

# Time To Join the Playing Field: A Proposal for Legalizing Sports Betting in Arizona

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## I. INTRODUCTION

The American Gaming Association (“AGA”) estimates that Americans illegally wager \$150 billion on sporting events every year.<sup>1</sup> In 2018, of this \$150 billion, Americans illegally wagered an estimated \$4.6 billion on Super Bowl LII.<sup>2</sup> An estimated \$9.7 billion was wagered illegally on the 2018 National Collegiate Athletics Association (“NCAA”) March Madness men’s basketball tournament.<sup>3</sup>

Noting a need for change, Geoff Freeman, the president and CEO of the AGA, stated that, due to the illegality of sports gambling, “Americans are sending billions of their hard-earned dollars to corner bookies, shady offshore operators and other criminal enterprises.”<sup>4</sup> This isn’t an exaggeration. The AGA numbers demonstrate that Americans are determined to bet on sports, whether it is legal or not.

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1. *Gaming Industry Files Amicus Brief with United States Supreme Court Detailing Impacts of Failing Federal Sports Betting Ban*, AM. GAMING ASS’N (Sept. 5, 2017), <https://www.americangaming.org/new/gaming-industry-files-amicus-brief-with-united-states-supreme-court-detailing-impacts-of-failing-federal-sports-betting-ban/> [https://perma.cc/3QGC-CAXG].

2. *Americans To Wager More than \$4.6 Billion Illegally on Super Bowl 52*, AM. GAMING ASS’N (Jan. 30, 2018), <https://www.americangaming.org/new/americans-to-wager-more-than-4-6-billion-illegally-on-super-bowl-52/> [https://perma.cc/HN33-D7ZF].

3. *97% of Expected \$10 Billion Wagered on March Madness To Be Bet Illegally*, AM. GAMING ASS’N (Mar. 12, 2018), <https://www.americangaming.org/new/97-of-expected-10-billion-wagered-on-march-madness-to-be-bet-illegally/> [https://perma.cc/8V6G-RTVX]. However, it must be noted that this number takes into account the popular and common March Madness sports pools. This includes pools where ten friends each throw in ten dollars for a chance to win the entire one hundred dollars. These are common, yet roughly two-thirds of states make it illegal to do this. See *Legal Analysis of Pool Betting*, AM. GAMING ASS’N, <https://www.americangaming.org/sites/default/files/DickinsonWright%20pools%20legality%20one%20pager.pdf> [https://perma.cc/3H96-RUGB].

4. *Americans To Wager More than \$4.6 Billion Illegally on Super Bowl 52*, *supra* note 2.

In May 2018, perhaps heeding these numbers, in *Murphy v. NCAA*,<sup>5</sup> the Supreme Court struck down the Professional and Amateur Sports Protection Act (“PASPA”),<sup>6</sup> a statute that made sports betting illegal in nearly the entire country. The Supreme Court held that PASPA was unconstitutional because it violated the anticommandeering principle, which prohibits the federal government from ordering states to pass laws that are consistent with federal standards.<sup>7</sup> Consequently, states are now free to legalize sports betting, absent any federal action from Congress.

Like illegal sports wagering, tribal gaming also has powerful numbers. Part of the casino gaming industry, tribal gaming is operated on Indian reservations or other tribal lands.<sup>8</sup> The tribal gaming industry has grown from generating \$121 million in 1988, just after the passage of the Indian Gaming Regulatory Act (“IGRA”),<sup>9</sup> to over \$32 billion in 2016.<sup>10</sup> In 2016, Arizona earned the fifth-largest state revenue of tribal gaming at \$1.9 billion.<sup>11</sup> Arizona’s tribal gaming tax revenue and revenue-share payments from the tribes totaled over \$691 million.<sup>12</sup>

Under IGRA, a tribe must have a tribal-state gaming compact with the state in order to operate gaming.<sup>13</sup> In Arizona, Native American tribes hold exclusive rights to the operation of slot machines and casino-style gaming through the Tribal-State Gaming Compact (the “Compact”).<sup>14</sup> In exchange

5. 138 S. Ct. 1461 (2018).

6. 28 U.S.C. § 3702, *invalidated by* *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

7. *Murphy*, 138 S. Ct. at 1467; *see also* *New York v. United States*, 505 U.S. 144, 161 (1992).

