organizing betting pools and making them relapse into gambling addiction”).

and an ADA-recognized disability.¹³⁹ The term “comorbidity” is defined as “the simultaneous presence in an individual of more than one illness, disease, or disorder.”¹⁴⁰ Those with gambling disorder have higher rates of comorbidity, with studies showing overlap specifically with sleep disorders, depression, substance abuse and alcoholism.¹⁴¹ These overlapping conditions are considered by some courts as ADA-qualifying disabilities.¹⁴² Consequently, employers may use an employee’s gambling addiction/disorder as a shield to justify or defend an adverse action taken against an employee with a recognized disability.¹⁴³

Similar to comorbidity, employees may claim an ADA recognized disability that manifests in the form of gambling addiction.¹⁴⁴ In *Trammell v. Raytheon Missile Systems*, for example, the plaintiff (“Trammell”) claimed that his employer (“Raytheon”) violate the ADA when it terminated him based on his major depression, which presented through his compulsive gambling behavior.¹⁴⁵ However, Trammell’s case was defeated at the summary judgment stage because Trammell could not make out a prima facie case of discrimination.¹⁴⁶ Although it was

¹³⁹ See Wade, *supra* note 104.

¹⁴⁰ *Comorbidity*, American Psychological Association, <https://dictionary.apa.org/comorbidity> (last visited April 25, 2022).

¹⁴¹ See Wade, *supra* note 104.

¹⁴² See, e.g., *Duggins v. Appoquinimink Sch. Dist.*, 921 F. Supp. 2d 283, 290 (D. Del. 2013) (recognizing that the plaintiff’s severe depression qualified as a disability under the ADA).

¹⁴³ See Wade, *supra* note 104 (“because gambling-disorder claims are excluded, the employer might have been able to fire the doubly afflicted employee for the explicitly stated reason that the employee was a gambling addict. Even if the employee’s protected disability played a role in the termination decision, the employer could potentially use the excluded gambling disorder as a defensive bar to defeat the employee’s claim”).

¹⁴⁴ *Gambling in the Workplace: Should You Take One for the Team?*, Rudman Winchell, <https://www.rudmanwinchell.com/gambling-in-the-workplace-should-you-take-one-for-the-team/> (last visited April 25, 2022); see also Wade, *supra* note 104 (“people with gambling disorder often use betting as a way to cope with negative feelings of stress, anxiety, guilt, and depression”); Brian Castellani, *Is Pathological Gambling Really a Problem? You Bet!*, PSYCHIATRIC TIMES, (Feb. 1, 2001), <http://www.psychiatrictimes.com/articles/pathological-gambling-really-problem-you-bet> (“[g]ambling becomes a coping mechanism, a way of dealing with the world. For these people, gambling provides an opportunity to ‘be in action,’ ‘numb out’ and escape their problems.”); Richard A. McCormick, *The Importance of Coping Skill Enhancement in the Treatment of the Pathological Gambler*, 10 J. GAMBLING STUD. 77, 78 (1994) (discussing gambling as “an escape avoidance coping response” to a triggering event that produces “sadness, frustration and perhaps anxiety”).

¹⁴⁵ 721 F.Supp.2d 876, 877 (D. Ariz. 2010); see also Rudman Winchell, *supra* note 116; Wade, *supra* note 104 (discussing *Trammell*).

¹⁴⁶ See Wade, *supra* note 104.

clear that Raytheon knew of Trammell's compulsive gambling, the court found that this in itself was insufficient to prove that Raytheon had knowledge of Trammell's ADA-recognized depression.¹⁴⁷ According to the court,

Plaintiff argues that in his case, there are not two distinct psychological conditions because his mood disorder manifested itself as a gambling addiction. Unless there is proof the Defendant knew of this manifestation, the Court rejects this approach given the ADA's express exclusion of compulsive gambling as a disability. In other words, Plaintiff's proof that his compulsive gambling is associated with major depression and proof he was terminated because of compulsive gambling does not *a fortiori* prove he was terminated due to the mood disorder, depression. To survive summary judgment, Plaintiff needs evidence to dispute Defendant's assertion it had no knowledge that the Plaintiff suffered from depression until after his termination. There is none.¹⁴⁸

While Trammell's claim ultimately failed, it is important to note that his case was decided in 2010; similar claims may now sway courts, however, with more research pointing to the rise of gambling addiction in the post-*Murphy* era. More generally, it is likely that employers will face new or revamped issues relating to gambling addiction—from discrimination to accommodation.

B. Stigmas Surrounding "Gambling"

The long and contentious road leading to the enactment of the ADA and its amendments¹⁴⁹ gives credence to the notion that compulsive gambling may have been arbitrarily excluded in the first place, largely due to then-existing stigmas and misconceptions about

¹⁴⁷ *Trammell*, 721 F. Supp. 2d at 882–83.

¹⁴⁸ *Id.*

¹⁴⁹ See discussion *supra* Section II.A.

gambling.¹⁵⁰ In fact, the exclusions found under § 12211 of Title V are colloquially referred to as the “sin exceptions.”¹⁵¹

Moreover, while the ADA's legislative history does not explain exactly why Congress excluded compulsive gambling as a disability,¹⁵² several statements from Senators at the time do provide insight. Senator Armstrong and Senator Rudman, who were among the Senators who promoted § 12211's explicit exclusions, were similarly concerned that the ADA would be interpreted as covering mental impairments that have “moral content.”¹⁵³ Senator Armstrong also justified the exclusions by pointing to the potential impact on courts, which would be “swamped with mental disability litigation.”¹⁵⁴ Thus, according to Senator Armstrong, the § 12211 exclusions would remove “some of the mental disorders that would have created the more egregious lawsuits.”¹⁵⁵ Perhaps best summarizing the sentiment underlying the ADA's exclusion of compulsive gambling and other “immoral” conditions, Senator Rudman explained

¹⁵⁰ See Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 Yale Human Rights & Development L. J. 1 (2013) (“[i]n the eleventh hour of a marathon floor debate . . . the ADA's sponsors and disability rights advocates reluctantly agreed to sacrifice GID and nine other mental impairments in exchange for passage in the Senate”); see, e.g., 135 CONG. REC. S19,896 (1989) (statement of Sen. Rudman) (“the bill could protect individuals from discrimination on the basis of a variety of socially unacceptable, often illegal, behavior if such behavior is considered to be the result of a mental illness. Some examples that come to mind are compulsive gambling, pedophilia, and kleptomania. I have serious problems with this result”).

¹⁵¹ See Wade, *supra* note 104.

