

# LEGISLATIVE REFERENCE BUREAU

## States are Placing Bets on Sports Betting: Will it Pay Off?

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In May 2018, the U.S. Supreme Court overturned a law that for twenty-five years had prohibited states from legalizing betting on sporting events.<sup>1</sup> At the time of the ruling, only Nevada offered comprehensive legal sports betting.<sup>2</sup> Since the ruling, over a dozen states have taken action to offer legal sports betting, and a number of other states are currently considering legislation to do so. This paper provides a summary of sports betting and how the issue has evolved over time. It also reviews recent action in other states to legalize sports betting and the policy considerations that lawmakers have faced when addressing the issue. Finally, the paper outlines the barriers to legalizing sports betting in Wisconsin.

## What is sports betting?

Broadly defined, sports betting is the placing of a bet on a sporting event or contest.<sup>3</sup> Many different types of wagers can be placed on a variety of sporting events. One of the most common betting options is the point spread—a bet on a specific team to win a game or event by a certain number of points. Other types of wagers include betting on the total number of points scored, parlay bets, which are bets on the outcomes of multiple games, and bets on specific events occurring within games, such as the number of strike outs by a pitcher.

States that have legalized sports betting differ in terms of what sports they allow bets on and whether they allow bets on amateur teams. Nevada offers the widest selection of sporting events betting options, permitting bets on at least twelve different sports in a number of domestic and international leagues.<sup>4</sup> While excluding most amateur sporting events, Nevada allows betting on some college sports, primarily football and basketball, as well as Olympic events.

A betting operation that takes bets on sporting events and contests is called a “sportsbook.” Sportsbooks are primarily operated by brick-and-mortar gaming operators, such as casinos and race tracks. However, mobile and online sportsbooks, such as those operated by FanDuel and DraftKings, are becoming increasingly popular.

## Background

In 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA), which made it a violation of federal law for a governmental entity to “sponsor, operate,

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1. *Murphy v. National Collegiate Athletic Association*, 584 U.S. \_\_\_\_ (2018).

2. Nevada was the only state to offer betting on a wide variety of single sporting events or games. A few other states were permitted to offer limited sports lotteries or sports pools on specific types of sporting events.

3. See 18 U.S.C. § 1084 (the Wire Act).

4. See *Nev. Rev. Stat. Ch. 464 (Pari-Mutuel Wagering)* and Regulations of the Nevada Gaming Commission and Nevada Gaming Control Board, *Regulation 22 (Race Books and Sports Pools)*.

advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling or wagering scheme based on” competitive sporting events and for a person to “sponsor, operate, advertise, or promote” any of those same gambling schemes “pursuant to the law or compact of a governmental entity.”<sup>5</sup> The law emerged in response to movement by state legislatures in the 1980s to legalize sports betting.<sup>6</sup> Sports leagues were concerned that sports betting would undermine the legitimacy of sporting events and urged Congress to ban the practice. Although gambling is largely regulated at the state level, proponents of the ban argued that sports betting had national implications that justified federal action.<sup>7</sup>

PASPA did not prohibit sports betting activities that were already legal under state law; existing sports betting in Nevada, as well as limited sports lotteries or sports pools in a few other states, continued to be legal.<sup>8</sup> In addition, the law contained a provision that would allow New Jersey to legalize sports betting in Atlantic City if the state acted to do so within one year of PASPA’s passage.<sup>9</sup> New Jersey did not take advantage of this provision, but in 2012 the state enacted a law to allow sports betting at casinos and race tracks.<sup>10</sup> The NCAA, NBA, NFL, NHL, and MLB all sued to enjoin the state from implementing the 2012 law. The law was struck down by the state’s U.S. District Court, and the lower court’s decision was upheld by the Third Circuit Court of Appeals.<sup>11</sup>

After the U.S. Supreme Court declined to hear the case, New Jersey enacted a new law in 2014 that once again legalized sports betting.<sup>12</sup> The NCAA, along with the same professional sports leagues from the 2012 case, sued to enjoin the law on the grounds that it violated PASPA. In response, New Jersey challenged the validity of PASPA based on the constitutional anticommandeering doctrine, which provides that Congress may not command a state legislature to enact state regulation or to enforce federal law. The case reached the Third Circuit Court of Appeals, which upheld the judgment of the U.S. District Court that the 2014 law violated PASPA and that PASPA did not commandeering the state. This time, the U.S. Supreme Court granted the state’s petition for appeal, in June of 2017.

In May of 2018, the Supreme Court ruled that the provision of PASPA prohibiting a

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5. 28 U.S.C. § 3702.

6. Michelle Minton, “Legalizing Sports Betting in the United States: A Playbook for State Liberalization and Regulation,” *OnPoint*, no. 243 (Washington, D.C.: Competitive Enterprise Institute, March 15, 2018): 3.

7. Kate Main, “The Constitutionality of PASPA,” *Saint Louis University Law Journal Online*, October 2017, <https://www.slu.edu/law/law-journal/>.

8. No states were listed by name as being exempt from PASPA. Instead, the law carved out exceptions for states that had authorized and implemented specific types of sports betting during certain time periods. This resulted in confusion and debate over which states’ limited sports betting laws were in fact grandfathered in. 28 U.S.C. § 3704.

9. 28 U.S.C. § 3704 (a) (3).