8. *The Economic Impact of Tribal Gaming: A State-by-State Analysis*, AM. GAMING ASS’N, 1 (Nov. 2018), <https://www.americangaming.org/sites/default/files/Economic%20Impact%20of%20Tribal%20Gaming%20-%20Two%20Pager%20-%202011.5.18.pdf> [https://perma.cc/4T94-LZA6]. Tribal gaming generates 45% of all gaming revenue in the United States. *Id.*

9. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. § 2701–2721 (2018)).

10. *The Economic Impact of Tribal Gaming: A State-by-State Analysis*, *supra* note 8, at 1.

11. Howard Stutz, *Report: Indian Gaming Revenue Nationwide Reaches \$31.5 Billion in 2016*, CDC GAMING REP. (Oct. 3, 2018, 6:30 AM), <https://www.cdcgamingreports.com/report-indian-gaming-revenue-nationwide-reaches-31-5-billion-in-2016/> [https://perma.cc/435Z-NB7L].

12. *The Economic Impact of Tribal Gaming: A State-by-State Analysis*, *supra* note 8, at 2.

13. 25 U.S.C. § 2710(d)(1)(C) (2018).

14. *Tribal Gaming History*, ARIZ. DEP’T GAMING, <https://gaming.az.gov/about/history> [https://perma.cc/2XXD-283Q]. Each tribe has its own compact, but the material provisions concerning duration, revenue-sharing, and the Poison Pill remain the same. *Id.* The differences concern the types of gaming, number of allowed slot machines, and casino locations for each tribe. *Id.* The term “Compact” thus refers to the standard form compact, available at [https://gaming.az.gov/sites/default/files/documents/files/compact.final\\_.pdf](https://gaming.az.gov/sites/default/files/documents/files/compact.final_.pdf) [https://perma.cc/9WNT-BT3M].

for these exclusive rights, the tribes share a percentage of their gaming revenue with the State.<sup>15</sup> This amount is determined based on a sliding scale and ranges from one to eight percent, with the percentage shared increasing as revenue increases.<sup>16</sup> As of September 3, 2019, total tribal contributions to the state from this revenue-sharing provision amounted to over \$1.5 billion.<sup>17</sup>

The tribes have enjoyed these exclusive rights since the first compacts were signed in 1992.<sup>18</sup> Yet, this right has not come without significant battles, both inside and outside the courtroom. Tribes overcame opposition from then-Governor Fife Symington in 1992 and from horse race tracks in 2000.<sup>19</sup> In 1992, Governor Symington ordered raids on several tribal casinos, which resulted in a standoff.<sup>20</sup> After a cooling off period, the tribes and the Governor reached a compromise and signed the first compacts.<sup>21</sup> Then, in 2000, horse race tracks, threatened by new competition, filed a lawsuit, *American Greyhound Racing, Inc. v. Hull*,<sup>22</sup> against Governor Jane Hull to prevent her from signing any new gaming compacts with tribes.<sup>23</sup> The Ninth Circuit ultimately dismissed the case, which allowed the Governor to continue to negotiate with tribes on compacts.<sup>24</sup> Today, sixteen tribes operate casino-style gaming under the Compact in Arizona.<sup>25</sup>

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15. ARIZ. STANDARD FORM TRIBAL-STATE GAMING COMPACT § 12(a) (2003), [https://gaming.az.gov/sites/default/files/documents/files/compact.final\\_.pdf](https://gaming.az.gov/sites/default/files/documents/files/compact.final_.pdf) [<https://perma.cc/P5MA-8KHL>].

16. *Id.* at § 12(b).

17. *Tribal Contributions from Gaming Revenue to the State, Cities, Towns & Counties*, ARIZ. DEP'T GAMING (2019), [https://gaming.az.gov/sites/default/files/cumulativetribalcontributions\\_2.pdf](https://gaming.az.gov/sites/default/files/cumulativetribalcontributions_2.pdf) [<https://perma.cc/39WX-DPYQ>].

18. *Tribal Gaming History*, *supra* note 14.

