

WINNING THE RIGHT WAY – WHY NORTH DAKOTA SHOULD HAVE A VESTED INTEREST IN LEGALIZING SPORTS GAMBLING

ABSTRACT

In 1992, Congress passed the Professional and Amateur Sports Protection Act (“PASPA”) to effectively outlaw sports gambling in the United States outside of Nevada. In 2018, the United States Supreme Court struck down PASPA in *Murphy v. Nat’l Collegiate Athletic Ass’n* based on the anti-commandeering doctrine of the 10th Amendment. After, many states rushed to legalize sports gambling as a means of both generating additional tax revenue for the state and regulating a prevalent black market. For states with significant tribal gaming presences, the legislature’s attempts to legalize sports gambling can trigger difficult political, social and economic implications based on established gaming compacts with the tribes. In North Dakota, tribal casinos opened their own sportsbooks on site due to interpretations of the gaming compacts allowing for sportsbooks if not in violation of PASPA. Obviously, PASPA does not restrict the tribes’ ability to operate sportsbooks after the Supreme Court struck PASPA down. Yet, the North Dakota legislature has made some unsuccessful attempts at legalizing sports gambling throughout the rest of the state. This note analyzes the approaches other states have taken to their sports gambling laws. For example, Wyoming allows mobile betting throughout the state with no physical sportsbooks. In contrast, South Dakota restricts sports gambling to physical sportsbooks at established casinos in Deadwood. As somewhat of an intermediate approach, Michigan granted licenses to its existing casinos to partner with sports gambling operators, such as DraftKings, to allow for statewide mobile betting. This note will advocate for North Dakota to follow Michigan’s example and provide licenses to the existing tribal casinos while allowing for statewide mobile betting. This conclusion will be reached based on analyzing the difference of betting volume between statewide betting and physical presence only betting. North Dakota must legalize statewide mobile sports betting to best protect citizens by regulating a large black market and maximize tax revenues recovered.

I. BACKGROUND	247
A. REGULATORY HISTORY	247
B. PASPA & <i>MURPHY V. NAT'L COLLEGIATE ATHLETIC ASS'N</i>	247
1. <i>State Responses</i>	249
C. FEDERAL LAW & TRIBAL GAMING COMPACTS	250
II. HOW SPORTSBOOKS WORK	251
A. PROCESS	251
B. PHYSICAL PRESENCE VS. MOBILE.....	252
C. LOCATION OF MOBILE BETS	253
D. PROFIT MARGIN COMPARISON	253
III. CURRENT SITUATION IN NORTH DAKOTA	254
A. NORTH DAKOTA GAMING COMPACTS	254
B. TRIBAL SPORTSBOOKS IN NORTH DAKOTA	255
C. PROPOSED LEGISLATION.....	256
IV. DIFFERENT STATE APPROACHES.....	257
A. PHYSICAL PRESENCE REQUIRED.....	257
B. STATEWIDE MOBILE	259
C. TRIBAL INTEGRATION	260
1. <i>Michigan's Experience</i>	260
2. <i>Arizona's Adaptation</i>	261
3. <i>Florida's Issues</i>	262
D. LOCAL COMPARISON – <i>WYOMING VS. SOUTH DAKOTA</i>	263
E. COLLEGIATE BETTING BANS	265
V. RECOMMENDATION	266
A. WHY LEGALIZE	266
B. NO COLLEGIATE BAN	267
C. METHOD – CASINO TETHER.....	268
VI. CONCLUSION.....	269

I. BACKGROUND

A. REGULATORY HISTORY

Throughout the 1960s and 70s, Congress made many legislative attempts to curtail gambling in an effort to target mafia activities.¹ As another restraint on the sports gambling market, the federal government imposed a 10% excise tax on the total amount of bets placed rather than the sportsbook's revenue.² Congress essentially made it impossible to operate a sportsbook at a profit.³ In 1974, Congress reduced the federal excise tax to 2%, which still represented nearly a 50% tax rate on sportsbook revenues.⁴ While still a burdensome tax rate, some Nevada businesses were enticed to expand their sports betting operations.⁵ In 1983, Congress further lowered the federal excise tax rate to 0.25% which triggered an explosion of the sports gambling industry in Nevada.⁶ Although many people looked favorably on the growth and prosperity occurring in Nevada, certain groups remained skeptical about the effects of sports wagering on society.⁷ As an example of why the public feared sports gambling, former Boston College basketball player, Rick Kuhn, was convicted of conspiring to fix games in 1981.⁸ Despite concerns about corruption, many states considered expanding into the sports gambling marketplace in the 1990s because of Nevada's success.⁹

B. PASPA & *MURPHY V. NAT'L COLLEGIATE ATHLETIC ASS'N*

In 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA) amid both public concern and lobbying from the sports

1. John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 916-17 (discussing legislative acts such as the Interstate Wire Act, Wagering Paraphernalia Act, Sports Bribery Act, Racketeer Influenced Corrupt Organizations Act, and the Illegal Gambling Business Act as means for Congress to expand legislative power in cracking down on illegal bookmaking largely driven by organized crime).

2. *Id.* at 918.

3. See I. Nelson Rose, *Impact of 1% Tax on Sports Betting*, GAMBLING AND THE L. (Jan. 9, 2018), <http://www.gamblingandthelaw.com/impact-of-a-1-tax-on-sports-betting/> (providing an example that a sportsbook with \$10,000,000 in bets would owe \$1,000,000 in excise tax while only generating a revenue of \$416,000 off of those bets).

4. *Id.*

5. *Id.*

6. *Id.* (explaining that “[i]n 1973 there were only ten sports books with a total handle of \$2.8 million. Twenty years later there were approximately 100 sports books with a total handle in excess of \$2 billion.”).

7. See Holden & Edelman, *supra* note 1, at 918 (noting that a report was presented to President Ford in 1976 that stated illegal bookmaking was the largest source of illegal gambling in the US and the main concern was tampering with the outcomes of the games).

8. *Id.* at 919.

9. *Id.* at 919-20.

leagues based on the fear of gambling induced corruption.¹⁰ PASPA made it illegal for government entities to authorize any type of gambling on collegiate or professional sporting events.¹¹ However, PASPA did not completely ban sports gambling because it grandfathered in state gambling laws that were already in effect.¹² By freezing sports gambling regulation in time, PASPA created a monopoly for Nevada casinos.¹³

Despite PASPA's efforts, America's appetite for sports gambling continues to thrive. In the 2010s, daily fantasy sports (DFS) emerged as a new way to skirt PASPA's prohibitions.¹⁴ FanDuel and DraftKings exemplify the potential of DFS by each raising over a billion dollars in equity investment.¹⁵ As further proof of American society's acceptance of sports gambling, both companies featured professional sports leagues as equity investors while PASPA was still in effect.¹⁶ Along with the rise in DFS popularity, statistics indicate the illegal sports gambling market in the United States exceeds \$80 billion.¹⁷ With the size of the sports gambling black market and society gaining tolerance for sports gambling, it was only a matter of time before PASPA became entirely outdated.

In 2018, the United States Supreme Court transformed the sports gambling marketplace by striking down PASPA in *Murphy v. Nat'l Collegiate Athletic Ass'n*¹⁸ based on anti-commandeering principles of the 10th Amendment.¹⁹ The Court held Congress cannot bar states from passing certain

10. *See id.* at 920.

11. 28 U.S.C. § 3702.

12. 28 U.S.C. § 3704.

13. Holden & Edelman, *supra* note 1, at 920; *see* I. Nelson Rose, *States Grandfathered-In Under PASPA*, GAMBLING & THE L. (Jan. 9, 2018), <https://www.gamblingandthelaw.com/states-grandfathered-in-under-paspa/> (explaining other states had some more obscure forms of sports betting at the time, such as a calcutta, but PASPA did not allow states to authorize head-to-head wagering like Nevada unless such wagering was legal in 1991); *OFC Comm Baseball v. Markell*, 579 F.3d 293, 303 (3d Cir. 2009) (holding that Delaware could not expand its sports gambling scheme beyond what was substantively allowed at the time PASPA's passing).

14. John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 585 (2020); *see also* Daniel Blechynden, *How do Daily Fantasy Sports Work?*, TECH RADAR (Mar. 26, 2020), <https://www.techradar.com/news/how-do-daily-fantasy-sports-work> (explaining that DFS competitions allow users to select a certain amount of players for their team. Contests are confined to a limited time frame (often one day). If the user's team scores enough fantasy points to finish high enough in the contest, the user will win money based on every entrant's entry fee).

15. Holden & Edelman, *supra* note 1, at 923.

16. *Id.* (noting that the NBA owns an equity stake in FanDuel and the MLB owns an equity stake in DraftKings).

17. Brian Barrett, *The Sports Betting Revolution Will Be a Slow Play Online*, WIRED (May 15, 2018, 1:59 PM), <https://www.wired.com/story/the-sports-betting-revolution-will-be-muted-online>.