10. Chapter 231, Pamphlet Laws of 2011 (New Jersey).

11. NCAA v. Governor of the State of New Jersey, 730 F.3d 208 (2013).

12. Chapter 62, Pamphlet Laws of 2014 (New Jersey).

state from licensing or authorizing sports betting violated the anticommandeering doctrine because the provision “unequivocally dictates what a state legislature may and may not do.”<sup>13</sup> The Court then examined whether the unconstitutional provision could be severed from the rest of PASPA and determined that it could not. The *Murphy* case overturned PASPA in its entirety, thereby eliminating the prohibition on sports betting and opening up the issue to regulation by the states.

## Current state of sports betting

In the wake of the *Murphy* decision, sports betting has received much attention from lawmakers, primarily at the state level. Due to the longstanding sports betting ban, an illegal sports betting market has proliferated in the United States. According to one study, 97 percent of sports betting in the U.S. was conducted illegally while PASPA was in place.<sup>14</sup> For comparison’s sake, in the U.K., where sports betting was legalized in 1960, less than 1 percent of sports bets were placed illegally.<sup>15</sup> Estimates of illegal sports betting in the U.S. vary widely, from \$80 billion to as much as \$400 billion a year.<sup>16</sup> By contrast, only \$5 billion in legal sports bets were placed in Nevada in 2018 (when that state still accounted for most of the legal market).<sup>17</sup> Considering how extensive the illegal market is, states have a strong incentive to legalize and regulate sports betting, which state lawmakers view as an opportunity to raise additional revenue.

Since the *Murphy* decision, several states have moved quickly to legalize or implement sports betting. At the time of this writing, sports betting is legal and operational in eight states<sup>18</sup> and legal but not yet operational in seven others.<sup>19</sup> As mentioned, Nevada was the only state allowed to offer full sports betting prior to *Murphy*. However, Connecticut, Delaware, Mississippi, New York, Pennsylvania, and West Virginia all had laws in place that would legalize limited or full-scale sports betting upon the overturn of PASPA.<sup>20</sup> All of these states, except New York and Connecticut, began offering sports betting in 2018.<sup>21</sup>

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13. *Murphy*, 584 U.S. \_\_\_ (2018), slip op. at 18.

14. Minton, “Legalizing Sports Betting in the United States,” 12.

15. Minton, “Legalizing Sports Betting in the United States,” 12.

16. Ed Smith, “Placing Odds on How States will Handle Sports Betting,” *The NCSL Blog*, July 31, 2018, <http://www.ncsl.org/blog.aspx>.

17. David G. Schwartz, *Nevada Sports Betting Totals: 1984–2018* (Las Vegas: Center for Gaming Research, University Libraries, University of Nevada Las Vegas, 2019).

18. Delaware, Mississippi, Nevada, New Jersey, New Mexico, Pennsylvania, Rhode Island, and West Virginia.

19. Arkansas, Connecticut, Indiana, Iowa, Montana, New York, and Tennessee.

20. Public Act 17-209 (Connecticut); Chapter 28, 77 Delaware Laws (2009–2010); 2017 House Bill 967 (Mississippi); Chapter 174, Laws of New York, 2013; 2017 Act 42 (Pennsylvania); Chapter 101, Acts, Regular Session, 2018 (West Virginia).

21. Although New York enacted a law in 2013 allowing sports betting at four commercial casinos, the New York State Gaming Commission has yet to finalize corresponding regulations, and sports betting has not yet been offered. Likewise, in July 2017, the Connecticut legislature approved a measure that tasked state regulators with developing regulations for sports betting if the federal ban was lifted, but regulators have yet to do so, largely due to exclusivity concerns among tribal casinos.

Rhode Island and New Jersey enacted laws legalizing sports betting within months of the *Murphy* decision and began offering sports betting shortly after.<sup>22</sup> In November of 2018, Arkansas legalized sports betting in its constitution via a statewide referendum; however, sports betting is not yet operational in the state because regulations are still being finalized.<sup>23</sup> The state of New Mexico did not itself legalize sports betting but, in October of 2018, the Santa Ana Pueblo began offering sports betting at a casino it operates under its tribal gaming compact with the state. The compact allows for “any or all forms of Class III gaming,” which includes sports betting.<sup>24</sup> So far in 2019, four states, Montana, Iowa, Indiana, and Tennessee, have passed legislation to legalize sports betting.<sup>25</sup> All four states are still in the process of implementing their sports betting programs. The table below summarizes the status and scope of sports betting in states where it has been legalized.

Sports betting continues to be a major legislative topic in 2019, with over half of the states currently considering bills to legalize or expand sports betting, including Illinois, Michigan, and Minnesota.<sup>26</sup> Up-to-date information on the status of sports betting in each state, as well as links to the legislation being considered on the topic, can be found on online sports betting legislative trackers maintained by [ESPN](#) and [SB Nation](#).

#### Status and scope of legalized sports betting

State	Method of legalization	Date implemented	Online betting allowed?	Tax rate/revenue share	Regulatory body
Arkansas	<a href="#">Issue no. 4</a> , a constitutional amendment approved on November 6, 2018	Not yet operational; regulations being finalized.	No	13% tax on gaming revenue under \$150 million; 20% tax on revenue over \$150 million.	Arkansas Racing Commission
Connecticut	<a href="#">Public Act 17-209</a> (2017)	Not yet operational; the Department of Consumer Protection has not developed regulations.	Unclear until regulations are adopted or a new law is enacted.	Unclear until regulations are adopted or a new law is enacted.	Connecticut Department of Consumer Protection

22. Chapter 47, Article 4, 2018 Public Laws (Rhode Island); Chapter 33, Pamphlet Laws of 2018 (New Jersey). Although New Jersey’s 2014 sports betting law went into effect following the *Murphy* decision, that law was very minimal and did not include any type of state involvement or oversight. The 2018 law both authorized and regulated sports betting.