19. *Tribal Gaming History Timeline*, ARIZ. DEP'T GAMING, <https://gaming.az.gov/about/history#timeline> [<https://perma.cc/ZHE8-H5ZU>].

20. *Yavapai History & Culture*, FORT McDOWELL YAVAPAI NATION, <https://www.fmyn.org/about-fmyn/history/> [<https://perma.cc/BR79-3M7S>].

21. Heidi L. McNeil, *Indian Gaming in Arizona: The Great Casino Controversy Continues*, 34 ARIZ. ATT'Y 13, 14 (Jan. 1998); *F.B.I. Agents Raid Casinos on 5 Indian Reservations*, N.Y. TIMES (May 13, 1992), <https://www.nytimes.com/1992/05/13/us/fbi-agents-raid-casinos-on-5-indian-reservations.html> [<https://perma.cc/54J9-SDXZ>].

22. 305 F.3d 1015 (9th Cir. 2002).

23. *Id.* at 1020; *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1025 (D. Ariz. 2001).

24. *Am. Greyhound Racing*, 305 F.3d at 1022. The court did not decide whether the Governor has authority to enter into compacts. Instead, the case was decided on the grounds of the indispensable party rule and Rule 19 of the Federal Rules of Civil Procedure. *Id.* Part II.B.2) discusses this case in more depth.

25. Heidi McNeil Staudenmaier, *The State of Indian Gaming in Arizona*, INDIAN GAMING LAW., Spring 2018, at 14. These sixteen tribes are: the Ak-Chin Indian Community, the Cocopah Indian Tribe, the Fort McDowell Yavapai Nation, the Fort Mojave Indian Tribe, the Fort Yuma

The Compact restricts the types of gaming and number of slot machines per tribe and per gaming facility.<sup>26</sup> Most importantly for this Comment, the Compact contains a provision that allows for the tribes to significantly reduce the amount of revenue they share with Arizona if the state allows any type of gaming that was not lawful as of May 1, 2002 by an entity that is not a tribe.<sup>27</sup> This provision is known as the Poison Pill.<sup>28</sup> In determining whether, and how, to legalize sports gambling, Arizona must take the Poison Pill into consideration. This Comment argues that Arizona should legalize sports betting in a manner that satisfies the interests of the State's tribes and regulate sports betting in a way that diverts a significant amount of illegal gaming to the newly-legalized market.

In Arizona, sports betting necessarily lies within the context of tribal gaming, and therefore, this Comment discusses tribal gaming first. Part II of this Comment explains the evolution of tribal gaming in the United States and looks at IGRA's provisions. Next, Part II explores the history of tribal gaming in Arizona and describes the Compact in depth, noting that the Poison Pill will be triggered if Arizona allows any entity other than a tribe to conduct sports gambling. Lastly, Part II details the state of sports betting in the United States by discussing PASPA and *Murphy's* successful challenge to PASPA, then examining Connecticut as an example of a state where tribes also enjoy exclusive gaming rights, and reviewing a study of the economic impact of legalized sports betting. Informed by the history of tribal gaming in Arizona, Connecticut's attempt to legalize sports betting, and the economic impact study, Part III proposes a solution for Arizona to legalize sports betting. Part IV concludes.

## II. BACKGROUND

This Part begins by exploring the history of tribal gaming in the United States through caselaw and statutes. This Part then turns to an examination of tribal gaming's history in Arizona, and concludes by reviewing the current state of sports betting in the United States.

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– Quechan Tribe, the Gila River Community, the Navajo Nation, the Pascua Yaqui Tribe, the Salt River Pima-Maricopa Indian Community, the San Carlos Apache Tribe, the Tohono O'odham Nation, the Tonto Apache Tribe, the White Mountain Apache Tribe, the Yavapai Apache Nation, and the Yavapai Prescott Tribe. *Id.* at 15.

26. *Id.* at 15.

27. ARIZ. STANDARD FORM TRIBAL-STATE GAMING COMPACT, *supra* note 15, at § 3(h)(1)(C).

28. *Frequently Asked Questions, BENEFITING ARIZ.*, <https://www.benefitingarizona.org/faqs/> [<https://perma.cc/6HRT-5XHA>].