18. 138 S. Ct. 1461 (2018).

19. *Id.* at 1478.

legislation just like Congress cannot force states to pass certain legislation.²⁰ The Court also acknowledged that Congress possesses the power to regulate sports gambling itself, but Congress cannot instruct states to ban sports gambling.²¹

Notably, the Court's decision in *Murphy* did not legalize sports gambling across the United States.²² *Murphy* simply removed the barrier blocking states from legalizing sports gambling within their borders.²³ Now, states are free to legalize and regulate sports gambling if they so choose.

1. State Responses

In the wake of *Murphy*, over twenty states introduced legislation to legalize sports gambling by the end of 2018.²⁴ These states' two primary objectives driving this enthusiasm are to generate revenue without imposing additional taxes and cut into the illegal gambling market.²⁵ This note will dive deeper into each legislative option at a later section, but a quick overview may provide context for the reader.

First, ten states with legalized sports gambling restrict it to existing brick and mortar casinos.²⁶ For these states, lawmakers see in person sports gambling as a means to increasing foot traffic in established casinos.²⁷ Second, states may allow for their existing casinos to partner with online retailers to offer mobile betting.²⁸ States that allow mobile wagering cite to the increase in betting volume – and in turn tax revenue – as a main incentive.²⁹ Third, states may allow mobile betting without attaching the online operators to physical casinos.³⁰ Tennessee serves as an example of this approach;

20. *Id.* (“It is 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. A more direct affront to state sovereignty is not easy to imagine.”).

21. *Id.* at 1481.

22. Holden, *supra* note 14, at 587.

23. *See id.*

24. Holden & Edelman, *supra* note 1, at 932.

25. *See* Kathryn Kisska-Schulze & John T. Holden, *Betting on Education*, 81 OHIO ST. L. J. 465, 518 (2020); Matt Volz & Geoff Mulvihill, *Handful of US States are Poised to Legal Sports Betting*, ASSOCIATED PRESS (Apr. 23, 2019), <https://ap-news.com/3ab98743f50a4a49a2fe64655234d495>.

26. *See* Ryan Butler, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK (Dec. 10, 2021, 5:15 PM), <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections>.

27. Kevin Shelly, *When It Comes to Retail Sports Betting, Valley Forge Is All About Foot Traffic*, PLAY PA. (Aug. 1, 2019), <https://www.playpennsylvania.com/valley-forge-fanduel-retail-traffic/>.

28. *See* Marc Edelman, *Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 GEO. MASON L. REV. 313, 327 (2019).

29. *Id.* at 333.

30. *See* Alexander J. Hall, *Place Your Bets*, 55 TENN. B.J. 14, 16 (July 2019).

however, it also does not have any brick and mortar casinos.³¹ For states with a significant tribal casino presence, there are additional concerns for legalizing sports gambling.

C. FEDERAL LAW & TRIBAL GAMING COMPACTS

At this point, it is important to note the reality states face in navigating their relationship with tribal casinos. This section will provide background information on how tribal gaming operates.

The Indian Gaming Regulatory Act (IGRA) is a federal law that regulates the relationship between tribes and states in relation to gaming on tribal lands.³² The IGRA states, “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by [f]ederal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.”³³ IGRA divides gaming activities into three classes.³⁴ The tribe must negotiate a compact with their state to offer Class III activities.³⁵ The gaming compacts required by IGRA represent a tradeoff where the tribe gets substantial exclusivity in exchange for the tribe subjecting itself to state regulation and often revenue sharing payments.³⁶ Sports gambling qualifies as a Class III gaming activity.³⁷ Therefore, tribes seeking to offer sports betting will seemingly need to renegotiate their gaming compacts with the state.³⁸

As complex contracts, gaming compacts heavily involve political considerations.³⁹ Although the IGRA requires good faith in negotiations,

31. *Id.*

32. Eric S. Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO L.J. 451, 453 (2003).

33. 25 U.S.C. § 2701(5).

34. Lent, *supra* note 32, at 454 (Class I gaming activities include games for minimal prize value in connection with tribal ceremonies. Class II activities mainly pertain to bingo. Class III activities encompass all gaming activities not in class I or II).

35. *Id.*

36. Barbara Hoberock, *Tribal Gaming 101: What You Need to Know as Tribal Gaming Becomes a Topic of Significant Debate*, TULSA WORLD (July 20, 2019), https://tulsa-world.com/news/tribal-gaming-what-you-need-to-know-as-tribal-gaming/article_1d42d1c0-40ef-5fb6-b6b7-01afb867a2f9.html.

37. Kathryn R.L. Rand & Steven Andrew Light, *Sports Betting and Indian Gaming: Should Tribal Casinos Get in the Game?*, 9 UNLV GAMING L.J. 55, 59 (2019) (referring to a National Indian Gaming Commission opinion that states sports gambling is a class III activity).

38. *Id.* at 60.

39. See Randy Ellis, *Governor Voices Frustration, Suggests Tribal Gaming Fees as High as 25%*, THE OKLAHOMAN (Nov. 15, 2019), <https://www.oklahoman.com/article/5647067/chickasaw-attorney-says-tribes-prepared-to-renegotiate-gaming-fees?> (describing Oklahoma’s hostile negotiations with tribes in attempt to quadruple revenue sharing payments).

renegotiating existing compacts poses a risk due to political relationships and large economic payments in the revenue sharing agreements.⁴⁰

II. HOW SPORTSBOOKS WORK

This section will look at how sportsbooks operate to aid the reader in following some of this note's later arguments. The following subsections will describe what a sportsbook seeks to achieve when setting lines. They will also show why sports gambling does not return as high of profit margins as other forms of gambling.

A. PROCESS

Sportsbooks will offer "lines" or "spreads" for bettors to wager on a specific sporting event.⁴¹ For sports like football and basketball, the team that is favored to win may be noted as 'favored team -7.5.'⁴² If a bet with that hypothetical spread is placed on the favored team, the team must win by 8 or more points in order for the bettor to win that bet.⁴³ The bettor will also see a number showing "-110" that reflects the sportsbook's commission.⁴⁴ This commission may be known as the "vig," "juice" or "take."⁴⁵ The -110 number means that \$110 dollars must be wagered to win \$100.⁴⁶ When there is a bet on each side of the line (meaning a bet is placed on each team), the sportsbook collects \$220. The winning bettor receives \$210 which reflects their initial \$110 bet and their \$100 winnings.⁴⁷ The \$10 the sportsbook pocketed reflects a 4.5% profit on the \$220 "handle."⁴⁸

The sportsbook aims to receive even bets on each side of the line so the bet is "balanced."⁴⁹ Although each sportsbook technically sets its own lines, sportsbooks tend to follow the national lines that originate in Nevada casinos.⁵⁰ If the sportsbook's lines strayed from the consensus at other books, bettors would be incentivized to overload one side of the line, and the bet

40. Holden, *supra* note 14, at 608-09 (discussing Florida's hesitancy to pass sports gambling laws that could potentially jeopardize the state's nine figure revenue stream from tribal gaming compacts).

41. Chris Yuscavage, *Everything You Need to Know About How Betting Lines Work*, COMPLEX (Jan. 30, 2015), <https://www.complex.com/sports/2015/01/how-betting-lines-work/>.

42. *See id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Sportsbook Profit Margins*, SPORTSINSIGHTS.COM, <https://www.sportsinsights.com/betting-tools/sportsbook-profit-margins/> (last visited Dec. 13, 2021).

49. *Id.*

50. *See* Rand & Light, *supra* note 37, at 64.

would be unbalanced.⁵¹ Further, sportsbooks may need to shift lines leading up to the game if the bet becomes heavily unbalanced.⁵² These considerations indicate that sportsbooks must actively manage their lines to minimize risk.⁵³

B. PHYSICAL PRESENCE VS. MOBILE

As shown above, sportsbooks depend on a large volume of bettors due to slim profit margins and risk management concerns.⁵⁴ In essence, sportsbooks obtain their customers through two methods: in-person traffic at casinos or mobile betting.⁵⁵ Existing casinos see sports gambling as another amenity to entice patrons to their casinos where bettors will potentially spend on food and beverage as well as play other games.⁵⁶ But, casinos that are not destinations face the risk that the new sportsbook will not increase foot traffic enough to provide sufficient cushion from the risk of unbalanced bets.⁵⁷ A sportsbook may set a line where an objective bettor would be indifferent on which team to take. Yet, when dealing with small sample sizes, individual bettors may not behave perfectly logically, so the sportsbook could end up overexposed on one side of the line.⁵⁸

Alternatively, many states wish to implement mobile betting to increase tax revenues because more people will bet when wagers can be placed sitting at home.⁵⁹ By creating a larger pool of bettors, mobile betting also alleviates some of the sportsbook's risk because larger samples of bettors are more likely to bet according to averages and logic.⁶⁰

51. *See id.* at 65.

