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Betting on Themselves: How Players Could Benefit from Legalized Sports Wagering

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I. Introduction

In 2018, the Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA), holding that the law impermissibly commandeered state legislatures by forbidding states from choosing to pass or repeal laws surrounding sports wagering.¹ In the immediate aftermath of *Murphy v. Nat'l Collegiate Athletic Ass'n*,² six states passed laws legalizing sports wagering: Delaware, New Jersey, Pennsylvania, Mississippi, West Virginia, and Rhode Island.³ As of the writing of this comment, twenty-seven states have legalized some form of sports wagering employing various methods and models, and two others have legislation pending.⁴ With the legalization of sports wagering, there is a fundamental fear among some that competition will be corrupted and tainted.⁵ Similarly, there is a recognition that bettors must be protected from possible ills and dangers of gambling.⁶ And of course, with the legalization and increasing popularity of sports wagering, there is a question of how immense amounts of money will be distributed between private actors, states, and leagues.⁷

The major professional sports leagues and the National Collegiate Athletic Association (NCAA) have drastically shifted their stances towards legalized sports wagering in the years since *Murphy*.⁸ Once the federal ban on sports gambling was struck down, leagues have seen significant

¹ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018).

² *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

³ John T Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 588 (2020).

⁴ Darren Rovell, *Where is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Mar. 28, 2021), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections#nm>

⁵ Ryan Glasspiegel, *Sports Leagues Will Plead with the Federal Government for Integrity Fees from Gambling*, THE BIG LEAD (May 14, 2018), <https://www.thebiglead.com/posts/sports-leagues-will-plead-with-the-federal-government-for-integrity-fees-from-gambling-01dxf2509zd9>.

⁶ Marc Edelman, *Developments: Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 337–38 (2018).

⁷ *Id.* at 335–36.

⁸ Jon Wertheim, *The Big Picture*, SPORTS ILLUSTRATED (Aug. 21, 2021), <https://www.si.com/betting/2021/08/09/gambling-issue-daily-cover>.

profits.⁹ Because of a surge in popularity and profit, leagues now champion the very industry they asked the Supreme Court to continue to ban. Indeed, what was once a taboo vice that was certain to lead to corruption is “now not merely accepted behavior, but a cornerstone of growth strategy.”¹⁰ Leagues are enjoying the increased fan engagement and revenue increases, and fans are enjoying wagering in ever increasing numbers. Athletes, however, particularly collegiate athletes, have not seen their fair share of profits.

Currently, inequities and inefficiencies exist in the markets of both professional and amateur sport wagering. Specifically, players are not being fairly compensated for their role in an incredibly lucrative business that is fundamentally changing the business of sports. This can be solved through logical legislation that creates an efficient and economically just mechanism to promote league and competition integrity, ensure the safety and security of wagering, fairly compensate athletes, and generate tax revenue for the State. Further, this proposed mechanism could be a vehicle used to address issues plaguing both professional and amateur sports, and result in significant and lasting change.

Although the issue of revenue inequity, and growing inequality as sports gambling becomes more popular and profitable, is prevalent across professional leagues, the most egregious inequality exists in the NCAA. But the NCAA is also in the best position to implement a system that solves the inequality. The NFL perhaps leads the way on sports wagering, with 2021-22 National Football League (NFL) season likely saw 45.2 million Americans legally wager on games.¹¹ The increase in wagering surely drove higher revenues, and the league’s revenue is split

⁹ *Id.*

¹⁰ *Id.*

¹¹ Ian Thomas, *More Americans will wager on the NFL than ever before as league embraces sports betting*, CNBC (Sept. 9, 2021), <https://www.cnbc.com/2021/09/09/more-americans-will-wager-on-the-nfl-as-the-league-embraces-betting.html>.

near evenly between owners and players.¹² The NFL CBA is not perfect, and the NFL Players Association would be wise to address sports wagering and related revenue specifically in the next CBA; however, the NFL CBA, with a few adjustments, provides the NCAA with a logical framework for how to properly and safely compensate players, while maintaining competition integrity.

This comment discusses the present state of sports gambling in America, and how it could be altered to safely and fairly solve issues leagues are facing, most importantly the NCAA. Part I served as an introduction, and Part II of this comment will discuss the background of gambling and sports wagering in America, as well as the rise of commercial sports, and ultimately the federal ban on sports gambling. Part II will also examine the litigation that eventually struck down the federal ban on sports wagering. Part III of this comment will explore state regulatory frameworks that emerged in the early days of legalization and those that continue to emerge now. Part III will also include how the various professional and amateur leagues have altered their positions towards gambling and now embrace the concept. Finally, Part IV of this comment will highlight two leagues, the NFL and NCAA, and how each approaches gambling and revenue sharing. This comment will argue that the NFL's Collective Bargaining Agreement, with a few proposed adjustments, is a model for how the NCAA should move forward in creating a system of revenue sharing for its member athletes and schools.

II. Background/Overview

A. History of Gambling in the United States

¹² NFL Collective Bargaining Agreement 2020 [hereinafter *NFL CBA*], https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf.

Organized sports date back to the Olympics in 776 B.C.¹³ Sports wagering occurred at those same Olympics; around the world, as long as there have been organized sports, there has been a market for gambling on those sports.¹⁴ America too has a long and complicated history with gambling, with several periods of varying legalization and criminality.¹⁵ Additionally, America has experienced scandals that have rocked the athletic world and influenced ensuing legislation and public opinion towards gambling.¹⁶

America's gambling history predates the Republic itself: colonies instituted lotteries to raise public funds for things such as roads and hospitals.¹⁷ Individuals organized lotteries for major construction endeavors, like the building of Harvard University and Yale University, and very wealthy citizens organized lotteries for personal profit.¹⁸ Public opinion, however, turned against gambling at the turn of the nineteenth century, as most states passed legislation preventing individuals from creating or organizing their own lotteries.¹⁹ By the middle of the nineteenth century, state legislatures largely outlawed state-sponsored lotteries as it became evident that they were essentially a regressive tax.²⁰ During the Civil War, a few southern states reinstituted state lotteries.²¹ However, in 1890 and 1895, Congress passed two laws preventing the mailing and transporting of lottery tickets.²² Thus, "[t]he goal of these two federal statutes was to limit state-sanctioned gambling activities as much as Congress believed was possible."²³

B. Commercial Sports in America

¹³ Stephen Dubner, *The Economics of Sports Gambling*, FREAKONOMICS RADIO, Episode 388 (Sept. 4, 2019), <https://freakonomics.com/podcast/sports-gambling/>.

¹⁴ *Id.*

¹⁵ Edelman, *supra* note 6, at 314–15.

¹⁶ Edelman, *supra* note 6, at 314–15.

¹⁷ Edelman, *supra* note 6, at 314.

¹⁸ Edelman, *supra* note 6, at 314.

¹⁹ Edelman, *supra* note 6, at 314.

²⁰ Edelman, *supra* note 6, at 315.

²¹ Edelman, *supra* note 6, at 315.

²² Edelman, *supra* note 6, at 315.

²³ Edelman, *supra* note 6, at 315.

Commercial sports emerged in modern America in the late nineteenth century and expanded into the early twentieth century.²⁴ Major League Baseball (MLB) formed in 1903 when the American League and National League joined to create a single entity; the National Hockey League (NHL) crossed into American cities in 1924; the National Football League (NFL) formed in 1920; and the Big Ten Conference became the first modern collegiate athletic conference in 1895.²⁵

Perhaps from the very beginning of commercial sports, gamblers attempted to pay players for inside information.²⁶ But in 1919, scandal extended even further: eight players of the Chicago White Sox were indicted on conspiracy charges for allegedly taking bribes to purposefully lose the World Series against the Cincinnati Reds.²⁷ Although several players testified to the grand jury that they had indeed taken money in exchange for losing the series, the players were acquitted at trial.²⁸ Apparently, paper records relating to the grand jury testimony had vanished and could not be produced at trial.²⁹ Despite the verdict, and later accounts that cast doubt on exactly what happened with the players and the fix, newly appointed league commissioner Judge Kenesaw Mountain Landis, banned the players from professional baseball.³⁰

It is not surprising that Commissioner Landis issued this harsh punishment. Indeed, the owners of MLB clubs created the position of commissioner to restore the public's view of the sport, its integrity, and its accountability.³¹ Landis was commissioner of the league for twenty-

²⁴ Edelman, *supra* note 6, at 315.

²⁵ Edelman, *supra* note 6, at 315–16.

²⁶ Evan Andrews, *What Was the 1919 'Black Sox' Baseball Scandal?*, HISTORY (Oct. 9, 2014), <https://www.history.com/news/black-sox-baseball-scandal-1919-world-series-chicago>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Edelman, *supra* note 6, at 316.

four years and cracked down on gambling throughout his tenure.³² Each of the major sports followed suit, and today all have a Commissioner's Office.