### A. History of Tribal Gaming in the United States

In order to analyze and comprehend the current landscape surrounding sports gambling in both the United States and Arizona, this Section establishes the foundations of tribal gaming in the United States. This Section first examines a pivotal case for tribal gaming, *California v. Cabazon Band of Mission Indians*. After the Supreme Court decided *Cabazon*, Congress responded by enacting the Indian Gaming Regulatory Act (“IGRA”), which provides the framework for tribal gaming in states today.

#### 1. *California v. Cabazon Band of Mission Indians*: The Supreme Court Paves the Path for Tribal Gaming

Gaming has played a large role in some Native American culture for hundreds of years.<sup>29</sup> Indian tribes use gaming in both social and cultural activities, as a form of entertainment, a way to resolve arguments, and as a part of ceremonies.<sup>30</sup> In the late 1960s, the tribes were facing extreme poverty.<sup>31</sup> Commercial gaming arose to become a source of prosperity in the 1970s, when tribes in Florida, New York, California, and Wisconsin opened high-stakes bingo parlors.<sup>32</sup>

The tribes’ rationale for operating gaming was clear. Federal law held that “state laws have no force [on tribal lands].”<sup>33</sup> Thus, the tribes had a strong case that criminal laws that prohibited gaming would not apply on tribal land.<sup>34</sup> Even the federal government realized the promises of tribal gaming; the revenue would greatly support tribal governments and “would lessen the

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29. ROBERT J. MILLER, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 73 (2012); *see also* KATHRYN GABRIEL, GAMBLER WAY: MYTHOLOGY, HISTORY, AND ARCHAEOLOGY IN NORTH AMERICA 2–3 (1996) (telling the story of the Puyallop and Black River tribes’ gambling activities in 1895).

30. MILLER, *supra* note 29, at 73; Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17, 20 (2010).

31. Reid Peyton Chambers, *Reflections on the Changes in Indian Law, Federal Indian Policy & Conditions on Indian Reservations Since the Late 1960s*, 46 ARIZ. ST. L.J. 729, 733–34 (2014).

32. MILLER, *supra* note 29, at 73.

33. Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 45 (2007); *see Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (“The Cherokee nation, then is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . .”).

34. Fletcher, *supra* note 33, at 45.

federal burden to support tribes.”<sup>35</sup> Accordingly, between 1979 and the mid-1980s, the federal government began funding tribal bingo facilities.<sup>36</sup>

States were not as supportive and brought challenges to the authority of the tribes to operate gambling facilities.<sup>37</sup> They were fearful of tribal competition with state lotteries and suspicious of gaming being operated without their regulation.<sup>38</sup> However, several federal courts decided the issue in favor of the tribes, spurring an increase of tribal gaming across the nation.<sup>39</sup>

Nonetheless, the tension between Tribes and States did not dissipate after many courts held in favor of the tribes, and the issue finally went up to the Supreme Court in *California v. Cabazon Band of Mission Indians*<sup>40</sup> in 1987. The Cabazon and Morongo Bands of Mission Indians both conducted bingo games on their respective reservations, with the Cabazon Band also operating poker and other card games.<sup>41</sup> California sought to apply its gaming statute to the tribes and presented the same argument that Sheriff Butterworth used in his case against the Seminoles: Congress expressly granted states authority over tribal lands in Public Law 280.<sup>42</sup>

The Supreme Court affirmed the Ninth Circuit’s holding that California’s gambling laws had no force on the Cabazon and Morongo lands.<sup>43</sup> First, the Court adopted the Fifth Circuit’s “criminal/prohibitory” and “civil/regulatory” analysis, which the Ninth Circuit had also embraced.<sup>44</sup> The Court held that if a state’s law “generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and [Public Law 280] does not authorize its enforcement on an Indian reservation.”<sup>45</sup> Reasoning that

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35. MILLER, *supra* note 29, at 73.

36. *Id.*; see also William E. Horwitz, *Scope of Gaming Under the Indian Gaming Regulatory Act of 1988 After Rumsey v. Wilson: White Buffalo or Brown Cow?*, 14 CARDOZO ARTS & ENT. L.J. 153, 164 n.75 (1996) (“The federal government actively encouraged bingo as a means of economic development by providing approvals of tribal bingo ordinances and even guaranteeing some eight million construction loans for bingo facilities.” (citing 132 Cong. Rec. 22010 (1986) (statement of Sen. Andrews))).

