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Scott Mitchell

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# Moneyline: Maryland's Implementation of Sports Betting in The Wake of *Murphy v. NCAA*

SCOTT MITCHELL\*

## INTRODUCTION

In 2018, *Murphy v. NCAA* held that the Professional and Amateur Sports Protection Act (PASPA) was unconstitutional.<sup>1</sup> For decades, PASPA effectively outlawed any state-sponsored sports wagering outside the State of Nevada.<sup>2</sup> Nevada had long enjoyed a monopoly on the industry of sports wagering.<sup>3</sup> However, with PASPA overturned, states across the country have raced to pass legislation which allows them to get in on the action.<sup>4</sup> As of now, more than thirty states across the country have live or legal sports gambling legislation that has seen varying levels of success.<sup>5</sup> In response, states have quickly had to weigh factors which impact the effectiveness of their sports betting legislation, such as protecting consumers, promoting states' interests via tax considerations and revenue streams, and incentivizing sportsbooks to do business in their state.<sup>6</sup>

On November 3rd, 2020, Marylanders overwhelmingly voted yes at the ballot on Maryland Question 2, Sports Betting Measure.<sup>7</sup> Passing

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\* © Scott Mitchell, J.D. Candidate 2023, University of Maryland Francis King Carey School of Law. The author would like to thank the Executive Board and Staff Members at the Journal of Business & Technology Law for their support and dedication. Most importantly, the author would like to thank his family & friends for their unwavering love and support, without whom none of this would have ever been possible. 1. *Murphy v. Natl. Collegiate Athletic Ass'n*, 138 S. Ct. 1465, 1467 (2018); *See generally* 28 U.S.C.A. § 3702.

1. 28 U.S.C.A. § 3702.

2. Jeremy Martin, *History of Sports Betting and the Point Spread*, DOC'S SPORTS SERVICE (May 30, 2017), <https://www.docsports.com/sports-betting-history.html> (It is important to note that "sports gambling," "sports wagering," and "sports betting" will all be used interchangeably for the purposes of this analysis).

3. *Murphy*, 138 S. Ct. at 1468.

4. *Interactive Map: Sports Betting in the U.S.*, AMERICAN GAMING ASSOCIATION (Dec. 9, 2021), <https://www.americangaming.org/research/state-gaming-map/>.

5. *See infra* Part III.

6. *Maryland Question 2, Sports Betting Measure (2020)*, BALLOTPEdia, [https://ballotpedia.org/Maryland\\_Question\\_2,\\_Sports\\_Betting\\_Measure\\_\(2020\)](https://ballotpedia.org/Maryland_Question_2,_Sports_Betting_Measure_(2020)).

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with a 67% majority, the legislatively referred state statute was officially set to move forward.<sup>8</sup> Maryland House Bill 940 titled “Gaming – Regulation of Fantasy Gaming Competitions and Implementation of Sports Wagering” was approved by Governor Larry Hogan on May 18th, 2021.<sup>9</sup> Maryland’s legislation has some key characteristics which position the crab cake state to thrive within the expanding sports wagering market, passing on benefits to consumers in the process.<sup>10</sup> Maryland’s sports gambling legislation has a few key characteristics which the state believes will lead to its success. First, the Maryland legislation makes a clear distinction between fantasy gaming competitions and sports wagering.<sup>11</sup> Second, the bill has a robust licensing system, which results in strict classifications for participating businesses that will promote inclusion and success for businesses of varying size in the State.<sup>12</sup> In addition, Maryland has a universal tax rate of 15% on all sports gambling revenue, which should promote competition that benefits consumers and incentivizes sportsbooks to do business in the State.<sup>13</sup> Lastly, Maryland has chosen to be a trailblazer by actively promoting the interests of women and minority owned businesses within all aspects of the sports wagering industry.<sup>14</sup> In theory, the State has positioned itself to benefit drastically from the development of the sports betting industry, while promoting underrepresented businesses in the process.<sup>15</sup>

#### **I. THE HISTORY OF GAMES OF CHANCE**

Gambling and games of chance have a deep rooted history in the United States of America.<sup>16</sup> Throughout the nation’s history, there has been a “long tug of war” between gambling regulations and the people who are looking to get in on the action.<sup>17</sup> Even in the nations earliest colonial settlements, lotteries and other games of chance

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7. *Id.*

8. MD CODE ANN., STATE GOV’T § 9-1E-01 (West 2021).

9. *See infra* Part V.

10. MD CODE ANN., STATE GOV’T § 9-1D-01 (West 2021).

11. MD CODE ANN., STATE GOV’T § 9-1E-06 (West 2021).

12. MD CODE ANN., STATE GOV’T § 9-1E-12 (West 2021).

13. MD CODE ANN., STATE GOV’T § 9-1E-02 (West 2021).

14. *Id.*

15. Brett Smiley, *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTSHANDLE (Nov. 13, 2017),

<https://sportshandle.com/gambling-laws-legislation-united-states-history/>.