¹⁵² Blake R. Bertagna, *The Internet- Disability or Distraction? An Analysis of Whether "Internet Addiction" Can Qualify as a Disability Under the Americans with Disabilities Act*, 25 HOFSTRA LAB. AND EMP. L. J. 419 (2008) (“the ADA's legislative history fails to reveal the basis on which Congress excluded compulsive gambling as a disability”); Robert Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 519 (1991) (“[n]o evidence suggests that Congress investigated such conditions, except, perhaps, for the problem of illegal drug use. Consequently, it is arguable that the members of Congress relied upon nothing other than their own negative reactions, fears and prejudices in fashioning the list of excluded classes”).

¹⁵³ See 135 CONG. REC. 19,853 (1989) (statement of Sen. Armstrong) (explaining that Senator Armstrong “could not imagine the [ADA's] sponsors would want to provide a protected legal status to somebody who has such [mental] disorders, particularly those [that] might have a moral content to them or which in the opinion of some people have moral content”); 135 CONG. REC. 19,896 (1989) (statement of Sen. Rudman) (“A diagnosis of certain types of mental illnesses is frequently made on the basis of a pattern of socially unacceptable behavior In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition”).

¹⁵⁴ 135 CONG. REC. 20,574 (1989) (statement of Sen. Armstrong).

¹⁵⁵ *Id.*

A diagnosis of certain types of mental illness is frequently made on the basis of a pattern of socially unacceptable behavior and lacks any physiological basis. In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand. Where we as a people have through a variety of means, including our legal code, expressed disapproval of certain conduct, I do not understand how Congress can create the possibility that employers are legally liable for taking such conduct into account when making employment-related decisions. In principle, I agree with the concept that the mentally ill should be protected from in[v]idious discrimination just as the physically handicapped should be. However, people must bear some responsibility for the consequences of their own actions.¹⁵⁶

Few Senators chose to argue against the § 12211 exclusions,¹⁵⁷ instead, preserving their political capital to ensure protection for individuals with HIV/AIDS.¹⁵⁸

Critically, and irrespective of the moral concerns, it was acknowledged during the Senate debate that American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM).¹⁵⁹ It was Senator Armstrong who pointed out that "it is the source of information that courts use" to determine what qualifies for protection under disability law:

I will tell a story at that time about an FBI agent that was found to be a compulsive gambler. In that particular case when the Government brought its motions they tried to say, look compulsive gambling is not a protected classification, and the judges said that is not right . . . I make the point that his reference in determining whether or not compulsive gambling was or was not covered was this document, what the Senator from Massachusetts described as

¹⁵⁶ 135 Cong. Rec. S19,896 (1989) (statement of Sen. Rudman).

¹⁵⁷ In response to Senator Helms' opposition to the inclusion of various mental impairments, Senator Harkin explained that "some people only think of people who are physically disabled as being handicapped. People can be mentally handicapped as well." He elaborated:

There is a wellspring of fears and unfounded prejudices about people with disabilities, unfounded fears, whether people have mental disorders, whether they are manic depressives or schizophrenia or paranoia, or unfounded fears and prejudices based upon physical disabilities. The point of the [ADA] is to start breaking down those barriers of fear and prejudice and unfounded fears, to get past that point so that people begin to look at people based on their abilities, not first looking at their disability

Barry, *supra* note 122 (quoting 135 CONG. REC. S10768 (1989) (statement of Sen. Harkin)); *see also* 135 CONG. REC. S10779 (1989) (statement of Sen. Domenici).

¹⁵⁸ Senators Harkin and Kennedy strongly defended the ADA's coverage of HIV/AIDS, noting that such coverage was "completely consistent with public health policy." "If we fail to provide this protection," Senator Kennedy warned, "we will continue to drive this epidemic underground." As a result, no amendment was offered to exclude HIV/ AIDS during the Senate floor debate.

Barry, *supra* note 122, 15 (quoting 135 CONG. REC. S10768 (statement of Sen. Kennedy); *id.* at S10772 (statement of Sen. Harkin)).

¹⁵⁹ *See* 135 Cong. Rec. S19,871 (1989) (statement of Sen. Armstrong).

some book. That book, let me tell Senators again, is a diagnostic and statistical manual of mental disorders of the American Psychiatric Association¹⁶⁰ While Senator Armstrong seemed to question the DSM's authority,¹⁶¹ the Manual is more often considered "the bible of mental-health care."¹⁶²

The DSM's classification of pathological gambling as an "impulse control disorder" in 1980, however, may have contributed to the condition's stigmatization and its resulting exclusion.¹⁶³ Instead of labeling pathological gambling as an addictive mental disorder, the DSM classified the condition under the catchall category, "impulse control disorders not elsewhere classified," alongside conditions such as kleptomania and pyromania.¹⁶⁴ Under this category, pathological gambling was characterized as a "failure to resist an impulse . . . to perform an act that is harmful to the person or to others."¹⁶⁵ Critics of the DSM's classification emphasized that labeling pathological gambling an impulse-control disorder was a misconception, and likewise, "compulsive gambling" was a misnomer.¹⁶⁶ According to these critics, "[a]lthough addictions often involve compulsive behaviors, they can be distinguished from purely compulsive

¹⁶⁰ *Id.*

¹⁶¹ *Id.* ("I do not know if it is a good reference. I do not know if it is the best source of information"); *but see* 135 Cong. Rec. 20,572 (1989) (Statement of Sen. Armstrong) ("[a] private entity that wishes to know what [the ADA] might mean with respect to mental impairments would do well to turn to [the DSM]").

¹⁶² Nancy Shute, *Paying a High Price for Mental Health*, U.S. NEWS & WORLD REP. (Nov. 5, 2007); *see also* Douglas A. Hass, *Could the American Psychiatric Association Cause You Headaches? The Dangerous Interaction Between the DSM-5 and Employment Law*, 44 LOY U. CHI. L.J. 683 (2013) ("[The DSM] has long served as the primary reference for mental health disorders not only for medical practitioners, but also for state and federal courts and government agencies like the Social Security Administration and Veterans Administration."); *Boldini v. Postmaster Gen.*, 928 F. Supp. 125, 130 (D.N.H. 1995) (stating, under section 501 of the Rehabilitation Act, that "in circumstances of mental impairment, a court may give weight to a diagnosis of mental impairment which is described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association").

¹⁶³ AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter DSM-III].

¹⁶⁴ *See* Wade, *supra* note 104.

¹⁶⁵ *See* DSM-III, *supra* note 135.