37. See Barona Grp. of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983); Seminole Tribe of Fla. v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); Oneida Tribe of Indians of Wis. v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981).

38. MILLER, *supra* note 29, at 74.

39. Fletcher, *supra* note 33, at 45–46. *Seminole Tribe of Fla. v. Butterworth* is the most famous of these decisions. In that case, the Fifth Circuit upheld the authority of the Seminole Tribe to operate bingo hall. The court reasoned that Florida’s bingo statute did not apply to tribal lands. See MILLER, *supra* note 29, at 74–75 for a detailed discussion of *Butterworth*.

40. 480 U.S. 202 (1987).

41. *Id.* at 204–05.

42. See *id.* at 206–07.

43. *Id.* at 222.

44. *Id.* at 209–10.

45. *Id.* at 209.

because California operated its own state lottery, permitted parimutuel horse-betting, and allowed many organizations to legally sponsor bingo games, the Court concluded that California's laws clearly allowed a significant amount of gambling activity.<sup>46</sup> Thus, the gaming statute had to be classified as regulatory because the laws did not prohibit gambling.<sup>47</sup>

Furthermore, the Court engaged in a balancing test, called the preemption test in federal Indian law.<sup>48</sup> This test asks whether state jurisdiction has been preempted by federal law: "state jurisdiction is preempted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."<sup>49</sup> The Court weighed the state's interests in prohibiting or regulating tribal gaming against the tribal and federal interests in conducting gaming to determine if federal law preempted state authority.<sup>50</sup> The tribal and federal interests involved were "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."<sup>51</sup> The only state interest that California asserted was the prevention of the "infiltration of the tribal games by organized crime."<sup>52</sup> The Court held that, while this was a "legitimate concern," it was not enough to outweigh tribal and federal interests.<sup>53</sup> Thus, federal law preempted state authority.

*Cabazon* was a major victory for tribes across the country for its "affirmation of tribal sovereignty."<sup>54</sup> No state could regulate Indian gaming, unless its state criminal law expressly prohibited all gaming.<sup>55</sup>

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46. *Id.* at 210–11.

47. *Id.*

48. *Id.* at 214–22.

49. *Id.* at 216 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–34 (1983)); see Dean B. Suagee, *The Supreme Court's "Whack-a-Mole" Game Theory in Federal Indian Law, A Theory that Has No Place in the Realm of Environmental Law*, 7 GREAT PLAINS NAT. RESOURCES J. 90, 133–35 (2002), for a discussion of the preemption test.

50. *Cabazon*, 480 U.S. at 210–11; see also MILLER, *supra* note 29, at 76.

51. *Cabazon*, 480 U.S. at 216 (quoting *Mescalero*, 462 U.S. at 335).

52. *Id.* at 220. The Seminole Tribe filed an amicus brief explaining its experiences with bingo and Sheriff Butterworth. The Seminoles refuted California's claim that organized crime would infiltrate tribal gaming, pointing out that it actually was not in the tribe's interest to loosely regulate gaming. Rather, the success of tribal gaming depended on an honest operation with extensive regulation and close monitoring. Matthew L.M. Fletcher, *The Seminole Tribe and the Origins of Indian Gaming*, 9 FIU L. REV. 255, 266–68 (2014).

53. *Cabazon*, 480 U.S. at 221.

54. MILLER, *supra* note 29, at 76.

55. *Id.*

## 2. IGRA: A Response to *Cabazon*

Partially in response to *Cabazon*, Congress enacted the Indian Gaming Regulatory Act (“IGRA”) in 1988.<sup>56</sup> Along with IGRA came the creation of the National Indian Gaming Commission (“NIGC”).<sup>57</sup> Congress had been holding hearings on Indian gaming before *Cabazon* and even had the support of the tribes, as they preferred federal regulation to state regulation and were worried that *Cabazon* would go the other way.<sup>58</sup> But after *Cabazon* came out in favor of the tribes, the states became the major voice in support of federal regulation of Indian gaming.<sup>59</sup>