16. Smiley, *supra* note 16.

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were viewed as a fundamental piece of the community, often used to raise funds for local projects such as schools and churches.<sup>18</sup> However, as we look back through history, gambling came to be synonymous with corruption, crime and economic downturn across the country.<sup>19</sup> In response to the recession of the early 1900's, the country saw a wave of anti-gambling laws that restricted all aspects of gaming including lotteries, table games, and sports wagering.<sup>20</sup> These laws were often influenced by popular Christian sentiment of the time, which tied gambling to other unhealthy qualities of society.<sup>21</sup> It wasn't until the 1919 Major League Baseball World Series that sports wagering, specifically, came under immense scrutiny.<sup>22</sup> Infamously known today as the Black Sox Scandal, players from the Chicago White Sox were revealed to have fixed games on baseball's biggest stage at the request of local sports gamblers.<sup>23</sup> This game fixing scandal shocked the nation and painted the sports gambling community as criminals who were trying to ruin the sanctity of the game for their own monetary advancement.<sup>24</sup> As the decades passed, a negative connotation around sports betting remained, however the amount of money wagered by Americans on live sporting events continued to rise.<sup>25</sup>

As the world recovered from the devastation inflicted by the first World War, the American economy was poised to enter a new age.<sup>26</sup> Americans were working less and the average family had more money in their pocket than ever before.<sup>27</sup> The countries most popular athletes began to rise to stardom and people were lining up to see these players in action.<sup>28</sup> Stars like "Babe" Ruth and Lou Gehrig of the

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17. Aaron Gray, *The History of Sports Betting Legislation in the USA*, SBD (Nov. 23, 2020), <https://perma.cc/66JY-HBLW>.

18. Gray, *supra* note 18.

19. *Id.*

20. Peter Ferentzy & Nigel Turner, *Gambling and Organized Crime – A Review of the Literature*, CENTRE FOR ADDICTION AND MENTAL HEALTH, TORONTO, CANADA (June 2019), <https://jgi.camh.net/index.php/jgi/article/view/3812/3827>.

21. Martin, *supra* note 3.

22. Martin, *supra* note 3 (The fixed games resulted in the Chicago White Sox losing the series 5-3 to Cincinnati).

23. Martin, *supra* note 3.

24. *Id.*

25. Stephanie Credno & Darlene You, *The Golden Age of Sports*, THE ROARING 20'S (Feb. 17, 2017), <https://20sroaringhistory.weebly.com/home/the-golden-age-of-sports>.

26. Credno & You, *supra* note 26.

27. *Id.*

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New York Yankees stole the show, while many people around the country become infatuated with sports.<sup>29</sup> This time period become known as the “Golden Age of American Sports” and its cultural impact is still felt today.<sup>30</sup> College football and basketball were gaining the support of fans across the country. Whether it was in upcoming areas of college athletics, or American pastimes such as boxing and Major League Baseball, more money was being wagered across the country than ever before.<sup>31</sup> By 1949, the State of Nevada added sports wagering to its list of permitted gambling activities, “opening an economic market in Nevada, which elsewhere remained illegal.”<sup>32</sup> Outside of Nevada, sports wagering occurred either through your local neighborhood bookie or with some of the most notorious organized crime gangs in the country.<sup>33</sup> Nevertheless, sports wagering was on the rise across the nation.

## **II. THE RISE AND FALL OF THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT**

Beginning in the 1960’s, the federal government focused its enforcement efforts on sports wagering.<sup>34</sup> In an effort to “combat and dismantle” the growing control of organized crime in the industry,<sup>35</sup> the federal government introduced various new pieces of legislation.<sup>36</sup> This included the Federal Wire Act of 1961.<sup>37</sup> This provision criminalized whoever used “a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest.”<sup>38</sup> These new laws assisted in facilitating the state’s ability to enforce their own state anti-gambling regulations.<sup>39</sup> By 1992, the federal government was ready to up the ante and deliver a substantial blow to the sports betting industry by

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28. *Id.*

29. *Id.*

30. *Id.*

31. Brooke Taylor, *Sports Betting: The Ball Is in the States’ Court*, 30 U. FLA. J.L. & PUB. POL’Y 339, 341 (2020).

32. Gray, *supra* note 18.

33. Gray, *supra* note 18.

34. Taylor, *supra* note 32, at 342.

35. Taylor, *supra* note 32, at 342.

36. 18 U.S.C.A. § 1084.

37. 18 U.S.C.A. § 1084.

38. Taylor, *supra* note 32, at 342.

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enacting the Professional and Amateur Sports Protection Act (PASPA).<sup>40</sup>

PASPA “prohibited governmental entities, meaning states, from permitting sports betting.”<sup>41</sup> Essentially, making it unlawful at all levels to operate a business which conducts “betting, gambling, or wagering” directly or indirectly on competitive games in which “amateur or professional athletes participate.”<sup>42</sup> At the time of its passing, PASPA effectively outlawed all sports wagering outside of Nevada and Delaware,<sup>43</sup> which had been grandfathered in via an exemption.<sup>44</sup> At the time, the sports gambling industry was estimated to be worth around 40 billion dollars.<sup>45</sup> By preventing states from regulating the industry, many argued that PASPA has negatively impacted the ability of law enforcement to regulate the field.<sup>46</sup> Some felt that PASPA had contributed to the revenue generated by criminal organizations operating illegal sports betting enterprises,<sup>47</sup> leaving consumers at risk in an unregulated market and advancing corruption.<sup>48</sup> However, the main argument in favor of sanctioning sports gambling that has persisted throughout the decades is the hundreds of millions of dollars in potential tax revenue that could be allocated toward public projects upon endorsement by states.<sup>49</sup>

PASPA had been under scrutiny since its inception.<sup>50</sup> The first major challenge to PASPA came from the state of New Jersey.<sup>51</sup> New Jersey was ripe for its expansion into sports gambling due to its already established and robust laws surrounding the regulation of their

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39. 28 U.S.C.A. § 3702.