Over the twentieth century, several states, including California, Nevada, and Florida, explored the legalization of sports betting, either in the form of lotteries, an extension of legal casino games, or as a new method of generating revenue.³³ But in 1989, news of the Pete Rose betting scandal broke.³⁴ Baseball's all-time leader in hits signed an agreement with Commissioner Bart Giamatti, which effectively banned Rose from the sport, including a spot in the Hall of Fame, for life.³⁵ The agreement was the culmination of rumors that Rose was heavily involved with bookies and wagered on baseball, an investigation by former Justice Department lawyer Jon Dowd, and the early stages of litigation.³⁶ Following the Rose scandal, baseball and other leagues recommitted themselves to antigambling positions and practices.³⁷

Paralleling league action, gambling went through legislative and public policy changes as well. In 1961, Congress passed the Federal Act, and in the 1960s and 1970s, Congress passed The Travel Act, the Wagering Paraphernalia Act, and the Illegal Gambling Business Act.³⁸ Each piece of legislation was enacted in response to growing interstate gambling operations fueled by organized crime.³⁹ More specifically, each law, and especially the Wire Act, sought to cripple organized crime's largest revenue stream: sports gambling.⁴⁰

³² Chelsea Janes, *Throwback Thursday: The First Commissioner of Baseball*, WASH. POST (Nov. 13, 2014), <https://www.washingtonpost.com/news/dc-sports-bog/wp/2014/11/13/throwback-thursday-the-first-commissioner-of-baseball/>.

³³ Edelman, *supra* note 6, at 318.

³⁴ Ronald J. Rychlak, *The Dowd Report: Pete Rose, Bart Giamatti, and the Dowd Report*, 68 MISS. L.J. 889, 892 (1999).

³⁵ *See id.* at 892–94.

³⁶ *Id.* at 892.

³⁷ Edelman, *supra* note 6, at 319–20.

³⁸ Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNLV GAMING L.J. 153, 154 (2018).

³⁹ *Id.* at 154.

⁴⁰ Savannah Malnar, *Murphy's Law: How to Avoid Going Wrong with Federal Regulation of Sports Gambling*, 23 VAND. J. ENT. & TECH. L. 161, 164 (2020).

Following the Pete Rose scandal, and with a backdrop of organized crime syndicates preying on both leagues and citizens, commissioners of the major sports leagues lobbied Congress for a federal ban on sports gambling.⁴¹ Congress took up the task, finding sports gambling to be a “national problem” that was inflicting harm on citizens.⁴² Congress felt that legislation surrounding sports wagering needed to both protect citizens from the ills of gambling and ensure integrity in commercial sports leagues.⁴³ Following some deal-making to carve out certain exceptions in certain states, PASPA passed the Senate by an 88-5 vote and the House of Representatives by a voice vote, and was signed into law by President George H.W. Bush.⁴⁴

PASPA reached beyond the scope of the Wire Act, as the latter does not actually ban interstate sports gambling, but rather only the means by which it was conducted.⁴⁵ PASPA, however, made it illegal for any state to pass laws allowing in-state gambling.⁴⁶ Further, PASPA allowed not only the Attorney General but also professional sports organizations, such as the NFL, and amateur sports organizations, such as the National Collegiate Athletic Association (NCAA) to bring civil action to enjoin violations.⁴⁷

C. *Murphy v. NCAA*

In 2011, a state-wide ballot question appeared to New Jersey voters.⁴⁸ The nonbinding resolution asked voters if they were in favor of legalizing wagering on professional sports.⁴⁹ By a wide margin, voters answered that it should be legal.⁵⁰ Supporters of legalized gambling argued

⁴¹ Edelman, *supra* note 6, at 319–20.

⁴² Malnar, *supra* note 40, at 165–166; *What Is PASPA?: The Professional Amateur Sports Protection Act*, LINES [hereinafter *What is PASPA?*], <https://www.thelines.com/betting/paspa> (last visited Mar. 11, 2021).

⁴³ Malnar, *supra* note 40, at 165.

⁴⁴ *What Is PASPA?*, *supra* note 42.

⁴⁵ Malnar, *supra* note 40, at 166.

⁴⁶ Malnar, *supra* note 40, at 166.

⁴⁷ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1471 (2018).

⁴⁸ MaryAnn Spoto, *Sports Betting Backed by N.J. Voters*, NJ.COM (Nov. 9, 2011), https://www.nj.com/news/2011/11/nj_residents_vote_on_legalizin.html.

⁴⁹ *Id.*

⁵⁰ *Id.*

that New Jersey was losing millions of dollars in tax revenue as the federal ban did not prevent people from gambling, rather, people either wagered in other states where forms of gambling were legal, wagered with offshore operations, or with organized crime syndicates.⁵¹

Following the referendum, New Jersey amended its constitution to allow for sports wagering, and in 2012, Governor Chris Christie signed the Sports Wagering Law.⁵² Rather quickly and unsurprisingly, the NCAA and the four major professional sports leagues filed suit against the New Jersey Governor and various New Jersey state officials seeking an injunction alleging the law violated PASPA.⁵³ Multiple rounds of litigation followed over several years.⁵⁴ New Jersey argued that PASPA was unconstitutional because it commandeered the states, a principle that was deemed unconstitutional in *New York v. United States*⁵⁵ and in *Printz v. United States*.⁵⁶ In *Murphy*, the Court explained the doctrine as applied in *New York* and *Printz*, “[i]n *New York*, [the Court] held that a federal law unconstitutionally ordered the State to regulate in accordance with federal standards, and in *Printz*, [the Court] found that another federal statute unconstitutionally compelled state officers to enforce federal law.”⁵⁷ The leagues argued that PASPA was not commandeering because it did not require the states to act affirmatively and “[w]ithout an affirmative federal command to do something, the plaintiffs insisted, there can be no claim of commandeering.”⁵⁸

In the first round of litigation, the district court held PASPA to be constitutional, as did a divided Third Circuit panel.⁵⁹ New Jersey filed a petition for a writ of certiorari, but the Supreme Court denied review; interestingly, in arguing against certiorari, the Department of Justice

⁵¹ *Id.*

⁵² Malnar, *supra* note 40.

⁵³ *Murphy*, 138 S. Ct. at 1472.

⁵⁴ Malnar, *supra* note 40, at 167.

⁵⁵ *New York v. United States*, 505 U. S. 144, 112 (1992).

⁵⁶ *Murphy*, 138 S. Ct. at 1472; *Printz v. United States*, 521 U. S. 898 (1997).

⁵⁷ *Murphy*, 138 S. Ct. at 1472.

⁵⁸ *Id.*

⁵⁹ *Id.*

indicated that New Jersey could repeal pre-PAPSA laws that prohibited gambling in the state.⁶⁰ Seeing an opening, New Jersey passed an amended law in 2014 (the 2014 Act): “[t]he 2014 Act declares that it is not to be interpreted as causing the State to authorize, license, sponsor, operate, advertise, or promote sports gambling.”⁶¹ Rather, the 2014 Act repealed aspects of state laws prohibiting wagering on sports that addressed the “placement and acceptance of wagers” at a horseracing track or casino in Atlantic City.⁶²

The NCAA and professional leagues again filed suit and won in district court.⁶³ On appeal, the Third Circuit heard the case en banc and affirmed the ruling of the district court.⁶⁴ New Jersey again filed for a writ of certiorari and the Supreme Court granted review.⁶⁵ The Supreme Court held that PASPA was indeed unconstitutional because it impermissibly commandeered the states.⁶⁶ The Court reasoned that PASPA “unequivocally dictates what a state legislature may and may not do . . . as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals.”⁶⁷ Justice Alito noted, “[a] more direct affront to state sovereignty is not easy to imagine.”⁶⁸

New Jersey was finally successful, and through “cleverly engineered lawsuits,” the Supreme Court struck down the federal ban on sports gambling, opening the door for legal sports gambling.⁶⁹

III. Post-Murphy and Current Framework

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Murphy*, 138 S. Ct. at 1472.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Dubner, *supra* note 13.

There is currently no federal framework governing sports wagering. The issue is currently left entirely to the states, and many states have adopted various methods and regulations. Because legalized sports wagering is a new creation, legislation is happening quickly and is very much in flux. The current state models and hypothetical federal models discussed herein reflect the reality at the time of the writing of this comment.

It is imperative to understand the current state regulatory models so that any proposed changes to the regulatory scheme are considered in the proper context, are within reason, and are workable solutions to the identified problem. Any proposed change to state gambling regulatory schemes must maintain a concern for the integrity of competition, the prevention of corruption, and a safe and secure apparatus for patrons to responsibly use. Additionally, in order to propose an alternate taxation or revenue sharing scheme, the current model must be understood.

As such, the following discussion examines several state regulatory frameworks that are currently in place, as well as proposed, but not yet adopted, federal frameworks.