¹⁶⁶ *See* Wade, *supra* note 104; *see also* NAT'L RESEARCH COUNCIL, COMM. ON THE SOC. & ECON IMPACT OF PATHOLOGICAL GAMBLING, *Pathological Gambling: a Critical Review*, 11-12, 20, 23-24 (1999), <http://www.ncbi.nlm.nih.gov/books/NBK230630/pdf/TOC.pdf> ("[F]or most researchers and many clinicians, the notion of compulsive gambling as a description of pathological gamblers is a technical misnomer").

disorders.”¹⁶⁷ Perhaps heeding these criticisms, in 2013, the APA renamed and reclassified pathological gambling: the DSM-5 created a new term—“gambling disorder,” located under a new category of “Substance-Related and Addictive Disorders,” alongside substance-based disorders (i.e., alcohol use disorder).¹⁶⁸

As one scholar notes, the APA’s “decision to craft this new category was a significant step in recognizing gambling disorder not as a compulsion or an impulse-control disorder, but as an addiction.”¹⁶⁹ Though social stigmas surrounding gambling remain,¹⁷⁰ the DSM’s reclassification may propel the argument for legal protection of gambling addiction under the ADA. In addition, society’s shift in terminology, from “gambling” to “gaming,” may likewise help remove the stigmas that prevented gambling addicts from receiving protection in 1990 when the ADA was enacted.¹⁷¹

C. State Silence on Gambling Addiction

As indicated by the survey of state (anti-discrimination) disability laws below,¹⁷² the vast majority of states have not adopted the exclusions found under § 12211 of the ADA. Instead, most states are silent as to gambling-related conditions.¹⁷³ Though little scholarship exists on this subject, there are two readily apparent inferences that can be drawn from the contrast between

¹⁶⁷ See Wade, *supra* note 104.

¹⁶⁸ See APA DSM-5, *supra* note 4; see also Wade, *supra* note 104.

¹⁶⁹ See Wade, *supra* note 104.

¹⁷⁰ *Id.* (“[t]oday, gambling addicts continue to face multiple layers of social stigma: stigma against disabilities, stigma against mental illnesses, and stigma against gambling itself. Gambling has been called a “classic vice”—an activity traditionally viewed as morally condemnable that has undergone some level of legalization in our society”); see also Michael Walker, *The Medicalisation of Gambling as an “Addiction”*, in GAMBLING CULTURES: STUDIES IN HISTORY AND INTERPRETATION, 223, 223-24 (Jan McMillen ed., 1996).

¹⁷¹ Ashlee McGandy, *How you name it matters: 'gambling' vs. 'gaming'*, CORNELL CHRONICLE (Oct. 15, 2013), <https://news.cornell.edu/stories/2013/10/how-you-name-it-matters-gambling-vs-gaming> (“[c]hanging an industry label from gambling to gaming affects what consumers, especially nonusers, think of betting online. A label like gaming prompts all sorts of implicit associations like entertainment and fun, while a label like gambling can prompt seedier implicit associations like crime”).

¹⁷² See discussion, *infra* Appendix.A.

¹⁷³ *Id.*

federal and state disability laws. First, states may have intentionally left out any such exclusions with the hope of providing citizens more comprehensive protection.¹⁷⁴ Accordingly, “[f]ederal law establishes the floor for anti-discrimination laws, but many states and cities have more protective language for employees.”¹⁷⁵ Moreover, as the Mid-Atlantic ADA Center explains,

While the ADA does not override other federal laws, it will override state or local laws that provide less protection or benefit. However, if a state or local law provides more protection or greater benefit, it will override the ADA. If an entity (such as an employer) is covered by a state or local law and by the ADA, the entity must comply with each provision of all the applicable laws, according to which provision is the most generous to individuals with a disabilities.¹⁷⁶

This means that employees can, in theory, bring a gambling addiction discrimination claim under state law. Of course, the employee would still need to prove that their gambling addiction meets the state’s definition of disability; though, the reclassification under the DSM-5 should prove useful.¹⁷⁷ In Connecticut, for example, “[m]ental disability” refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association’s [DSM]”¹⁷⁸

Second, the states may have modeled their definitions of disability on the Rehabilitation Act, which did originally did not exclude the conditions found under § 12211 of the ADA.¹⁷⁹ As mentioned earlier, the ADA’s definition of disability was modeled after that in the Rehabilitation Act.¹⁸⁰ Moreover, part of the reason the ADA was amended was because courts had not interpreted disability as broadly as Congress had intended—i.e., as broadly as the term was

¹⁷⁴ See, e.g., Jeffrey Freedman, Know the Difference: Federal vs State Employment Discrimination Laws, Jeffrey Freedman Attorneys, PLLC (October 5, 2017), <https://www.jeffreyfreedman.com/know-difference-federal-vs-state-employment-discrimination-laws/>;

¹⁷⁵ Freedman, *supra* note 174.

¹⁷⁶ Mid-Atlantic ADA Center, *Federal, State, and Local Laws: Conflicts or Complement*, <https://www.adainfo.org/content/federal-state-and-local-laws-conflicts-or-complements> (last visited April 25, 2022).

¹⁷⁷ See discussion, *supra* III.B.

¹⁷⁸ *Conn. Gen. Stat. § 46a-51* [Effective Jan. 1, 2023].

¹⁷⁹ *But see* discussion, *supra* Section II.A.i; 29 U.S.C. § 705(2)(F)(ii).

¹⁸⁰ See discussion, *supra* Section II.A

interpreted under the Rehabilitation Act.¹⁸¹ Even gambling disorders were considered “disabilities” under the original version of the Rehabilitation Act.¹⁸²

In sum, state silence on whether or not gambling addiction may qualify as a disability represents a significant departure from the ADA, and may further indicate that the § 12211 exclusions are *not* widely accepted.

D. Proposal for Amendment: Alcoholism as a Model for Gambling Addiction

Neither Title I nor Title V preclude the possibility that alcoholism may be deemed a disability; instead, the ADA is silent on that specific issue, ultimately leaving it up to the courts. Still, while courts may hold that alcoholism is a covered disability,¹⁸³ the law makes it clear that employers can enforce rules on alcohol-related misconduct without violating the ADA’s prohibition against discrimination.¹⁸⁴ The ADA provides that employers may: prohibit the use of alcohol in the workplace; require that employees not be under the influence of alcohol in the workplace; and hold an employee with alcoholism “to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the . . . alcoholism of such employee.”¹⁸⁵

¹⁸¹ See H.R. Rep. No. 110-730, pt. 2, at 6 (Congress modeled the ADA definition of disability on the definition of “handicapped individual” contained in the Rehabilitation Act . . . which the courts had interpreted broadly to include persons with a wide range of physical and mental impairments.”).

