

TIME TO GO “ALL-IN” ON SPORTS BETTING: KENTUCKY’S PATHWAY TO LEGALIZED SPORTS BETTING

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I. INTRODUCTION

“Let’s not talk about the ‘evils’ of gambling when it comes to sports,” proclaimed David Stern in 2016—one of the National Basketball Association’s most infamous commissioners.¹ “The industry has come to accept that a properly run gaming association will be protective of sports.”² And with the landmark decision of *Murphy v. NCAA*, the Supreme Court finally overturned the Professional and Amateur Sport Protection Act of 1992 (PASPA).³ PASPA, in essence, prohibited any state from authorizing or permitting sports wagering, and *Murphy* effectively cleared a path for states like Kentucky to legalize sports betting.⁴

The overturning of PASPA sent shockwaves throughout the gaming world.⁵ Various state legislatures rushed the field in order to secure their stake in the additional revenue that could potentially be generated by sports betting.⁶ However, this newfound gaming imperative drew the attention of numerous professional sport leagues that wanted a voice in the legislative process and a share of the money.⁷ These leagues included the National Basketball Association (NBA), the National Football League (NFL), Major

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¹ David Purdum, *Former NBA Commissioner David Stern Hopes to See Legalized Betting Expand in U.S.*, ABC NEWS (September 30, 2016), <https://abcnews.go.com/Sports/nba-commissioner-david-stern-hopes-legalized-betting-expand/story?id=42480797>.

² *Id.*

³ *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

⁴ See Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified at 28 U.S.C. §§3701–3704 (2012)), *invalidated by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

⁵ See generally A.J. Perez, *What it Means: Supreme Court Strikes Down PASPA Law that Limited Sports Betting*, USA TODAY (May 14, 2018), <https://www.usatoday.com/story/sports/2018/05/14/supreme-court-sports-betting-paspa-law-new-jersey/440710002/>.

⁶ Dustin Gouke, *Legal Sports Betting is Coming to US, as New Jersey Wins Supreme Court Case*, LEGAL SPORTS REPORT (May 14, 2018), <https://www.legalsportsreport.com/18718/nj-sports-betting-case-2/>.

⁷ See *id.*

League Baseball (MLB), the National Hockey League (NHL), and Major League Soccer (MLS).⁸ Now, with the ball in Kentucky's possession, the legislature must decide on how to best regulate the sports betting industry.⁹

Part II of this Note begins with a discussion of the history of sports gambling, including details of its emergence and growth in American society; a brief overview of legislative enactments to regulate it; and a summary of the Supreme Court decision in *Murphy v. NCAA* that overturned the prohibition on sports gambling.¹⁰ Part III analyzes sports betting in the aftermath of the *Murphy* decision. This analysis explains the perspectives of current professional leagues and discusses how some states have already tackled the issue of legalized sports betting. Part III also presents the possibility of federal legislation, and it also considers the implication for Kentucky—considering potential constitutional challenges in the state. Lastly, Part IV applies the *Murphy* decision to Kentucky and proposes how the state should handle the issue of sports betting through legislation. More specifically, Part IV provides insight into important core betting provisions that should be considered before a state regulates sports betting, by unpacking the principles announced by various professional sports leagues, and incorporates a selection of those principles through an enabling statute. This would allow the appropriate regulating agency to use the guidelines to promulgate regulations that benefit Kentucky while still protecting the interests of sports leagues.

⁸ See *id.*

⁹ At the time of this Note's publication, the Kentucky General Assembly is debating House Bill 137. See Joe Sonka, *Kentucky Sports Betting Bill Passes Out of House Committee by Unanimous Vote*, COURIER J. (Jan. 15, 2020, 12:59 PM), <https://www.courier-journal.com/story/news/politics/2020/01/15/kentucky-sports-betting-bill-passes-out-house-committee-unanimously/4476769002/>. The bill "would set up a regulatory framework for residents to legally bet on sports — in addition to playing online poker and fantasy sports contests." *Id.* However, after passing out of a House committee, it is currently stalled before the full House of Representatives, presenting itself as a divisive issue among House Republicans. See Daniel Desrochers, *Kentucky's Sports Betting Bill is Stalled in the House of Representatives. How Come?*, LEXINGTON HERALD LEADER (Feb. 5, 2020, 11:59 AM), <https://www.kentucky.com/news/politics-government/article239964298.html>. This is not Kentucky's first legislative attempt since the *Murphy* decision. See Jill R. Dorson, *Sports Betting A Better Bet In Kentucky in 2020*, SPORTS HANDLE (Sept. 16, 2019), <https://sports-handle.com/kentucky-governor-sports-betting/>.

¹⁰ See generally *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

II. BACKGROUND

A. America's National Pastime

Sports betting has been a long-standing tradition in the United States.¹¹ Since the colonial era in America, the practice of making a friendly wager on sports or competitions was commonplace.¹² For example, wagers on horse races, cockfights, and bare-knuckle fights occurred frequently.¹³ Even the powerful Puritan influence permitted it, so long as the betting was in moderation and no trouble ensued.¹⁴ This tradition became a staple during and after the American Revolutionary War period, especially through horse racing.¹⁵ The personal writings of prominent political figures of the era, such as Thomas Jefferson, George Washington, and Andrew Jackson, reference their winning bets at local race tracks.¹⁶ Sports wagering became an "integral part" of life during post-Civil War America as young males flocked to the large cities of the North where saloon keepers would often serve the double role of bookmaker and bartender.¹⁷ Regardless of its popularity, sports betting did not persist without significant opposition. A number of Victorian era religious organizations firmly stood against gambling, and the underground betting rooms run by criminal organizations faced constant pressure from police raids.¹⁸

In the late nineteenth and early twentieth centuries, sports betting grew exponentially.¹⁹ The involvement of more money and more participants created more opportunities for corruption.²⁰ This period featured some of the country's most infamous sports betting scandals.²¹ With inadequate and ineffective laws to curb sports betting, gamblers and players intentionally rigged games with impunity. It soon became apparent that "things were rotten" in the sports industry.²² For example, 1877 saw professional baseball's first significant gambling scandal. Members of the Louisville Grays baseball team accepted bribes from bookkeepers, amounting to one

¹¹ See generally RICHARD O. DAVIES & RICHARD G. ABRAM, *BETTING THE LINE: SPORTS WAGERING IN AMERICAN LIFE* (2001).

¹² *Id.* at 9.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 13.

¹⁶ *Id.*

¹⁷ *Id.* at 17.

¹⁸ *Id.*

¹⁹ *Id.* at 18.

²⁰ See *id.* at 20.