A. State Models

Following the Supreme Court's decision in *Murphy*, New Jersey legalized sports gambling, joining Delaware, the first state to legalize the activity post-PASPA, and Nevada.⁷⁰ Several other states soon followed, but there are both major and minor differences between the state schemes, such as whether online wagering is allowed and if bettors can wager on college athletics.⁷¹ Other significant differences include the regulatory scheme of the several states, revenue sharing, and how much sportsbooks and casinos pay in taxes.⁷² To represent the variety of state regulatory

⁷⁰ Brent Johnson, *Phil Murphy Signs N.J. Sports Betting Law. You Can Start Betting on Thursday*, NJ.COM (Jun. 11, 2011), https://www.nj.com/politics/2018/06/sports_betting_to_begin_in_nj_after_phil_murphy_si.html.

⁷¹ Ryan Butler, *Where Is Sports Betting Legal? Projections for All 50 States*, Action Network, (Oct. 4, 2021), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections#nm>.

⁷² Edelman, *supra* note 6, 325–330.

schemes, a select few are explored here as most other states largely follow a model similar to one of these three states: New Jersey, Pennsylvania, and New York.

1. New Jersey

In New Jersey, a person must be at least twenty-one years of age to place a legal bet, and may do so in-person or online through licensed operators.⁷³ In order to accept sports bets, an New Jersey casino, racetrack, or partner of a New Jersey casino or racetrack, must apply for and receive a “sports wagering license” and comply with other regulatory procedures.⁷⁴ Additionally, New Jersey law prohibits betting on a game or match in which a New Jersey college team is playing, as well as prohibits gambling on any NCAA competition held in New Jersey, regardless of the teams.⁷⁵ For example, not only can a person in New Jersey not bet on Seton Hall basketball, regardless of where the game is played, but individuals within the state can also not place wagers on non-New Jersey schools playing an NCAA tournament game at the Prudential Center in Newark. Washington, New York, South Dakota, and Virginia also prohibit wagering on in-state colleges, but New Jersey is the only state that has legal sports wagering to have the college exception for non in-state team competitions.⁷⁶

Entities holding a sports wagering license will pay an 8.5% tax on its in-person gambling income, and a 13% tax on its online gambling income (a “sums received by the casino” in wagers minus winnings “paid out . . . to patrons”).⁷⁷ The vast majority of New Jersey’s sports wagering

⁷³ New Jersey Assembly Bill 4111, P.L. 2018, Chapter 33 § (2)(e), <https://legiscan.com/NJ/text/A4111/id/1809536>.

⁷⁴ *Id.* at § 1.

⁷⁵ *Id.* at § 1.

⁷⁶ Brent Johnson, *N.J. Asking Voters to Decide an Expansion of Sports Betting, But It’s Not a Sure Thing*, NJ.COM (Oct. 29, 2021), <https://www.nj.com/politics/2021/10/nj-asking-voters-to-decide-an-expansion-of-sports-betting-but-its-not-a-sure-thing.html>; Associated Press, *New Jersey fines BetMGM \$25,000 for allowing bets on college games involving Garden State schools*, ESPN (March 23, 2020), https://www.espn.com/chalk/story/_/id/33579400/new-jersey-fines-betmgm-25000-allowing-bets-college-games-involving-garden-state-schools.

⁷⁷ New Jersey Assembly Bill 4111, P.L. 2018, Chapter 33 § 7. <https://www.nj.gov/lps/ge/docs/SportsBetting/SportsWageringLawPL2018c33.pdf>.

occurs online, and is subject to the higher tax rate. For example, in October 2021, New Jersey accepted \$1.3 billion in bets, with nearly \$1.2 billion being wagered online.⁷⁸

2. Pennsylvania

Pennsylvania has taken a somewhat different approach yet has still seen revenue.⁷⁹ Pennsylvania has the same age requirement as New Jersey, and requires users to be physically in the state when placing a wager.⁸⁰ However, it is considerably more expensive for a casino to operate in Pennsylvania as the state charges sports betting operators (casinos, sportsbooks) a \$10 million licensing fee and a 36% tax rate.⁸¹

3. New York

New York aimed to legalize and implement sports wagering in time for the 2022 Super Bowl.⁸² The state included the legalization of online sports wagering, rather than only in-person at four upstate casinos, in its budget legislation following the COVID-19 pandemic.⁸³ New York took a unique approach to wagering as it required potential operators to submit bids to the state and be selected to have the privilege of tapping the massive New York betting market.⁸⁴ Of course, that privilege comes with a tax rate of 51%, the highest in the nation, and a one-time licensing fee of \$25 million.⁸⁵ However, when \$1.3 billion was wagered in a single month in New Jersey, with

⁷⁸ Wayne Perry, *NJ Breaks Own Monthly Sports Betting Record With Whopping \$1.3B in Bets*, NBCNEWYORK.COM (Nov. 17, 2021), <https://www.nbcnewyork.com/news/local/nj-breaks-own-monthly-sports-betting-record-with-whopping-1-3b-in-bets/3407437/>.

⁷⁹ Steve Ruddock, *PA Sports Betting Off to Reasonably Fast Start Despite High Tax Rate*, LEGAL SPORTS REP. (Jan. 23, 2019), <https://www.legalsportsreport.com/27911/pa-sports-betting-tax/>.

⁸⁰ *Rules and Regulations: Title 58 – Recreation, Pennsylvania Gaming Control Board*. 58 PA. Code. Chs. 1401.6–1401.8 and 1407–1411 at 11, 42. https://gamingcontrolboard.pa.gov/files/legislation/125-220_temp_Sports_Wagering.pdf.

⁸¹ Ruddock, *supra* note 79.

⁸² Joseph Spector, *No, New York Doesn't Allow for Mobile Sports Betting Yet. Here's When it Could Start*, LOHUD (Sept. 10, 2021), <https://www.lohud.com/story/news/2021/09/10/mobile-sports-betting-new-york-nfl/8271031002/>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Will Yakowicz, *New York Picks Nine Operators To Launch State's \$1 Billion Sports Betting Market*, FORBES (Nov. 8, 2021), <https://www.forbes.com/sites/willyakowicz/2021/11/08/new-york-picks-draftkings-fanduel-and-others-to-launch-states-mobile-sports-betting-program/?sh=4069079d1a08>.

\$1 billion of that being wagered online, New York was eager to become involved, and sportsbooks were eager to take bets, even with a significant tax rate.⁸⁶

New York's first month of legalized sports wagering proved to be a lucrative one. Four sportsbooks handled about \$1.62 billion in sports wagers from January 8, 2022 to January 30, 2022, meaning that "[i]n less than a full month, New York totaled more than \$55 million in taxes from the \$112.99 million gross gaming revenue total."⁸⁷

B. Proposed Federal Model

While there is not currently a federal regulatory scheme in place, and it is not clear that any one single federal scheme will ever be adopted, the idea has been explored. In December 2018, U.S. Senators Chuck Schumer (D-NY) and Orrin Hatch (R-UT) introduced the Sports Wagering Market Integrity Act of 2018 (SWMIA).⁸⁸ Schumer said he "treasure[s] the purity of the game" and that "Congress had an obligation to ensure that the integrity of the games we love was never compromised."⁸⁹ Schumer went on to say "the time is now to establish a strong national integrity standard for sports betting that will protect consumers and the games themselves from corruption."⁹⁰ The goal of SWMIA was to federally adopt minimum standards for states that chose to legalize gambling.⁹¹ Among its provisions: (1) prohibit gambling for those under 21; (2) allow online gambling; (3) restrict sports wagering to professional sports, college, and Olympic

⁸⁶ Brett Smiley, *Sports Handle: That Was the Week That Was in US Sports Betting*, SBCAMERICAS (Nov. 19, 2021), <https://sbcamericas.com/2021/11/19/sportshandle-that-was-the-week-that-was-in-us-sports-betting-96/>. record-6-billion-in-2020-and-nearly-1-billion-in-december-alone/?sh=20024ebf5c7c.

⁸⁷ Josh Schafer, *Sports betting in New York sets all-time first month mobile record*, YAHOO FINANCE (Feb. 5, 2022), https://finance.yahoo.com/news/sports-betting-in-new-york-165624206.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAACgH6iC6KsP6YytDt11I1pvILXM77m7ZImoevqc4y3jVc7TO_J2quWi7tyjrtoFXE-7bA9KbE8W5ni99jx361YyfDWGdwLQOFaNzOJOHPrzNRC8XVVz30zqEhFwlvH1vvs54g6cSHmfzDkhPZrdSwaIZjL3VdsmL_UE4cBwJVB1.

⁸⁸ *Schumer, Hatch Introduce Bipartisan Sports Betting Integrity Legislation*, SENATE DEMOCRATS PRESS RELEASE (Dec. 19, 2018), <https://www.democrats.senate.gov/newsroom/press-releases/schumer-hatch-introduce-bipartisan-sports-betting-integrity-legislation>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

competition; and (4) require that sportsbooks use data provided by the leagues; and create a National Sports Wagering Clearinghouse.⁹² SWMIA was referred to the Senate Judiciary Committee, but there has been no movement since first introduced in December 2018.⁹³

Although the federal government has not taken action, in *Murphy*, the Court noted that a federal regulatory scheme could be constitutional when it stated that “Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”⁹⁴ Several academic articles have explored and advocated for a federal regulatory model, a scheme reflective of the stock market and commodities industries, and various other regulatory practices.⁹⁵ Yet, as things are moving incredibly quickly and money is being made, state governments rather than the federal government are taking the lead on sports wagering.