¹⁸² See, e.g., *Fields v. Lyng*, 705 F. Supp. 1134 (D. Md. 1988); *Rezza v. Department of Justice*, 698 F. Supp. 586 (E.D. Pa. 1988); see also 135 Cong. Rec. S19,871 (1989) (statement of Sen. Armstrong) (when an FBI agent was found to be a compulsive gambler . . . “the Government brought its motions they tried to say, look compulsive gambling is not a protected classification, and the judges said that is not right”).

¹⁸³ See, e.g., *Williams v. Widnall*, 79 F.3d 1003 (10th Cir. 1996) (alcoholism is a covered disability); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 441 (1997) (where plaintiff could show she was regarded as being an alcoholic, she was disabled within the meaning of the ADA); *Office of the Senate Sergeant-at-Arms v. Office of Senate Fair Employment Practices*, 95 F.3d 1102 (Fed. Cir. 1996) (it is well-established that alcoholism meets the definition of a disability); see also *Burch v. Coca-Cola*, 119 F.3d 305, 322 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 871 (1998) (holding that alcoholism is not a per se disability and found that the plaintiff’s alcoholism was not a covered disability because it did not substantially limit any of his major life activities); *Wallin v. Minnesota Department of Corrections*, 153 F.3d 681, 686 (8th Cir. 1998) (suggesting that alcoholism should be analyzed on a case-by-case basis and noting that the plaintiff had not presented evidence that his alcoholism impaired a major life activity).

¹⁸⁴ 42 U.S.C. 12114 (1994).

¹⁸⁵ *Id.*

As the 2013 DSM-5 reclassification indicates,¹⁸⁶ gambling disorder is no longer considered an impulsive disorder, but instead, is more akin to a substance use disorder. Many argue that this reclassification is justified since gambling addiction is quite similar to other addictions. Accordingly, “the reward center of the brain is hijacked, to the point where gambling becomes an obsession that blocks out all other thoughts. Just as an individual with alcohol use disorder can’t stop at one drink, someone with a gambling addiction will gamble beyond all rational thought.”¹⁸⁷ With this in mind, the ADA should be amended so that compulsive gambling is no longer expressly excluded. Rather, the ADA should return to its predecessor’s version of silence, and should treat gambling addiction similar to alcoholism. Such an amendment could still be agreeable to opposition and employers alike if additional gambling-related misconduct provisions, like those found under § 12114, are incorporated. This would prevent employees from free reigns on gambling in the workplace, while at the same time protecting those in need of accommodations.

IV. CONCLUSION

The *Murphy* decision and the subsequent legalization of sports betting among states has revamped discussions surrounding gambling addiction. The rates of individuals who identify as problem gamblers has soared, and as a result, legal protection in the workplace must be addressed. As this paper illuminates, there are an abundance of legal and policy reasons that support the notion that the ADA should be amended to no longer exclude compulsive gambling. The strongest of them all, however, is that the ADA was enacted to eliminate discrimination and to provide individuals with disabilities access and opportunities, so that they may participate

¹⁸⁶ See discussion, *supra* Section III.B.

¹⁸⁷ See Webber and Gensler, *Pro/Con*, *supra* note 82.

more equally in society; yet, the exclusion of compulsive gambling merely reinforces misconceived attitudes and opinions about gambling addiction, and therefore, it is in direct contradiction with the purpose of the ADA.

V. APPENDIX

(A) STATE DISABILITY LAWS THAT ARE SILENT ON COMPULSIVE GAMBLING

STATE	LAW/CODE	PROTECTION
(1) Alaska	<i>Alaska Stat. § 18.80.300</i>	<p>(14) “physical or mental disability” means</p> <ul style="list-style-type: none"> (A) a physical or mental impairment that substantially limits one or more major life activities; (B) a history of, or a misclassification as having, a mental or physical impairment that substantially limits one or more major life activities; (C) having <ul style="list-style-type: none"> (i) a physical or mental impairment that does not substantially limit a person’s major life activities but that is treated by the person as constituting such a limitation; (ii) a physical or mental impairment that substantially limits a person’s major life activities only as a result of the attitudes of others toward the impairment; or (iii) none of the impairments defined in this paragraph but being treated by others as having such an impairment; or (D) a condition that may require the use of a prosthesis, special equipment for mobility, or service animal; <p>(15) “physical or mental impairment” means</p> <ul style="list-style-type: none"> (A) physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; (B) mental or psychological disorder, including intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities;
(2) Arizona	<i>AZ Rev Stat § 41-1461 (2018)</i>	"Disability" means, with respect to an individual, except any impairment caused by current use of illegal drugs, any of the following:

		<p>(a) A physical or mental impairment that substantially limits one or more of the major life activities of the individual.</p> <p>(b) A record of such a physical or mental impairment.</p> <p>(c) Being regarded as having such a physical or mental impairment.</p>
(3) Connecticut	<i>Conn. Gen. Stat. § 46a-51</i> [Effective Jan. 1, 2023]	<p>(15) “Physically disabled” refers to any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or being hard of hearing or reliance on a wheelchair or other remedial appliance or device;</p> <p>...</p> <p>(20) “Mental disability” refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association’s “Diagnostic and Statistical Manual of Mental Disorders”¹⁸⁸</p>
(4) Delaware	<i>19 Del. C. § 722</i>	<p>(4) “Person with a disability” means any person who satisfies any 1 of the following:</p> <p>a. Has a physical or mental impairment which substantially limits 1 or more major life activities.</p> <p>b. Has a record of such an impairment.</p> <p>c. Is regarded as having such an impairment. As used in this paragraph:</p> <p>1. “Major life activities” includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. “Major life activities” also includes the operation of a major bodily function, including functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological brain, respiratory, circulatory, endocrine, and reproductive functions.</p>

¹⁸⁸ In the DSM-5, gambling disorder has been placed in a new category on behavioral addictions. This reflects research findings showing that gambling disorder is similar to substance-related disorders in clinical expression, brain origin, comorbidity, physiology and treatment. American Psychiatric Association, *What is Gambling Disorder?*, Help With Gambling Disorder, <https://www.psychiatry.org/patients-families/gambling-disorder/what-is-gambling-disorder> (last visited March 17, 2022).