²¹ See *id.*

²² *Id.*

hundred fifty dollars, to throw late-season games and ensure the team did not win the pennant.²³ Most notably, Major League Baseball fell victim to perhaps the most notorious betting transgression in the history of American sports.²⁴ Two members of the Chicago White Sox approached the infamous gambler Arnold Rothstein with a scheme to throw the World Series in exchange for payments of \$10,000 to each player.²⁵ Initially, the public revelation of this scandal sent shockwaves throughout the American sports community.²⁶ However, scandals such as these did little to deter the public's interest in casual sports betting, because the activity was so deeply ingrained into American culture.²⁷ Countless Americans continued to bet with their local bookmakers throughout the early twentieth century despite efforts by politicians, journalists, and religious leaders to slow gambling through legislation.²⁸

B. Congress Attempts to Control Sports Betting

In an attempt to slow the growth of illegal gambling, Congress passed the Wire Act in 1961.²⁹ This Act targeted individuals who operated their illegal gambling businesses by telephone or telegraph.³⁰ Specifically, it prohibited “betting or wagering knowingly us[ing] a wire communication facility for the transmission . . . of bets or wagers or information assisting in the placing of bets or wagers on any sport event or contest”³¹ While the Act was an affirmative step towards preventing rampant corruption in sports gambling, it has long been understood “as a narrow and targeted weapon to assist the states” in their efforts to combat organized crime operations.³² For staunch opponents of sports gambling, the Wire Act did not amount to the desired federal prohibition that would prevent sports gambling operations.³³

²³ *Id.*

²⁴ Seth S. Tannenbaum, *The Ever Watchful Eye of the Magnate: Policing and Ballpark Gambling in the Twentieth Century*, in ALL IN: THE SPREAD OF GAMBLING IN TWENTIETH-CENTURY UNITED STATES 44, 56 (Jonathan D. Cohen & David G. Schwartz eds., 2018).

²⁵ *Id.* at 56.

²⁶ *Id.*

²⁷ *Id.* at 44–45.

²⁸ DAVIES & ABRAM, *supra* note 11, at 29.

²⁹ Federal Wire Act of 1961, 18 U.S.C § 1084 (2012).

³⁰ *Id.*

³¹ *Id.*

³² Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, UNLV CTR. FOR GAMING RES. OCCASIONAL PAPER SERIES 2 (Sept. 2014), https://gaming.unlv.edu/papers/cgr_op29_minton.pdf.

³³ *Id.*

This changed in 1992 with the passage of PASPA. Section 3702 provided:

It shall be unlawful for –

- (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law, or compact, or
- (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.³⁴

Additionally, legislative history provides insight into the sweeping nature of the law and its three main goals: to end the spread of all state-sponsored sports gambling while maintaining integrity in sports and limiting youth exposure to sports gambling.³⁵ Following PASPA's enactment, professional leagues, prominent amateur leagues, and other opponents of sports gambling finally got the coverage they sought; sports betting was now prohibited across the country. But, this protection was relatively short lived, as states began to challenge its constitutionality.

C. The Court Strikes Back

In May of 2018, the Supreme Court decided *Murphy v. NCAA*, a landmark opinion concerning sports gambling.³⁶ The case arose out of a New Jersey amended statute enacted in 2012 that allowed the state legislature to authorize sports gambling.³⁷ This legislation faced fierce opposition from sports leagues at the professional and collegiate level.³⁸ The National Collegiate Athletic Association (NCAA) and various professional leagues filed action against the New Jersey Governor Chris Christie and other state

³⁴ See Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified at 28 U.S.C. §§3701–3704 (2012)), *invalidated by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

³⁵ Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 288 (2011).

³⁶ See *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

³⁷ *NCAA v. Christie*, 926 F. Supp. 2d 551, 556 (D. N.J. 2013), *aff'd sub nom. NCAA v. Governor of N.J.*, 730 F.3d 208 (3rd Cir. 2013).

³⁸ *Id.* at 553.

officials seeking an injunction to prevent the state from enacting the sports wagering law.³⁹

New Jersey primarily relied on the anti-commandeering principle,⁴⁰ asserting that PASPA “regulates a State’s exercise of its lawmaking power by prohibiting it from modifying or repealing its laws” regarding sports gambling.⁴¹ Ultimately, the district court did not find an anti-commandeering violation⁴² and the Third Circuit affirmed this decision because “PASPA does not require or coerce states to lift a finger.”⁴³ New Jersey’s writ of certiorari was denied as well.⁴⁴

New Jersey’s pursuit for sports gambling did not end there. The state enacted a new law in 2014 that did not allow New Jersey to “authorize, license, sponsor, operate, advertise, or promote sports gambling.”⁴⁵ Instead, the state constructed the 2014 law as a repealer.⁴⁶ It removed provisions of state law that prohibited sports gambling “insofar as they concerned the placement and acceptance of wagers on sporting events” that did not include a New Jersey college team or a collegiate competition occurring in the State.⁴⁷

As expected, in 2014, the original plaintiffs—the NCAA, the NBA, the NFL, the NHL, and MLB—took action against the State of New Jersey, filing suit in a New Jersey District Court.⁴⁸ Once again, the district court and the Third Circuit confirmed that the new law, just like the old one, violated PASPA because it “authoriz[ed] sport gambling.”⁴⁹ Further, the court affirmed that PASPA did not violate anti-commandeering because it “does not command states to take affirmative actions.”⁵⁰

In 2014, the Supreme Court granted review to decide the constitutionality of PASPA and the actions taken by New Jersey.⁵¹ First, the Court had to

³⁹ *Id.*

⁴⁰ The anti-commandeering principle, in relation to the Supreme Court’s Tenth Amendment jurisprudence, is that Congress may not “command a state government to enact state regulation . . . [and] may not conscript state governments as its agents.” *New York v. United States*, 505 U.S. 144, 178 (1992).

⁴¹ *Murphy*, 138 S. Ct., at 1471.

⁴² *Christie*, 926 F. Supp. 2d at 561 (“PASPA does not violate the Tenth Amendment. Most importantly, it neither *compels* nor *commandeers* New Jersey to take any action. Moreover, the federal officials who passed PASPA, and continue to support it, are clearly accountable to the citizens of the several States.”).

⁴³ *Murphy*, 138 S. Ct. at 1471.

⁴⁴ *Christie v. NCAA*, 573 U.S. 931 (2014).

⁴⁵ *Murphy*, 138 S. Ct. at 1472.

⁴⁶ *NCAA v. Christie*, 61 F. Supp. 3d 488, 494 (D. N.J. 2014).

⁴⁷ *Murphy*, 138 S. Ct. at 1472 (internal quotation marks omitted).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *NCAA v. Governor of N.J.*, 832 F.3d 389, 401 (3rd Cir. 2016).

⁵¹ *See Murphy*, 138 S. Ct. at 1471.

clarify the meaning of the word "authorize" within PASPA.⁵² New Jersey, the petitioner, argued that the anti-authorization clause required the "States to maintain their existing laws against sports gambling without alteration."⁵³ The professional and amateur sports leagues pushed for a narrower interpretation, arguing that the clause necessitated "affirmative action" that "endows" entities with the "authority to conduct sports gambling operations."⁵⁴ Ultimately, the Court sided with the petitioners because when a state "repeals old laws banning sports gambling, it authorizes that activity."⁵⁵ This coheres with the rationale that a state does not authorize everything it does not prohibit through its laws. Indeed, state authorization only occurs if "the activity in question would otherwise be restricted."⁵⁶ For instance, a state does not "authorize its residents to brush their teeth" because the state does not prohibit or regulate this action.⁵⁷ Thus, a state does not authorize sports gambling by repealing its own laws that prohibit it.

Once it made a decision on the meaning of the authorization provision, the Court then analyzed PASPA's authorization provision under the anti-commandeering principle.⁵⁸ Generally, the anti-commandeering principle restrains Congress' "power to issue orders directly to the States."⁵⁹ The Court in *New York v. United States* emphatically held that the Constitution "confers upon Congress the power to regulate individuals, not States."⁶⁰ In the context of PASPA, the authorization provision expressly prohibits "state authorization of sports gambling" and thus contravenes the anti-commandeering principle.⁶¹ The respondents attempted to distinguish the PASPA provision in question by insisting that it only directs what states must not do rather than what they must do.⁶² This distinction held no weight in the eyes of the Court.⁶³ The principle "that Congress cannot issue direct orders to state legislatures applies" regardless of whether the law prohibits a state from acting or directs a state on how it should act.⁶⁴ Accordingly, the Court

⁵² *Id.*

⁵³ *Id.* at 1474.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1478.