23. Listed as [Issue no. 4](#) on the November 6, 2018, ballot, the constitutional amendment was approved by a vote of 469,226 to 398,104.

24. Section 3 (A) in the [2015 general compact](#). “Tribal Compacts,” website of the New Mexico Gaming Control Board, <https://www.nmgcb.org>.

25. [2019 House Bill 725](#) (Montana); [2019 Senate File 617](#) (Iowa); [2019 House Bill 1015](#) (Indiana); and [2019 House Bill 1](#) (Tennessee).

26. “The State of Sports Betting,” SB Nation, <https://www.sbnation.com/a/sports-betting-gambling-state-legislation-tracker>; [2019 House Bill 3308](#) (Illinois); [2019 House Bill 4311](#) (Michigan); [2019 House File 1278](#) (Minnesota).

## Status and scope of legalized sports betting, continued

State	Method of legalization	Date implemented	Online betting allowed?	Tax rate/revenue share	Regulatory body
Delaware	<a href="#">Chapter 28, 77 Delaware Laws (2009–2010)</a>	June 2018	Yes; not yet operational.	State receives 43.75% of revenue. <sup>27</sup>	Delaware Lottery
Indiana	<a href="#">2019 House Bill 1015</a>	Not yet operational.	Yes; not yet operational.	9.25% tax	Indiana Gaming Commission
Iowa	<a href="#">2019 Senate File 617</a>	Not yet operational.	Yes; not yet operational.	6.75% tax	Iowa Racing and Gaming Commission
Mississippi	<a href="#">2017 House Bill 967</a>	August 2018	Yes, but bets must be placed on casino property.	12% tax	Mississippi Gaming Commission
Montana	<a href="#">2019 House Bill 725</a>	Not yet operational.	Yes; not yet operational.	Unclear	Montana Lottery
New Jersey	<a href="#">Chapter 33, Pamphlet Laws of 2018</a>	June 2018	Yes	8.5% tax for in-person bets; 13% tax for online bets.	New Jersey Division of Gaming Enforcement
New Mexico	No legislation; via state gaming compact	October 2018	No	Unclear	New Mexico Gaming Control Board
New York	<a href="#">Chapter 174, Laws of New York, 2013</a>	Not yet operational; the Gaming Commission has not finalized regulations implementing the law.	Unclear until the Gaming Commission finalizes regulations.	Unclear until the Gaming Commission finalizes regulations.	New York State Gaming Commission
Nevada	1949 law	1949	Yes	6.75% tax	Nevada Gaming Commission
Pennsylvania	<a href="#">2017 Act 42</a>	November 2018	Yes; not yet operational.	36% tax	Pennsylvania Gaming Control Board
Rhode Island	<a href="#">Chapter 47, Article 4, 2018 Public Laws</a>	November 2018	Yes, since the passage of an additional law ( <a href="#">Chapter 7, 2019 Public Laws</a> ).	State receives 51% of revenue.	Rhode Island Lottery

27. Under Delaware's law, the state receives 50 percent of the revenue that remains after 12.5 percent of the total revenue is paid to the sports betting vendors.

## Status and scope of legalized sports betting, continued

State	Method of legalization	Date implemented	Online betting allowed?	Tax rate/revenue share	Regulatory body
Tennessee	<a href="#">2019 House Bill 1</a>	Not yet operational.	Yes; online and mobile only; not yet operational.	20% tax	Tennessee Lottery Corporation Sports Wagering Advisory Council
West Virginia	<a href="#">Chapter 101, Acts, Regular Session, 2018</a>	August 2018	Yes; not yet operational.	10% tax	West Virginia Lottery Commission

## Sports leagues' position on sports betting

While sports leagues were previously opposed to legalized sports betting, several team owners and commissioners have come out in favor of legalization over the past few years, often with the caveat that laws meet their demands. A pivotal moment occurred in 2014 when Adam Silver, the commissioner of the NBA, wrote an op-ed in favor of legalizing sports betting, arguing that legalization would allow for regulation and scrutiny over a thriving market.<sup>28</sup> League commissioners and owners see opportunity and benefits with the legalization of sports betting but also have concerns that legalization will compromise the integrity of sports if safeguards are not put in place to prevent bribery or corruption.<sup>29</sup>

Sports leagues have voiced their preference for federal legislation on the matter so that regulations would be uniform across the country. At the same time, sports leagues have made a concerted effort to lobby state legislatures on this issue. The NBA, for example, has created a list of five elements that state sport betting laws should include to gain its support: (1) a 1 percent integrity fee on the total amount bet (or “handle”), which would be paid to the leagues; (2) consumer protection provisions; (3) availability of mobile and online betting; (4) the ability for leagues to restrict wagering; and (5) measures to detect and prevent improper conduct.<sup>30</sup> So far, no states have adopted all of these elements.

## Policy considerations

As state lawmakers move to legalize and regulate sports betting, they must consider a number of policy factors. These factors are discussed in turn below.