IGRA divided tribal gaming into three different classes. Class I gaming includes “social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.”<sup>60</sup> These are “ceremonial or traditional activities,”<sup>61</sup> and regulation of these games is within the exclusive jurisdiction of the tribes.<sup>62</sup>

Class II gaming consists of bingo, card games played in compliance with state laws, and non-banked card games.<sup>63</sup> This includes the types of games at issue in *Cabazon*. Non-banked card games are those played only against other players, rather than also against the house.<sup>64</sup> This is like the typical poker game. The NIGC defines house banking as “any game of chance that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win.”<sup>65</sup> Taking *Cabazon* into account, Congress also left regulation of Class II gaming mostly to the tribes.<sup>66</sup>

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56. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721 (2018)); see MILLER, *supra* note 29, at 77.

57. 25 U.S.C. § 2704 (2018).

58. MILLER, *supra* note 29, at 77; Clinton, *supra* note 30, at 52.

59. MILLER, *supra* note 29, at 77; Marianne T. Caulfield, *Will It Take a Move by the New York Yankees for the Seneca Nation To Obtain a Class III Gaming License?*, 44 CATH. U. L. REV. 279, 317 (1994).

60. 25 U.S.C. § 2703(6) (2018).

61. MILLER, *supra* note 29, at 77–78.

62. 25 U.S.C. § 2710(a)(1) (2018).

63. *Id.* § 2703(7) (2018).

64. NAT’L INDIAN GAMING COMM’N, BULL. NO. 95-1, ALL BANKING CARD GAMES FALL WITHIN CLASS III GAMING (1995), <https://www.nigc.gov/images/uploads/bulletins/1995-1bankingcardgames.pdf> [<https://perma.cc/7VNS-B4X3>].

65. 25 C.F.R. § 502.11 (2018).

66. 25 U.S.C. § 2710(b)(2). Congress placed conditions on Class II gaming. First, state law dictates whether Class II gaming can actually be offered because it is only allowed in a state that permits such gaming. *Id.* § 2710(b)(1)(A). Second, a tribe must have adopted a gaming ordinance that is approved by the chairman of the NIGC. *Id.* § 2710(b)(1)(B). Third, the tribe must issue a



Lastly, Class III gaming is “all forms of gaming that are not class I gaming or class II gaming.”<sup>67</sup> Recognizing that this definition was a bit broad, the NIGC revised it to be more specific in 1992:<sup>68</sup> “all forms of gaming that are not [C]lass I gaming or [C]lass II gaming, including but not limited to . . . [house banked] [c]ard games such as baccarat, chemin de fer, [and] blackjack.”<sup>69</sup> These are the types of games that provide the largest opportunity for huge revenues for the tribes.<sup>70</sup> Importantly, Class III gaming includes sports gambling.

A tribe must satisfy three conditions before it can offer Class III gaming. First, the NIGC must have approved the tribe’s gaming ordinance.<sup>71</sup> Second, Class III gaming must be “located in a State that permits such gaming for any purpose.”<sup>72</sup> Lastly and most significantly, there must be an active Tribal-State gaming compact between the Tribe and the State, and all gaming must be facilitated in compliance with the compact.<sup>73</sup>

This last condition has led to a multitude of conflicts. One issue that comes up consistently is the state’s desire for a revenue-sharing provision in the compact that allows the state to profit off of tribal gaming.<sup>74</sup> This is problematic because the agreement for revenue-sharing can be seen as a tax on the tribe, which IGRA does not allow.<sup>75</sup> For example, in 2010, in *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*,<sup>76</sup> the Ninth Circuit held that California’s demand for ten to fifteen percent of tribal gaming’s net win was an “impermissible demand.”<sup>77</sup> States are not allowed to unilaterally impose taxes, but they are not prohibited

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gaming license for each gaming facility, and the NIGC will oversee all activity, unless that tribe has petitioned for and been issued a certificate of self-regulation. *Id.* § 2710(b)(2)(F)(ii)(I); § 2710(c)(1)–(3).

67. *Id.* § 2703(8) (2018).

68. Definitions Under the Indian Gaming Regulatory Act, 57 Fed. Reg. 12382, 12384–86 (Apr. 9, 1992).

69. 25 C.F.R. § 502.4 (2018).