C. League Stances

In *Murphy*, it was the major sports leagues who wished to uphold the federal ban on sports wagering.⁹⁶ Even then, the NFL held annual games in England, and both an NFL and NHL franchise appeared in Las Vegas, both locations where sports gambling is legal.⁹⁷ Now, leagues are fully embracing in the increased fan engagement and involvement in sports wagering. However, leagues are still firmly against player involvement in any aspect of gambling or marketing. Recently, the NFL, the NHL, and Major League Soccer (MLS) have dealt with accusations of players gambling: (1) the NFL suspended Calvin Ridley of the Atlanta Falcons indefinitely, but at least for one (1) year, after Ridley was found to have placed wagers over a five-

⁹² *Id.*

⁹³ Becky Harris, *Federal Interference with State and Tribal Sports Betting Regulations Will Not Work: Where the Sports Wagering Integrity Act of 2018 Went Wrong and How Federal Legislation Might Be Effective*, 30 J. LEGAL ASPECTS OF SPORT 106, 110 (2020).

⁹⁴ *Murphy*, 138 S. Ct. 1461.

⁹⁵ See Malnar, *supra* note 40; see also John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575 (2020).

⁹⁶ *Murphy*, 138 S. Ct. 1461.

⁹⁷ *NFL returns to London with two games in 2021*, NFL.com (May 12, 2021), <https://www.nfl.com/news/nfl-returns-to-london-with-two-games-in-2021-press-release>.

day period while away from the team on NFL games, including on his own team to win;⁹⁸ (2) Evander Kane of the San Jose Sharks was investigated for gambling on NHL games, but following an investigation into the matter, was cleared of any wrongdoing;⁹⁹ (3) the MLS suspended Felipe Hernandez of Sporting Kansas City for the remainder of the season without pay after finding Hernandez “engaged in extensive and unlawful sports gambling” including wagering on two MLS games.¹⁰⁰

Even still, far from rejecting gambling, each of the four largest professional leagues in the United States now fully embrace sports wagering as part of the gameday experience as they are each, at the very minimum, partnered with a sportsbook.¹⁰¹ Additionally, stadiums and arenas around the country are seeking to add sportsbooks or wagering lounges to existing infrastructure.¹⁰² Sports gambling is increasingly becoming not merely a tolerated part of sports, but a fully embraced and incredibly profitable aspect of sports. Such a complete reversal by the leagues raises the question of why now. The answer is likely two-fold: (1) the significant increase in fan engagement, leading to increased profits in advertising revenue and television deals; and (2) games and players have not been tainted or corrupted, and are not perceived as such by fans, as was once the fear. Given the reversal and reasoning, it is now time to consider what leagues are doing with their increased profits, and how to distribute those profits more equitably and purposefully.

⁹⁸ Kevin Patra, *Falcons WR Calvin Ridley suspended indefinitely through at least 2022 season for betting on NFL games*, NFL.COM (Mar. 7, 2022), <https://www.nfl.com/news/falcons-wr-calvin-ridley-suspended-indefinitely-through-2022-season-for-betting->.

⁹⁹ Steven Ellis, “No Evidence”: *NHL Concludes Evander Kane Gambling Investigation*, SPORTS ILLUSTRATED (Sept. 22, 2021), <https://www.si.com/hockey/news/no-evidence-nhl-concludes-evander-kane-gambling-investigation>.

¹⁰⁰ MLSsoccer Staff, *Felipe Hernandez Suspended for Betting on MLS Matches*, MLS LEAGUE ANNOUNCEMENT (Oct. 8, 2021), <https://www.mlssoccer.com/news/felipe-hernandez-suspended-for-betting-on-mls-matches>.

¹⁰¹ *Gambling Wave Coming to NFL TV Screens, But in Moderation*, THE ASSOCIATED PRESS (Sept. 7, 2021), <https://kstp.com/minnesota-sports/gambling-wave-coming-to-nfl-tv-screens-but-in-moderation/6230364/>.

¹⁰² Tony Arnold, *The Chicago Bears’ Rift With The Park District Widens Over Stalled Sports Betting Lounge At Soldier Field*, WBEZ CHICAGO (Sept. 20, 2021), <https://www.wbez.org/stories/chicago-bears-have-been-trying-to-get-into-the-sports-betting-business/d3691c5d-137b-4296-81f8-c66e54040fa7>.

It is perhaps not surprising that the leagues have changed their tune considering that prior to *Murphy*, illegal sports betting in the United States was estimated to be \$150 billion industry.¹⁰³ And now that gambling is legalized and growing beyond that figure, leagues see no reason why they should not maximize profits.

Here, partnerships and relationships with casinos and gambling entities from each of the major leagues in America will be surveyed. As is evident, gambling is now integral to the business of sports. While that is a completely legitimate and logical business decision, the leagues should now consider how the newly found profits may be fairly distributed to players.

1. National Football League

The NFL is partnered with “seven sportsbooks, including Caesars Entertainment, which has a partnership with ESPN, NBC partner PointsBet and FOX Bet. DraftKings, FanDuel, MGM and WynnBet are also among those who can advertise during games and other league media platforms.”¹⁰⁴ “The biggest change viewers will see is during commercials. NBC, CBS, FOX, and ESPN will be allowed to make up to six spots available for sportsbooks during each game — one during pregame, one per quarter, and one at halftime.”¹⁰⁵

2. National Basketball Association

The NBA was the first league to change its public approach to legalized gambling. In 2014, league Commissioner Adam Silver penned an op-ed in *The New York Times* stating that “we need a different approach” in the piece titled *Legalize and Regulate Sports Betting*.¹⁰⁶

¹⁰³ Elaine S. Povich, *Show Me the Money: Sports Betting Off and Running*, PEW (Sept. 10, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/09/10/show-me-the-money-sports-betting-off-and-running>

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Adam Silver, *Legalize and Regulate Sports Betting*, THE NEW YORK TIMES (Nov. 14, 2014).

Subsequently, the NBA was the first league to partner with a gambling company when it struck a deal with MGM in 2018.¹⁰⁷

3. National Hockey League

In 2018, the NHL formed their first partnership with a gambling company, also partnering with MGM.¹⁰⁸ The partnership allows for MGM to reach NHL fans through the league's media platforms, as well as MGM's use of official league branding.¹⁰⁹ Finally, "MGM Resorts will receive access to previously unseen enhanced NHL proprietary game data that will be generated by the League's state of the art tracking systems currently under development."¹¹⁰ This data will enable MGM to "provide its customers with specialized NHL game insights, as well as unlocking new and innovative interactive fan engagement and betting opportunities for its U.S. customers wherever legally available."¹¹¹

4. National Collegiate Athletic Association

"NCAA rules prohibit participation in sports wagering activities and from providing information to individuals involved in or associated with any type of sports wagering activities concerning intercollegiate, amateur or professional athletics competition."¹¹² Yet, the University of Colorado has a \$1.65 million advertising agreement with PointsBet and the University of Nevada, both Las Vegas and Reno campuses, have a deal with William Hill.¹¹³ Additionally, at least three bowl games were set to be partnered with a casino or company that operates a sportsbook: Fiesta Bowl and Guaranteed Rate Bowl with Caesars to include an 800-person lounge

¹⁰⁷ David Purdum and Darren Rovell, *NBA Signs Deal with MGM to be Gaming Partner*, ESPN (Jul. 31, 2018), https://www.espn.com/chalk/story/_/id/24245142/nba-first-league-betting-sponsor-deal-mgm.

¹⁰⁸ *NHL Announces Sports Betting Partnership*, NHL PUBLIC RELATIONS PRESS RELEASE, (Oct. 29, 2018), <https://www.nhl.com/news/nhl-sports-betting-partnership-with-mgm-resorts/c-301391752>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Sports Wagering*, NCAA.ORG, <https://www.ncaa.org/enforcement/sports-wagering?>

¹¹³ Ross Dellenger, *Fiesta Bowl Secures First Bowl Game Gambling Partnership With Caesars Entertainment*, SPORTS ILLUSTRATED (Aug. 23, 2021), <https://www.si.com/college/2021/08/23/fiesta-bowl-caesars-entertainment-sports-gambling-nil>.

in the stadium, and the Arizona Bowl and Barstool Sports.¹¹⁴ The latter did not happen due to COVID-19.¹¹⁵

5. Sportsbooks in Arenas

In May 2021, William Hill Sportsbook opened the first sports betting venue in a professional sports arena when it opened its doors in Capital One Arena in Washington, D.C., home of the Washington Wizards of the NBA and the Washington Capitals of the NHL.¹¹⁶

Additionally, in August 2021, the Arizona Cardinals announced a partnership with BetMGM which will include a sportsbook in the Cardinals' State Farm Stadium.¹¹⁷ While the Cardinals are the NFL first team to announce such an addition to their stadium, they are not the only team to consider the benefit.¹¹⁸ The Chicago Bears are currently in negotiations with the Mayor and City of Chicago regarding the team's future in the city limits.¹¹⁹ The team was in discussions with the Chicago Park District, the owner of Soldier Field, when the team also put in a bid for Arlington International Racecourse.¹²⁰ According to the team, the city failed to engage in good faith negotiations regarding the inclusion of a sportsbook within Soldier Field, but that such tactics were not the motivation for the bid on Arlington.¹²¹

All of this is to say that gambling, without a doubt, is becoming a crucial consideration of leagues, teams, and sports, and is fundamentally altering the business of sports.