40. Taylor, *supra* note 32, at 344.

41. 28 U.S.C.A. § 3702

42. Kyle Wyant, *Do Not Pass Go, Do Not Collect \$231 Million Dollars: How NCAA v. Governor of New Jersey Could Negatively Affect Nevada’s Monopoly on Sports Betting*, 7 U.N.L.V. GAMING L.J. 223 (2017). It is important to note that Montana and Oregon also maintained the ability to operate sports based lotteries which had been previously established prior to PASPA. This was a limited form of sports wagering that did not encompass sports gambling as we know it today. *Id.*

43. 28 U.S.C.A. § 3704.

44. Michelle Minton, LET STATES REGULATE SPORTS GAMBLING WITHIN THEIR BORDERS: CONSTITUTIONAL PRINCIPLES AT STAKE IN SUPREME COURT CASE CHRISTIE V. NCAA, 1 (2017).

45. Minton, *supra* note 45.

46. Taylor, *supra* note 32.

47. Minton, *supra* note 45.

48. *Id.*

49. *Id.*

50. Taylor, *supra* note 32, at 344.

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Atlantic City based casinos.<sup>52</sup> First, New Jersey added two amendments to its Constitution,<sup>53</sup> which repealed the state's prohibition on sports wagering at casino's and race tracks.<sup>54</sup> This initial amendment to the state's Constitution was ultimately struck down in 2012 by the Third Circuit for violating PASPA.<sup>55</sup>

Pivoting their strategy, New Jersey adopted a different approach to dismantling the grip that PASPA had on the sports betting industry.<sup>56</sup> The new approach, instead of affirmatively authorizing sports wagering like in 2012, repealed any state laws which prohibit sports gambling by an individual 21 years or older at a state sponsored horse racing track or casino.<sup>57</sup> Consistent with the lower court in 2012, the New Jersey legislation was deemed to be in violation of PASPA by the United States District Court, holding that the prohibition of sports gambling by PASPA did not commandeer the state's constitutional rights.<sup>58</sup> As a result, the case made its way to the U.S. Supreme Court in regard to three main issues: (1) whether repealing the New Jersey laws prohibiting sports gambling violated PASPA, (2) whether PASPA prohibiting state sponsored sports gambling schemes violated the anti-commandeering principles protected by the constitution, and (3) whether any provisions prohibiting sports gambling are severable from PASPA.<sup>59</sup>

The 10th Amendment of the United States Constitution states that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, shall be reserved to the States.<sup>60</sup> One of the fundamental principles of the United States Constitution, the anti-commandeering doctrine, is an expression of the decision by the drafters to "withhold [from] Congress the power to issue orders directly to the states."<sup>61</sup> Both the federal government of the United

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51. Weston Blasi, *This State Makes the Most Tax Revenue from Sports Betting – and it's Not Nevada*, MARKET WATCH (Nov. 23, 2019, 12:29 PM), <https://www.marketwatch.com/story/this-state-makes-the-most-tax-revenue-from-sports-betting-and-its-not-nevada-2019-11-20>.

52. N.J. CONST. art. IV, § VII. <sup>(1)</sup><sub>(SEP)</sub>

53. Minton, *supra* note 45.

54. Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013).

55. Taylor, *supra* note 32, at 344.

56. Murphy v. Natl. Collegiate Athletic Ass'n, 138 S. Ct. 1465, 1471 (2018).

57. *Id.* at 1472.

58. *Id.*

59. U.S. CONST. amend. X.

60. *Murphy*, 138 S. Ct. at 1475.

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States, and its States, “wield sovereign powers” which are protected under our concept of dual sovereignty.<sup>62</sup> In *Murphy*, the Court held that repealing any laws prohibiting sports gambling in the State of New Jersey is essentially the authorization of sports gambling and shall be treated as such.<sup>63</sup> However, the Court decided that PASPA’s provision prohibiting state authorization of sports gambling schemes violated the anti-commandeering doctrine,<sup>64</sup> holding that PASPA “unequivocally dictates what a state legislature may or may not do.”<sup>65</sup> As a result, Congress has intruded on state sovereignty in a manner which they are not permitted.<sup>66</sup> Since the Court held that “no provision of PASPA is severable from the provisions directly at issue,” the Professional and Amateur Sports Protection Act was deemed unconstitutional.<sup>67</sup> This landmark case allowed states to begin passing their own sports betting legislation.<sup>68</sup> Accordingly, we have been catapulted into a new era that has states jockeying for position as they compete to see who can dominate the expansion into sports wagering.

### III. MARYLAND’S IMPLANTATION OF SPORTS WAGERING IN THE WAKE OF *MURPHY V. NCAA*

After percolating its way through the Maryland General Assembly, due to a largely bi-partisan effort,<sup>69</sup> Maryland House Bill 940 titled “Gaming – Regulation of Fantasy Gaming Competitions and Implementation of Sports Wagering” was approved by Governor Larry Hogan on May 18th, 2021.<sup>70</sup> Maryland’s sports wagering legislation is truly unique in its design and is sought to become a model for other states moving forward who are looking to implement a thoughtful approach to their state’s legislation. Maryland’s sports gambling laws have three distinct characteristics which distinguish its

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61. *Id.* at 1475.