		<p>2. “Has a record of such impairment” means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits 1 or more major life activities.</p> <p>3. “Is regarded as having an impairment” means an individual that establishes that the individual subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. Such impairment does not include impairments that are transitory and minor.</p> <p>This term is intended to be interpreted in conformity with the federal Rehabilitation Act of 1973 [29 U.S.C. § 701 et seq.], as amended, and, consistent with § 728 of this title, shall be further defined by the Secretary through regulation to clarify and delimit its scope following adequate public notice and comment.</p> <p>Enforcement of this subchapter by persons qualifying for protection solely under this paragraph (4)c. of this section shall be deferred until the issuance of the Secretary’s final regulation.</p> <p>4. “Substantially limits” means that the impairment so affects a person as to create a likelihood that such person will experience difficulty in securing, retaining or advancing in employment because of a disability.</p> <p>5. “Person with a disability” shall not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.</p> <p>6. “Transitory impairment” means an impairment with an actual or expected duration of 6 months or less.</p>
(5) District of Columbia	<i>D.C. Code § 2-1401.02</i>	(5A) “Disability” means a physical or mental impairment that substantially limits one or more of the major life activities of an individual having a record of such an impairment or being regarded as having such an impairment
(6) Florida	<i>Fla. Stat. § 413.08</i>	(b) “Individual with a disability” means a person who has a physical or mental impairment that substantially limits one or more major life activities of the individual. As used in this paragraph, the term:

		<p>1. “Major life activity” means a function such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.</p> <p>2. “Physical or mental impairment” means:</p> <p>a. A physiological disorder or condition, disfigurement, or anatomical loss that affects one or more bodily functions; or</p> <p>b. A mental or psychological disorder that meets one of the diagnostic categories specified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association, such as an intellectual or developmental disability, organic brain syndrome, traumatic brain injury, posttraumatic stress disorder, or an emotional or mental illness.</p>
(7) Georgia	<i>O.C.G.A. § 34-6A-2</i>	<p>(3) “Individual with disabilities” means any person who has a physical or mental impairment which substantially limits one or more of such person’s major life activities and who has a record of such impairment. The term “individual with disabilities” shall not include any person who is addicted to the use of any drug or illegal or federally controlled substance nor addiction to the use of alcohol</p> <p>...</p> <p>(7) “Physical or mental impairment” means:</p> <p>(A) Any physiological disorder or condition or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, or endocrine; or</p> <p>(B) Intellectual disabilities and specific learning disabilities.</p>
(8) Hawaii	<i>HRS § 378-1</i>	<p>“Disability” means the state of having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment.</p>

(9) Idaho	<i>Idaho Code § 67-5902</i>	(15) “Disability” means a physical or mental condition of a person, whether congenital or acquired, which constitutes a substantial limitation to that person and is demonstrable by medically accepted clinical or laboratory diagnostic techniques. A person with a disability is one who (a) has such a disability, or (b) has a record of such a disability, or (c) is regarded as having such a disability;
(10) Illinois	<i>775 ILCS 5/1-103</i>	<p>(I) Disability.</p> <p>(1) “Disability” means a determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the person’s use of a guide, hearing or support dog, the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic:</p> <p style="padding-left: 40px;">(a) For purposes of Article 2 [775 ILCS 5/2-101 et seq.], is unrelated to the person’s ability to perform the duties of a particular job or position and, pursuant to Section 2-104 of this Act [775 ILCS 5/2-104], a person’s illegal use of drugs or alcohol is not a disability;</p> <p style="padding-left: 40px;">(b) For purposes of Article 3, is unrelated to the person’s ability to acquire, rent, or maintain a housing accommodation;</p> <p style="padding-left: 40px;">(c) For purposes of Article 4 [775 ILCS 5/4-101 et seq.], is unrelated to a person’s ability to repay;</p> <p style="padding-left: 40px;">(d) For purposes of Article 5 [775 ILCS 5/5-101 et seq.], is unrelated to a person’s ability to utilize and benefit from a place of public accommodation;</p> <p style="padding-left: 40px;">(e) For purposes of Article 5, also includes any mental, psychological, or developmental disability, including autism spectrum disorders.</p>
(11) Iowa	<i>Iowa Code § 216.2</i>	5. “Disability” means the physical or mental condition of a person which constitutes a substantial disability, and the condition of a person with a positive human immunodeficiency virus test result, a diagnosis of acquired immune deficiency syndrome, a diagnosis of acquired immune deficiency syndrome-related complex, or any other condition related to acquired immune deficiency syndrome. The inclusion of a condition related to a positive human immunodeficiency virus test result in the

		meaning of “disability” under the provisions of this chapter does not preclude the application of the provisions of this chapter to conditions resulting from other contagious or infectious diseases.
(12) Kansas	<i>K.S.A. § 44-1002</i>	<p>(j) “Disability” means, with respect to an individual:</p> <p style="padding-left: 40px;">(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;</p> <p style="padding-left: 40px;">(2) a record of such an impairment; or</p> <p style="padding-left: 40px;">(3) being regarded as having such an impairment.</p> <p>Disability does not include current, illegal use of a controlled substance as defined in section 102 of the federal controlled substance act (21 U.S.C. § 802), in housing discrimination. In employment and public accommodation discrimination, “disability” does not include an individual who is currently engaging in the illegal use of drugs where possession or distribution of such drugs is unlawful under the controlled substance act (21 U.S.C. § 812), when the covered entity acts on the basis of such use.</p>
(13) Louisiana	<i>La. R.S. § 23:322</i>	<p>(3) “Person with a disability” means any person who has a physical or mental impairment which substantially limits one or more of the major life activities, or has a record of such an impairment, or is regarded as having such an impairment.</p> <p>(6) “Impairment” means an intellectual disability, any physical or physiological disorder or condition, or prior mental disorder or condition, but, at the discretion of the employer, may not include chronic alcoholism or any other form of active drug addiction, any cosmetic disfigurement, or an anatomical loss of body systems.</p>
(14) Maryland	<i>Md. State Government Code Ann. § 20-601</i>	<p>(1) “Disability” means:</p> <p style="padding-left: 40px;">(i)</p> <p style="padding-left: 80px;">1. a physical disability, infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect, or illness, including epilepsy; or</p>