IV. What is the Problem? What is the Solution?

¹¹⁴ *Id.*

¹¹⁵ Michael Lev and Gabriela Rico, *Arizona Bowl cancellation leaves local officials frustrated; 2022 game already on their minds*, TUSCON.COM (Dec. 28, 2021) https://tucson.com/news/local/arizona-bowl-cancellation-leaves-local-officials-frustrated-2022-game-already-on-their-minds/article_f0cabf0c-672d-11ec-b621-172819838e6c.html.

¹¹⁶ Ryan Homler, *William Hill Sportsbook at Capital One Arena Officially Opens*, NBC SPORTS (May 26, 2021), <https://www.nbcsports.com/washington/wizards/william-hill-sportsbook-capital-one-arena-officially-opens-wednesday>.

¹¹⁷ *Cardinals, BetMGM Announce Sports Betting Partnership at State Farm Stadium*, ARIZ. SPORTS (Aug. 9, 2021), <https://arizonasports.com/story/2772130/arizona-cardinals-announce-sports-betting-plans-at-state-farm-stadium/>.

¹¹⁸ *Id.*

¹¹⁹ Arnold, *supra* note 102.

¹²⁰ Arnold, *supra* note 102.

¹²¹ Arnold, *supra* note 102.

It may be easy to look at sports gambling and the current profit-sharing apparatus and conclude that any adjustment to the status quo would be a solution without a problem. However, a closer look at the industry, its incredible and perhaps unexpected growth across states and sports, combined with increased player autonomy and trends toward NCAA student-athlete compensation will reveal that a problem does indeed exist. Specifically, a closer look will show that the current sports wagering system contains holes, inequities, and inefficiencies. However, with some changes, in legislation and policy, the sports wagering regulatory scheme but can be utilized as a vehicle to promote safe betting that protects users, secures profits for private companies and state actors, and benefits individual athletes all while also retaining the integrity of the game that fans love.

This comment will explore how two institutions, the NFL and the NCAA, deal with sports gambling revenues, the future of each league, and how and why the NFL CBA, with some adjustments, is a roadmap for how the NCAA can justly and safely share profits with student athletes. Proposed changes will include both legislation and league rules. This comment suggests that the systems could be implemented at either the state or federal level but would be most effective if uniformly applied throughout the country. The schemes may be driven by changes in policy to existing legislation, or through new legislation entirely.

A. National Football League: The Reality of Gambling and a Possible Roadmap for the NCAA

In 2020, the year of COVID-19 shutdowns, \$6 billion was wagered with New Jersey sportsbooks alone, a 33% increase from 2019, with five consecutive record-setting months.¹²² In 2020, Americans legally wagered \$21.51 billion compared to \$13.07 billion in 2019, resulting in

¹²² David Purdum, *Record \$6 Billion Bet with New Jersey Sportsbooks in 2020*, ESPN (Jan. 13, 2021), https://www.espn.com/chalk/story/_/id/30705676/record-6-billion-bet-new-jersey-sportsbooks-2020.

a 68.3% increase in profits totaling \$1.55 billion.¹²³ An estimated \$20 billion is expected to be wagered on NFL and NCAA football games in the 2021-22 season, which dwarfs the \$7.5 billion wagered in 2020.¹²⁴ In September 2021, New Jersey became the first state to exceed \$1 billion wagered on sports.¹²⁵ Only to outdo itself, New Jersey again set a record in October 2021 by wagering \$1.3 billion, with \$1 billion of that being wagered online.¹²⁶ Legalized sports wagering is growing at a tremendous rate as it both expands into new state borders, is embraced by leagues and fans, and surges in popularity.

In 2020, the National Football League (NFL) generated \$3.78 billion in television advertising revenue.¹²⁷ Executives believe that 2021 advertising revenue will eclipse that of 2020.¹²⁸ After about one-third of the way through the 2021-22 NFL season, viewership increased 17% from the 2020-21 season, and 3% compared to 2019-20.¹²⁹ NFL games make up the top twenty-one shows on television since the beginning of the season, with the most watched game capturing 26.7 million viewers.¹³⁰

The recently negotiated Collective Bargaining Agreement (CBA) between the NFL owners and the NFL Players Association (NFLPA) provides for a revenue sharing agreement wherein the players receive 48.5% of the revenue generated by the league in the form of an equal dispersion among the thirty-two teams in monies to be used for salaries and the total dispersion to be the

¹²³ *State of the Sates 2021: The AGA Survey of the Commercial Casino Industry*, 10, American Gambling Association (May 2021).

¹²⁴ Weston Blasi, “As NFL season kicks off, over \$20 billion is expected to be wagered on football in 2021, says analyst,” MARKET WATCH (Sept. 9, 2021), <https://www.marketwatch.com/story/americans-will-bet-over-20-billion-on-nfl-and-college-football-in-2021-says-analyst-11631194076>.

¹²⁵ The Associated Press, *New Jersey Has Its First \$1 Billion Month in Sports Betting*, N.J.COM (Oct.18, 2021), <https://www.nj.com/atlantic/2021/10/new-jersey-has-its-first-1-billion-month-in-sports-betting.html>.

¹²⁶ Brett Smiley, *Sports Handle: That Was the Week That Was in US Sports Betting*, SBCAMERICAS (Nov. 19, 2021), <https://sbcamericas.com/2021/11/19/sportshandle-that-was-the-week-that-was-in-us-sports-betting-96/>.

¹²⁷ Jason Lynch, *Broadcasters Anticipate Biggest NFL Ad Revenue Season Ever Following Covid Upheaval*, AD WEEK (Sept. 9, 2021), <https://www.adweek.com/convergent-tv/broadcasters-anticipate-biggest-nfl-ad-revenue-season/>.

¹²⁸ *Id.*

¹²⁹ *NFL TV Viewership up 17% from Last Season*, ESPN (Oct 6, 2021), https://www.espn.com/nfl/story/_/id/32349578/nfl-tv-viewership-17-last-season.

¹³⁰ *Id.*

league salary cap.¹³¹ Online gambling, as an industry, and specifically sports gambling, ranks eleventh among 1,200 product categories for television advertisements, creating a \$154 million market.¹³² In 2019, the same market was just \$10.7 million.¹³³

The current CBA provides for a near even split between players and the NFL, and revenue from gambling advertisements and endorsement deals are included in the profit-sharing agreement there is a near even revenue share, the NFLPA would be wise to negotiate for an increase in the players' share of gambling revenue when the next CBA is negotiated in 2030.¹³⁴ Sports gambling increases fan engagement, television audience and media contracts, advertising, and ticket sales.¹³⁵ As sports gambling increases, so too does just about every other revenue generating aspect of the NFL's business model. But sports gambling is unique as a revenue generator, because, except for casino or sportsbook advertising, it is a secondary market that increases revenue across other markets. The NFL, for example, does not earn any money from an individual placing a wager on Monday Night Football. However, when millions of fans across the country place wagers on Monday Night Football, they are more likely to watch the game, increasing the television audience and driving up media contracts and advertising agreements for other products. In fact, a study found that individuals who place a bet on a game are 80% more likely to watch the game, 77% more likely to watch news about the game, 72% more likely to research statistics about the game, 68% more likely to follow the game on social media, and 65% more likely to attend the game in person.¹³⁶ Sports wagering inherently increases fan engagement and advertising dollars not only

¹³¹ *NFL CBA*, *supra* note 12; NFLPA_CBA_March_5_2020.pdf; Ken Belson and Kevin Draper, *N.F.L. Players Split Over Revenue Share and Longer Season as C.B.A. Vote Looms*, THE NEW YORK TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/sports/football/nfl-cba-agreement-players.html>.

¹³² *Online Gambling Ad Spend is Bolstering the Local TV Market*, NIELSEN (May 5, 2021), <https://www.nielsen.com/us/en/insights/article/2021/online-gambling-ad-spend-is-bolstering-the-local-tv-market/>.

¹³³ *Id.*

¹³⁴ *NFL CBA*, *supra* note 12, at Article I.

¹³⁵ Michael Balderston, *Sports Betting Can Boost TV Engagement, Says Study*, TV TECH (Jun. 20, 2020), <https://www.tvtechnology.com/news/sports-betting-can-boost-tv-engagement-says-study>.