⁵⁹ *Id.* at 1475.

⁶⁰ *New York v. United States*, 505 U.S. 144, 166 (1992).

⁶¹ *Murphy*, 138 S. Ct. at 1473.

⁶² *Id.*

⁶³ *Id.* at 1478.

⁶⁴ *Id.*

determined that the authorization provision violated the anti-commandeering rule and therefore, it was unconstitutional.

In the wake of *Murphy*, a vital question remains: who should regulate sports gambling? The Court ended its opinion by admitting that this newfound legalization “requires an important policy choice,” and if Congress chooses not to act, each state may act individually.⁶⁵ This decision opened the door for states to enact a variety of regulations that could have drastic implications for both professional and amateur sports leagues.⁶⁶ Recognizing the states’ eagerness to implement sports gambling legislation, various professional leagues lobbied for specific provisions to protect the interests of the leagues.⁶⁷ These requests are not without merit, and they necessitate careful consideration by state lawmakers.

III. ANALYSIS

This analysis first examines the various requests for proposed legislation that have been submitted by major professional sports leagues, as well as the policy reasons behind these requests. It also includes a brief discussion of the controversial inclusion of integrity fees. Next, this analysis transitions into a survey of the New Jersey statute already implemented after the *Murphy* decision. This section also presents and challenges the possibility of federal legislation by Congress. Finally, this analysis introduces the implications of the *Murphy* decision for Kentucky and considers the potential constitutional challenges.

A. The Sports Leagues Offer Advice

Currently, Kentucky—along with many other states—has no legislation to regulate sports gambling, but this has not stopped professional sports leagues from expressing concerns about how sports betting should be regulated.⁶⁸ In order to implement an effective and reasonable policy on sports betting, it is important for all states to first understand and consider the policies requested by the United States’ major professional sports leagues.

⁶⁵ *Id.* at 1484.

⁶⁶ See Dustin Gouker, *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> (last updated Dec. 20, 2019).

⁶⁷ See Eric Ramsey, *NBA, MLB Turn up Pressure on Sports Betting: Leagues Registered to Lobby for or Against Legalization in Six States*, LEGAL SPORTS REP. (February 7, 2018), <https://www.legalsportsreport.com/18265/mlb-nba-lobbying-sports-betting/>.

⁶⁸ Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN, http://www.espn.com/chalk/story/_id/19740480/gambling-sports-betting-bill-tracker-all-50-states (last updated Dec. 20, 2019).

This will protect the interests of the states, the leagues, the consumers, the operators, and the fans.⁶⁹

1. The National Football League

Following the *Murphy* decision, Roger Goodell, the current commissioner of the NFL issued a statement that laid the groundwork for a potential legislative framework.⁷⁰ Goodell asked Congress to “enact core standards for states that choose to legalize sports betting” in order to “protect[] our players, employees, and partners.”⁷¹ He then provided four core principles to serve as the foundation for legislation.

a. Consumer Protections

First, Goodell requested “substantial consumer protections.”⁷² As a general matter, this is a relatively broad provision that elicits virtually no opposition.⁷³ More specifically, it secures the validity of the actual betting transactions for both sides of the bet. The operators of sports betting organizations need to know who is betting; likewise, the bettors need confidence in both the legitimacy of these betting operations and the assurance that winning bets will be fully paid.⁷⁴

Additionally, this principle ties into ensuring that there is “substantial education and compliance trainings” for employees, players, and teams.⁷⁵ The NFL and other professional leagues do not want to return to a state of widespread corruption and game-fixing like that which tarnished the reputation of professional sports throughout the early twentieth century before anti-sports gambling legislation was implemented. Similarly, a state wants to protect the interests of its residents who choose to participate in sports gambling through the legitimacy of the state’s own gaming operations, while also instilling confidence in consumers that members of sports leagues

⁶⁹ See Ramsey, *supra* note 67.

⁷⁰ Justin Rogers, *Goodell on Betting Ruling: He’ll ‘Protect Integrity’ of NFL*, THE DETROIT NEWS (May 21, 2018), <https://www.detroitnews.com/story/sports/nfl/lions/2018/05/21/nfl-commissioner-roger-goodell-weighs-sports-betting/628944002/>.

⁷¹ *Id.*

⁷² *Statement from NFL Commissioner Roger Goodell on Sports Betting*, NFL COMM., <https://nflcommunications.com/Pages/STATEMENT-FROM-NFL-COMMISSIONER-ROGER-GOODSELL-ON-SPORTS-BETTING.aspx>. [hereinafter *NFL Statement*] (last visited Dec. 22, 2019).

⁷³ See Eric Ramsey, *Game on for NFL and Sports Betting: Goodell Lays Out ‘Core Principles’ for Regulation*, LEGAL SPORTS REP. (May 21, 2018), <https://www.legalsportsreport.com/20618/nfl-core-principles-sports-betting/> [hereinafter *Game On*].

⁷⁴ *Id.*

⁷⁵ *NFL Statement*, *supra* note 72.

refrain from betting on their own sport.⁷⁶ This type of provision secures the legitimacy of sports betting operations.

b. Protection of Intellectual Content

Second, Goodell urged that sports leagues must be able to protect content and intellectual property “from those who attempt to steal or misuse it.”⁷⁷ This principle seeks to safeguard the league from the unauthorized use of its statistics. More specifically, it ensures that third parties do not have free access to data that the NFL would deem to be proprietary.⁷⁸ However, a policy such as this will likely “come to judicial blows” because the commercialization of data is a legal battle that professional leagues have lost on multiple occasions.⁷⁹ Furthermore, the Supreme Court held that data are only protected if they “are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”⁸⁰ Thus, the mere collection of sports event data is not copyrightable.⁸¹ Subsequent cases implemented this framework to decide issues regarding the collection and transmittance of sports data from live games.⁸²

The first in this series of cases involved the NBA and a sports data provider named STATS.⁸³ STATS watched the NBA games and delivered live data from the game to a sports information service owned by Motorola.⁸⁴ The NBA asserted that this distribution of game data constituted copyright infringement because the data contained time sensitive information generated by the NBA at its own expense.⁸⁵ The court of appeals reaffirmed the district court’s decision that STATS did not infringe upon the NBA’s copyrighted data because STATS only reproduced “facts from the broadcasts” rather than reproducing an “expression or description of the game,” which would constitute an actual broadcast of the game itself.⁸⁶ Furthermore, this use of

⁷⁶ *Game On*, *supra* note 73.

⁷⁷ *NFL Statement*, *supra* note 72.

⁷⁸ *Game On*, *supra* note 73.

⁷⁹ *Id.*

⁸⁰ *Feist Publ’ns, Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340, 356 (1991).

⁸¹ *See* Christina Frodl, *Commercialisation of Sports Data: Rights of Event Owners Over Information and Statistics Generated About Their Sports Events*, 26 MARQ. SPORTS L. REV. 55, 76 (2015).

⁸² *See, e.g.*, *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077. (E.D. Mo. 2006), *aff’d*, 505 F.3d 818 (8th Cir. 2007); *Morris Communs. Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004).