52. *Id.*

53. *Id.*

54. *Id.*

55. *See generally* Molly Hudson, *More States Embrace Online Sports Gambling as Popularity Soars*, NBC NEWS (Dec. 11, 2021), <https://www.nbcnews.com/politics/politics-news/more-states-embrace-online-sports-gambling-popularity-soars-n1285169>.

56. Rand & Light, *supra* note 37, at 67 (stating that rural casinos could see their sportsbooks attract customers to come watch games in a communal setting without as much competition from other bars and restaurants); Jill R. Dorson, *Tribes Want Monopolies, but Not Mobile. How Come?*, SPORTSHANDLE (Feb. 19, 2019), <https://sportshandle.com/tribal-sports-betting-exclusivity-mobile/> (detailing the opposition from Minnesota tribes to allowing sports gambling kiosks in nontribal bars because the tribes fear losing traffic at their casinos).

57. Rand & Light, *supra* note 37, at 65.

58. *See Sportsbook Profit Margins*, *supra* note 48 (saying that, for example, bettors tend to prefer wagering on favored teams).

59. Carol Cain, *Michigan's Online Sports Betting Launch Was a Big Win. I Talked to the Man Behind It*, DETROIT FREE PRESS (Apr. 3, 2021) (explaining the exponential increase in gambling revenues when Michigan made the switch from retail only sports gambling to allowing mobile betting), <https://www.freep.com/story/money/business/columnists/carol-cain/2021/04/03/michigan-online-sports-betting/4847437001/>.

60. *See* Rand & Light, *supra* note 37, at 68-69 (“[M]obile gaming app architecture could facilitate player liquidity via customer acquisition and pooling at low marginal cost, and could be a true game changer for many tribes.”).

C. LOCATION OF MOBILE BETS

The question may seem elementary, but authorities disagree about where mobile bets originate.⁶¹ Many state legislatures expressly deem mobile sports bets to occur at the location of the server receiving the bet.⁶² For example, New Jersey's constitution restricts gambling to Atlantic City casinos, but a state statute says online wagering is specifically located at the server in the Atlantic City casino transacting with the bettor.⁶³ New Jersey bases their approach on traditional contract law which deems a contract to take effect at the location where the offeree accepts.⁶⁴

But, state attempts to define the nexus of online wagers in their state laws do not necessarily correlate to federal law application.⁶⁵ As will be discussed later,⁶⁶ a federal court invalidated Florida's compact with the Seminole Tribe that deemed mobile wagers to occur at the server located on reservation land because IGRA expressly regulates gaming on Indian lands only.⁶⁷ Further, other tribes offer mobile sports betting as commercial operators which indicates unease about using "deeming" language in IGRA compacts.⁶⁸

D. PROFIT MARGIN COMPARISON

As noted above, sports betting typically represents around a 4.5% profit margin for the casino.⁶⁹ Conversely, other games generate a far greater profit margin for the casino.⁷⁰ Based on the monthly revenue report of the Nevada Gaming Control Board, popular table games such as blackjack, craps and roulette show profit margins of 13-19%.⁷¹ On the highest end of the scale,

61. *Opinion: So Where Exactly Is a Mobile Sports Bet Made?*, LEGAL SPORTS REP. (Dec. 31, 2021), <https://www.legalsportsreport.com/47917/where-is-a-mobile-sports-bet-made/>.

62. *Id.*; Mylan L. Denerstein et al., *The Constitutionality of Mobile Sports Wagering in New York State*, N.Y.L.J. (Apr. 3, 2020), <https://www.gibsondunn.com/wp-content/uploads/2020/02/2020-2-Denerstein-Shapiro-Crain-The-Constitutionality-of-Mobile-Sports-Wagering-In-New-York-State.pdf> (arguing that New York's legislature may copy New Jersey's approach to online bets to occur at the location of the server without offending New York's constitution).

63. Denerstein et al., *supra* note 62.

64. *Id.* (citing Restatement (Second) of Contracts § 64 cmt. c. (Am. L. Inst. 1981)).

65. John Holden, *Opinion: Why Florida Sports Betting Deal Still Might Not Happen*, LEGAL SPORTS REP. (Apr. 26, 2021), <https://www.legalsportsreport.com/50981/opinion-florida-sports-betting-speed-bumps/> (discussing how IGRA places restraints on state legislature's ability to deem the location of online wagers).

66. *See infra* Part IV.C.3. *Florida's Issues*.

67. *West Flager Assocs. v. Haaland*, No. 21-cv-2192, 2021 WL 5492996 at *9 (D.D.C. Nov. 22, 2021).

68. Holden, *supra* note 65.

69. *See supra* Part II.A. PROCESS.

70. *See Monthly Revenue Report*, NEV. GAMING CONTROL BD. (Oct. 2021), <https://gaming.nv.gov/modules/showdocument.aspx?documentid=18239>.

71. *Id.* (showing that from Nov. 1, 2020 to Oct. 31, 2021, Nevada casinos reported a statewide win percentage of 13.75% on blackjack, 15.47% on craps, and 18.96% on roulette).

keno offers a 28.23% win percentage for the casino.⁷² As a main casino attraction, slot machines of all price denominations combined for a profit margin of 7.07%.⁷³ Despite their lower profit margin, slot machines comprise 65-80% of the average casino's revenue because the machines are played so often.⁷⁴ Because slot machine results are instantaneous, the slots enjoy the scalability that sports betting lacks due to dependence on games that take three hours.

III. CURRENT SITUATION IN NORTH DAKOTA

With some sports gambling background established above, this section will examine the current sports betting climate in North Dakota. This section will begin by looking at the existing tribal gaming compacts. Language within those compacts will show how the tribal casinos in North Dakota have begun to open sportsbooks without new legislation or a renegotiation of the gaming compacts. Finally, this section will discuss some aspects of proposed legislation relating to sports gambling.

A. NORTH DAKOTA GAMING COMPACTS

As explained above, the IGRA governs the relationship between states and gaming on tribal lands.⁷⁵ Five federally recognized tribes reside in North Dakota.⁷⁶ Each tribe operates a casino on its reservation.⁷⁷ Because these casinos offer Class III gaming activities, all five tribes have existing tribal gaming compacts with the state that were last amended in 2013.⁷⁸ Unlike some other states, North Dakota does not receive revenue sharing payments from

72. *Id.*

73. *Id.*

74. David G. Schwartz, *How Casinos Use Math to Make Money When You Play the Slots*, FORBES (June 4, 2018), <https://www.forbes.com/sites/davidschwartz/2018/06/04/how-casinos-use-math-to-make-money-when-you-play-the-slots/?sh=5a622f8294d0>.

75. *See supra* Part I.C. FEDERAL LAW & TRIBAL GAMING COMPACTS.

76. TRIBAL NATIONS, ND. GOV'T, <https://www.indianaffairs.nd.gov/tribal-nations> (last visited Dec. 14, 2021) ("These include the Mandan, Hidatsa, & Arikara Nation (Three Affiliated Tribes), the Spirit Lake Nation, the Standing Rock Sioux Tribe, the Turtle Mountain Band of Chippewa Indians, [and] the Sisseton-Wahpeton Oyate Nation[.]").

77. CASINOS & GAMING, N.D. TOURISM COMM'N <https://www.ndtourism.com/listings/casinos> (last visited Dec. 14, 2021) (showing a list of all casinos in North Dakota).

78. Notices, 78 C.F.R. 17427 (Mar. 21, 2013) (copy of the federal register providing notice of the amended tribal gaming compacts approval); INDIAN GAMING COMPACTS, BUREAU OF INDIAN AFFS. <https://www.bia.gov/as-ia/oig/gaming-compacts> (last visited Dec. 14, 2021) (showing a list of all tribal gaming compacts in the US); *see Lent, supra* note 32, at 454 (stating that Class III gaming activities require a compact between the tribe and the state).

the tribes pursuant to their gaming compact.⁷⁹ Instead, North Dakota's tribal gaming compacts simply require the tribes to reimburse the state for the actual cost spent in regulating tribal gaming activity.⁸⁰ For the 2011-13 biennium, the tribes paid the state \$261,128 as reimbursement for the cost of regulation.⁸¹

Each of North Dakota's tribal gaming compacts contain provisions authorizing the tribes to establish a sportsbook "except as prohibited by the Professional and Amateur Sports Protection Act."⁸² Further, Assistant Secretary of Indian Affairs Kevin Washburn's confirmation letter stated that the United States government interprets the above quoted provision to mean the tribes are authorized to engage in sports betting provided the tribe meets one of PASPA's exceptions.⁸³ Since Assistant Secretary Washburn wrote that letter in 2013, the United States Supreme Court struck down PASPA in 2018 in *Murphy v. National Collegiate Athletic Ass'n*.⁸⁴

B. TRIBAL SPORTSBOOKS IN NORTH DAKOTA

As previously indicated, the current gaming compacts authorize Indian tribes in North Dakota to establish sports betting provided the tribe does not violate PASPA.⁸⁵ PASPA no longer exists, so the annulment of PASPA removed the constraint on the tribes. In response, North Dakota tribes began opening sportsbooks at their casinos by utilizing International Game Technology (IGT) PlaySports kiosks.⁸⁶ The kiosks allowed the tribes to launch

79. *Tribal Gaming in North Dakota and Wisconsin*, N.D. LEGIS. COUNCIL (Oct. 2011), <https://www.legis.nd.gov/files/resource/committee-memorandum/13.9096.01000.pdf> [hereinafter NDLC Memo] (stating that North Dakota does not receive payments from the tribes beyond the actual costs of regulation); Art Zimmerman & Judy Zelio, *Tribal Gaming in the States*, NAT'L CONF. OF STATE LEGIS. 6-8 (Jan. 2007), <https://www.ncsl.org/Portals/1/documents/econ/trib-gam07.pdf> (chart showing tribes in states like California and Connecticut disburse to their states hundreds of millions of dollars annually beyond the cost of regulating tribal gaming).