¹³⁶ *Id.*

for more wagering but also for virtually every other product and business that chooses to advertise with the NFL.¹³⁷ Sports gambling is fundamentally changing the business of sports in the America.

The combination of legalized sports gambling spreading across the country, the consistent increase in the amounts wagered in states where gambling is legal, and the increased television audience and revenue that is very likely directly related to, or at least connected to increased gambling, has given birth to an industry that is constantly changing, growing, and is perhaps far more profitable than initially projected or expected. Because the industry is fundamentally different than originally planned and negotiated, it is not unreasonable, and perhaps necessary, to reevaluate the profit-sharing structure of the venture.

Sports wagering, and the huge profits realized from wagering would not exist without the players. There would not be competitions on which to place a wager. Because of that, and the unique and meteoric rise of gambling, players must be able to benefit from the industry, beyond any secondary or trickle-down benefits they may receive. Rather, players are entitled to direct and tangible benefits beyond what is already in place. Moreover, the NFL and the NFLPA could use the newly acquired gambling revenue to address issues of concern for the players and league, such as player safety, both during and following player's careers.

B. National Football League: Possible Adjustments

1. Increased Revenue Sharing Through Collective Bargaining

Using the NFL CBA as a model for this example, the NFLPA and NFL could amend the CBA, or include a provision in the next one, to specifically address sports wagering and a new revenue sharing model. The current CBA includes a revenue sharing scheme for wagers taken at an NFL arena, but those wagers only account for a fraction of the amount wagered throughout the country.¹³⁸ The CBA does include, however, that revenue from gambling licensing fees will be

¹³⁷ *Id.*

¹³⁸ *NFL CBA*, *supra* note 12, at Article 12 §1.

shared in accordance with the revenue sharing model.¹³⁹ Because of the massive increase in sports betting, and the increased revenue that is bringing to the league, both in the form of gambling advertising and other revenue generators, the NFLPA could negotiate a scheme by which the league gives players a portion of the gambling revenue separate from other revenues. This would of course benefit players but would also benefit the league and the gaming industry as it could lead to changing attitudes towards gambling which in turn could lead to more individuals gambling and more states legalizing sports wagering.

2. Revenue sharing through legislation & integrity fees

In the race to legislate gambling while also ensuring a profit, both the MLB and the NBA have advocated for integrity fees.¹⁴⁰ Integrity fees are simply money sportsbooks or casinos would pay the various leagues' governing entities to ensure the integrity of the sport is not compromised.¹⁴¹ Even at a small percentage of total wagers placed, this could amount to hundreds of millions of dollars for individual leagues, and a significant portion of a sportsbook's revenue.¹⁴² Casinos and sportsbooks are adamantly opposed to integrity fees for various reasons, in part because the leagues are attempting to tax the total amount wagered, not a casino's revenue, which are drastically different amounts.¹⁴³ Also, casinos are against integrity fees because, as they argue, the leagues will not be regulating gambling, states will.¹⁴⁴ This is a fair criticism of the request.

Perhaps a more convincing argument for integrity fees is if the fees, whatever the exact percentage or allocation, is not paid to the league to somehow police integrity in competition, but instead paid to players, or used for player development, health, and safety. Football is a certainly a dangerous sport, and player safety is an increasingly important issue. The risk and effects of

¹³⁹ *Id.*

¹⁴⁰ *Sports Betting Integrity Fee*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/integrity-fee/>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

head trauma, for example, have been widely discussed in the media.¹⁴⁵ Over the past several years, the league has amended rules to further player safety.¹⁴⁶ However, more could certainly be done preemptively as well as off the field. With this in mind, player safety is a legitimate area to allocate new profits from gambling. Under this structure, players would directly receive the benefits from this massive newly legalized and profitable market. Such a provision could be written to state or federal legislation.

Below is a proposed amended law that has not been advanced in any state, and is of the author's creation. The proposal is meant to demonstrate one way in which players may more directly and equitably benefit from sports wagering profits, while maintaining the original law's purpose and goals. This would be an option that does not require negotiation between the NFLPA and the owners, but rather force the NFL's hand, so to speak, to allocate more funds towards player safety.

Proposed State Law: An Act allowing wagering at casinos and racetracks, and internet or online sports pools on the results of collegiate sports or athletic events, provided that all casinos, racetracks, internet, or online sports pools pay 1% of their profit from wagers on such competitions or events to the various professional and collegiate leagues on which users place wagers in the form of an integrity fee.

(A) To be eligible for an integrity fee, a specific league must make up at least 10% of a casino, racetrack, or internet or online sports pool's total sports wagers.

(B) At no time will casinos, racetracks, internet, or online sports pools be required to pay more than 5% of its profit to leagues in the form of integrity fees.

¹⁴⁵ See generally Ingfei Chen, *Exactly How Dangerous is Football?*, THE NEW YORKER (Feb. 1, 2020), <https://www.newyorker.com/culture/annals-of-inquiry/exactly-how-dangerous-is-football>.

¹⁴⁶ Zach Kruse, *Are Player Safety Concerns Putting the NFL's Future in Jeopardy?*, BLEACHER REPORT (Jan. 28, 2013), <https://bleacherreport.com/articles/1504886-are-player-safety-concerns-putting-the-nfls-future-in-jeopardy>.

(C) In order to be eligible for integrity fees leagues must at all times comply with this law and other applicable state and federal laws. Monies leagues receive in the form of integrity fees will be deposited into a trust account (the Gambling Trust) and shall, at no time, be comingled with any other funds or trusts, except at the discretion of the players' association of the various leagues. The Gambling Trust shall be established, maintained, and controlled by the players' association of the various leagues.

(D) 50% of the amount of integrity fees paid by casinos, racetracks, internet, or online sports pools shall be tax deductible.

The percentages set out here aim to represent numbers that are large enough to make a significant impact, while also still draw sportsbooks to operate and succeed in a given state. The percentage is a give and take number that is malleable. The proposed percentage is one that has been proposed by leagues but rejected by legislators and casinos, but the tax deductibility may be persuasive. Although previously rejected as a form of compliance or regulation, something that is not done by the leagues but by the state, casinos may be more open to a distribution of profit in this manner.

3. Player Ownership of Sportsbooks / Sponsorship

The Gambling Policy for NFL Personnel, released in 2018, dictates that personnel may not gambling on NFL games, although players are allowed to wager on other sports during the off season, and that NFL personnel are “prohibited from using or allowing others to use one’s name and/or image directly to promote, advertise, or publicize gambling-related enterprises . . . or making personal, promotional appearances on behalf of any entity in a casino gaming area or Sportsbook.”¹⁴⁷ Additionally, NFL personnel are prohibited from owning, in part or in whole,

¹⁴⁷ *Gambling Policy for NFL Personnel 2018*, NFL (2018), <https://nflcommunications.com/Documents/2018%20Policies/2018%20Gambling%20Policy%20-%20FINAL.pdf>.

directly or indirectly, any casino or gambling enterprise, unless the ownership is part of a mutual fund or similar account.¹⁴⁸ Leagues and team owners, however, do own stock in gambling companies.¹⁴⁹ Specifically, team owners Robert Kraft and Jerry Jones, as well as team owners in other leagues, have ownership stakes in Draft Kings dating back to when the company operated only as a daily fantasy site.¹⁵⁰ Share prices of Draft Kings have tripled since going public in 2019.¹⁵¹

Allowing players to buy ownership stakes in gambling companies, or automatically setting aside certain proceeds from gambling into a trust that is reinvested on behalf of players' associations, would be an avenue to enable players to reap the financial benefits of the market while maintaining the integrity of the game. The integrity of the game is protected because neither the players nor the league has a financial interest in one side of a bet occurring. Rather, their money is made simply by the bet being wagered in the first place, regardless of the outcome of any bet.

Another approach may be to allow players to appear as sponsors of gambling companies, especially considering the league's relationship with such companies. Such an approach may help alleviate the concern that gambling will corrupt competitions by showing that players and teams neither care nor benefit from the outcome of a singular wager, but rather from wagers being placed and increased revenue and fan engagement. By fully embracing gambling, leagues are no longer clinging to the notion that games or players would be corrupted. Leagues do not pretend to shy away from gambling. Players being able to have ownership stakes in gambling companies, or appear in advertisements for gambling companies would not increase the risk of corruption.

¹⁴⁸ *Id.*

¹⁴⁹ Amy Calistri, *SEC Filing Reveals NFL, NBA Owners Among Major Investors in DraftKings*, ONLINE GAMBLING (May 13, 2020), <https://www.onlinegambling.com/news/sec-filing-nfl-nba-owners-among-major-investors-in-draftkings/>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

Further, although initially the perception may be that there is collusion between a player and company, but that would also be likely to change when it is evident that it is not the case.

C. NCAA: The Problem

The NCAA presents a different set of problems, as college athletics are vastly different than professional in various ways. The NCAA is also in the most dire need to change its policies. The NCAA is larger than any league, and of course, governs student athletes who are not professionals. Student athletes, however, should be entitled to certain revenue raised through sports gambling and advertising.