⁸³ *See* *NBA v. Motorola, Inc.*, 105 F.3d 841 (2nd Cir. 1997).

⁸⁴ *Id.* at 843.

⁸⁵ *Id.* at 845.

⁸⁶ *Id.* at 847.

data did not reach the levels found in *Feist Publications, Inc. v. Rural Telephone Service Co.*⁸⁷ because the game data fell within the umbrella of fact in the "fact/expression dichotomy," instead of reproducing expressions or descriptions of the game.⁸⁸

The following year, Major League Baseball Advanced Media, having developed its own online fantasy baseball game using like data, declined a license to CBC Distribution and Marketing.⁸⁹ Subsequently, CBC sought declaratory relief because the use of the players' names and baseball statistics violated neither the players' publicity rights nor the league's ownership of statistics.⁹⁰ The court agreed and held that "CBC's use of the players' names in conjunction with the players' records involves 'purely factual information'" to which any fan or newspaper would have access.⁹¹ Furthermore, this did not constitute an infringement of copyright law because CBC only utilized facts from the games and not "the expression or description of the game."⁹²

Professional sports leagues finally caught a break when the Eleventh Circuit affirmed a summary judgment ruling in favor of the Professional Golf Association (PGA).⁹³ This case arose when Morris Communications Corporation filed suit against the PGA because it claimed that the PGA monopolized the publication of real-time golf scores along with the sale of those scores.⁹⁴ Due to the nature of a golf tournament, it is impossible for one person to follow the scores of all the players. The PGA developed the Real-Time Scoring System (RTSS) to combat this issue.⁹⁵ Once the PGA receives the scores, it prohibits "credentialed media organizations from selling . . . information obtained in the media center to non-credentialed third-party[s] . . . without first buying license . . . from [the] PGA."⁹⁶ Morris contended that the "PGA is the only entity able to publish and sell real-time golf scores."⁹⁷ The court rejected this contention and found that the PGA had a "legitimate business purpose" to protect the RTSS, and it could act to prohibit data

⁸⁷ See generally *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)

⁸⁸ *NBA*, 105 F.3d at 847.

⁸⁹ See *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1081 (E.D. Mo. 2006).

⁹⁰ *Id.*

⁹¹ *Id.* at 1102.

⁹² *Id.* at 1103.

⁹³ See *Morris Comm'ns. Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1290 (11th Cir. 2004).

⁹⁴ *Id.* at 1291.

⁹⁵ See *id.* at 1290–91 (This section offers a description of the unique system used by the PGA to comply with previous decisions).

⁹⁶ *Id.* at 1291.

⁹⁷ *Id.*

companies, such as Morris, from “free-riding” with the use of the PGA’s licensed data.⁹⁸

With these decisions as a backdrop for betting regulation, professional leagues such as the NFL must understand the difficulty in ensuring protection of official league data. Perhaps the leagues could develop a system similar to the PGA’s that is unique to the sport and prohibits betting operators from free-riding off the data collected and managed by the league. Otherwise, leagues will have no choice but to allow the unrestricted use of their data,⁹⁹ which could lead to uncertainty regarding the accuracy of the data when it is transmitted to fans.

c. Reliable League Data

Third, Goodell intends for fans to have access to official and reliable league data.¹⁰⁰ This ties back to the protection of intellectual content and league data because many leagues established partnerships with sports data firms that collect and transmit live sports statistics, and this information is already used by teams, media outlets, and daily fantasy sports sites.¹⁰¹ Presumably, sports betting operations will need data that is accurate and reliable so that bettors maintain confidence in the gambling system. This means that leagues such as the NFL need to ensure that the betting operators receive official statistics through licensed distributors, rather than freeloaders.¹⁰² However, in order to avoid judicial conflict, the leagues must comply with the previously discussed decisions and develop unique systems that do not inhibit the use of information that falls under the “purely factual” umbrella described in the *Major League Baseball Advanced Media* case.¹⁰³ Under the principles suggested by Goodell, if the betting operators can receive official statistics by purchasing licensed league data, they will be able to secure reliable data for fans.

d. Resources for Law Enforcement

Fourth, Goodell requests that the federal government allocate resources to ensure that law enforcement has sufficient means to effectively monitor

⁹⁸ *Id.* at 1295–96.

⁹⁹ *Game On*, *supra* note 73.

¹⁰⁰ *NFL Statement*, *supra* note 72.

¹⁰¹ *Game On*, *supra* note 73.

¹⁰² *Id.*

¹⁰³ See *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1102 (E.D. Mo. 2006), *aff’d*, 505 F.3d 818 (8th Cir. 2007).

sports betting.¹⁰⁴ In other words, the league requests reinforcement of the states’ police power to conduct effective control over sports betting operators and consumers so that fans are protected and bad actors are penalized.¹⁰⁵ Moreover, this principle acts as an extension to the first—consumer protection—but seeks assurance that states will maintain sufficient resources within their own gaming commissions so that organized crime and bad actors do not influence the outcome of competitions. This request secures sufficient resources for states that are not currently major players in gambling in order to shield the leagues and consumers from bad actors.

As a whole, these four principles serve as a sturdy foundation for any betting legislation. The overarching goal is to protect the consumers, the leagues, and the operators. Furthermore, states should take these provisions into consideration in order to develop regulations that sustain a healthy sports betting industry.

2. The NBA and MLB Make Requests

The NFL was not the only league attempting to convince legislatures about how to regulate betting operations. While lawmakers for West Virginia began discussions for legalized sports betting throughout the state’s casinos, lobbyists for the NBA and MLB handed out documents that outlined the leagues’ position on sports betting. The opening statement of the document declares that it is a state’s responsibility to “put consumer safety and sports integrity first.”¹⁰⁶ Moreover, it asserts that without the sports and without the fans, sports betting would not exist.¹⁰⁷ The request then outlined five principles that are “essential to fair and safe sports betting.”¹⁰⁸

First, betting operators have a duty to report “suspect betting” and comply with investigations.¹⁰⁹ More specifically, operators must immediately report any betting activity considered to be “abnormal” or “suspicious.”¹¹⁰ If any activity leads to an official investigation, the operators must cooperate with leagues and regulators and ensure that all betting information is readily available. Second, the state must allow sports leagues to opt-out of certain

¹⁰⁴ *NFL Statement*, *supra* note 72.

¹⁰⁵ *Game On*, *supra* note 73.

¹⁰⁶ *Protecting the Integrity of Sports in a Regulated Sports Betting Market*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/wp-content/uploads/2018/02/NBA-WV-sports-betting-lobby-1.jpg> (last visited Dec. 22, 2019) [hereinafter *NBA and MLB Requests*].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

betting types.¹¹¹ For example, because in-game bets are more susceptible to corruption and fixing, leagues have an interest in preventing these types of bets from being placed. Third, leagues should be compensated for “their investments, risks, and integrity expenses.”¹¹² This has been dubbed as an “integrity fee,” and it will be discussed further in the following section. Fourth, there should be “reasonable protections” for fans who bet on sports,¹¹³ which includes restrictions on age and advertising. This request also seeks the use of official and reliable league data. Fifth, the leagues desire for internet gambling to be legal so that illegal markets that already permit online betting will be phased out by regulated operators.¹¹⁴

With an understanding of these requests, states have the opportunity to maintain strong relationships with the professional leagues. Moreover, implementation of these policies will ensure that leagues do not continue to lobby Congress for federal legislation that could prove costly for states. These provisions further enhance the overall goal of each professional league: to protect the consumers, leagues, and betting operators from illegal actors.

a. Integrity Fees

One area of contention that has not garnered universal support from both states and professional leagues is integrity fees. While the NFL and state level lawmakers displayed hesitation as to the implementation of integrity fees, other leagues such as the NBA and MLB have expressed interest in their use.¹¹⁵ These fees are essentially taxes on sports betting in order for the leagues to profit from the rise of legal sports betting.¹¹⁶ An integrity fee would tax handle, rather than revenue, at a rate of around one percent.¹¹⁷ This money would then be payable to each league where the sports betting occurs.¹¹⁸

It is important to emphasize the difference between a tax on the handle versus a tax on the revenue—an integrity fee being a tax on the former. Handle is the total “amount of money in wagers accepted.”¹¹⁹ Revenue, on

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Sports Betting Integrity Fee*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/integrity-fee/> (last updated Jan. 11, 2020, 9:09 AM).