70. MILLER, *supra* note 29, at 80; Fletcher, *supra* note 33, at 52.

71. 25 U.S.C. § 2710(d)(1)(A). The Johnson Act of 1951 prohibited the use and possession of any gambling device everywhere in the United States, including Indian Country. 15 U.S.C. § 1175(a) (2018). IGRA dealt with this by providing that the Johnson Act does not apply to any gaming operated in accordance with a tribal-state compact. 25 U.S.C. § 2710(d)(6). For a more detailed examination of IGRA and the Johnson Act, see generally Heidi McNeil Staudenmaier & Andrew D. Lynch, *The Class II Gaming Debate: The Johnson Act vs. the Indian Gaming Regulatory Act*, 74 Miss. L.J. 843 (2005).

72. 25 U.S.C. § 2710(d)(1)(B).

73. *Id.* § 2710(d)(1)(C).

74. MILLER, *supra* note 29, at 83.

75. Fletcher, *supra* note 33, at 43; see 25 U.S.C. § 2710(d)(4).

76. 602 F.3d 1019 (9th Cir. 2010).

77. *Id.* at 1042.

from “*negotiating* for such payments where ‘meaningful concessions’ are offered in return.”<sup>78</sup> The *Rincon* court acknowledged that a grant of exclusivity on gaming was one such meaningful concession.<sup>79</sup> However, in this case, California had already allowed the tribe exclusive gaming rights, and thus, the court reasoned that the state’s offer of “*revised and expanded exclusivity*” was not a “real, meaningful concession.”<sup>80</sup>

Recognizing that the necessity of a tribal–state gaming compact makes states a key player in Class III gaming, Congress tried to make the playing field more even by requiring that states negotiate the gaming compacts in good faith.<sup>81</sup> If a state refuses to negotiate in good faith, the tribe can file a lawsuit in federal court.<sup>82</sup> Any evidence that shows that the state has demanded direct taxation of the tribe or any of the tribe’s lands are to be taken as evidence that the state has not negotiated in good faith.<sup>83</sup>

IGRA was “a compromise between the interests of Indian tribes that had been recognized and validated by the Supreme Court and the interests of state and local governments.”<sup>84</sup> In enacting IGRA, Congress limited the holding in *Cabazon* by providing a statutory scheme for the states to play a role in the regulation of tribal gaming, but clearly emphasized that the statute was intended to benefit the tribes, not the states.<sup>85</sup> At the outset, IGRA was a fair balance of all involved interests because tribes were permitted to conduct gaming while states were allowed to play a part in regulation.<sup>86</sup> Nonetheless,

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78. *Id.* at 1036.

79. *Id.* at 1037.

80. *Id.* at 1037–38.

81. 25 U.S.C. § 2710(d)(3)(A) (2018); MILLER, *supra* note 29, at 81.

82. 25 U.S.C. § 2710(d)(7)(A)(i). IGRA provides five factors for the court to consider in its determination of good faith: “the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities.” *Id.* § 2710(d)(7)(B)(iii)(I).

83. *Id.* § 2710(d)(7)(B)(iii)(II). If the court determines that the state has failed to negotiate in good faith, it must order the state and tribe to finalize a compact within sixty days. If they fail to do so, the tribe and the state each submits “their last best offer for a compact” to an appointed mediator. The mediator picks the compact that is most in accordance with IGRA and other applicable federal law and submits that compact to the state and tribe. In order for this compact to become the official tribal-state compact, the state must consent to it within sixty days of its submission. If a state does not consent within sixty days, the Secretary of the Interior consults with the tribe and establishes procedures for tribal gaming operations. *Id.* § 2710(d)(7)(B)(iii)–(vii).

84. Fletcher, *supra* note 33, at 50.

85. *See, e.g.*, 25 U.S.C. § 2701(4) (2018) (stating that “a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government”).