		<p>2. a mental impairment or deficiency;</p> <p>(ii) a record of having a physical or mental impairment as otherwise defined under this subsection; or</p> <p>(iii) being regarded as having a physical or mental impairment as otherwise defined under this subsection.</p> <p>(2) “Disability” includes:</p> <p>(i)</p> <ol style="list-style-type: none"> 1. any degree of paralysis, amputation, or lack of physical coordination; 2. blindness or visual impairment; 3. deafness or hearing impairment; 4. muteness or speech impediment; and 5. physical reliance on a service animal, wheelchair, or other remedial appliance or device; and <p>(ii) retardation and any other mental impairment or deficiency that may have necessitated remedial or special education and related services.</p>
(15) Massachusetts	<i>ALM GL ch. 151B, § 1</i>	<p>17. The term “handicap” means (a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment, but such term shall not include current, illegal use of a controlled substance as defined in section one of chapter ninety-four C.</p>
(16) Michigan	<i>MCLS § 37.1103</i>	<p>(d) Except as provided under subdivision (f), “disability” means 1 or more of the following:</p> <p>(i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:</p> <p>(A) For purposes of article 2, substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual’s ability to perform the duties</p>

		<p>of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual’s qualifications for employment or promotion.</p> <p>(B) For purposes of article 3, is unrelated to the individual’s ability to utilize and benefit from a place of public accommodation or public service.</p> <p>(C) For purposes of article 4, is unrelated to the individual’s ability to utilize and benefit from educational opportunities, programs, and facilities at an educational institution.</p> <p>(D) For purposes of article 5, substantially limits 1 or more of that individual’s major life activities and is unrelated to the individual’s ability to acquire, rent, or maintain property.</p> <p>(ii) A history of a determinable physical or mental characteristic described in subparagraph (i).</p> <p>(iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i).</p> <p>...</p> <p>(f) For purposes of article 2, disability does not include either of the following:</p> <p>(i) A determinable physical or mental characteristic caused by the current illegal use of a controlled substance by that individual.</p> <p>(ii) A determinable physical or mental characteristic caused by the use of an alcoholic liquor by that individual, if that physical or mental characteristic prevents that individual from performing the duties of his or her job.</p>
(17) Minnesota	<i>Minn. Stat. § 363A.03</i>	Subd. 12. Disability. — “Disability” means any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

<p>(18) Mississippi</p>	<p><i>1998 Miss. S.B. 2193</i></p>	<p>SECTION 2. It is the intent of the Legislature that citizens of the State of Mississippi who have physical or mental disabilities shall be afforded the opportunity to compete and participate in employment on an equal basis with persons who are not disabled, if the disabled persons are qualified and able to perform the essential functions of the employment positions that are held or sought.</p>
<p>(19) Missouri</p>	<p><i>§ 213.010 R.S.Mo.</i></p>	<p>(4) “Disability”, a physical or mental impairment which substantially limits one or more of a person’s major life activities, being regarded as having such an impairment, or a record of having such an impairment, which with or without reasonable accommodation does not interfere with performing the job, utilizing the place of public accommodation, or occupying the dwelling in question. For purposes of this chapter, the term “disability” does not include current, illegal use of or addiction to a controlled substance as such term is defined by section 195.010; however, a person may be considered to have a disability if that person:</p> <ul style="list-style-type: none"> (a) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of, and is not currently addicted to, a controlled substance or has otherwise been rehabilitated successfully and is no longer engaging in such use and is not currently addicted; (b) Is participating in a supervised rehabilitation program and is no longer engaging in illegal use of controlled substances; or (c) Is erroneously regarded as currently illegally using, or being addicted to, a controlled substance;
<p>(20) Montana</p>	<p><i>49-2-101, MCA</i></p>	<p>(19)</p> <ul style="list-style-type: none"> (a) “Physical or mental disability” means: <ul style="list-style-type: none"> (i) a physical or mental impairment that substantially limits one or more of a person’s major life activities; (ii) a record of such an impairment; or (iii) a condition regarded as such an impairment. (b) Discrimination based on, because of, on the basis of, or on the grounds of physical or mental disability includes the failure to make reasonable accommodations that are required by an

		otherwise qualified person who has a physical or mental disability. An accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation.
(21) Nevada	<i>Nev. Rev. Stat. Ann. § 613.310</i>	<p>1. “Disability” means, with respect to a person:</p> <p>(a) A physical or mental impairment that substantially limits one or more of the major life activities of the person, including, without limitation, the human immunodeficiency virus;</p> <p>(b) A record of such an impairment; or</p> <p>(c) Being regarded as having such an impairment.</p>
(22) New Hampshire	<i>RSA 354-A:2</i>	<p>IV. “Disability” means, with respect to a person:</p> <p>(a) A physical or mental impairment which substantially limits one or more of such person's major life activities;</p> <p>(b) A record of having such an impairment; or</p> <p>(c) Being regarded as having such an impairment.</p> <p>Provided, that “disability” does not include current, illegal use of or addiction to a controlled substance as defined in the Controlled Substances Act (21 U.S.C. 802 sec. 102).</p>
(23) New Jersey	<i>N.J. Stat. § 10:5-5</i>	<p>q. “Disability” means physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impairment, or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological, or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological, or neurological conditions which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted</p>

		clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection. ¹⁸⁹
(24) New Mexico	<i>N.M. Stat. Ann. § 28-1-2</i>	M. “physical or mental handicap” means a physical or mental impairment that substantially limits one or more of a person’s major life activities. A person is also considered to be physically or mentally handicapped if the person has a record of a physical or mental handicap or is regarded as having a physical or mental handicap;
(25) New York	<i>NY CLS Exec § 292</i>	21. The term “disability” means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.
(26) North Carolina	<i>N.C. Gen. Stat. § 168A-3</i>	(7a) Person with a disability. — Any person who (i) has a physical or mental impairment which substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. The following definitions apply in this subdivision: <p style="margin-left: 40px;">a. Physical or mental impairment. — Any of the following:</p> <p style="margin-left: 80px;">1. Any physiological disorder or abnormal condition, cosmetic disfigurement, or anatomical loss, caused by bodily injury, birth defect, or illness, affecting a body system, including, but not limited to, neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive;</p>

¹⁸⁹ Assuming the compulsive gambling was a disability, the employee failed to demonstrate that he actually suffered from compulsive gambling because even though he explained in his brief that he produced medical records of his disability for his employer, he did not include those medical records as part of the record before the court; therefore, aside from his own claims that he was a compulsive gambler, there was no proof before the court on the issue. *DePiano v. Atl. County*, 2005 U.S. Dist. LEXIS 20250 (D.N.J. Sept. 2, 2005); Employee failed to demonstrate that his compulsive gambling was a disability under the Law Against Discrimination (LAD) because he did not point to, and the court had not found, a single case recognizing compulsive gambling as a disability under the LAD. *DePiano v. Atl. County*, 2005 U.S. Dist. LEXIS 20250 (D.N.J. Sept. 2, 2005).