28. Adam Silver, “[Legalize and Regulate Sports Betting](#),” *The New York Times* online, November 13, 2014, <https://www.nytimes.com>.

29. Smith, “Placing Odds on How States will Handle Sports Betting.”

30. [Statement of Dan Spillane, Senior Vice President and Assistant General Counsel, National Basketball Association, Public Hearing to Discuss the Potential of Sports Betting in New York State before the New York State Senate Standing Committee on Racing, Gaming and Wagering](#), January 24, 2018.



## Federal Law

While the federal ban on sports betting was overturned in *Murphy*, there are federal laws in place that directly affect state sports betting laws. The Interstate Wire Act of 1961, 18 U.S. Code § 1084, prohibits interstate betting or using wire communications to place “bets or wagers on any sporting event or contest.”<sup>31</sup> It states:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

As a result of the law, bets cannot be placed across state lines, which restricts online and mobile betting to within a state’s borders.<sup>32</sup>

In addition to the Wire Act, there is a federal tax of 0.25 percent on the sports betting handle.<sup>33</sup> This tax reduces the amount of money that sportsbook operators can keep as profit or use to pay any taxes that states might impose. Because of the federal tax, the maximum amount of taxes that states can impose, if they do not want to discourage sportsbook operators from operating (or from operating legally), is lower than it would otherwise be.

Since PASPA was overturned, federal legislation has been introduced to regulate sports betting. In December of 2018, Senators Chuck Schumer (D-NY) and Orrin Hatch (R-UT) introduced the Sports Wagering Market Integrity Act of 2018, which would have established minimum regulatory standards for sports betting that states would have to abide by.<sup>34</sup> The NCAA and professional sports leagues, including the NFL, PGA, and MLB, voiced their support for the bill.<sup>35</sup> Among other things, the bill would have banned betting on amateur sports, except college and Olympics sports, mandated the use of official league data for sportsbooks, and created a National Sports Wagering Clearinghouse to maintain and share data on sports wagering and reports on suspicious transactions. The American Gaming Association came out in opposition to the bill, stating its preference for state regulation.<sup>36</sup> The bill has not been reintroduced in the 116th Congress.

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31. Paul Connelly and Justin Stempeck, *White Paper on Sports Betting* (Boston: Massachusetts Gaming Commission, 2018), 13–14.

32. Connelly and Stempeck, *White Paper*, 14–15.

33. 26 U.S.C. § 4401; “Sports Wagering,” website of the Internal Revenue Service, accessed April 17, 2019, <https://www.irs.gov/businesses/small-businesses-self-employed/sports-wagering>. The tax was originally enacted in the Revenue Act of 1951 as a 10 percent tax on the entire sports bet to act as a deterrent to gambling. The tax was reduced to 2 percent in 1974 and reduced again in 1982 to its current rate.

34. Sports Wagering Market Integrity Act of 2018, S.3793, 115th Cong. (2018). ESPN News Services, “U.S. Senators Charles Schumer, Orrin Hatch Introduce Federal Sports Gambling Bill,” ESPN online, December 19, 2018, <http://www.espn.com>.

35. David Purdum and Ryan Rodenberg, “What You Need to Know About the New Federal Sports Betting Bill,” ESPN online, December 20, 2018, <http://www.espn.com>.

36. ESPN News Services, “U.S. Senators Charles Schumer, Orrin Hatch Introduce Federal Sports Gambling Bill”

## Revenue and taxation

The ability to tax legalized sports betting to increase state revenue is a primary interest of states looking to legalize sports betting. Yet, while there may be a lot of money associated with sports betting, it is a relatively low-margin industry compared to other gambling activities like table games and slot machines.<sup>37</sup> Sportsbooks operators' revenue is typically around just 5 percent of the betting handle.<sup>38</sup> In Nevada, out of a total of \$5 billion in sports bets placed in 2018, sportsbooks operators took in revenue of \$300 million.<sup>39</sup> In 2017, the total gaming revenue for gaming operators in Nevada was \$11.4 billion. Of this amount, sports betting comprised \$248 million—just 1.9 percent of total gambling revenue.<sup>40</sup> A study by Oxford Economics estimates that if legal sports betting existed in all or most states, it would generate revenue ranging from approximately \$4.2 billion to \$19.6 billion annually, depending on the accessibility of sports betting products.<sup>41</sup>

The amount of tax revenue that states are expected to generate from sports betting varies widely, depending on the accessibility of sports betting products, the quality of the products, and tax rates. Further, according to the Massachusetts Gaming Commission, the amount of revenue a state brings in is largely dependent on how successful the state's policies are at migrating sports betting activity from the illegal market to the legal market.<sup>42</sup> The Oxford Economics study estimates that total state tax revenue from legal sports betting (if legal sports betting existed in all or most states) would amount to between \$359 million and \$2.5 billion annually.<sup>43</sup>

Nevada, which has a mature sports betting market and a history of offering sports betting, generated roughly \$20 million in tax revenue from a tax rate of 6.75 percent on \$300 million of sports betting revenue in 2018.<sup>44</sup> For the majority of states that have implemented sports betting since the *Murphy* decision, state revenue has fallen far below projections. Mississippi and Pennsylvania have brought in approximately half of what they expected, while Rhode Island and West Virginia have brought in even less.<sup>45</sup> New Jersey and Delaware have had better success, with both states so far meeting their revenue projections.<sup>46</sup> In the first ten months after sports betting was implemented in New

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37. Connelly and Stempeck, *White Paper*, 22.