After the NFL, NCAA football is the most bet-on sport.¹⁵² NCAA basketball, especially conference tournaments and March Madness draw massive amounts of betting and massive television advertising revenues. In 2019, when only eight states offered legal gambling, approximately 47 million Americans wagered \$8.5 billion on March Madness.¹⁵³ Just four days into the 2022 NCAA Tournament, both the men's and women's tournament are seeing double-digit viewer increases from last year.¹⁵⁴ The men's tournament is up 12%, averaging 9.12 million viewers, which is the highest in five years; the women's tournament is up 15% overall, with the second round alone up 25%, averaging 474,000 viewers totaling 26 million hours viewed.¹⁵⁵ Athletes do not receive any compensation from increased fan engagement or revenue, but the NCAA does. In fact, in 2020 the NCAA received about \$1 billion in revenue from March Madness, which includes media rights, ticket sales, and sponsorships.¹⁵⁶

¹⁵² Blasi, *supra* note 124.

¹⁵³ Hilary Russ, *Americans to Bet \$8.5 Billion on NCAA's 'March Madness' Basketball Tournament: Report*, REUTERS (Mar. 18, 2019), <https://www.reuters.com/article/us-basketball-ncaa-gambling/americans-to-bet-8-5-billion-on-ncaas-march-madness-basketball-tournament-report-idUSKCN1QZ0YH>.

¹⁵⁴ Associate Press, *Men's, women's NCAA college basketball tournaments see double-digit gains in TV viewership*, ESPN (Mar. 23, 2022), https://www.espn.com/college-sports/story/_/id/33580245/mens-women-ncaa-college-basketball-tournaments-see-double-digit-gains-tv-viewership.

¹⁵⁵ *Id.*

¹⁵⁶ National Collegiate Athletic Association Consolidated Financial Statements, NCAA, Page 5 (Aug. 2020 and 2019), https://ncaaorg.s3.amazonaws.com/ncaa/finance/2019-20NCAAFIN_FinancialStatement.pdf.

NCAA athletes are prohibited from receiving payments for their performances. However, there are changes happening in the attitudes surrounding NCAA compensation. In 2021, the Supreme Court heard arguments concerning the NCAA rules on capping non-cash compensation to student athletes for academic related purposes in *National College Athletic Association v. Alston*.¹⁵⁷ The Court held that the “NCAA can’t limit education-related benefits — like computers and paid internships — that colleges can offer” student athletes.¹⁵⁸ Justice Gorsuch, writing for the unanimous Court, held that the Ninth Circuit Court of Appeals had properly applied the “rule of reason” analysis regarding antitrust scrutiny.¹⁵⁹ The NCAA argued that the district court erred in “impermissibly redefin[ing]” its “product,” referring to amateur sports.¹⁶⁰ The Court rejected this argument, noting, “[b]ut a party cannot declare a restraint ‘immune from §1 scrutiny’ by relabeling it a product feature . . . Moreover, the district court found the NCAA had not even maintained a consistent definition of amateurism.”¹⁶¹

In a concurring opinion, Justice Kavanaugh admonished the NCAA for the argument that the NCAA is justified in not paying athletes because it is the “defining feature” of the organization not to pay athletes.¹⁶² Justice Kavanaugh went on, “[t]he NCAA’s business model would be flatly illegal in almost any other industry in America.”¹⁶³ Even further, Justice Kavanaugh broached the subject of athlete compensation beyond academic related expenses.¹⁶⁴ Although *Alston* was limited in scope to academic related compensation and violations of antitrust laws, “Kavanaugh seemed to invite more legal challenges to the NCAA’s caps on all forms of compensation for

¹⁵⁷ *National College Athletic Association v. Alston*, 594 U.S. __ 2021.

¹⁵⁸ Jessica Gresko, *Supreme Court Win for College Athletes in Compensation Case*, ASSOCIATED PRESS (Jun. 21, 2021), <https://apnews.com/article/ncaa-supreme-court-alston-college-athlete-benefits-5be12caeaf014da7d71baf0bb60646fe>.

¹⁵⁹ *Alston*, 594 U.S. __ 2021.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Gresko, *supra* note 158.

athletes, not just those tethered to education.”¹⁶⁵ Indeed, Justice Kavanaugh rejected the NCAA’s argument that its tradition of amateurism justified its business model because, “traditions alone cannot justify the NCAA’s decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated.”¹⁶⁶

While both the majority opinion in *Alston* and Justice Kavanaugh’s concurring opinion stopped short of completely breaking the NCAA’s traditional business model and allowing or requiring student athlete compensation, the Court certainly suggested that the system is deeply flawed:

[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.¹⁶⁷

Alston was a win for student athletes both in the short and long term.¹⁶⁸ The immediate result is that student athletes will no longer be limited in the compensation they may receive for academic related expenses, while the long-term effect remains to be realized but “sets the stage for future challenges to NCAA rules limiting athletes’ compensation.”¹⁶⁹

Following *Alston*, perhaps seeing the writing on the wall, the NCAA enacted an interim rule permitting athletes to profit from their name, image, and likeness (NIL).¹⁷⁰ The NCAA plans to keep the interim rule in place until federal legislation is enacted, or the NCAA publish a permanent rule.¹⁷¹ Since the NCAA interim rule was announced, twenty-two (22) states enacted

¹⁶⁵ Sean Gregory, *Why the NCAA Should Be Terrified of Supreme Court Justice Kavanaugh’s Concurrence*, TIME (Jun. 21, 2021), <https://time.com/6074583/ncaa-supreme-court-ruling/>.

¹⁶⁶ *Alston*, 594 U.S. __ 2021.

¹⁶⁷ *Id.*

¹⁶⁸ Gresko, *supra* note 158.

¹⁶⁹ Gresko, *supra* note 158.

¹⁷⁰ Gresko, *supra* note 158.

¹⁷¹ Thomas Di Biasio, *Most States Pass “Name, Image, and Likeness” Laws for Student Athletes*, MULTISTATE (Sept. 21, 2021), <https://www.multistate.us/insider/2021/9/21/most-states-pass-name-image-and-likeness-laws-for-student-athletes>.

legislation and seven others have legislation that will take effect between 2022 and 2025.¹⁷² While this patchwork of legislation has some differences, there are common areas as well, such as (1) athletes being prohibited from entering into an endorsement contract specifically tied to performance and (2) institutions being able to put into place additional policies and restrictions on student athlete endorsements.¹⁷³ Fourteen (14) states included prohibitions in legislation that prevent student athletes from entering into endorsements with certain industries, ranging from adult entertainment to tobacco and alcohol.¹⁷⁴ Further, “some states prohibit any industries that ‘negatively impact the reputation or the moral or ethical standards’ of the institution from contracting with student-athletes.¹⁷⁵ Specifically, “[t]he vast majority of state laws and institutional policies governing name, image and likeness for student athletes prohibit deals with sports betting or gambling entities.”¹⁷⁶

In November 2021, New Jersey voters considered a ballot measure that would allow an amendment to the state constitution to expand sports gambling to in state colleges and in state collegiate events.¹⁷⁷ Originally, New Jersey excluded college betting from legislation “because lawmakers were concerned that student athletes would fix or throw games.”¹⁷⁸ Perhaps out of the same fear, New Jersey voters largely rejected the recent ballot measure.¹⁷⁹ Why are voters and lawmakers convinced that college student athletes are more susceptible to bribery and more likely to engage in point-shaving or fixing than professional athletes? Certainly, a striking difference

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Kristi Dosh, *MaximBet Offers Statewide NIL Deal To Every NCAA Female Student Athlete In Colorado*, FORBES (Sept. 28, 2021), <https://www.forbes.com/sites/kristidosh/2021/09/28/maximbet-offers-statewide-nil-deal-to-every-ncaa-female-student-athlete-in-colorado/?sh=1dad1fb9127d>.

¹⁷⁷ Ashley Balcerzak, *NJ Election Results: Voters Reject Expanding College Sports Betting*, NORTHJERSEY.COM (Nov. 3, 2021), <https://www.northjersey.com/story/news/2021/11/03/nj-ballot-question-2021-results-college-sports-betting/8581638002/>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

between a college athlete, even a high profile one, and professional athletes is compensation. NCAA athletes are prohibited from receiving a salary, except for new NIL deals, while the NFL league minimum salary for a rookie with a one-year contract is \$660,000.¹⁸⁰ Voters and lawmakers determined that a professional athlete making a substantial amount of money is less likely to engage in prohibited gambling than a NCAA athlete making no salary at all. Rather than prohibiting gambling on college athletics because the current framework leaves student athletes vulnerable to coercion, the framework itself should be adjusted so that the vulnerabilities are removed.