62. *Id.* at 1478.

63. *Id.*

64. *Id.* at 1478.

65. Taylor, *supra* note 32, at 345.

66. *Murphy*, 138 S. Ct. at 1485.

67. *See Murphy*, 138 S. Ct. at 1485.

68. Darryl Barnes, *Black Caucus Chair: Sports Betting in Md. an Opportunity to Promote Equity, Right Wrongs*, MARYLAND MATTERS (May. 25, 2021), <https://www.marylandmatters.org/2021/05/25/del-barnes-opportunities-for-minority-owned-businesses-for-sports-betting-a-lesson-from-the-past/>.

69. MD CODE ANN., STATE GOV’T § 9-1E-01 (West 2021).



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laws from other states' laws in the region. First, the legislation sets out a clear licensing system which establishes distinct classifications for different types of businesses and entities that wish to become a "sports wagering facility licensee" or a "mobile sports wagering licensee."<sup>71</sup> Next, the legislation sets out a clear path for minority and women owned businesses to participate in all aspects of the industry such as "goods and services related to sports wagering, including procurement of construction, equipment, and ongoing services."<sup>72</sup> Finally, by requiring that 15% of the proceeds derived from sports gaming be redirected to various state funds, the Maryland General Assembly has created a tax system that both incentivizes businesses to participate, while still passing along substantial benefit to the consumer.<sup>73</sup>

#### *A. The Advantages of Maryland Sports Wagering Licensing Process*

In order to facilitate the administration of sports wagering in the State of Maryland, the General Assembly created multiple distinct classifications for the various entities that will participate in the industry.<sup>74</sup> Generally, sports wagering in the State of Maryland will be governed by a few regulatory bodies.<sup>75</sup> The State Lottery and Gaming Control Commission (SLGCC) regulates sports wagering and sports wagering conduct to the same extent it governs other areas of gaming, including table games and video lottery terminals (VLTs).<sup>76</sup> For the purposes of this legislation, sports wagering is classified generally as "the business of accepting wagers on any sporting event by any system or method of wagering."<sup>77</sup> A sporting event is defined as:

[P]rofessional sports or athletic event; a collegiate sports or athletic event; an Olympic or international sports or athletic event; an electronic sports or video game competition in which participants are at least 18 years old; a motor race event sanctioned by a motor racing governing entity; certain horse races held in or out of the State; any portion of a sporting event, including the individual performance statistics of

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70. MD CODE ANN., STATE GOV'T § 9-1E-06 (West 2021).

71. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 6 (2021 Session).

72. MD CODE ANN., STATE GOV'T § 9-1E-12 (West 2021).

73. MD CODE ANN., STATE GOV'T § 9-1E-06 (West 2021).

74. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 1 (2021 Session).

75. MD CODE ANN., STATE GOV'T § 9-A1-01(k) (West 2021).

76. MD CODE ANN., STATE GOV'T § 9-1E-01(j) (West 2021).

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athletes or competitors in a sporting event; or an award event or competition of national or international prominence if authorized by the State Lottery and Gaming Control Commission (SLGCC).<sup>78</sup>

This is a broad and expansive definition of “sporting event”<sup>79</sup> that is favorable to sports bettors and contains a few critical distinctions.

One distinction of Maryland House Bill 940 that is well-defined is the distinction between “sports wagering”<sup>80</sup> and “Fantasy Competition.”<sup>81</sup> “Fantasy Competition” as defined in the legislation includes any online fantasy or simulated game or contest such as fantasy sports.<sup>82</sup> Some of the defining characteristics include (1) the participation of managing imaginary teams, (2) the winning outcome being determined by statistics generated by actual players or teams, and (3) the winning outcome being based not on the performance of an individual athlete or on the score, point spread, or any performance of any single real world team.<sup>83</sup> Fantasy sports competitions have remained unregulated largely due to their status as games of skill and their mainly online presence.<sup>84</sup> Their status as games of skill is supported by the belief that the consumers are relying on their own statistical analysis of players’ data and prior performance, and not on mere chance.<sup>85</sup> In 2006, Congress enacted the Unlawful Internet Gambling Enforcement Act,<sup>86</sup> to target online poker sites. The Act carved out a distinction for fantasy sports gaming, stating that the definition of a bet or wager does not include “participation in fantasy or simulation sports.”<sup>87</sup> The Unlawful Internet Gambling Enforcement Act’s definition of fantasy sports or competitions is identical to the definition of fantasy sports in

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77. MD CODE ANN., STATE GOV’T § 9-1E-01(i)(1) (West 2021) (Excluded from the definition of “Sporting Event” is any a high school sports or athletic event).

78. MD CODE ANN., STATE GOV’T § 9-1E-01(i)(1) (West 2021).

79. MD CODE ANN., STATE GOV’T § 9-1E-01 (West 2021); MD CODE ANN., STATE GOV’T § 9-1D-01 (West 2021).

80. MD CODE ANN., STATE GOV’T § 9-1D-01 (West 2021).

81. *See generally* MD CODE ANN., STATE GOV’T § 9-1D-01 (West 2021).