80. NDLC Memo, *supra* note 79.

81. *Id.*

82. Amended Gaming Compact Between the Sisseton-Wahpeton Sioux Tribe and the State of North Dakota, § 3.1(G), Jan. 3, 2013, <https://www.bia.gov/sites/bia.gov/files/assets/asia/oig/pdf/idc1-025707.pdf> [hereinafter *Sisseton Compact*] (link to pdf of amended gaming compact). The Sisseton-Wahpeton Sioux Tribe's gaming compact is substantially identical to the other four gaming compacts, except for alterations to geographic specific references. See INDIAN GAMING COMPACTS, *supra* note 78 (database containing the other four tribes' compacts).

83. Letter from Kevin Washburn, Assistant Sec'y, U.S. Dep't of Interior for Indian Aff., to Honorable Robert Shepherd, Chairman, Sisseton-Wahpeton Sioux Tribe (Mar. 11, 2013) [hereinafter *Washburn Letter*] (attached to the *Sisseton Compact*) (similar letters addressed to the chairman of each tribe are attached to each of the other four gaming compacts).

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

85. See *Sisseton Compact*, *supra* note 82 at § 3.1(G).

86. Thomas Evanella, *Legal Sports Betting Coming Soon To Dakota Magic Casino in Hankinson, North Dakota*, THE DICKINSON PRESS (Nov. 24, 2021), <https://www.thedickinsonpress.com/news/7293964-Legal-sports-betting-coming-soon-to-Dakota-Magic-Casino-in->

sports betting while they created plans to build proper sportsbook lounges.⁸⁷ Unsurprisingly, the tribes displayed their readiness to quickly implement sports betting into their casinos because the tribes specifically bargained for sports betting authorization in the 2013 gaming compact amendments.⁸⁸ The tribes undoubtedly sensed the nation's shifting views on sports gambling and wanted to be prepared for Congressional repeal of PASPA or United States Supreme Court intervention, as happened in *Murphy*.⁸⁹

C. PROPOSED LEGISLATION

Although North Dakota has not legalized statewide sports gambling, legislative efforts to legalize sports betting nearly succeeded in 2021.⁹⁰ HB 1234 passed overwhelmingly in the North Dakota House but failed by one vote in the Senate.⁹¹ HB 1234 authorized kiosks, like those currently used at the tribal casinos, to be placed in businesses that desire to have sports gambling, such as bars, restaurants, and hotels.⁹² Wagers placed at retail locations featuring these kiosks were proposed to be taxed at 6.75%.⁹³ The bill also proposed to adopt mobile betting taxed at 10%.⁹⁴ Other features of the bill included banning betting on North Dakota college sports and prohibiting users from funding accounts with a credit card.⁹⁵ Proponents of banning wagers on college sports argue student athletes are vulnerable to throwing games due to blackmail.⁹⁶ Concerns over allowing users to fund accounts with credit cards likely stem from history of banks over-cautiously rejecting credit card

Hankinson-North-Dakota; *Sports Book*, 4 BEARS CASINO AND LODGE <https://4bearscasino.com/slots/sports-betting-sports-book-sports-book/> (last visited Dec. 14, 2021); Christina Monroe, *North Dakota Takes Play From New Mexico, To Launch Tribal Sportsbooks*, LEGAL SPORTS BETTING (Sep. 25, 2020), <https://www.legalsportsbetting.com/news/north-dakota-takes-play-from-new-mexico-to-launch-tribal-sportsbooks/>.

87. See Evanella, *supra* note 86.

88. *Id.* (quoting chief marketing officer for Dakota Magic Casino, Rojelio Rubio, "In North Dakota, sports betting was negotiated prior and approved in the state gaming compact between the tribal nation and the state . . ."); see *Sisseton Compact*, *supra* note 82.

89. *See id.*

90. Jeremy Turley, *North Dakota Senate Rejects Sports Betting Resolution*, THE DICKINSON PRESS (Mar. 22, 2021), <https://www.thedickinsonpress.com/news/government-and-politics/6948210-North-Dakota-Senate-rejects-sports-betting-resolution>.

91. *Id.*

92. Jill R. Dorson, *North Dakota Lawmaker Seeks 24-Month Waiting Period for Online Sports Betting*, SPORTSHANDLE (Mar. 16, 2021), <https://sportshandle.com/nd-mobile-delay-proposal/>.

93. *Id.*

94. *Id.*

95. *Id.*

96. See John Hageman, *North Dakota University System Leader Comes Out Against Sports Betting Bill*, INFORUM (Mar. 7, 2019, 3:30 PM), <https://www.inforum.com/news/government-and-politics/983428-North-Dakota-University-System-leader-comes-out-against-sports-betting-bill> (reporting that NDUS Chancellor Mark Hagerott testified before the North Dakota Senate to say college athletes are vulnerable and need to be protected).

transactions with casinos due to incorrect interpretations of the Wire Act.⁹⁷ However, the Wire Act exempts credit transactions for wagers when the betting is legal, so the only real justification for restricting credit card funding is perceived consumer protection.⁹⁸

Local Indian tribes were one of the main groups opposed to North Dakota legalizing statewide sports wagering.⁹⁹ The tribes view statewide sports wagering as another attack on their relied upon gaming revenues.¹⁰⁰ In 2017, North Dakota legalized electronic pull tabs which accounted for \$1.8 billion in wagers in 2019 and 2020.¹⁰¹ With such a large gaming market occurring outside of casinos, the tribes' main source of revenue suffers.¹⁰² To help secure the casinos' profitability, tribal leaders strongly advocate for containing sports gambling to the casinos.¹⁰³

IV. DIFFERENT STATE APPROACHES

While the first section of this note¹⁰⁴ provided an overview of states' different approaches to sports gambling, this section will provide further detail. First, this section will look at the implementation and effect of states restricting their sports betting to casinos only or granting statewide mobile betting. Then, this section will look at some states implementation of tribal and mobile sports betting.

A. PHYSICAL PRESENCE REQUIRED

Tribal sportsbooks create the first instance of sports betting that requires the bettor to be physically present. Soon after *Murphy*, a New Mexico tribe began offering sports betting at its casino because their gaming compact permitted the tribe to conduct "any or all forms of Class III Gaming" and sports betting is a Class III gaming activity.¹⁰⁵ As explained above,¹⁰⁶ North Dakota tribes opened sportsbooks recently because their gaming compacts from 2013

97. See Holden & Edelman, *supra* note 1, at 951.

98. See *id.*

99. Evanella, *supra* note 86.

100. *Id.* (quoting United Tribes Gaming Association Director Cynthia Monteau in saying, "Gaming is, in most cases, our sole source of revenue for jobs and economic development . . .").

101. Renee Cooper, *Tribal Leaders: Bills Continue to Chip Away at Tribes' Gaming Revenue*, KX NEWS (Feb. 3, 2021, 10:45 PM), <https://www.kxnet.com/news/local-news/tribal-leaders-bills-continue-to-chip-away-at-tribes-gaming-revenue/>.

102. *Id.*

103. Evanella, *supra* note 86.

104. See *supra* Part I.B.1., *State Responses*.

105. John Holden, *So How Exactly is New Mexico Sports Betting Legal, and What Does it Mean in Other States?*, LEGAL SPORTS REP. (Oct. 17, 2018), <https://www.legalsportsreport.com/24965/legality-of-sports-betting-in-new-mexico/>.