38. Connelly and Stempeck, *White Paper*, 22.

39. Schwartz, *Nevada Sports Betting Totals*.

40. A.G. Burnett, "Written Testimony of A.G. Burnett" (written testimony for the session, "Post-PASPA: An Examination of Sports Betting in the States," 2018 NCSL Capitol Forum, December 6, 2018).

41. Adam Sacks and Aran Ryan, *Economic Impact of Legalized Sports Betting* (Wayne, Pennsylvania: Oxford Economics, May 2017), 19.

42. Connelly and Stempeck, *White Paper*, 25.

43. Sacks and Ryan, *Economic Impact of Legalized Sports Betting*, 19.

44. Schwartz, *Nevada Sports Betting Totals*.

45. Timothy Williams, "A Small Town Bet on Sports Gambling. It's Still Waiting," *The New York Times* online, April 16, 2019, <https://www.nytimes.com>.

46. Jennifer McDermott and Geoff Mulvihill, "Most States' Sports Betting Revenue Misses Estimates," Associated Press online, April 2, 2019, <https://apnews.com>.

Jersey, over \$2 billion was wagered on sporting events, the majority of which came from online betting, netting the state over \$18.16 million in tax revenue.<sup>47</sup>

States have taken two approaches to generating revenue: taxing the revenue of sportsbooks operators and revenue sharing.<sup>48</sup> The majority of states have gone the taxation route. Tax rates differ drastically, from a low of 6.75 percent in Nevada to a high of 36 percent in Pennsylvania.<sup>49</sup> Given the low margin for sports betting, industry leaders caution that too high of a tax rate would discourage legal operators and put them at a disadvantage to illegal operators.<sup>50</sup> A study by the Competitive Enterprise Institute proposes that the ideal tax rate for maximizing state revenue is between 10 and 15 percent.<sup>51</sup>

Rhode Island and Delaware utilize a revenue sharing system, in which the state government partners with gambling facilities and vendors to offer sports betting. In a revenue sharing model, revenue from sports betting is split between the state and sports betting operators, as opposed to a taxation model where the sports betting operator collects all of the revenue, which the state then taxes. In Rhode Island, revenue is split between three different entities: the state, the sports betting vendor, and the host facility (casino). The state receives the highest portion of the revenue at 51 percent, followed by the vendor at 32 percent, with the casino taking in the lowest portion at 17 percent.<sup>52</sup> Delaware has a more complicated model, in which sports betting operators receive 12.5 percent of the total revenue, and the remaining amount is split three ways: 50 percent to the state, 40 percent to the casinos that host sports bets, and 10 percent to horse racing purse accounts.<sup>53</sup>

## Integrity fees

One area of interest to sports leagues are so-called “integrity fees” or “royalty fees,” which are payments made from the sportsbook operators directly to the sports leagues. Integrity fees as currently envisioned are a percentage of the betting handle. The MLB and NBA have been the biggest proponents of integrity fees and have previously proposed a

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47. McDermott and Mulvihill, “Most States’ Sports Betting Revenue Misses Estimates.” The tax revenue estimate provided above was calculated using the year-to-date tax on sports wagering reported in the March 2019 and December 2018 Monthly Sports Wagering Revenue Reports provided by the New Jersey Division of Gaming Enforcement. New Jersey taxes sports betting at different rates depending on whether bets are taken in person or over the Internet. Revenue from in-person bets is taxed at 8.5 percent, while revenue from Internet bets is taxed at 13 percent. New Jersey has taken in \$4.33 million from in-person bets and \$13.83 million from Internet bets as of March 2019.

48. Legislation has been proposed that considers a third approach: taxing the entire handle. See, for example, West Virginia’s 2017 House Bill 2751, which proposed a 2 percent tax on the betting handle. However, this approach has not been enacted anywhere.

49. Jackson Brainerd, “Sports Betting Legalization Landscape” (PowerPoint presentation, 2018 NCSL Fiscal Analysts Seminar, October 12, 2018).

50. Minton, “Legalizing Sports Betting,” 13.

51. Minton, “Legalizing Sports Betting,” 14.

52. 42 R.I. Gen. Laws § 42-61.2-5.

53. Eric Ramsey, “Delaware Sports Betting Numbers for First 20 Days: \$1 Million Revenue, \$7 Million Handle,” Legal Sports Report, July 5, 2018, <https://www.legalsportsreport.com>; “Distribution of 2019 Sportsbooks Net Proceeds (Unaudited),” website of the Delaware State Lottery, <https://www.delottery.com/Sports-Lottery/Sportsbooks/Monthly-Distribution/2019>.

fee of 1 percent.<sup>54</sup> In a statement advocating for a 1 percent fee, the NBA stated that the fee is necessary to compensate the leagues for additional costs resulting from compliance and enforcement as well as to account for the fact that the sports betting industry is dependent on the leagues' existence.<sup>55</sup> While seeming like a small amount, a 1 percent fee on the betting handle equates to approximately 20 percent of the sportsbook operator's revenue.<sup>56</sup> As such, policymakers and leaders in the gambling industry have been largely opposed to enacting integrity fees. The gambling industry is concerned that integrity fees will eat into their profits and raise costs, which would make it harder to compete against illegal operators who are not subject to the payments. Lawmakers are apprehensive about imposing a fee that reduces revenue to the state and increases revenue for sports leagues.<sup>57</sup> Currently, no states have instituted integrity fees and very few proposed bills have included them.<sup>58</sup>