		<p>digestive; genitourinary; hemic and lymphatic; skin; and endocrine.</p> <p>2. Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.</p> <p>“Physical or mental impairment” excludes (i) sexual preferences; (ii) active alcoholism or drug addiction or abuse; and (iii) any disorder, condition, or disfigurement which is temporary in nature, lasting six months or fewer, and leaving no residual impairment. A disorder, condition, or disfigurement that is episodic or in remission is a physical or mental impairment if it would substantially limit a major life activity when active.</p>
(27) North Dakota	<i>N.D. Cent. Code, § 14-02.4-02</i>	5. “Disability” means a physical or mental impairment that substantially limits one or more major life activities, a record of this impairment, or being regarded as having this impairment.
(28) Oklahoma	<i>25 Okl. St. § 1301</i>	4. “Individual with a disability” means a person who has a physical or mental impairment which substantially limits one or more of such person’s major life activities, has a record of such an impairment or is regarded as having such an impairment;
(29) Pennsylvania	<i>43 P.S. § 954</i>	<p>(p.1) The term “HANDICAP OR DISABILITY,” with respect to a person, means:</p> <p>(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities;</p> <p>(2) a record of having such an impairment; or</p> <p>(3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance, as defined in section 102 of the Controlled Substances Act (Public Law 91-513, 21 U.S.C. § 802).</p>
(30) Rhode Island	<i>R.I. Gen. Laws § 42-87-1</i>	<p>(1) “Disability” means, with respect to an individual:</p> <p>(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;</p>

		<p>(ii) A record of such impairment; or</p> <p>(iii) Being regarded as having such an impairment (as described in paragraph (4));</p> <p>(iv) Includes any disability which is provided protection under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. and federal regulations pertaining to the act 28 C.F.R. 35 and 29 C.F.R. 1630; and</p> <p>(v) Nothing in this chapter alters the standards for determining eligibility for benefits under workers' compensation laws or under state disability benefit programs.</p>
(31) South Dakota	<i>S.D. Codified Laws § 20-13-1</i>	<p>(4) "Disability," a physical or mental impairment of a person resulting from disease, injury, congenital condition of birth, or functional disorder which substantially limits one or more of the person's major life functions; a record of having such an impairment; or being regarded as having such an impairment which:</p> <p>(a) For purposes of §§ 20-13-10 to 20-13-17, inclusive, is unrelated to an individual's ability to perform the major duties of a particular job or position, or is unrelated to an individual's qualifications for employment or promotion;</p> <p>(b) For purposes of §§ 20-13-20 to 20-13-21.1, inclusive, is unrelated to an individual's ability to acquire, rent or maintain property;</p> <p>(c) For purposes of §§ 20-13-22 to 20-13-25, inclusive, is unrelated to an individual's ability to utilize and benefit from educational opportunities, programs and facilities at an educational institution.</p> <p>This term does not include current illegal use of or addiction to marijuana as defined in subdivision 22-42-1(7) or a controlled substance as defined in subdivision 22-42-1(1);</p>
(32) Tennessee	<i>Tenn. Code Ann. § 4-21-102</i>	<p>(3)</p> <p>(A) "Disability" means, with respect to a person:</p>

		<p>(i) A physical or mental impairment that substantially limits one (1) or more of such person's major life activities;</p> <p>(ii) A record of having such an impairment; or</p> <p>(iii) Being regarded as having such an impairment;</p> <p>(B) “Disability” does not include current, illegal use of, or addiction to, a controlled substance or controlled substance analogue;</p>
(33) Texas	<i>Tex. Lab. Code § 21.002</i>	<p>(1) “Disability” means, with respect to an individual, a mental or physical impairment that substantially limits at least one major life activity of that individual, a record of such an impairment, or being regarded as having such an impairment. The term does not include:</p> <p>(A) a current condition of addiction to the use of alcohol, a drug, an illegal substance, or a federally controlled substance; or</p> <p>(B) a currently communicable disease or infection as defined in Section 81.003, Health and Safety Code, or required to be reported under Section 81.041, Health and Safety Code, that constitutes a direct threat to the health or safety of other persons or that makes the affected person unable to perform the duties of the person’s employment.</p>
(34) Vermont	<i>21 V.S.A. § 495d</i>	<p>(5) “Individual with a disability” means any natural person who:</p> <p>(A) has a physical or mental impairment that substantially limits one or more major life activities;</p> <p>(B) has a history or record of such an impairment; or</p> <p>(C) is regarded as having such an impairment.</p>
(35) Virginia	<i>Va. Code Ann. § 51.5-40.1</i>	<p>“Mental impairment” means (i) a disability attributable to intellectual disability, autism, or any other neurologically handicapping condition closely related to intellectual disability and requiring treatment similar to that required by individuals with intellectual disability or (ii) an organic or mental impairment that has substantial adverse effects on an individual’s cognitive or volitional functions, including central nervous</p>

		<p>system disorders or significant discrepancies among mental functions of an individual.</p> <p>“Mobility-impaired person” means any person who has completed training to use a dog for service or support because he is unable to move about without the aid of crutches, a wheelchair, or any other form of support or because of limited functional ability to ambulate, climb, descend, sit, rise, or perform any related function.</p> <p>“Otherwise disabled person” means any person who has a physical, sensory, intellectual, developmental, or mental disability or a mental illness.</p> <p>“Person with a disability” means any person who has a physical or mental impairment that substantially limits one or more of his major life activities or who has a record of such impairment.</p> <p>“Physical impairment” means any physical condition, anatomic loss, or cosmetic disfigurement that is caused by bodily injury, birth defect, or illness.</p>
<p>(36) Washington</p>	<p><i>Rev. Code Wash. (ARCW) § 49.60.040</i></p>	<p>(7)</p> <p>(a) “Disability” means the presence of a sensory, mental, or physical impairment that:</p> <ul style="list-style-type: none"> (i) Is medically cognizable or diagnosable; or (ii) Exists as a record or history; or (iii) Is perceived to exist whether or not it exists in fact. <p>(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.</p> <p>(c) For purposes of this definition, “impairment” includes, but is not limited to:</p> <ul style="list-style-type: none"> (i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory,