Is there a legal remedy that would (1) allow individuals to bet on college sports, (2) ensure the integrity of the game, (3) protect players from the temptation to fix or throw games, and (4) convince voters that allowing wagering will benefit both the sport and the athletes? The last prong would perhaps be the most difficult to surmount. However, because the NCAA does not pay student athletes, the NCAA is uniquely situated to use newly found sports wagering revenue and attention to direct money to schools and athletes in a responsible way. Additionally, recent shift in thinking on the topic of athlete compensation as seen in the NCAA's NIL rule and the Supreme Court's decision in *Alston*, suggests a recognition both by the NCAA and by the highest court that the current system is not perfect and may need to be revamped.

D. NCAA: Possible Solution

If a state such as New Jersey, whose voters and lawmakers have now twice rejected college sports betting at least in part due to concerns of player susceptibility to bribes or threats, enacted a law that specifically addressed those concerns, voters may be more likely to support it. For example, if New Jersey allowed betting on college athletics, but only if sportsbooks and casinos paid a small percentage of their profit, not revenue, to the NCAA with the stipulation that such

¹⁸⁰ Jake Elman, *What Is the NFL League Minimum Salary for 2021?*, SPORTSCASTING (Apr. 14, 2021), <https://www.sportscasting.com/nfl-league-minimum-salary-2021/>.

fees would be held in a trust account and dispersed to athletes upon graduation, used to provide stipends for unpaid internships student athletes complete during the course of their studies or immediately following, or used to fund under-financed schools or sports, voters and lawmakers would perhaps more readily and comfortably enact such a law. Further, because of the growth and popularity of sports betting, it is likely that sportsbooks, although not eager to pay a portion of their profit to the NCAA, would nevertheless compete in the market because there would still be large sums of money to be made.¹⁸¹ This is evident in sportsbooks operating in Pennsylvania and competing for operation in New York, despite large licensing fees and high tax rates.¹⁸² In fact, sportsbooks and casinos may support this model as it may pave the way for legalized sports betting in the remainder of states that do not yet have a system in place. Such expansion, even with paying a small percentage of profit, would greatly increase market share and profits.

1. Proposed State Law

Below is a proposed amended law that has not been advanced in any state, and is of the author's creation. The proposal is meant to demonstrate one way in which student athletes may more directly and equitably benefit from sports wagering profits, while maintaining the original law's purpose and goals:

An Act allowing wagering at casinos, racetracks, and internet or online sports pools on the results of collegiate sports or athletic events. Each casino, racetrack, or online sports pool that engages in collegiate wagering shall be required to purchase a licensing fee, and a renewal fee every five years, of \$25,000, as well as 1% annually of profit earned from collegiate wagering to the Department of Gaming Enforcement. The Department of Gaming Enforcement shall in turn deposit the entirety of said funds with the National Collegiate Athletic Association's (NCAA) trust account where it shall be distributed to

¹⁸¹ Ruddock, *supra* note 79; Spector, *supra* note 82.

¹⁸² Ruddock, *supra* note 79; Spector, *supra* note 82.

players, programs, and schools in accordance with this law and NCAA rules. The percentage of profits a casino, racetrack, or online sports pool pays to the Department of Gaming Enforcement under this law shall be tax deductible.

2. Proposed NCAA Rule:

Monies paid to the NCAA from the several States' Departments of Gaming Enforcement shall be deposited into an interest-bearing trust account (the Gambling Trust) that is established for this purpose and is not comingled with any other funds or revenue. The NCAA board of directors shall establish a committee that will oversee the Gambling Trust, process applications, and execute distributions. Monies from this account shall not be used in any way that is inconsistent with this Rule or state or federal law, and monies from this fund shall not be used to pay for any expense other than those expressly set forth in this Rule.

Internship / Externship: Monies from the Gambling Trust may be payable, on application, to current or former collegiate athletes enrolled or participating in a paid or unpaid internship/externship, provided that such payment is not inconsistent with the rules of said internship/externship. Payment shall be made by using the NCAA approved formulation determining stipend amounts based on zip-code cost of living averages. To receive payment, participants must be in good academic standing with their NCAA associated academic institution or have successfully graduated from an NCAA associated academic institution.

Research Grant: Monies from the Gambling Trust may be payable, on application, to current or former collegiate athletes conducting a research project domestically or abroad so long as the project is sanctioned and approved by the participant's NCAA associated academic institution and the participant is in good academic standing. The NCAA will

match academic institution grant funding, or, in the absence of academic institution monies, the Gambling Trust Committee will use its discretion and best judgement to determine the requisite amount.

Undercapitalized Institutions: Monies from the Gambling Trust may be payable, on application, to academic institutions that have undercapitalized athletic departments as determined by the NCAA. Monies from the Gambling Trust may be used to further player wellness, improve player facilities, or enhance player experience. Monies may not be used to fund or supplement any salary of any employee, nor compensate players directly.

Undercapitalized Programs: Monies from the Gambling Trust may be payable, on application, to academic institutions that have undercapitalized athletic programs as determined by the NCAA. Monies from the Gambling Trust may be used to establish or improve a specific program, consistent with this rule and applicable law. Monies may be used to establish or fund scholarships, further player wellness, improve player facilities, or enhance player experience. Monies may not be used to fund or supplement any salary of any employee, nor compensate players directly.

Graduate Scholarships: Monies from the Gambling Trust may be payable, on application, to graduating student athletes to attend a graduate program, but are not continuing to participate in collegiate athletics while pursuing a graduate degree.

Injured Player Scholarship: Monies from the Gambling Trust may be payable, on application, to NCAA athletes who were injured, causing the player's scholarship to be revoked or reduced by the academic institution, or who have been removed from the team, but who wish to continue to attend the academic institution.

Cash Dividends: Monies from the Gambling Trust may be payable, on application, to former NCAA athletes who successfully participated in NCAA competition and departed

their academic institution, either prior to or upon graduation, in the form of cash dividends. The amount of the dividend will be computed on a pro-rata basis determined by (1) the number of years the student athlete participated in NCAA competition and (2) the amount of money in the Gambling Trust in a given fiscal year once other priorities of the Gambling Trust are allocated.

Restrictions: If a player is found responsible for violating NCAA rules regarding gambling while a student-athlete, that player will not be eligible for the aforementioned benefits. Nothing in this rule shall be construed as to limit a player from receiving multiple benefits, so long as each benefit is consistent with this rule and applicable law. At no time shall an athlete's benefit eligibility be determined by the sport played, the institution attended, or any metric of success; all NCAA athletes are in good standing are entitled to equal benefits.

The goal of this law is four-fold: (1) raise enough money to be able to bring about significant change at schools and programs that are in need; (2) provide for student athletes with the resources they need and deserve; (3) encourage sportsbooks to operate within the state, and promote collegiate athletics on their platforms; (4) ensure the integrity of competition.

This is accomplished here in various ways. For example, the 1% of profits casinos pay would be could significantly impact and improve the highlighted areas. Because that amount of money would be tax deductible, casinos would still be incentivized to operate within the state. And, because players would have the ability to gain from the increased revenues gambling creates, so long as they are within good standing, they are further disincentivized from engaging in activity that could corrupt competition.

Additionally, this law seeks to address certain gaps and issues with the NCAA's policies towards student compensation and create a vehicle through which student athletes can safely and

access money and programs that they deserve.¹⁸³ The identified benefits, by no means an exhaustive or concrete list, are areas in which athletes could benefit both on and off the field of play, without driving up costs of the university for other students, and without benefits being tied to any competition success metric.

Finally, a similar law could also be enacted by any state, mandating that a certain percentage of state gambling tax revenue shall be utilized in the aforementioned areas, thus eliminating the NCAA as a middleman. However, this is not the ideal solution. First, such a situation may attract high-school athletes to a school in one state over another because of such benefits. The goal of this law is to solve inequities, not create ones. Second, the more states that pass such a law and contribute to a national fund, the more money is combined, interest earned, and distributed. Finally, student athletes and member institutions must comply with NCAA rules, and fundamental change will be most effective when the governing body, the NCAA, implements and oversees those changes.

V. Conclusion

Legalized sports wagering is fundamentally changing the business of professional and collegiate sports in this country. The industry is growing at an incredible speed, and if various precautions are not implemented, the industry could become an unjust one. A modified revenue sharing scheme for professional sports is not intended to bring more wealth to already well-paid players, but rather to properly compensate individuals who are crucial to a market that depends on their performance. Similarly, an overhaul of the NCAA compensation model is not to unjustly enrich student athletes who may be receiving a free or reduced cost education, but rather to fairly compensate student athletes who generate substantial amounts of money for the NCAA and their

¹⁸³ See generally Jon Solomon, *10 ways college athletes can get paid and remain eligible for their sport*, CBS SPORTS (Jun. 21, 2016), <https://www.cbssports.com/college-football/news/10-ways-college-athletes-can-get-paid-and-remain-eligible-for-their-sport/>.

schools. Legalized sports gambling can (1) be safe for users, (2) ensure the integrity of the of game, (3) protect players from temptations or bribery, and (4) benefit the sport, the athletes, and consumers.