### **Online and mobile betting**

Online sports betting, and specifically mobile betting, has become increasingly popular over the years due to the convenience it offers and its potential to reach more people and bring in more revenue. Currently, four states provide options for placing bets online, either through websites or mobile apps, with several more states planning on providing an online option. Tennessee plans to offer sports betting entirely online—the only state to do so.<sup>59</sup> States vary in how and where they offer online betting. For example, in New Jersey an individual may place an online bet anywhere in the state, whereas in Mississippi an individual must be on the grounds of an authorized gambling facility.<sup>60</sup>

Online betting presents a challenge that is absent from in-person betting: ensuring that the person placing the bet is legally allowed to gamble in the given jurisdiction. The two primary factors of concern are age and location. Many states require a person to register in person at a gambling facility to verify their identification and prove that they meet the age requirement to gamble.<sup>61</sup> The exception to this is New Jersey, which allows mobile users to register remotely.<sup>62</sup> The location of the bet placer is also a concern since

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54. Chris Crouse, "NFL, MLB, NBA and NHL Players Unions Join Legal Sports Gambling Debate," CNBC online, April 12, 2018, <https://www.cnbc.com>; Statement of Dan Spillane, *Public Hearing to Discuss the Potential of Sports Betting in New York State*.

55. Statement of Dan Spillane, *Public Hearing to Discuss the Potential of Sports Betting in New York State*.

56. Connelly and Stempeck, *White Paper*, 17.

57. Smith, "Placing Odds on How States will Handle Sports Betting."

58. New York and Indiana both considered bills that would have charged an integrity fee. New York's 2018 A11144 proposed a "royalty fee of one-fifth of one percent." Indiana's 2018 House Bill 1325 proposed an "integrity fee of one percent."

59. Blake Toppmeyer, "What Legal Online Sports Betting in Tennessee Means for College and Pro Teams," *Knoxville News Sentinel* online, May 12, 2019, <https://www.knoxnews.com>.

60. Bruce Schoenfeld, "Will Sports Betting Transform How Games Are Watched, and Even Played?" *The New York Times* online, January 29, 2019, <https://www.nytimes.com>.

61. Connelly and Stempeck, *White Paper*, 22–23.

62. "Sports Wagering Questions," website of the Division of Gaming Enforcement, New Jersey Office of the Attorney Gen-

the federal Wire Act prevents betting from occurring across state lines. This means that a person must be physically present in a state in order to gamble in that state. States with mobile betting utilize geolocation services to verify the location of the bet placer. While there are concerns about the accuracy of geolocation technology, it has been shown to be highly accurate. David Rebeck, the director of New Jersey's Division of Gaming Enforcement, reported in 2015 that the state had a 98 percent success rate in correctly verifying the location of individuals gambling online.<sup>63</sup>

Despite the challenges posed by online betting, it remains a highly attractive and lucrative option. Online betting is convenient and allows for instantaneous bets to be made on constantly evolving betting options. It also enables sportsbook operators to reach more people, thus increasing their revenue. Revenue estimates from states that allow widespread mobile betting have shown that mobile betting tends to account for a majority of the bets placed. In Nevada, several sportsbook operators have reported that bets placed on mobile apps account for the majority of the handle—between 50 and 75 percent.<sup>64</sup> From June 2018 through March 2019, New Jersey sports betting operators have taken in approximately \$157.2 million in revenue from sports betting; over half of this amount, \$106.27 million, came from Internet betting.<sup>65</sup>

Additionally, sports betting advocates argue that it is essential to provide an online betting platform to ensure the success of the legal market. Since the illegal sports betting market is conducted almost entirely on the Internet, online sportsbooks are seen as essential for migrating individuals from the illegal market to the legal market.<sup>66</sup>

### **League data requirement**

Another policy issue being considered by legislators is whether to require sportsbook operators to purchase official data provided by the sports leagues to determine betting outcomes. Sports leagues have advocated for the use of official league data to ensure accuracy, while the gambling industry opposes restricting the data that can be used. So far, only one state, Tennessee, has made it a requirement for sportsbook operators to buy official league data. The legislation passed by Tennessee requires sportsbook operators to purchase the data based on “commercially reasonable terms.”<sup>67</sup> Previously introduced federal legislation also included this provision but, as noted, that legislation failed to

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eral, accessed April 17, 2019, [https://www.nj.gov/oag/ge/sportsbetting\\_faqs.html](https://www.nj.gov/oag/ge/sportsbetting_faqs.html).

63. David Rebeck, *RE: New Jersey Internet Gaming One Year Anniversary—Achievements to Date and Goals for the Future* (Atlantic City: New Jersey Division of Gaming Enforcement, January 2, 2015).

64. “Nevada Sports Betting,” Legal Sports Report, March 10, 2019, <https://www.legalsportsreport.com>.

65. These estimates were calculated using the year-to-date sports wagering gross revenue amounts reported in the March 2019 and December 2018 Monthly Sports Wagering Revenue Reports provided by the New Jersey Division of Gaming Enforcement.