		<p>including speech organs, cardiovascular, reproductive, digestive, genitor-urinary [genitourinary], hemic and lymphatic, skin, and endocrine; or</p> <p>(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.</p> <p>(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:</p> <p>(i) The impairment must have a substantially limiting effect upon the individual’s ability to perform his or her job, the individual’s ability to apply or be considered for a job, or the individual’s access to equal benefits, privileges, or terms or conditions of employment; or</p> <p>(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.</p> <p>(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.</p>
(37) West Virginia	<i>W. Va. Code § 5-11-3</i>	<p>(m) The term “disability” means:</p> <p>(1) A mental or physical impairment which substantially limits one or more of such person’s major life activities. The term “major life activities” includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;</p> <p>(2) A record of such impairment; or</p> <p>(3) Being regarded as having such an impairment.</p> <p>For the purposes of this article, this term does not include persons whose current use of or addiction to alcohol or drugs prevents such persons from performing the duties of the job in question or whose employment,</p>

		by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.
(38) Wisconsin	<i>Wis. Stat. § 111.32</i>	(8) “Individual with a disability” means an individual who: <ul style="list-style-type: none"> (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work; (b) Has a record of such an impairment; or (c) Is perceived as having such an impairment.
(39) Wyoming	<i>WY Stat. Sec. 27-9-105¹⁹⁰</i>	(a) It is a discriminatory or unfair employment practice: <ul style="list-style-type: none"> (i) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation or the terms, conditions or privileges of employment against, a qualified disabled person or any person otherwise qualified, because of age, sex, race, creed, color, national origin, ancestry or pregnancy; <p>...</p> <ul style="list-style-type: none"> (d) As used in this section "qualified disabled person" means a disabled person who is capable of performing a particular job, or who would be capable of performing a particular job with reasonable accommodation to his disability.
(B) STATE DISABILITY LAWS THAT EXPRESSLY EXCLUDE COMPULSIVE GAMBLING		
STATE	LAW/CODE	EXCLUSION
(1) California	<i>CA Gov. Code § 12926(j)</i>	“Mental disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

¹⁹⁰ Regulations issued by the Wyoming Department of Employment define "a person with a disability" as one who:

- Has a physical or mental impairment that substantially limits one or more major life activities,
- Has a record of such an impairment, or
- Is regarded as having such an impairment.

See Business & Learning Resources, *Wyoming ADA: What you need to know*, <https://www.blr.com/Workplace-Safety/Safety-Administration/ADA-in-Wyoming> (last visited April 11, 2022).

(2) Colorado	<i>C.R.S.A. § 24-34-301</i>	(2.5) “Disability” has the same meaning as set forth in the federal “Americans with Disabilities Act of 1990”, 42 U.S.C. sec. 12101 et seq., and its related amendments and implementing regulations.
(3) Indiana	<i>910 Ind. Admin. Code 3-2-4</i>	(d) The term [disability] does not include the following: (1) Transvestitism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders. (2) Compulsive gambling, kleptomania, or pyromania. (3) Psychoactive substance use disorders resulting from current illegal use of drugs.
(4) Kentucky	<i>KY Rev. Stat. Sec. 344.010</i>	(5) "Disability" means, with respect to an individual: (a) A physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual; (b) A record of such an impairment; or (c) Being regarded as having such an impairment. Persons with current or past controlled substances abuse or alcohol abuse problems and persons excluded from coverage by the Americans with Disabilities Act of 1990 (P.L. 101-336) shall be excluded from this section
(6) Maine	<i>ME Rev. Stat. Tit. 5 Sec. 4553-A</i>	3. Exceptions. "Physical or mental disability" does not include: A. Pedophilia, exhibitionism, voyeurism, sexual behavior disorders, compulsive gambling, kleptomania, pyromania or tobacco smoking;
(7) Nebraska	<i>NE Rev. Stat. Sec. 48-1102 (9)</i>	(8) Disability shall mean (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (b) a record of such an impairment, or (c) being regarded as having such an impairment. Disability shall not include homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender-identity disorders not resulting in physical impairments, other sexual behavior disorders, problem gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs;
(9) Ohio	<i>OH Rev. Code Sec. 4112.01(A)(16)</i>	(16) (b) "Physical or mental impairment" does not include any of the following:

		<ul style="list-style-type: none"> (i) Homosexuality and bisexuality; (ii) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; (iii) Compulsive gambling, kleptomania, or pyromania; (iv) Psychoactive substance use disorders resulting from the current illegal use of a controlled substance or the current use of alcoholic beverages.
(10) Oregon	<i>OR Rev. Stat. Sec. 659A.130</i>	<p>(2) For the purposes of ORS 659A.112 (Employment discrimination) to 659A.139 (Construction of ORS 659A.103 to 659A.145), the following conditions are not physical or mental impairments, and an individual with one or more of the following conditions does not have a disability for the purposes of ORS 659A.112 (Employment discrimination) to 659A.139 (Construction of ORS 659A.103 to 659A.145) solely by reason of that condition:</p> <ul style="list-style-type: none"> (a) Pedophilia, exhibitionism, voyeurism or other sexual behavior disorders. (b) Compulsive gambling, kleptomania or pyromania. (c) Psychoactive substance use disorders resulting from current illegal use of drugs.
(11) South Carolina	<i>S.C. Code § 1-13-30</i>	<p>(N) "Disability" means with respect to an individual:</p> <ul style="list-style-type: none"> (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of an impairment; or (3) being regarded as having an impairment. <p>The definition of "disability" must be interpreted in a manner consistent with federal regulations promulgated pursuant to the Americans with Disabilities Act of 1990, as amended, Public Law 101-336.</p>
(12) Utah	<i>UT Code Sec. 34A-5-102</i>	(f) "Disability" means a physical or mental disability as defined and covered by the Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12102
(C) OTHER		
STATE	LAW/CODE	PROTECTION

(1) Alabama ¹⁹¹	N/A	N/A
----------------------------	-----	-----

¹⁹¹ Alabama does not have a law that prohibits private employers from discrimination on the basis of disability; however, Alabama law prohibits disability bias on the part of state and local government agencies, public schools, and other employers supported in whole or in part by public funds. *See* AL Code Sec. 21-7-8; Business & Learning Resources, *Alabama Disabilities (ADA): What you need to know*, [https://www.blr.com/HR-Employment/Discrimination/Disabilities-ADA-in-Alabama#:~:text=Alabama%20does%20not%20have%20a.with%20Disabilities%20Act%20\(ADA\)](https://www.blr.com/HR-Employment/Discrimination/Disabilities-ADA-in-Alabama#:~:text=Alabama%20does%20not%20have%20a.with%20Disabilities%20Act%20(ADA)) (last visited April 11, 2022).