82. MD CODE ANN., STATE GOV’T § 9-1D-01 (D) (West 2021).

83. *Fantasy Football – Is it Illegal Gambling*, HG.ORG (2021), <https://www.hg.org/legal-articles/fantasy-football-is-it-illegal-gambling-49747>.

84. *See generally* 31 U.S.C.S. § 5361.

85. 31 U.S.C.S. § 5361.

86. 31 U.S.C.A. § 5362

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Maryland House Bill 940 and serves as a benchmark, which the Maryland wisely followed.<sup>88</sup>

The state of Maryland requires that a Fantasy Competition Operator register with SLGCC before offering a fantasy competition.<sup>89</sup> The operator will retain 85% of the proceeds while paying the remaining 15% to the SLGCC, which will distribute the funds appropriately.<sup>90</sup> However, Maryland House Bill 940 retains an exemption for traditional individuals who do not receive compensation for organization of fantasy competitions, and for the purposes of the Federal Bank Secrecy Act, are not a gaming establishment with at least \$1,000,000 in annual gross revenue.<sup>91</sup> This distinction avoids unnecessary regulation for the traditional fantasy sports participant, does not unduly burden Fantasy Sports Operators with the additional regulation that is required for Online Sports Wagering Operators, and creates an additional source of revenue for the SLGCC.<sup>92</sup>

Maryland House Bill 940 divides the operators of sports wagering entities into specific categories, which has varying effects on their licensing process. The bill established the Sports Wagering Application Review Commission (SWARC), whose primary purpose is to review applications for sports wagering facilities and mobile sports wagering licensures.<sup>93</sup> Under the structure defined by House Bill 940, Class A-1 licenses are reserved for the following applicants:

[A] video lottery operator with more than 1,000 VLTs; the owner of a stadium in Prince George's County used primarily for professional (National Football League (NFL)) football; the owner of an NFL franchise that leases a stadium in Baltimore City; the owner of a major league baseball franchise that leases a stadium in Baltimore City; and the owner of specified professional hockey, basketball, or soccer franchises that lease a stadium in the State.<sup>94</sup>

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87. MD CODE ANN., STATE GOV'T § 9-1D-01(d) (West 2021).

88. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 5 (2021 Session).

89. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 5 (2021 Session).

90. MD CODE ANN., STATE GOV'T § 9-1D-01(e)(3) (West 2021).

91. MD CODE ANN., STATE GOV'T § 9-1E-01 (West 2021).

92. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 3 (2021 Session).

93. MD CODE ANN., STATE GOV'T § 9-1E-06 (West 2021).

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This is an exhilarating proposal for sports bettors, as stadium sports wagering has transformed from only a dream into an ever-approaching reality.

Led primarily by the National Football League (NFL), major sports organizations have for years been looking down upon the legalization of sports gambling.<sup>95</sup> However, only a few short years after joining as parties in an effort to stop New Jersey from striking down PASPA, the NFL is setting itself up for a lucrative future in the legalized sports gambling market.<sup>96</sup> In April of 2021, the NFL partnered with Caesars, Draft Kings, and FanDuel, establishing an official relationship with three of the largest sportsbooks in the country.<sup>97</sup> As the NFL seeks to enhance their user experience by infusing broadcasts with gambling content, a sanctioning of sports wagering kiosks inside the stadiums is on the horizon.<sup>98</sup> This is supported by the authorization of sportsbook-sponsored lounges and advertisements within the stadium.<sup>99</sup> In addition, the state of Maryland will receive a \$2 million dollar application fee for the procurement of a Class A-1 license.<sup>100</sup> As a result, Maryland House Bill 940 has positioned the state perfectly to absorb the benefit of this shift in prerogative and receive the maximum amount of financial gain.

Class A-2 licenses are available for in-person sports betting operators with less than 1,000 video lottery terminals and the majority of the state's prominent horse racing tracks, which are governed by the Maryland Jockey Club.<sup>101</sup> Class A-2 licenses are available for a \$1,000,000 application fee.<sup>102</sup> This includes the home of Maryland's most prestigious sporting event, the second leg of the American Horse Racing Triple Crown, the Preakness Stakes.<sup>103</sup> In addition, the bill requires Class B-1 and Class B-2 licenses for qualified horse racing, simulcast, and commercial bingo entities who wish to

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94. Ben Strauss & Mark Maske, *The NFL Once Viewed Sports Betting as a Threat. Now the League Wants the Action*, WASHINGTON POST (Aug. 25, 2021, 9:00 AM), <https://www.washingtonpost.com/sports/2021/08/25/nfl-sports-betting/>.

95. *Id.*

96. *Id.*

97. Strauss & Maske, *supra* note 95.

98. *Id.*

99. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 3 (2021 Session).

100. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 3 (2021 Session).

101. MD CODE ANN., STATE GOV'T § 9-1E-06 (b)(2) (West 2021).

102. *Pimlico Race Course*, ONLINESPORTSBETTING.NET (2021), <https://www.onlinesportsbetting.net/horse-racing/pimlico-racetrack.html>.