66. Connelly and Stempeck, *White Paper*, 25.

67. Senate Amendment 4 to 2019 House Bill 1 (Tennessee).

pass.<sup>68</sup> Most states have chosen not to legislate on this issue, leaving sportsbook operators to decide whether to use league data. So far, MGM Resorts has made agreements with both the NBA and NHL to use their data for sports bets.<sup>69</sup>

## Sports betting in Wisconsin

While a number of states are rushing to legalize sports betting, enticed by the additional revenue it promises, some states face significant barriers to legalizing or implementing sports betting. Wisconsin, like several other states, would need to amend its state constitution in order to legalize sports betting. In addition, twenty-eight states, including Wisconsin, have gaming compacts in place with American Indian tribes that dictate the gaming terms in those states.<sup>70</sup> In many cases, those compacts would need to be amended to allow for sports betting.

If Wisconsin lawmakers decided to legalize sports betting statewide, the state's constitution and statutes would need to be amended, which in turn could open the tribal gaming compacts up for renegotiation. Alternatively, absent a change in the state constitution or statutes, if a tribe wanted to offer sports betting at its gambling facilities, the tribe would have to renegotiate its compact with the state.

### Wisconsin Constitution

Sports betting is prohibited by the Wisconsin Constitution. Article IV, Section 24 forbids gambling in any form, with only five exceptions, provided by a series of constitutional amendments, ratified between 1965 and 1987, which authorized specific forms of betting.<sup>71</sup> These exceptions, with various restrictions, include: promotional contests, charitable bingo games and raffles, a state-operated lottery, and privately operated pari-mutuel on-track betting. In 1993, voters ratified a constitutional amendment clarifying that any additional forms of gambling are prohibited and barring the state from conducting prohibited forms of gambling as part of the state lottery.<sup>72</sup>

In order to legalize sports betting statewide, the constitution would need to be amended to add an additional exception to the strict gambling ban outlined in Article IV, Section 24.

### Wisconsin Statutes

State law criminalizes gambling, including sports betting, that is prohibited by the constitution. Under Chapter 945 of the Wisconsin Statutes, if a person makes a bet, enters or

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68. *Sports Wagering Market Integrity Act of 2018*, S.3793, 115th Cong. (2018).

69. Schoenfeld, "Will Sports Betting Transform How Games Are Watched, and Even Played?"

70. Brainerd, "Sports Betting Legalization Landscape."

71. *Wis. Const. art. IV, § 24*.

72. In the years prior, there had been significant debate over what forms of gambling could fall within the term "lottery."

remains in a gambling place with the intent to gamble, or conducts a lottery (that is not the state lottery), that person is guilty of a Class B misdemeanor.<sup>73</sup> If a person engages in commercial gambling, that person is guilty of a Class I felony.<sup>74</sup>

In order to legalize sports betting in Wisconsin, the legislature would need to amend the definition of “bet” under section 945.01 (1) of the Wisconsin Statutes to exclude sports betting from the general prohibitions on gambling. However, simply removing the criminal penalties for sports betting would not legalize the practice in Wisconsin, because sports betting is still prohibited by the state constitution, as discussed above.

If the legislature does pursue the option of legalizing sports betting, it may also wish to enact regulations for the licensing and operation of sports betting similar to regulations currently outlined in Chapter 562 of the Wisconsin Statutes for racing and on-track pari-mutuel wagering.<sup>75</sup>

### **Wisconsin tribal compacts**

Authorizing sports betting in Wisconsin could have a number of implications for the state’s tribal gaming compacts and the associated annual payments from the tribes to the state. Likewise, tribal gaming compacts may be impacted if any of the tribes wanted to offer sports betting at one of its casinos.

Wisconsin has gaming compacts with eleven tribes in the state, as required by the federal Indian Gaming Regulatory Act (IGRA) of 1988.<sup>76</sup> Under IGRA, states and tribes must negotiate agreements to allow the tribes to operate any games that are either specifically legal or not criminally prohibited in the state. Specifically, the compacts are intended to regulate high-stakes, casino-style games, known as Class III games.<sup>77</sup> Note that sports betting is considered Class III gaming by IGRA.<sup>78</sup>

Several Class III games currently offered at tribal casinos in Wisconsin, such as video gaming machines, blackjack, and poker, are not specifically authorized by the state constitution and are in some cases criminally prohibited by the statutes. However, tribes are authorized to offer these prohibited games under the current compacts because the

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73. [Wis. Stat. § 945.02](#).

74. [Wis. Stat. § 945.03](#).

75. See also Wis. Stat. ch. 563, regulating bingo and raffles, and Wis. Stat. ch. 565, regulating the state lottery.

76. All of the state tribal compacts and amendments can be found on the website of the Wisconsin Department of Administration at: <https://doa.wi.gov/Pages/AboutDOA/TribalCompactsAndAmendments.aspx>.

77. In addition to authorizing specific types of gaming prohibited in nontribal lands, the eleven compacts generally contain additional provisions requiring the tribes to: (1) adhere to certain procedures and requirements for operating Class III games (i.e. age requirements, intoxication bans, maximum payouts and wagers etc.); (2) utilize internal control standards; (3) perform annual financial audits of casino operations; (4) report certain machine accounting data to the state; (5) agree to various employee restrictions; (6) withhold Wisconsin income tax from prize winnings; (7) allow the Department of Administration and the Department of Justice to monitor Class III gaming to ensure compliance; and (8) provide money to the state to reimburse for the cost of regulation of tribal gaming. The compacts also include dispute resolution procedures. [Chapter 569](#) of the Wisconsin Statutes governs state activities with regard to the compacts and tribal gaming regulation