¹¹⁶ *See id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Sports Betting Handle vs. Revenue*, THE LINES (May 24, 2018), <https://www.thelines.com/sports-betting-handle-revenue/>.

the other hand, is the total amount of money that sports betting operations would retain from the total amount wagered after the payouts of winning bets.¹²⁰ Historically, the revenue for betting operations has totaled to about five percent per year.¹²¹ For example, data from the Nevada Gaming Control Board indicates a record \$4.87 billion in total handle in 2017.¹²² Consequently, this set a record high for sports betting revenue at \$248.4 million—approximately 5.1% of the handle.¹²³ The implementation of an integrity fee at the proposed one percent would therefore constitute one dollar for every estimated five dollars of revenue that a sportsbook holds in revenue from one hundred dollars in handle. Furthermore, the sports betting operations would be surrendering twenty percent of their revenue with the inclusion of a one percent integrity fee.¹²⁴ This could potentially translate into “hundreds of millions” going straight to leagues’ pockets.¹²⁵

With this newfound money from integrity fees, the question of what sports leagues intend to do with their share of additional money must be answered. For leagues that are already associated with prolific betting numbers, league officials will need to increase the time and money spent on data monitoring and fairness,¹²⁶ because bettors and operators need assurance that league statistics are reliable and accessible. Perhaps even more important is the concern for integrity itself. Leagues must make certain that everyone—players, coaches, referees, and fans—understands the importance of integrity. Professional sports cannot afford a return to a period of widespread corruption at the hands of sports betting. A properly implemented integrity fee could combat this through education and strong enforcement of league policies. For example, a league such as the NFL could use the money earned from an integrity fee to provide training to new players and personnel about the league’s policies on gambling. These additional resources could provide for stronger enforcement of the rules. While the current NFL betting policy makes it clear that “all NFL Personnel are prohibited from placing, soliciting, or facilitating any bet,” the nature and simplicity of placing bets, especially with online betting, makes this difficult to enforce without adequate monitoring.¹²⁷

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² Dustin Gouker, *Nevada Sportsbooks Set Record With A Quarter Of A Billion Dollars Of Revenue In 2017*, LEGAL SPORTS REP. (Jan. 31, 2018, 9:09 AM), <https://www.legalsportsreport.com/18130/nevada-sportsbooks-2017/>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Sports Betting Integrity Fee*, *supra* note 115.

¹²⁶ *Id.*

¹²⁷ *Gambling Policy for NFL Personnel*, NFL COMM. (2018), <https://nflcommunications.com/>

There is a substantial degree of skepticism concerning the implementation of integrity fees.¹²⁸ First, taxing only the handle could have serious financial consequences for betting operations.¹²⁹ Nevada is the only state with an established sports betting industry, and it already operates on extremely thin profit margins.¹³⁰ For states new to the business, this one percent fee from multiple leagues could seriously cut into the operators' margins and force some operations out of business.¹³¹

Additionally, the majority of sports betting has been concentrated in a single state—Nevada. As more states enact regulations for sports betting, revenue will be distributed among multiple states instead of just one.¹³² Consequently, each state will have to share this money with professional leagues through integrity fees,¹³³ resulting in drastically lower margins for the operators.¹³⁴ The bearer of this cost will be the consumers who have to pay higher fees in order to offset the burden of the integrity fees.¹³⁵ This has the potential to make it more difficult for stateside operators to compete with offshore operators who are free from integrity fees and can offer lower prices. Furthermore, if the goal of professional leagues and states is to push sports gambling into a regulated market, both should ensure that costs remain low, and integrity fees threaten this.¹³⁶

Second, a question arises as to why the professional leagues actually deserve the money from integrity fees. While the leagues are the basis for the betting, they play no functional role in the betting industry.¹³⁷ The industry regulation will be handled by the state government while the operators will handle the business of gambling.¹³⁸ This leaves no room for the leagues to intervene in the operation or regulation of sports gambling. Rather, the leagues “simply exist” within the world of sports gambling.¹³⁹

Despite questions challenging the necessity of integrity fees, states cannot ignore the fact that they could potentially play a valuable role in

Documents/2018%20Policies/2018%20Gambling%20Policy%20-%20FINAL.pdf.

¹²⁸ See *Sports Betting Integrity Fees*, *supra* note 115.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ A.G. Burnett & Rick Trachok, *States Need Realistic Expectations for Sports Betting*, LAW360 (May 24, 2018, 5:36 PM), <https://www.mcdonaldcarano.com/wp-content/uploads/2018/05/States-Need-Realistic-Expectations-For-Sports-Betting-Law360.pdf>.

¹³² *Id.*

¹³³ See *Sports Betting Integrity Fees*, *supra* note 115.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

governing sports betting. These fees could prove to be a crucial source of income for smaller leagues that do not have the resources to internally monitor sports betting. However, the current trend for states that have already enacted legislation, such as New Jersey, is to omit these provisions because lawmakers see them as additional revenue for greedy leagues.¹⁴⁰

B. Existing State Legislation

A number of states have sprinted to the lead in the race for sports betting by enacting legislation immediately after the *Murphy* decision, but this Note will focus on the New Jersey statute. These enactments provide pivotal insight into how states have been able to effectively regulate sports gambling. In June of 2018, after a long battle in the courts, the New Jersey Governor signed the state’s sports betting bill into law.¹⁴¹ This signified “the dream of legalized sports betting” becoming reality for a state with an established gaming tradition in casinos and horse racing.¹⁴² As a leader in the race for legalized sports betting, along with its long history of gaming legislation, New Jersey’s gaming statute highlights successful mechanisms to create effective sports betting legislation.

1. New Jersey

This statute included a number of important provisions. First, it clarified that all professional sports are fair game for betting.¹⁴³ It defined professional sports as “two or more persons participat[ing] in sports or athletic events and receiv[ing] compensation in excess of actual expenses for their participation in such event.”¹⁴⁴ However, it included a distinction for college athletic events. The statute deemed “any collegiate sport or athletic event that takes place in New Jersey. . . or in which any New Jersey college team participates” as a prohibited sports event for betting purposes.¹⁴⁵ It also prohibited any wagering on high school sports events.

Second, the legislation prevents those closely associated with a sport—such as coaches, players, and referees—from betting on the sport in which

¹⁴⁰ Josh Kosman, *Leagues Big Losers Under New NJ Sports Betting Bill*, N.Y. POST, <https://nypost.com/2018/06/04/new-sports-betting-bill-waves-controversial-integrity-fee/> (last updated June 4, 2018, 1:43 AM).