106. See *supra* Part III.B., TRIBAL SPORTSBOOKS IN NORTH DAKOTA.

contemplated allowing sports betting in the event PASPA went away.¹⁰⁷ In contrast, the Sisseton-Wahpeton Sioux Tribe's previous compact with South Dakota did not mention sports gambling, so the Tribe amended their compact in 2021 to allow the tribe to operate sportsbooks at their casinos on the South Dakota portion of their reservation.¹⁰⁸ These three approaches exemplify the ways in which tribal sports betting launches. Regardless, tribal sportsbooks do not reflect different legislative approaches to sports gambling because state executive branches negotiate the tribal gaming compacts.¹⁰⁹

As for state legislatures passing sports gambling laws, Delaware became the first state outside of Nevada to accept sports bets after *Murphy*, but Delaware still prohibits mobile betting.¹¹⁰ Similarly, Mississippi also legalized sports betting immediately after *Murphy* and restricted wagering to casino property only.¹¹¹ Mississippi's law boasts a unique quirk that users may bet online, but users must still be located on casino property when betting online.¹¹² Because of the physical presence requirement, casinos on Mississippi's Gulf Coast that already served as tourist resorts receive the majority of bets.¹¹³ At first, Mississippi owned a monopoly on the Southern market for sports gambling because surrounding states had yet to legalize sports betting.¹¹⁴ Still, some commenters express concerns that Mississippi's restriction on statewide mobile access contributes to failing to recapture wagers from the illegal market.¹¹⁵ Further, Tennessee's 2020 legalization of fully mobile sports betting caused casinos near the Memphis border to lose up to 25% of their sports betting revenue immediately.¹¹⁶ Due to competition from

107. See Evanella, *supra* note 86.; *Sisseton Compact*, *supra* note 82.

108. Amendment to the Gaming Compact Between the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation and the State of South Dakota, S.D.- Sisseton Wahpeton Oyate of the Lake Traverse Reservation, July 13, 2021, <https://www.bia.gov/sites/bia.gov/files/assets/asia/oig/pdf/508%20Compliant%202021.10.14%20Sisseton%20Wahpeton%20Oyate%20Tribal%20State%20Gaming%20Compact.pdf>, [hereinafter South Dakota Compact] (link to pdf of amended gaming compact); see Evanella, *supra* note 86 (reporting that the Dakota Nation Sportsbook will also be available at the Dakota Connection and Dakota Sioux casinos in South Dakota).

109. N.D. CENT. CODE. § 54-58-03 (2021).

110. See Butler, *supra* note 26.

111. Mary M. Shaffrey, *Mississippi Lawmakers Hope to Expand Mobile Sports Betting Soon*, GAMING TODAY (Nov. 8, 2021), <https://www.gamingtoday.com/news/mississippi-expansion-mobile-sports-betting/>.

112. *Id.*

113. Courtney Ann Jackson, *Three Months of Numbers are In for Mississippi Sports Betting*, ACTION NEWS 5 (Nov. 30, 2018, 8:06 PM), <https://www.actionnews5.com/2018/12/01/three-months-numbers-mississippi-sports-betting/>.

114. *Id.*

115. Holden, *supra* note 14, at 599.

116. Shaffrey, *supra* note 111 (quoting MGM Vice President Anthony Delvescovo in saying, "the Tunica market took an immediate hit of 25% of their local market . . .").

neighboring states, Mississippi currently seeks to legalize statewide mobile sports gambling in July of 2022.¹¹⁷

As another example, the New York legislature approved retail sports gambling at four upstate casinos in 2019.¹¹⁸ However, most of New York's residents live in the New York City metro area, so bettors simply drove across the river to place mobile bets in New Jersey rather than venture hours upstate to place a bet in a casino.¹¹⁹ A recent study utilizing geo-tracking software revealed that New York residents placed approximately \$837 million in bets in New Jersey.¹²⁰ Due to losing potential state revenue to New Jersey, New York legalized mobile sports betting in April of 2021, and the state estimates there will be \$1 billion in annual bets placed.¹²¹ As the New York and Mississippi experiences show, states risk losing a considerable share of their potential sports gambling market to other states or to the illegal market by restricting statewide mobile sports betting.

B. STATEWIDE MOBILE

As noted above,¹²² Tennessee legalized statewide mobile wagering without requiring operators to be connected to a casino because Tennessee does not have casinos.¹²³ Other states, New Hampshire, Oregon, and Montana utilize the state lottery for their mobile sports gambling.¹²⁴ Montana's lottery developed its own app for mobile wagering, but the user must be physically present in a licensed Sports Bet Montana retailer.¹²⁵ However, almost any business that possesses a liquor license may become an eligible retailer, so

117. *Gaming Committee Working to Develop Mobile Sports Betting*, WLOX (Nov. 4, 2021, 9:12 AM), <https://www.wlox.com/2021/11/04/mississippi-gaming-committee-working-develop-mobile-sports-betting/>; John Brennan, *Bill In Mississippi Legislature Would Allow Mobile Sports Wagering*, SPORTS HANDLE (Jan. 4, 2022), <https://sportshandle.com/mississippi-bill-allow-mobile-sports-wagers/>.

118. *New York State Legalizes Online Sports Wagering*, GIBSON DUNN (Apr. 13, 2021), <https://www.gibsondunn.com/new-york-state-legalizes-online-sports-wagering/>; Darren Rovell, *Study: New York is Losing \$200+ Million By Not Legalizing Online Sports Betting*, ACTION NETWORK (Sep. 23, 2021, 3:48 PM), <https://www.actionnetwork.com/news/new-york-legal-sports-betting-online-legalized-gambling-darren-rovell>.

119. Will Yakowicz, *New York Picks Nine Operators To Launch State's \$1 Billion Sports Betting Market*, FORBES (Nov. 8, 2021, 5:42pm), <https://www.forbes.com/sites/wilyakowicz/2021/11/08/new-york-picks-draftkings-fanduel-and-others-to-launch-states-mobile-sports-betting-program/?sh=2f5d9d4d1a08>.

120. Rovell, *supra* note 118.

121. Yakowicz, *supra* note 119.

122. *See supra* Part I.B.1., *State Responses*.

123. Hall, *supra* note 30, at 16.

124. Butler, *supra* note 26; N.H. LOTTERY <https://www.nhlottery.com/Sports/DraftKings-Mobile-Sportsbook> (last visited Dec. 15, 2021) (advertising DraftKings as the "Official Sports Betting Partner of NH Lottery").

125. *General Questions*, SPORTS BET MONT. <https://sportsbetmontana.com/en/view/faqs-general-questions> (last visited Apr. 13, 2022) (FAQ explaining that bets can only be placed within a licensed retailer).

bettors have more options than states that require bets to be made in large, established casinos.¹²⁶ Similarly, Oregon's lottery developed their own sports betting app, but bettors may place wagers anywhere within the state provided they are not on tribal lands.¹²⁷

For another approach, Nevada and Illinois allow both retail and statewide mobile sports betting, but they require users to sign up in person at a casino before users may bet online.¹²⁸ Iowa and Rhode Island originally implemented in-person registration, but both states quickly dropped the requirement.¹²⁹ Most states see online betting revenues eight to ten times higher than retail revenues, but Nevada's ratio resides at two to one because of both in-person registration and Nevada's significant retail sports betting presence.¹³⁰ Some commenters speculate in-person registration may lead certain Nevada residents to utilize Arizona's mobile sports betting instead.¹³¹

C. TRIBAL INTEGRATION

1. *Michigan's Experience*

Michigan's twelve federally recognized tribes operate 24 casinos, and Detroit contains three commercial casinos.¹³² Michigan initially launched retail sports betting in March of 2020 in both tribal and commercial casinos.¹³³ All casinos were allowed to partner with one online platform to service mobile wagering which launched on January 22, 2021.¹³⁴ Due to COVID, the casinos shut down almost immediately after opening their sportsbooks.¹³⁵

126. *Where to Bet*, SPORTS BET MONT. <https://sportsbetmontana.com/en/view/where-to-bet> (last visited Dec. 15, 2021) (showing a list of over 300 licensed retailers).

127. *See Most Asked Questions*, DRAFT KINGS OR. LOTTERY SCOREBOARD <https://sports.oregonlottery.org/most-asked-questions/> (last visited Dec. 15, 2021).

128. John Mehaffey, *Despite a Head Start of Decades, Nevada Remains in Sports Betting Dark Ages*, THE NEV. INDEP. (Dec. 14, 2021, 2:00 AM), <https://thenevadaindependent.com/article/despite-a-head-start-of-decades-nevada-remains-in-sports-betting-dark-ages>.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Listing of Tribal Class III Gaming Facilities*, MICH. GAMING CONTROL BD. (Feb. 19, 2021), https://www.michigan.gov/documents/mgcb/listing_of_sites_for_tribal_casinos_REV_04152011_340040_350526_7.pdf (chart listing all tribal casinos in Michigan); *see* Craig Mauger, *Michigan on Verge of Joining National Sports Betting Movement*, THE DETROIT NEWS (Dec. 11, 2019, 1:33 PM), <https://www.detroitnews.com/story/news/politics/2019/12/11/michigan-sports-betting-movement/4397428002/> (discussing the additional tax imposed at Detroit's three commercial casinos).

133. Ryan Butler, *Updated: Michigan Online Sports Betting & Casino Gaming Could Launch Before End of 2020*, ACTION NETWORK (Sep. 24, 2021, 2:06 PM), <https://www.actionnetwork.com/legal-online-sports-betting/michigan-online-sports-betting-casino-gaming-could-launch-before-end-of-2020>.