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conduct in-person betting.<sup>104</sup> Class B-1 and Class B-2 licenses are subject to a \$250,000 and \$50,000 application fee, respectively.<sup>105</sup> Along with the structuring of in-person wagering license system, House Bill 940 has established a separate mobile licensing system.<sup>106</sup> Maryland defines a “Mobile Sports Wagering Licensee” as an entity authorized to conduct and operate online sports wagering.<sup>107</sup> Online sports wagering is defined as sports wagering through an online system via a computer, mobile device or any other interactive device.<sup>108</sup> Mobile sports wagering operators are subject to a \$500,000 application fee and are required to be approved by the SWARC.<sup>109</sup> The separation of in-person and online sports wagering applications is a critical distinction that allows for greater market competition, and will ultimately benefit Marylanders who participate.

#### *B. Maryland’s Sports Wagering Tax Within the Industry*

The regulation of online sports betting is of particular importance because the vast majority of sports bets are wagered online.<sup>110</sup> Up to 80% of the entire handle in New Jersey is wagered via online sports gambling.<sup>111</sup> Along with mirroring, the format most familiar to gamblers who participate in sports betting illegally, online wagering is by far the friendliest to the consumer.<sup>112</sup> It is almost a certainty that Maryland will follow a similar trend and be dominated primarily by online sports gambling. House Bill 940 establishes a few standard restrictions for conducting online gambling including prohibiting users under the age of 21 from participating, which is standard across the state, and requires the individual to be physically present in the state.<sup>113</sup> For example, New Jersey has an 8.5% tax on in-person wagering and implements a tax raise to 13% for online and mobile betting operators.<sup>114</sup> Understanding that the majority of consumers

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103. MD CODE ANN., STATE GOV’T § 9-1E-06 (b) (West 2021).

104. MD CODE ANN., STATE GOV’T § 9-1E-06 (b) (West 2021).

105. MD CODE ANN., STATE GOV’T § 9-1D-01 (West 2021).

106. MD CODE ANN., STATE GOV’T § 9-1D-01 (West 2021).

107. MD CODE ANN., STATE GOV’T § 9-1D-01 (West 2021).

108. MD CODE ANN., STATE GOV’T § 9-1E-06 (b) (West 2021).

109. Blasi, *supra* note 52.

110. Blasi, *supra* note 52. (It is important to note that New Jersey in person sports gambling is largely restricted to casinos in the geographic vicinity of Atlantic City).

111. Blasi, *supra* note 52.

112. MD CODE ANN., STATE GOV’T § 9-1E-11(a) (West 2021).

113. Blasi, *supra* note 52.

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prefer to place mobile sports bets, this strategy has propelled New Jersey to earn a whopping \$74 million dollars in state tax revenue from the time the first bet was placed in June of 2018 through September of 2020.<sup>115</sup> New Jersey's \$74 million dollar share is just a piece of the \$9 billion dollar handle that has been wagered in New Jersey over the same amount of time,<sup>116</sup> roughly 80% of which was taxed at the heightened rate of 13% for mobile wager operators.<sup>117</sup>

In response, the Maryland General Assembly adopted a tax strategy which imposes a 15% tax on sports gambling revenue across all licensing levels including in-person and online sports gambling.<sup>118</sup> There seems to be some distinct advantages to the 15% threshold upon further analysis. First, the threshold makes Maryland an attractive destination for businesses to establish in-person and online sportsbooks.<sup>119</sup> As of November 2020, all states which share a geographic border with Maryland, including the District of Columbia, have enacted sports betting laws.<sup>120</sup> This has created a competitive market that has seen state lawmakers and regulators attempt to strike the appropriate balance between incentivizing businesses and securing the state tax revenue.<sup>121</sup> Pennsylvania took an aggressive position in 2018, when it implemented a 36% tax rate on revenue collected by sportsbooks and required a \$10 million dollar application fee for licensee's.<sup>122</sup> This aggressive strategy initially rendered sportsbook operators hesitant to proceed and led one executive of William Hill USA, a British sportsbook giant, to consider "other states that are more interesting."<sup>123</sup> However, since the inception of sports betting in 2018, Pennsylvania has seen \$3 billion dollars wagered in the state as of September 2020, and the state has derived a tax revenue of \$61 million dollars.<sup>124</sup> Gamblers are the direct beneficiary

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114. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 14 (2021 Session).

115. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 14 (2021 Session).

116. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 14 (2021 Session); *See generally* Blasi, *supra* note 52.

117. MD CODE ANN., STATE GOV'T § 9-1E-12 (West 2021).

118. *See generally* Md Code Ann., State Gov't § 9-1E-12 (West 2021).

119. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 13 (2021 Session).

120. *Id.*

121. Andrew Maykuth, *Pa.'s Sports Betting Taxes So High Legal Bookmakers May Shun State*, THE PHILADELPHIA INQUIRER (Jul. 16, 2018), <https://www.inquirer.com/philly/business/pa-legal-sports-bookmakers-taxes-new-jersey-casinos-20180716.html>.