¹⁴¹ Nick Corasaniti, *New Jersey Legalizes Sports Betting*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/nyregion/sports-betting-legalized-nj.html>.

¹⁴² *Id.*

¹⁴³ S.B. 2602, 218th Leg., Reg. Sess. (N.J. 2018).

¹⁴⁴ *Id.* § 1.

¹⁴⁵ *Id.*

they participate.¹⁴⁶ This is an important provision because it helps ensure that consumers are protected from any wrongdoing, such as game fixing, by those who participate in the actual game.

Lastly, it includes special taxes on land-based bets and electronic bets. The money received by the casinos for sports betting will not be taxed as gross revenue. Instead, the sums will “be subject to an 8.5 percent tax” and electronic bets will “be subject to a [thirteen] percent tax.”¹⁴⁷ Interestingly, New Jersey did not include an integrity fee in the bill. As one New Jersey lawmaker bluntly put, “it is ‘extortion’ for the leagues to demand money” now that states are placing honest legislation to regulate sports betting.¹⁴⁸ Overall, this statute represents how other states have decided to legislate sports gambling. The exclusion of an integrity fee, however, could continue to cause tension among sports leagues vying for the fees. Consequently, this could lead to the leagues making a greater effort to pursue congressional action to enact a nation law including the fees.

C. Federal Legislation

Despite the rush to enact sports betting legislation, opponents of state regulation, including some professional leagues, have lobbied for Congress to enact comprehensive federal legislation.¹⁴⁹ Federal legislation would prevent a “hodgepodge of state-by-state regulations” that create different standards for fees and consumer protections.¹⁵⁰ Furthermore, a federal law would “direct a federal agency” to “administer the law” and work with states to coordinate the regulatory scheme.¹⁵¹

A primary benefit of a federal framework is more security for integrity. More security is important because issues of integrity do not arise solely in the United States. Foreign markets, such as China, have a history of game fixing that could affect contests in the U.S. now that betting is legalized.¹⁵² A universal system implemented by Congress would ensure that regulatory

¹⁴⁶ *Id.* § 2(f).

¹⁴⁷ *Id.* § 7.

¹⁴⁸ Wayne Perry, *Lawmaker Wants States to Reject Sports Bet ‘Integrity Fee’*, ASSOCIATED PRESS (May 23, 2018), <https://apnews.com/d2aa0429dcc64d3d940400a589d2b16a>.

¹⁴⁹ Dustin Gouker, *The NBA Says It Will Lobby Congress for Federal Regulation of Sports Betting, Shifting from Previous Stance*, LEGAL SPORTS REP. (Nov. 16, 2017, 6:09 AM), <https://www.legalsportsreport.com/16607/nba-lobbying-sports-betting/>.

¹⁵⁰ Robert Shawhan, *Legalizing Federal Sports Gambling Laws: You Got to Know When to Hold ‘em*, 40 HASTINGS COMM. & ENT. L.J. 41, 67 (2018).

¹⁵¹ Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 U.N.L.V. GAMING L.J. 153, 171 (2018).

¹⁵² *Id.* at 172.

agencies maintain international cooperation against game manipulation, and it would be more efficient than individual state legislation. This is because a federal system would facilitate the collection of nationwide data, and threats could be quickly identified and acted upon by federal law enforcement.¹⁵³

A similar concept manifests in the rationale for development of the Securities Exchange Commission (SEC). Before the creation of the SEC, regulation of the securities market was left to state governments.¹⁵⁴ This resulted in an ineffective regulatory scheme because stock promoters complied with the laws of the least regulated or most corrupted states.¹⁵⁵ A situation such as this could occur in sports betting due to market similarities with the stock exchange. For example, both markets include the "regulation of exchanges involving contracts where the purchaser/bettor is attempting to earn profits based on a future contingent event."¹⁵⁶ Moreover, the markets need government regulation to protect the honesty of the transactions; both markets exist at the national and international level, and state regulation alone may not be adequate.¹⁵⁷

However, federal regulation presents weaknesses as well. Congress has little to no real experience in regulatory schemes for betting operations.¹⁵⁸ The most recent Congressional attempt to regulate sports betting is the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). This regulatory scheme has been deemed "deeply flawed."¹⁵⁹ Many industry experts agree that the UIGEA does not work and does "little to stop online gambling."¹⁶⁰ For example, one of the glaring weaknesses in the Act is the ability of players to sidestep the regulation by setting up "a middleman payment processor" so that betting operators receive money from a third-party company as opposed to the bettor's bank account.¹⁶¹ Moreover, legitimate questions and concerns exist regarding Congress's ability to construct adequate federal gaming legislation.

States, on the other hand, largely control the regulation of gambling through their state-operated gaming agencies. These state "regulatory apparatuses" have already laid the foundation for the regulation of sports

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 173.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 174.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Brandon P. Rainey, Note, *The Unlawful Internet Gambling Enforcement Act of 2006: Legislative Problems and Solutions*, 35 J. LEGIS. 147, 151 (2009).

¹⁶¹ *Id.* at 152.

gambling.¹⁶² Thus, rather than relying on Congress to construct and implement an untested framework, the more efficient option remains with the states to build on an already existent structure that has proven to be effective.¹⁶³

D. Implications for Kentucky

Currently, Kentucky does not have legislation in place to regulate sports betting in the wake of the *Murphy* decision. Although legislators have urged the passage of a bill to ensure that Kentucky is not left behind, current legislative efforts are stalled in the General Assembly.¹⁶⁴ Kentucky is in a unique situation since it does not presently permit casino gambling.¹⁶⁵ The casino gambling industry essentially operates as a gateway for states to comfortably offer sports betting to consumers.¹⁶⁶ However, the state does operate one of the most iconic and successful horse betting industries in the country at the historic Churchill Downs.¹⁶⁷ Having horse betting operators on board for sports betting is key because they already control a significant portion of the gaming industry in the state. But, more importantly, they also have the resources and infrastructure to build the groundwork for effective regulation of the sports betting industry.¹⁶⁸

Additionally, the enactment of a state level sports betting law would allow Kentucky to customize a framework that would benefit the state, while incorporating some of the principles suggested by the professional sports leagues. This legislation should include consumer protections to protect bettors within the state, sufficient resources for state law enforcement to aid state agencies in enforcing the law, reliable data sources, and an integrity fee that provides resources for leagues to educate new members about sports gambling. Furthermore, the guidelines discussed in this analysis present crucial provisions that states should consider when legislating sports betting.

¹⁶² Miller & Cabot, *supra* note 151, at 164.

¹⁶³ *See id.*

¹⁶⁴ *See* Nicholas Garcia, *The Future of Kentucky Sports Betting Legislation Is Underway*, LEGAL SPORTS REP. (Aug. 27, 2018, 11:23 AM), <https://www.legalsportsreport.com/23313/kentucky-sports-betting-legislation/>. *See also* Desrochers, *supra* note 9.

¹⁶⁵ However, since his time as state attorney general, the newly elected Kentucky governor, Andy Beshear, has pushed for legalization of casino gambling—in addition to sports betting—to help “raise money to save Kentucky’s ailing public pension system” Tom Loftus, *Beshear to Lawmakers: Legalize Gambling to Help Fix Pension System*, COURIER J. (Nov. 26, 2018, 5:00 PM), <https://www.courier-journal.com/story/news/politics/2018/11/26/andy-beshear-letter-legalize-gambling-casinos-state-pension/2117056002/>.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

E. Potential Constitutional Challenges in Kentucky

Any potential gambling legislation, however, may face a potential uphill battle against Kentucky's Constitution. Section 226 of Kentucky's Constitution governs the state lottery.¹⁶⁹ It declares that all "lotteries and gift enterprises are forbidden" and that "no schemes for similar purposes shall be allowed."¹⁷⁰ Thus, it remains unclear whether this language precludes the operation of sports betting enterprises.