134. *Id.*; *see* Cain, *supra* note 59.

135. Butler, *supra* note 133.

When the casinos reopened in August 2020, they only allowed a limited capacity.¹³⁶ Because of COVID's impact on casino traffic, exclusively retail sports betting's true potential remains difficult to gauge in Michigan. Yet, Michigan's monthly handle never exceeded \$46 million in 2020.¹³⁷ Conversely, the state reported over \$325 million in total bets received during February of 2021, which was the first full month where mobile sports betting was authorized.¹³⁸ Michigan expects to bring in \$6-10 million in tax revenue from sports wagering in 2021.¹³⁹

2. *Arizona's Adaptation*

Like North Dakota, all of Arizona's casinos are tribal casinos located on reservations.¹⁴⁰ In April 2021, Arizona passed legislation authorizing retail and mobile sports betting.¹⁴¹ At the same time, the state also amended its gaming compacts with the tribes.¹⁴² The changes resulted in tribes gaining the ability to offer more types of games, authorization of new casinos, and approval of 20 sports betting licenses.¹⁴³ The previous compacts' revenue sharing provisions, which are made on a progressive system ranging from 1-8% depending on revenue, remained the same in the amended compacts.¹⁴⁴ In the end, Arizona now grants sports betting licenses to 10 tribes with an additional 10 licenses available for application by local professional sports entities.¹⁴⁵ Evident from the changes, Arizona prioritized a compromise that benefited the tribes with expanded gaming options and benefited the state with maximizing tax revenues through mobile sports betting.¹⁴⁶

136. *US Sports Betting Revenue and Handle*, LEGAL SPORTS REP. <https://www.legalsportsreport.com/sports-betting/revenue/> (last visited Dec. 15, 2021).

137. *Id.*

138. *Id.*

139. Sara Goldenberg, *Is Ohio Losing Out on a Windfall of Revenue from Sports Betting?*, 19 NEWS (Nov. 22, 2021, 8:01 PM), <https://www.cleveland19.com/2021/11/23/is-ohio-losing-out-windfall-revenue-sports-betting/>.

140. *See Arizona Online Casinos*, PLAY AZ <https://www.playaz.com/casinos/> (last visited Dec. 16, 2021).

141. Ryan Randazzo, *New Casinos, More Slots Coming to Arizona as Gov. Doug Ducey Signs Deal with Tribes*, AZ CENTRAL (Apr. 15, 2021, 9:00 AM), <https://www.azcentral.com/story/money/business/consumers/2021/04/15/new-arizona-gaming-compacts-tribes-bring-more-casinos-slots/7223927002/>.

142. *Id.*

143. Heidi McNeil Staudenmaier & Ed Hermes, *Arizona-Tribal 2021 Gaming Compact Amendments*, 57 ARIZ ATT'Y 56, 58-60 (2021) (stating that 2003 gaming compacts prohibited tribes from offering blackjack, craps, roulette, Pai gow, Sic bo, and sports betting).

144. *Id.* at 58.

145. *Id.* at 60.

146. Heidi McNeil Staudenmaier & Paloma Diaz, *What's in the Cards for Tribal Sports Betting in 2021 and Beyond?*, 7 GAMING L. REV. 288, 292 (2021), <https://www.swlaw.com/assets/pdf/news/2021/09/20/blr2.2021.0010.pdf>.

3. *Florida's Issues*

In 2018, Florida amended its constitution to require voter approval of expanded gambling off reservation lands.¹⁴⁷ In 2021, the state amended its compact with the Seminole Tribe to grant the Seminoles the exclusive right to offer sports gambling.¹⁴⁸ Voters did not vote on legalizing statewide sports betting.¹⁴⁹ Instead, the compact used the “deeming” language discussed earlier¹⁵⁰ to allow statewide mobile wagers to be located at the casino’s server on the reservation.¹⁵¹ In its letter approving Florida’s gaming compact with the Seminoles, the Department of Interior referred to the deeming language as a “hub and spoke” approach.¹⁵² By using the hub and spoke model, Florida legalized statewide mobile sports betting while sidestepping its constitutional requirement for voters to decide whether gambling should be expanded beyond reservation lands.¹⁵³

The Department of Interior defended the hub and spoke model by referencing multiple states that use the same method in their mobile gambling laws.¹⁵⁴ The department’s letter reasons that internet gambling was not possible when Congress passed IGRA in the 1980s, but Congress meant for IGRA to be a flexible statute that acknowledged tribal sovereignty.¹⁵⁵ In the spirit of flexibility, the hub and spoke model reflects the modern view of mobile gambling.¹⁵⁶

However, a federal court did not share the Department of Interior’s views on the hub and spoke model of internet wagering. In *West Flagler Assocs. v. Haaland*,¹⁵⁷ the court struck down Florida’s compact with the

147. *Florida Governor Signs Bill for Seminole Sports Betting Deal*, AP NEWS (May 25, 2021), <https://apnews.com/article/florida-business-sports-government-and-politics-d449bcc2627f157c97b554ea9e1e46fd>.

148. Holden *supra* note 65.

149. *See Florida Governor Signs Bill for Seminole Sports Betting Deal*, *supra* note 147.

150. *See supra* Part II.C. LOCATION OF MOBILE BETS.

151. Holden, *supra* note 65.

152. Letter from Bryan Newland, Principal Deputy Sec’y, U.S. Dep’t of Interior for Indian Aff. to The Honorable Marcellus W. Osceola, Jr., Chairman, Seminole Tribe of Florida (Aug. 6, 2021), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/pdf/508%20Compliant%202021.08.11%20Seminole%20Tribe%20Gaming%20Compact.pdf> [hereinafter Newland Letter].

153. *See* Michael Putney & Andrea Torres, *Mobile Sports Betting is Among Many Gambling-Related Issues Lawmakers Will Vote On*, LOCAL 10 (Mar. 14, 2021), <https://www.local10.com/news/politics/2021/05/15/mobile-sports-betting-is-among-many-gambling-related-issues-lawmakers-will-vote-on/>.

154. Newland Letter, *supra* note 152 (citing to hub and spoke statutes in Michigan, New Jersey, Rhode Island, and West Virginia).

155. *Id.*

156. *Id.*

157. No. 21-cv-2192, 2021 WL 5492996 at *1 (D.D.C. Nov. 22, 2021).

Seminoles because the hub and spoke model violates IGRA.¹⁵⁸ The court held that compacts under IGRA may only apply to activities on reservation lands, and the parties propose legal “fiction” by deeming off-reservation activities to occur on a reservation solely because of the location of a server.¹⁵⁹ In distinguishing state statutes that utilize the hub and spoke model, the court reasoned that states’ decisions to modify their state laws do not impact the interpretation of federal law.¹⁶⁰ The federal government filed an appeal of the *West Flagler* decision on January 19, 2022, but the hub and spoke model will not be one of the government’s arguments to the appellate court.¹⁶¹

D. LOCAL COMPARISON – WYOMING VS. SOUTH DAKOTA

So far, this note has covered sports gambling laws in much larger states. For readers that may feel North Dakota shares no geographic or cultural similarities with New York, Michigan, Arizona, etc., this section will offer a comparison between two neighboring states which more closely resemble North Dakota’s culture. In 2021, Wyoming legalized mobile sports betting, but South Dakota restricted sports betting to Deadwood casinos. This section will compare the two results.

Like Tennessee, Wyoming launched statewide mobile sports gambling on September 1, 2021 without any tether to physical casinos.¹⁶² In the first month, Wyoming reported a total handle of just over \$6 million.¹⁶³ However, net revenues were actually at a loss because over \$1 million of the winnings came from noncash bets due to large amounts of promotional signup offers instituted by the operating companies.¹⁶⁴ According to David Carpenter, sports betting project manager for Wyoming Gaming Commission, the state anticipated a net loss was possible in the first month, and he expressed excitement with the first month’s performance.¹⁶⁵ According to Carpenter, Wyoming primarily aims to eliminate the illegal market’s presence within its state by legalizing sports gambling.¹⁶⁶ For October, Wyoming’s total handle

158. *Id.* at *9.

159. *Id.*

160. *Id.* at *10.

161. Mary M. Shaffrey, *Florida Sports Betting Update: DOJ Steps In To Support Compact*, GAMING TODAY (Jan. 21, 2022), <https://www.gamingtoday.com/news/florida-sports-betting-update-doj-steps-in-to-support-compact/> (quoting The Athletic’s legal analyst Dan Wallace as saying, “DOJ has abandoned the server argument, and DOJ has acknowledged that the location of the bettor matters[.]”).