122. *Id.*

123. MD CODE ANN., STATE GOV'T § 9-1E-12 (West 2021).

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of a competitive market as they receive promotions and free credits from sportsbooks, which are fighting to secure their business.<sup>125</sup> As a result, the risk by the Pennsylvania legislature may have paid off for the state in the long run, although it likely suppressed access and value for the consumer, at least in the short term.<sup>126</sup>

Maryland's adoption of a 15% tax on all sports betting revenue derived by licensed entities puts the state in a strong position to allow its consumers to benefit from the competition of multiple sportsbooks.<sup>127</sup> Outside of Pennsylvania's 36% tax on sportsbooks revenue, other states in the region such as Virginia, West Virginia, and the District of Columbia have much more favorable tax structures for the participating entities.<sup>128</sup> West Virginia and the District of Columbia have introduced a tax rate of 10% of sports betting revenue.<sup>129</sup> Although advantageous for attracting sportsbooks to their borders, this underutilizes a tax revenue vehicle which is only in its infancy.<sup>130</sup> Maryland's 15% tax rate is equal to that of its neighboring state Virginia.<sup>131</sup> As indicated in the Fiscal and Policy Note, Maryland expects that by 2023, the 15% tax rate will be netting the state \$15 million dollars in revenue.<sup>132</sup> As a result, the legislation has placed Maryland in a strong position, relative to its neighboring competitions, to collect a healthy tax revenue without leaving too much on the table.

#### IV. THE MINORITY BUSINESS ENTERPRISE PROGRAM

One area where Maryland is working to be a leader in the sports gambling industry is attempting to increase the percentage of women and minority ownership. It was the intent of the Maryland General Assembly to maximize participation of "minorities, women, and minority and women-owned business" in the sports betting industry, to the extent permitted by law.<sup>133</sup> Implemented by the Minority Business Enterprise, this plan of inclusion was born out of a lack of representation in the wake of the State of Maryland's medical

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124. Maykuth, *supra* note 121.

125. *Id.*

126. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 9 (2021 Session).

127. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 14 (2021 Session).

128. *Id.*

129. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 14 (2021 Session).

130. *Id.*

131. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 14 (2021 Session).

132. MD CODE ANN., STATE GOV'T § 9-1E-02 (West 2021).

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marijuana legislation.<sup>134</sup> Originally, when the state moved forward with medical marijuana legislation, “not a single cannabis cultivation or processing license was awarded to a majority Black-owned applicant in the first round.”<sup>135</sup> A glaring absence in the eyes of some members of the Maryland General Assembly, the legislature set out to address this “jarring discrepancy.”<sup>136</sup> Medical marijuana and sports wagering are both lucrative and developing industries across the country, which have seen a recent uptick due to social and political changes surrounding their status in society.<sup>137</sup> Determined to seize this opportunity to promote inclusion, Maryland’s sports wagering legislation requires “to the extent practicable and authorized under the United States Constitution,” licensee’s must comply with the Minority Business Enterprise (MBE).<sup>138</sup>

Maryland is the first state to “prioritize the awarding of sports wagering licenses to applicants that have significant Black or women ownership.”<sup>139</sup> As the chairman of the Legislative Black Caucus of Maryland described, this is a pivotal moment in the state’s history, as the state takes an affirmative step to right the wrongs of the past and have minority participation in this new and lucrative industry.<sup>140</sup> As hoped, the structure of the MBE’s program has already seen progress, as the initial wave of licenses underwent review by SWARC.<sup>141</sup> As Class-1A licenses were issued to the traditional players within the state’s gambling community, a pair of minority owned facilities were on their way to approval beginning in 2022.<sup>142</sup> Long Shot’s, owned and operated by Alyse Cohen out of Frederick, Maryland, became the first 100% women owned entity to receive a sports wagering license in the

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133. Barnes, *supra* note 69.

134. *Id.*

135. *Id.*

136. *Id.*

137. DEP’T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 6 (2021 Session).

138. Barnes, *supra* note 69.

139. Barnes, *supra* note 69.

140. William J. Ford, *Sports Betting Commission Adds Diversity Requirement for Applicants to Receive Mobile Sports Betting Licenses*, MARYLAND MATTERS (Sept. 3, 2022), <https://www.marylandmatters.org/2022/09/03/sports-betting-commission-adds-diversity-requirement-for-applicants-to-receive-mobile-sports-betting-licenses/>.

141. Bennet Conlin, *Two Maryland Sports Betting Licensees Add Diversity to Industry*, SPORTSHANDLE (Dec. 15, 2021), <https://sportshandle.com/maryland-sports-betting-diverse-licensees/>.



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state.<sup>143</sup> In response, John Martin, Maryland's Lottery and Gaming Director, stated "That's why the whole legislation was developed, right?"<sup>144</sup>

Maryland has undoubtedly positioned themselves in a way which no state has since the repeal of the PASPA. However, the inclusion of the MBE program was not without risk.<sup>145</sup> As noted previously, Maryland legislators sought diverse inclusion to the extent permitted by law.<sup>146</sup> The U.S. Supreme Court has previously held that government programs which promote Minority Business Enterprises must do so in a manner which identifies the specific discrimination it wishes to remedy through the program.<sup>147</sup> In *City of Richmond v. J.A. Croson Co.*, the Court held that the city had failed to demonstrate a compelling government justification for their program's specific quota system.<sup>148</sup> In addition, the plan was not narrowly tailored to remedy the prior effects of the discrimination.<sup>149</sup> *City of Richmond* highlights the high level of scrutiny which will be applied to government programs making race and gender-based classifications.<sup>150</sup> As a result, the state will undergo an analysis of the Minority Business Enterprise requirements of this bill and any remedial measures, and will conduct a disparity study on the sports wagering industry.<sup>151</sup> The goal of SWARC and other regulatory bodies in the state is to ensure there is a compelling interest to implement remedial measures and other minority-conscious policies within the legislation.<sup>152</sup>

#### V. THE BAR TO ENTRY UNDER MARYLAND'S SPORTS WAGERING LEGISLATION

Sports gambling is an emerging industry within the United States, with more than 30 states having live or legal sports wagering

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142. *Id.*

143. *Id.*

144. Ford, *supra* note 141.

145. MD CODE ANN., STATE GOV'T § 9-1E-02 (West 2021).

146. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

147. *City of Richmond*, 488 U.S. at 486.