78. [25 C.F.R § 502.4 \(c\)](#).

original compacts were agreed to prior to the passage of legislation that expressly prohibited such games as well as prior to the aforementioned 1993 constitutional amendment. In *Dairyland Greyhound Park v. Doyle*, the Wisconsin Supreme Court held that the 1993 constitutional amendment did not invalidate the original compacts because the tribes' right of renewal for the compacts is constitutionally protected by the contract clauses of the Wisconsin and U.S. constitutions.<sup>79</sup> Further, the court held that future amendments to the original compacts that further expand the scope of gaming permitted are also constitutionally protected.<sup>80</sup>

As a condition of compact amendments made in 1998–99 and 2003, each tribe makes annual payments to the state based on its revenue from gaming. Some of these payments began as lump-sum payments, but since the 2006–07 fiscal year, payments for all tribes have been based on a percentage of net revenue. Although the percentages vary by tribe, higher percentages apply to tribes that run more lucrative casinos. Most of the compact amendments include MOUs stipulating the intended uses of these payments, which generally relate to: economic development initiatives to benefit the tribes and the regions around casinos, the promotion of state tourism, and financial support for county programs where tribes are located. The 2003 compact amendments significantly increased these payment amounts in exchange for expanded authorization of certain types of Class III gaming. For fiscal year 2017–18, these payments totaled just over \$53 million.<sup>81</sup>

The annual payments based on gaming revenue are regarded as a reimbursement for the exclusive ability to conduct types of gaming prohibited on nontribal lands in the state. To reflect this, the compact amendments include clauses specifically stating that if the Wisconsin Constitution and state statutes are changed to allow the state or other persons to conduct additional types of Class III gaming, then the tribes are relieved of their obligations to make the payments.<sup>82</sup> These clauses would be triggered if the state constitution or statutes were changed to allow sports betting. Tribes could also seek to renegotiate any other provision of the compacts.

The compacts also provide that a tribe is not authorized to operate any new types of Class III gaming unless its compact with the state is amended. Thus, a tribe would need to renegotiate its compact if it wanted to offer sports betting at one of its casinos.<sup>83</sup>

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79. *Dairyland Greyhound Park v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408.

80. For additional information about the history of Wisconsin's tribal gaming compacts, see: Daniel Ritsche, "[The Evolution of Legalized Gambling in Wisconsin](#)," *Informational Bulletin* 12-2 (Madison: Wisconsin Legislative Reference Bureau, November 2012). See also: Angela Miller, "[Tribal Gaming in Wisconsin](#)," *Informational Paper* 86, (Madison: Legislative Fiscal Bureau, January 2019).

81. Miller, "Tribal Gaming in Wisconsin," 25.

82. Separate from the issue of compact renegotiations, note that California, Florida and Texas all dropped plans to legalize sports betting, partly due to worries that undercutting tribal casinos would ultimately result in a decrease in tribal compact revenue. Williams, "A Small Town Bet on Sports Gambling."

83. Doug Schneider, "[Oneida Tribe unsure if it will Pursue Sports Betting following Supreme Court Ruling](#)," *Green Bay Press Gazette* online, May 15, 2018, <https://www.greenbaypressgazette.com>; Steven Walters, "[Wisconsin Tribes Consider Sports Betting](#)," *Urban Milwaukee*, June 11, 2018, <https://urbanmilwaukee.com>.



Further, under the compacts, if one tribe's compact with the state is amended to allow a new type of Class III gaming, all the other tribes' compacts would also be open for renegotiation. In addition, some of the compacts specifically require the state and the tribe to negotiate a reduction in the tribe's annual payments to the state if the tribe's revenue from gaming is substantially reduced because another tribe's compact was amended to allow new types of Class III gaming.<sup>84</sup>

The process for negotiating the compacts is primarily governed by IGRA. Section 14.035 of the Wisconsin Statutes authorizes the governor to enter into gaming compacts on behalf of the state. There is no statutory provision for legislative involvement in compact negotiations. However, a 2004 ruling in *Panzer v. Doyle* sets some limitations on the governor's power in negotiating the compacts.<sup>85</sup> All of the compacts have their own time-lines, expiration dates, and requirements for amendment. All compact amendments between the governor and the tribes must be approved by the U.S. secretary of the interior.

## Conclusion

With the *Murphy* ruling opening up the opportunity, states have eagerly pursued the legalization of sports betting. In just over seven months following the ruling, sportsbooks were operating legally in seven states. Many more states are considering legalization currently. These states will need to consider a number of factors when deciding how best to implement and regulate sports betting. Some states have spelled out the specifics via legislation, while others have authorized regulatory bodies to flesh out the details. To ensure the success of a legal sports betting market, states will need to carefully craft legislation that makes the market attractive for legal sportsbooks operators while also ensuring that sports betting is well regulated to prevent corruption and crime. At the same time, questions remain about revenue prospects and best practices. ■

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84. Miller, "Tribal Gaming in Wisconsin," 20; Brendan Cullerton, "Special Report: Could Sports Betting Become Legal in Wisconsin?" WDJT-Milwaukee online, May 7, 2019, <https://www.cbs58.com>.

85. In *Panzer*, legislative leaders filed a suit against Governor Doyle after he negotiated a compact with the Potawatomi that had an indefinite term and also waived the state's sovereign immunity. *Panzer v. Doyle*, 2004 WI 52, 271 Wis. 2d 295, 680 N.W.2d 666.