162. Josh Criswell, *Wyoming Aims to Expand Sports Betting by End of Year*, CASPER STAR TRIB. (Oct. 21, 2021), https://trib.com/news/state-and-regional/wyoming-aims-to-expand-sports-betting-by-end-of-year/article_d29db7be-f7e2-5f29-8712-88575109a1ba.html.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

increased to \$10.8 million resulting in \$16,021 in taxes.¹⁶⁷ The state's handle remained consistent in November and increased to \$12.2 million in December of 2021.¹⁶⁸ Carpenter said the state expects somewhere between \$1-3 million in taxes annually.¹⁶⁹

In contrast to Wyoming's statewide mobile approach, South Dakota launched retail sports betting on September 7, 2021, with bets restricted to Deadwood casinos.¹⁷⁰ South Dakota's September handle of \$443,365 pales in comparison to the \$6 million Wyoming brought in that month.¹⁷¹ However, South Dakota sees sports betting as a means of improving Deadwood activity levels outside of the typical summer tourist season.¹⁷² Evidently, the state's goal may materialize because overall Deadwood gaming revenue in September rose 14% from the previous September, and October's revenue rose 20% from the previous October.¹⁷³ Further, October's sports betting handle nearly doubled to \$815,036 aided by the addition of a fifth sportsbook.¹⁷⁴ Yet, sports betting growth appears limited in South Dakota because the state's December handle ended at \$675,312.¹⁷⁵

In comparing South Dakota and Wyoming, the two states have different goals that support their legalization of sports betting. Wyoming simply wishes to add an easy source of tax revenue while eliminating the illegal market,¹⁷⁶ but South Dakota desires sports gambling to be an overall economic driver for Deadwood.¹⁷⁷ South Dakota occupies a unique position with the Black Hills area being an established tourist destination with infrastructure

167. US SPORTS BETTING REVENUE AND HANDLE, *supra* note 136.

168. *Id.*

169. Alex Taylor, *Legal Sports Betting Goes Live in Wyoming*, CASPER STAR TRIB. (Sept. 6, 2021), https://trib.com/news/state-and-regional/legal-sports-betting-goes-live-in-wyoming/article_fd6fe3b3-e7d2-549d-b274-6fe072aa3b05.html.

170. Eric Mayer, *Official: Sports Betting Continues to Evolve in Iowa, More Growth Expected in South Dakota*, KELOLAND (Oct. 26, 2021), <https://www.keloland.com/keloland-com-original/official-sports-betting-continues-to-evolve-in-iowa-more-growth-expected-in-south-dakota/>.

171. Rae Yost, *Deadwood Sports Bettors Spend \$200,000 on NFL, \$100 on NBA*, KELOLAND (Oct. 26, 2021), <https://www.keloland.com/keloland-com-original/deadwood-sports-bettors-spend-200k-on-nfl-100-on-nba/>.

172. Devin O'Conner, *Deadwood Casinos Optimistic About Future with Legal Sports Betting*, CASINO.ORG (Sept. 16, 2021), <https://www.casino.org/news/deadwood-casinos-optimistic-with-legal-sports-betting/>.

173. Mitch Klein, *Deadwood Seeing Increase in Gaming*, KELOLAND (Oct. 25, 2021), <https://www.keloland.com/news/local-news/deadwood-seeing-increase-in-gaming/>; *Sports Betting Drives 20% Boost for Deadwood Casinos*, RAPID CITY JOURNAL (Nov. 26, 2021).

174. Nathan Thompson, *Gamblers Have Bet More Than \$1 Billion This Year at Deadwood Casinos*, RAPID CITY J. (Nov. 26, 2021), https://rapidcityjournal.com/news/local/gamblers-have-bet-more-than-1-billion-this-year-at-deadwood-casinos/article_e192d56a-3763-5982-9715-6b69a05545ef.html.

175. US SPORTS BETTING REVENUE AND HANDLE, *supra* note 136.

176. Criswell, *supra* note 162.

177. O'Conner, *supra* note 172.

to entice visitors.¹⁷⁸ Yet, Wyoming's sports betting handle outpaces South Dakota's handle by over tenfold which shows mobile sports betting's ability to maximize revenue.¹⁷⁹ Understandably, South Dakota wants to protect its casino industry in Deadwood, but evidence is unclear whether mobile sports gambling actually hurts casino traffic.¹⁸⁰

E. COLLEGIATE BETTING BANS

A common restriction in some states' sports gambling laws are prohibitions on gambling on college sports.¹⁸¹ State laws feature three types of limitations: all college sports, in-state college sports, and prop bets on college sports.¹⁸² States justify these restrictions based on the need to protect vulnerable, unpaid student athletes.¹⁸³ For states limiting the ban to in-state colleges, the restriction results from a legislative compromise between groups seeking to maximize revenues and legislative or academic groups worried about the impact on student athletes.¹⁸⁴ Especially for states without professional teams, the local Division 1 college sports teams often represent the largest portion of sports betting interest in the state.¹⁸⁵ Yet, North Dakota's proposed legislation sought to ban betting on all college sports.¹⁸⁶

The logic to ban collegiate sports betting is flawed. People interested in betting on their local teams will still place their bets.¹⁸⁷ Instead of betting in a legal, regulated, and taxable manner, gamblers seeking to bet on college sports will either travel to a nearby jurisdiction (if convenient) or bet illegally.¹⁸⁸ Since people truly interested in betting on the local college are already betting, college athletes are currently susceptible to potential

178. See *South Dakota's Tourism Industry Records Growth for 10th Straight Year*, KOTA TERRITORY (Jan. 24, 2020), <https://www.kotatv.com/content/news/Weather-was-a-factor-but-South-Dakota-tourism-industry-still-setS-2019-records-567265591.html>.

179. US SPORTS BETTING REVENUE AND HANDLE, *supra* note 136.

180. Chris Gothner, *Casinos Bet on Big Rewards From New Sports Gambling Law*, KCCIDES MOINES (Jan. 1, 2021), <https://www.kcci.com/article/casinos-bet-on-big-rewards-from-new-sports-gambling-law/35108838> (Iowa casino owners feel mobile sports betting will not cut into casino traffic).

181. Jill R. Dorson, *What's the Point of Banning Betting on In-State College Sports Teams?*, SPORTS HANDLE (Apr. 6, 2020), <https://sportshandle.com/why-ban-college-sports-betting/>.

182. *Id.*; Hall, *supra* note 30, at 17 (explaining Tennessee's ban on collegiate prop bets to mean bettors can only wager on the outcome of the game, not on specific statistics).

183. Hageman, *supra* note 96 (NDUS Chancellor testifying that student athletes require protection from gambling).

184. Dorson, *supra* note 181 (Illinois legislator stating that university lobbyists negatively impacting legislators' votes for sports gambling was not worth the headache).

185. *Id.* (West Virginia lawmaker saying, "Why go forward with sports betting and cut out what is probably the most lucrative part of it?"); Criswell, *supra* note 162 (noting the Wyoming Cowboys football games were the most bet on events in Wyoming).

186. Dorson, *supra* note 92; See H.B. 1234, 67th Legis. Assemb., Reg. Sess. (N.D. 2021).

187. Dorson, *supra* note 181.

188. *Id.*

blackmail. If states legalize sports gambling with exceptions for the local colleges, those bad actors will continue to bet illegally instead of utilizing the regulated sports betting industry.¹⁸⁹ Therefore, the student athlete does not receive any additional protection from the state's ban on local collegiate betting. In fact, student athletes receive more protection when sports gambling is legalized because the large commercial operators have internal controls for monitoring suspicious betting activity.¹⁹⁰ Remember, many states wish to eliminate the illegal gambling market just as heavily as they desire additional tax revenue.¹⁹¹ Eradicating the illegal market should be the larger priority in small states where the tax revenue will not be as substantial.

V. RECOMMENDATION

A. WHY LEGALIZE

North Dakota should legalize sports betting for similar reasons to Wyoming. First, sports betting currently takes place within the state both at tribal casinos and illegally through offshore accounts.¹⁹² If sports betting already occurs, the state might as well benefit by regulating and taxing sports betting. This will provide a safer and mutually beneficial betting environment.¹⁹³ Offshore sports betting is more attainable than some may think because users simply create an account like you would on any other website.¹⁹⁴ From there, users may fund their account with a credit card.¹⁹⁵ If their bank denies the credit card transaction, users can fund an account through electronic means like PayPal with little effort, but PayPal itself does not.¹⁹⁶ Further, more consumers will turn to offshore accounts because sports betting is becoming such

189. *Id.*

190. *Id.*

191. *See* Criswell, *supra* note 162.

192. *See* Evanela, *supra* note 86 (reporting on the opening of Dakota Nation Sportsbook); *See generally* Brad Allen, *Analysis: Why Offshore Sportsbooks are Thriving Despite Regulated Competition*, LEGAL SPORTS REP. (Sept. 20, 2021), <https://www.legalsportsreport.com/56009/are-offshore-sportsbooks-stronger-than-ever/>.

193. *See* Criswell, *supra* note 162 (explaining that Wyoming desires to protect consumers through a regulated market).

194. *Offshore Betting*, MADDUX SPORTS: PREMIER SPORTS HANDICAPPING <https://madduxsports.com/betting-offshore.html> (guide to starting an offshore betting account) (last visited Dec. 18, 2021).