When the framers of Kentucky's current Constitution drafted the provision, they understood that a lottery "was a system in which players wager that a particular number will be selected in a random drawing."¹⁷¹ Kentucky courts have relied upon this definition in subsequent decisions where it upheld laws that allowed pari-mutuel wagers on horse races because these types of wagers are merely "patrons wagering among themselves and not against the association."¹⁷² Contrarily, lotteries are a scheme "among persons who have paid. . . for a chance to share in the distribution" of randomly determined winnings.¹⁷³ Furthermore, in order for a type of bet to be constitutionally prohibited, "the winner must be chosen purely by chance."¹⁷⁴ Even with this definition and judicial precedent, the issue of preclusion has been clarified and reclarified by recent opinions from the Kentucky Attorney General.¹⁷⁵

Therefore, this current understanding of Kentucky's Constitution does not appear to pose a significant risk to any potential legislation. Sports betting would likely fall under the same pari-mutuel category as horse racing because it is a pool of wagers made by individuals rather than the randomly selected winner in a lottery scheme. Thus, the Kentucky Legislature will have the opportunity to enact legislation that permits sports betting and incorporates aspects of the previously discussed provisions to protect operators, participants, and the sports leagues.

¹⁶⁹ KY. CONST. § 226.

¹⁷⁰ *Id.*

¹⁷¹ Constitutional Limits upon the Auth. of the Gen. Assembly to Pass Statutes which Expand Gambling in Ky, Ky. Op. Att'y Gen. No. 05-003 (2005) [hereinafter *Constitutional Limits*].

¹⁷² *Id.*

¹⁷³ *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 992 (Ky. 1931).

¹⁷⁴ *Constitutional Limits*, *supra* note 171.

¹⁷⁵ *See, e.g., id.*

IV. RESOLUTION

As it stands, Kentucky has not enacted legislation to regulate sports gambling. While bills have been drafted, none were able to gain traction during previous legislative sessions.¹⁷⁶ And although the current iteration has more support, passage appears uncertain in the 2020 session as well.¹⁷⁷ Rather than approaching the issue of regulating sports gambling directly through legislative power, this section proposes a model enabling statute that incorporates the guiding principles discussed in the analysis section. This statute would bestow the appropriate regulatory commission with the authority to effectively govern sports gambling. Although this statute has been formulated with Kentucky in mind, it contains generally applicable guidelines that other states can implement into their respective regulations.

A. Overview of Kentucky Agency Law

Generally, administrative agencies “function to implement the general policy laid down by the legislature.”¹⁷⁸ In doing so, agencies “set[] down rules to be followed based on laws passed by the legislature.”¹⁷⁹ In addition to their rule-making role, they also “function as investigatory, enforcement, and adjudicatory bodies.”¹⁸⁰ Administrative agencies attain the authority to regulate through an enabling statute that is created by the legislature.¹⁸¹ These statutes confer new powers upon an agency to carry out a delegated task.¹⁸² By creating an enabling statute, the Kentucky Legislature can legalize sports betting in the state and set out general guiding principles while delegating the power to promulgate more specific rules, and to enforce them, to an appropriate agency.

B. Definitions

- (1) “Sport or athletic event” means any professional or collegiate game, competition or similar activity involving one person or a team competing against another person or team. “Sport or athletic event” shall not include

¹⁷⁶ See Dorson, *supra* note 9.

¹⁷⁷ See *id.* See also Desrochers, *supra* note 9.

¹⁷⁸ York v. Commonwealth, 815 S.W.2d 415, 418 (Ky. Ct. App. 1991).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (citing Am. Jur. 2d *Administrative Law* § 16 (1962)).

¹⁸¹ See *Enabling Statute*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁸² *Id.*

fantasy sports or any other prohibited sports as defined in any other sections.¹⁸³

- (2) "Collegiate sport or athletic event" means a sport or athletic event played in relation to a public or private educational institution that offers education past the secondary level.¹⁸⁴
- (3) "Sports pool" means a business that accepts wagers on sporting events or other events, other than horse racing.¹⁸⁵
- (4) "Prohibited sports event" includes all high school sports or athletic events and any other sport or athletic event involving only participants under the age of eighteen. This does not include international sports or athletic events in which participants under the age of eighteen make up a majority of the participants.¹⁸⁶

1. Reasoning for Statutory Language

These definitions clarify some of the basic terms that are incorporated throughout a typical sports gambling statute.¹⁸⁷ It is important for the public and the gambling operators to recognize which sports qualify for betting in order for the industry to remain free of corruption and focus the scope of the regulations.¹⁸⁸ Moreover, this regulation offers the state a wide range of sports to include in gambling operations, but limits the ability of persons to bet on competitions that involve minors in order to safeguard the integrity of youth and high school sports. Next, the state legislature must grant the authority to the respective agency to regulate sports betting.

C. Purpose, Intent, and Construction

- (1) The General Assembly of the Commonwealth of Kentucky hereby declares that sports gaming conducted by individuals in this State is a legitimate business in which the Commonwealth has a responsibility to foster and encourage legitimate occupations and industries, and to promote and to conserve the public health, safety, and welfare.¹⁸⁹
- (2) It is hereby declared the purpose and intent of this chapter in the interest of the public health, safety, and welfare, to vest in the Gaming

¹⁸³ N.J. STAT. ANN. § 5:12A-10 (Westlaw through L.2019, c. 424 and J.R. No. 22).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *See, e.g.*, NEV. GAMING COMM. § 22.010 (2017).

¹⁸⁸ *Game On*, *supra* note 73.

¹⁸⁹ KY. REV. STAT. ANN. § 238.500 (LEXIS through Chapt. 1 of the 2020 Reg. Sess.).

Commission (hereinafter “the Commission”) forceful control of sports gambling in the Commonwealth.¹⁹⁰ This vesting of control is within the plenary power to enact and enforce administrative regulations, detailing conditions under which all legitimate sports gambling is conducted in the Commonwealth.¹⁹¹ Further, this chapter is to regulate and maintain sports gambling at any facility or institution in order to maintain the highest quality sports gambling—free of any corrupt, incompetent, dishonest, or unprincipled gambling practices.¹⁹²

- (3) Additionally, it is hereby vested in the gaming commission by this chapter the authority to remove or exclude any person whose conduct or reputation is such that his association may reflect on the honesty and integrity of sports gambling.¹⁹³

1. Reasoning for Statutory Language

This section of the statute establishes the purpose behind regulating sports gambling and the general manner in which it is to be achieved. It gives ample power and deference to the Gaming Commission to regulate the operations under the parameters established by the General Assembly. In doing so, this section gives an already-existing agency the power to regulate a similarly situated industry—such as when the New Jersey Division of Gaming Enforcement acquired the regulation of sports wagering when the state legislature legalized it¹⁹⁴—rather than relying on the legislative branch to enact comprehensive statutes to govern the industry. However, most importantly, this section recognizes the legitimacy of sports gambling within the state while situating it in the context of the state’s responsibility to protect the general welfare of the public.