148. *Id.*

149. *Id.*

150. DEP'T LEGIS. SERVS., *Fiscal and Policy Note, House Bill 940*, at 6 (2021 Session).

151. *Id.*

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operations.<sup>153</sup> In the wake of *Murphy v. NCAA*, a window of opportunity emerged for states to cash in on additional gaming revenue.<sup>154</sup> However, the characteristics which define states' individual sports betting laws has a drastic impact on the potential state revenue, as well as the consumer's experience. Operating a sportsbook in a state generally has a high bar to entry, as application fees can be as upwards of \$10 million dollars.<sup>155</sup> As a result, sportsbooks across the country have generally been dominated by massive corporations or traditional titans within the casino industry.<sup>156</sup> For comparison, in New Jersey, all in-person sports wagering must occur at a licensed casino or racetrack.<sup>157</sup> In addition, mobile licenses, which account for roughly 80% of the action in New Jersey, require a partnership with an approved physical betting location within the state.<sup>158</sup> Although mobile licenses are uncapped and have a relatively low fee of \$650,000, the requirement of maintaining a partnership with a physical location in the state can create a bar to entry for non-traditional businesses in the industry.<sup>159</sup> Any restrictions on sports wagering and its licensing process, beyond what is reasonable to promote the state's interest, has the ability to restrict the potential revenue for the state and negatively impact the consumer's experience.<sup>160</sup>

Maryland approved the Sports Betting Expansion Measure by a vote of 67% in favor of the new legislation.<sup>161</sup> This overwhelming majority signaled a desire for a full implementation of sports wagering in the State.<sup>162</sup> The General Assembly of Maryland acknowledged this and structured its licensing process in a way which provides maximum benefits to the consumers and businesses in the State. First, it established a licensing system which allows for separate mobile and

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152. *Interactive Map: Sports Betting in the U.S.*, AMERICAN GAMING ASSOCIATION (Dec. 9, 2021), <https://www.americangaming.org/research/state-gaming-map/>.

153. *Murphy*, 138 S. Ct. at 1485.

154. Maykuth, *supra* note 121.

155. *New Jersey Sports Betting*, SBD (Dec. 7, 2021), <https://www.sportsbettingdime.com/new-jersey/>.

156. *Id.*

157. Blasi, *supra* note 52.

158. *New Jersey Sports Betting*, SBD (Dec. 7, 2021), <https://www.sportsbettingdime.com/new-jersey/>.

159. *See generally* Maykuth, *supra* note 119.

160. *Maryland Question 2, Sports Betting Measure (2020)*, BALLOTPEdia, [https://ballotpedia.org/Maryland\\_Question\\_2,\\_Sports\\_Betting\\_Measure\\_\(2020\)](https://ballotpedia.org/Maryland_Question_2,_Sports_Betting_Measure_(2020)).

161. *Id.*

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in-person gaming licenses.<sup>163</sup> This gives traditional giants in the state's sporting industry, such as M&T Bank Stadium or Pimlico Racetrack, access to sports wagering licenses at a fair rate to the parties and the State, while preserving licenses for smaller or minority-owned business.<sup>164</sup> In addition, the complete separation between mobile wagering licenses and any in-person wagering operation allows for greater participation by businesses across the state.<sup>165</sup> In return, consumers should have a plethora of wagering options which will promote competition between the sportsbooks. This will be felt directly by the consumer, as mobile wagering apps fight for their business by offering promotions and other enhancements to the users' experience. By combining this reasonable licensing structure, with a tax rate which is on par or better than the surrounding competition, Maryland is in a phenomenal position to take advantage of this growing industry.<sup>166</sup>

### CONCLUSION

The status of sports gambling in the United States has ebbed and flowed over the years.<sup>167</sup> In the wake of *Murphy*, states began to position themselves to capitalize on the most recent shift in the prerogative surrounding sports gambling.<sup>168</sup> In response, Maryland is poised to take advantage of this new opportunity by creating a robust licensing system to support all levels of businesses in the industry.<sup>169</sup> In addition to setting a competitive tax rate, which will protect the States' revenue interests, Maryland has generated a market that will pass benefits on to the consumer.<sup>170</sup> These benefits come in addition to the promotion of minority-owned businesses within the industry, which the State has affirmatively pursued.<sup>171</sup> As a result, the State has positioned itself to benefit drastically from the development of the sports betting industry while promoting underrepresented businesses in the process.

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162. See generally MD CODE ANN., STATE GOV'T § 9-1E-06 (West 2021).

163. See generally MD CODE ANN., STATE GOV'T § 9-1E-06 (West 2021).

164. See generally MD CODE ANN., STATE GOV'T § 9-1E-06 (West 2021).

165. See generally MD CODE ANN., STATE GOV'T § 9-1E-06 (West 2021).

166. See *infra* Part I.

167. *Murphy*, 138 S. Ct. at 1468.

168. See *infra* Part III.A.

169. See *infra* Part III.B.

170. See *infra* Part IV.