195. *Id.*

196. *Id.*

a prevalent part of American culture.¹⁹⁷ For example, mainstream networks like ESPN air gambling related shows, and North Dakotans may watch.¹⁹⁸

Also, North Dakota should seek to avoid losing sports betting revenue to other states. Montana currently offers mobile sports wagering if located within a licensed retailer. Montana could simply expand their betting app to allow bettors to wager from anywhere in the state, and North Dakotans on the border could easily take advantage.¹⁹⁹ Alternatively, Minnesota could authorize mobile sports betting in the future. Minnesota legislators are currently working on a bill to legalize mobile sports betting with support from the tribes.²⁰⁰ If residents of the Red River valley can simply drive across a bridge to place a bet on their phone, Minnesota will benefit at North Dakota's expense.

B. NO COLLEGIATE BAN

If North Dakota legalizes sports betting, the state should not restrict gambling on collegiate events. For starters, student athletes will not gain additional protection because people may already legally bet on college sports at the tribal sportsbooks.²⁰¹ Or, like mentioned above, an individual willing to blackmail a student athlete certainly already uses an offshore account.²⁰² Additionally, North Dakota college sports have limited options for betting. Gamblers generally cannot bet on FCS football games, the level NDSU and UND play at, outside of playoff games.²⁰³ As of writing on December 17, 2021, DraftKings and FanDuel do not feature any single game bets for

197. Allen, *supra* note 192.

198. See Andy Hall, *ESPN Expands Sports Betting Content with New Daily Wager Podcast, Radio Specials*, ESPN PRESS ROOM (Mar. 11, 2021), <https://espnpressroom.com/us/press-releases/2021/03/espn-expands-sports-betting-content-with-new-daily-wager-podcast-radio-specials/>; *Fox Bet Live Returns with Expanded Lineup and Cross-Platform Presence*, FOX SPORTS PRESSPASS (Aug. 27, 2021), <https://www.foxsports.com/presspass/latest-news/2021/08/27/fox-bet-live-returns-expanded-lineup-cross-platform-presence>.

199. See *supra* Part IV.B., STATEWIDE MOBILE (explaining that the Montana lottery developed its own sports betting app); Yakowicz, *supra* note 119 (stating that bettors will make a short drive across a border if more convenient than driving to a retail sportsbook).

200. *New Sports Betting Bill Puts Minnesota Tribes in Control*, KARE 11 (Mar. 7, 2022, 5:02 PM), <https://www.kare11.com/article/news/politics/new-sports-betting-bill-puts-minnesota-tribes-in-control/89-36b42fde-f150-40ea-9ee0-fa21afa3d5a3> (reporting that Minnesota plans to legalize mobile betting by giving the tribes exclusive control); Pat Evans, *Minnesota Sports Betting Bill Clears Another Roadblock, More to Come?*, LEGAL SPORTS REP. (Mar. 24, 2022), <https://www.legalsportsreport.com/66850/house-judiciary-2022-minnesota-sports-betting/> (stating that Minnesota tribes support the proposed bill as opposed to their prior resistance to sports betting in Minnesota).

201. See Evanela, *supra* note 86 (reporting that customers may bet on NDSU football at the Dakota Nation Sportsbook).

202. See Dorson, *supra* note 181.

203. Nathan Frederick, *Don't Forget About the FCS When Making Your College Football Bets*, PLAY PA. (Sept. 30, 2021), <https://www.playpennsylvania.com/college-football-fcs-odds-pa-barstool/>.

NCAA hockey;²⁰⁴ DraftKings offers futures bets for the NCAA Hockey tournament winner.

Beyond Division 1, no sportsbooks will make lines for Division 2 or NAIA games because there will not be sufficient interest. As explained above,²⁰⁵ sportsbooks open themselves to more risk of unbalanced lines when the sample size of bettors is small. Thus, NDSU and UND men's basketball will likely be the only sport that could potentially be wagered on.²⁰⁶ If North Dakota insists on restricting collegiate betting, the restriction should be limited to in-state schools only because North Dakotans will not be influencing the outcome of Alabama football games for instance.

C. METHOD – CASINO TETHER

North Dakota should legalize sports betting by granting the tribes exclusivity for retail and mobile betting. By doing this, the state balances a compromise between Indian gaming interests and the state's interest in legalizing sports betting. Plus, the state granting exclusivity to the tribes honors the spirit of the gaming compacts.²⁰⁷

To start, the tribes already offer retail sportsbooks at their casinos.²⁰⁸ The tribes bargained with the state in their 2013 gaming compacts to authorize sportsbooks.²⁰⁹ For mobile betting, North Dakota must pass legislation legalizing statewide mobile sports wagering to avoid reliance on the deeming language in the hub and spoke model that caused Florida problems.²¹⁰ However, North Dakota can ensure tribal exclusivity by requiring mobile betting platforms, such as DraftKings, to partner with existing casinos. Other states have considered this approach.²¹¹

204. *Sportsbook/ Hockey Odds/ NCAA Hockey Odds: Game Lines*, DRAFTKINGS SPORTSBOOK, <https://sportsbook.draftkings.com/leagues/hockey/88671558> (last visited Dec. 18, 2021); *Ice Hockey*, FANDUEL SPORTSBOOK, <https://sportsbook.fanduel.com/ice-hockey> (last visited Dec. 18, 2021) (showing no NCAA hockey bets under the "Ice Hockey" tab of the sportsbook).

205. See *supra* Part II.B., PHYSICAL PRESENCE VS. MOBILE.

206. *SPORTSBOOK/ BASKETBALL ODDS/ COLLEGE BASKETBALL ODDS: GAME LINES*, DRAFTKINGS SPORTSBOOK, <https://sportsbook.draftkings.com/leagues/basketball/88670771> (last visited Dec. 18, 2021) (showing single game bets for North Dakota vs. Dixie State men's basketball game).

207. See Holden & Edelman, *supra* note 1, at 945 (saying that IGRA mandated compacts are a tradeoff for the tribe between substantial exclusivity of gambling operation and subjecting itself to state regulation).

208. Evarella, *supra* note 86.

209. *Sisseton Compact*, *supra* note 82, at § 3.1(G).

210. See *supra* Part IV.C.3. *Florida's Issues*.

211. *Gaming Committee Working to Develop Mobile Sports Betting*, *supra* note 117 (Mississippi House Gaming Committee Chair stating they want to "do it the right way" by requiring national platforms to partner with the brick-and-mortar casinos); Mauger, *supra* note 132 (detailing that Michigan only granted mobile sports betting licenses to existing casinos).

From there, the tribes may exercise their business judgment to partner with an online platform to offer sports betting or invest in the tribe's own app.²¹² The tribal sportsbooks already partner with IGT for their sports gambling kiosks, so they may wish to expand that relationship to mobile betting.²¹³ Currently, the tribes oppose state legalization of sports betting because they fear casino traffic will dissipate.²¹⁴ But, tribal opposition to statewide sports gambling hinged on the proposal for kiosks all over the state that cut into the tribes' exclusivity.²¹⁵ Under this note's proposal, the tribes retain their exclusivity on gaming in North Dakota. Even if there is an impact on physical casino traffic, the tribes will receive compensation through the additional revenue created by mobile sports betting. However, some in the gaming industry question whether mobile gaming actually injures retail foot traffic.²¹⁶

VI. CONCLUSION

States across the nation are legalizing sports betting at an increasing pace, and gambling continues to occupy more of a pervasive presence in American sports culture. Because of these increases, more North Dakotans will likely gamble on sports. As long as North Dakota bans sports gambling, those people will turn to the illegal market. The state should desire to create a safe, regulated, taxable market for this consumer interest. Since North Dakota has a significant tribal gaming presence, the tribes must be incorporated into any sports gambling plan. States like New York, Mississippi, and Michigan show the benefits of mobile betting far outweigh retail only. Additionally, the local comparison between Wyoming and South Dakota further indicates that mobile betting should be utilized to maximize legal bets. The state should seek to maximize bets to eliminate as much of the illegal market as possible, but the state will also benefit by maximizing tax revenues as well.

*Austin Eggl**

212. See *supra* Part IV.C.1., *Michigan's Experience* (noting the Michigan tribes chose to partner with mobile operators); *supra* Part IV.C.2., *Arizona's Adaptation* (noting Arizona tribes also chose to partner with mobile operators).

213. See *supra*, Part III.B., TRIBAL SPORTSBOOKS IN NORTH DAKOTA.

214. Evanella, *supra* note 86.

215. See *supra* Part III.C. PROPOSED LEGISLATION.

216. See Gothner, *supra* note 180; Matt Traub, *How Sports Betting is Changing the Game for Destinations and Venues*, SPORTS TRAVEL (Apr. 13, 2021), <https://www.sportstravel-magazine.com/how-sports-betting-is-changing-the-game-for-destinations-and-venues/> (New Jersey retail casino owner discussing the positive benefits of New Jersey's legalization of sports gambling even though New Jersey authorizes mobile betting).

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