D. Integrity Fee

- (1) There is established, under the jurisdiction of the Commonwealth, an integrity fee on sports betting handle.¹⁹⁵
- (2) The purpose of this fee shall be to provide adequate financial resources for an integrity group that operates in association with the various professional sports leagues in order to promote compliance with these

¹⁹⁰ *Id.* § 230.215(1).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* § 230.215(2).

¹⁹⁴ See N.J. STAT. ANN. § 5:12A-13 (Westlaw through L.2019, c. 424 and J.R. No. 22).

¹⁹⁵ KY. REV. STAT. ANN. § 230.218(1) (LEXIS through Chapt. 1 of the 2020 Reg. Sess.).

rules and to maintain a reputable sports gambling industry.¹⁹⁶ The funds generated from this fee may be invested in the following categories:

- (a) Integrity monitoring expenses;
 - (b) Public relations expenses related to issues that arise due to integrity;
 - (c) Personnel costs associated with the creation and establishment of a group to monitor sports gambling integrity issues;
 - (d) Any other expenses approved by the Attorney General.¹⁹⁷
- (3) The Commission shall promulgate administrative regulations as may be necessary to carry out the provisions and purposes of this section.¹⁹⁸

1. Reasoning for Statutory Language

The integrity fee portion of the model statute reaches a compromise between professional sports leagues and states that regulate sports gambling. While professional leagues have a legitimate interest in ensuring that the integrity of their games are not compromised, it is not in the best interests of the individual states to pay a significant amount of their generated revenue to the leagues in order to ensure integrity.¹⁹⁹ Instead, this model statute allows the state to keep the money in its own pocket, but it designates a small portion of it to govern issues of integrity. This is so that the professional leagues have confidence that their games are protected from foul play. This money would be used to form a group that works with the leagues to educate league members about the industry and develop effective monitoring policies. Ultimately, this section of the statute offers safeguards for the leagues without compromising the already narrow revenue margins for states.²⁰⁰

E. Consumer Protections – Requirement for License

- (1) No person shall hold or conduct any sports gambling organization within the Commonwealth of Kentucky without acquiring the required license from the appropriate commission.²⁰¹

¹⁹⁶ *Id.* § 230.218(2).

¹⁹⁷ *Id.* § 230.218(2).

¹⁹⁸ *Id.* § 230.260(2).

¹⁹⁹ See Ramsey, *supra* note 67.

²⁰⁰ *Sports Betting Handle vs. Revenue*, *supra* note 119.

²⁰¹ KY. REV. STAT. ANN. § 230.280(1) (LEXIS through Chapt. 1 of the 2020 Reg. Sess.).

- (2) The Commission shall have the authority to investigate the qualifications of each applicant for a license to conduct sports gambling or the renewal of a license for sports gambling.²⁰²
- (3) The Commission may issue or renew a license unless the commission determines that:
- (a) The financing of the entire the gambling operation are not sufficient, or the financing is from an illegal or unsuitable source.²⁰³
 - (b) The applicant has failed to disclose or made a misstatement of information or attempted to mislead the commission in regard to any material fact contained in the application for the license.²⁰⁴
 - (c) The applicant has knowingly failed to comply with any other provision or any other administrative regulations promulgated thereunder.²⁰⁵
 - (d) The applicant or any of its principals is determined to be unsuitable because he or she has:
 - (i) Been convicted of any crime of moral turpitude, embezzlement, or larceny, or any violation of any law relating to illegal gaming or gambling.
 - (ii) Been identified in the published reports of any federal or state legislative or executive body as being a member of organized crime.
 - (iii) Had a sports gambling license revoked in another jurisdiction on grounds that would have justified revocation of the license in Kentucky.
 - (iv) Engaged in any other activities that would pose a threat to the public interest or to the effective regulation of sports gambling in Kentucky or enhance the dangers of unfair or illegal practices in the operation of a sports gambling institution.²⁰⁶

1. Reasoning for Statutory Language

This section of the enabling statute protects the interests of the participants in sports gambling. Participants need to have confidence that the operators are fair and reliable. For any successful gambling operation, it is imperative that consumers have confidence that their bets are secure and will

²⁰² *Id.* § 230.218(2).

²⁰³ N.J. REV. STAT. § 5:12A-11 (Westlaw through L.2019, c. 424 and J.R. No. 22).

²⁰⁴ KY. REV. STAT. ANN. § 230.218(2) (LEXIS through Chapt. 1 of the 2020 Reg. Sess.).

²⁰⁵ *Id.* § 230.280(2)(e).

²⁰⁶ *Id.* § 230.280(2)(f)(6).

be paid out upon a win. These sections ensure that persons of poor character will not be able to operate or participate in the operation of a sports gambling institution. Furthermore, it provides guidelines that exclude potential operators with a history of conduct that would damage the reputation of sports gambling in the state, and it establishes reliable financial resources for the gambling institution in order to guarantee payments to winners.

F. League Data: Use and Protection

- (1) Any person desiring to conduct a sports gambling operation within the Commonwealth of Kentucky shall use and transmit data gathered only by licensed data collectors.²⁰⁷
- (2) An application shall be filed with the Commission that details the following information:
 - (a) The full name and address of the person making the application;
 - (b) The location of the place, track, or enclosure where the applicant proposes to conduct sports gambling;
 - (c) The name, address, and proof of license for any collector from which the operation intends to collect game data; and
 - (d) Any other information that the commission by administrative regulation deems relevant and necessary to determine the qualification of the collector to provide game data.²⁰⁸
- (3) The completed application shall be signed by the applicant or the chief executive officer if the applicant is an organization, sworn under oath that the information is true, accurate, and complete, and the application shall be notarized.²⁰⁹

1. Reasoning for Statutory Language

This section of the statute governs the use of reliable league data. It guarantees that operators of sports betting operations do not use inaccurate or unauthorized game data. Likewise, it protects the intellectual property of sports leagues that expend resources to maintain precise data-keeping systems. Moreover, this section ensures that betting operations do not freeload off of unauthorized data keepers by requiring a government mandated application process. As a result, professional leagues will not have

²⁰⁷ *Id.* § 230.300(1).

²⁰⁸ *Id.* § 230.300(1)(a)–(h).

²⁰⁹ *Id.* § 230.300(3).

to worry that their data is being used without consent because it must be received through an authorized source.

G. Impact of Statute

While this model does not purport to cover all aspects of a sports betting enabling statute, it does offer guidance for important considerations. First, it defines necessary terms for any sports betting regulations. Second, it grants broad statutory authority to the necessary regulatory body. Third, it confronts the controversial issue of integrity fees by reaching a middle ground between states and sports leagues. Fourth, it promotes consumer protections. Lastly, the statute develops protections for league data. Furthermore, each of these provisions present important policy decisions that Kentucky and other states need to consider in order to create a sustainable sports betting industry.

V. CONCLUSION

“I believe that sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated,” wrote Adam Silver in 2014.²¹⁰ His words still remain relevant as states—post-PASPA—have the difficult task of enacting appropriate legislation to manage the risks associated with any type of gambling operation. It is critical that states take their own interests into account when deciding how to regulate. However, states must also recognize the interests and concerns of the sports leagues in order to foster an honest sports gambling industry. As it stands, sports betting legislation in Kentucky is imminent. The General Assembly must carefully consider both sets of interests in order to guarantee the long-term prosperity and success of sports gambling while protecting the consumers, operators, fans, and leagues.

²¹⁰ Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), <https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>.