86. MILLER, *supra* note 29, at 82.

this balance was thrown off by the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*,<sup>87</sup> and IGRA is now more favorable to the states.<sup>88</sup>

At issue in *Seminole Tribe* was a tribe's remedy in IGRA to sue states when they fail to negotiate in good faith.<sup>89</sup> The Seminole Tribe of Florida brought suit against the state of Florida, alleging that the State had refused to negotiate certain gaming aspects with the tribe.<sup>90</sup> Thus, the Seminole Tribe contended that the State had violated its requirement of good faith negotiation.<sup>91</sup> The State responded by arguing that the Eleventh Amendment<sup>92</sup> barred the suit because of its grant of sovereign immunity to states from suit in federal court, and that Congress had no authority to abolish the states' sovereign immunity in passing IGRA.<sup>93</sup>

The Supreme Court ruled that Congress had unconstitutionally waived state sovereignty immunity to lawsuits by giving the tribes the ability to sue states in IGRA.<sup>94</sup> Consequently, tribes could no longer sue states for failing to negotiate a tribal-state compact in good faith unless that state, on its own, had waived its immunity to that suit.<sup>95</sup>

Now that tribes were devoid of a remedy when states failed to negotiate a tribal-state compact in good faith, the states had much more power over tribal gaming than Congress intended when passing IGRA.<sup>96</sup> States could simply prevent the tribes from offering Class III gaming just by refusing to negotiate a compact. In fact, for over two years after *Seminole* was decided, no tribal-state compacts governing Class III gaming were concluded.<sup>97</sup> While this is

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87. 517 U.S. 44 (1996).

88. See MILLER, *supra* note 29, at 82.

89. *Seminole Tribe*, 517 U.S. at 47.

90. *Id.* at 52.

91. *Id.*

92. U.S. CONST. amend. XI. The Eleventh Amendment established the principle of state sovereign immunity and shields states from suits brought by citizens of other states or foreign countries.

93. *Seminole Tribe*, 517 U.S. at 52.

94. *Id.* at 47.

95. MILLER, *supra* note 29, at 82.

96. *Id.* at 83.

97. *Id.* at 82.

still the current state of the law,<sup>98</sup> the majority of states and tribes are able to successfully complete compact negotiations today.<sup>99</sup>

### B. Tribal Gaming in Arizona

First, this Section lays out the foundation of tribal gaming in Arizona by exploring how tribal-state gaming compacts came to be signed. Second, this Section details opposition to tribal gaming from horse race tracks. Lastly, this Section explains the current compacts.

#### 1. Fort McDowell Yavapai Nation Standoff and the First Tribal-State Gaming Compacts

By the 1990s, many Arizona tribes were offering slot machines, which are part of Class III gaming,<sup>100</sup> at their casinos before finalizing a tribal-state gaming compact.<sup>101</sup> Arizona Governor Fife Symington opposed this activity and refused to negotiate a compact, arguing that it would lead to an increase in organized crime.<sup>102</sup> In 1992, the Yavapai-Prescott Indian Tribe, the White Mountain Apache Tribe, the Cocopah Indian Tribe, the Pascua Yaqui Indian Tribe, and the Tohono O’odham Nation sued Governor Symington in federal court, claiming that the State was required to negotiate compacts permitting casino-style gaming as required by IGRA.<sup>103</sup>

While this lawsuit was pending, Governor Symington called upon the U.S. Attorney for Arizona to raid several casinos because the tribes were conducting gaming without a signed compact.<sup>104</sup> Unannounced, FBI agents conducted raids on five Indian casinos.<sup>105</sup> Four went relatively smoothly, but

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98. Austin R. Vance, *A Pretty Smart Answer: Justifying the Secretary of the Interior’s “Seminole Fix” for the Indian Gaming Regulatory Act*, 40 AM. INDIAN L. REV. 325, 326–27 (2016). In response to *Seminole*, the Department of the Interior produced Class III Gaming Procedures, which “provide a mechanism to circumvent a state’s refusal to negotiate compacts with the tribes.” *Id.* at 327. However, federal courts are divided on the validity of the Class III Gaming Procedures. *Id.* This is an issue outside the scope of this Comment. See *id.* at 336–50 for a detailed discussion.

99. *Id.* at 341–42.

100. *Tribal Gaming History*, ARIZ. DEP’T GAMING, <https://gaming.az.gov/about/history> [<https://perma.cc/Y7PA-UA5F>].

101. *Id.*; *Yavapai History & Culture*, FORT MCDOWELL YAVAPAI NATION, <https://www.fmyn.org/about-fmyn/history/> [<https://perma.cc/R4Y8-KRCA>].

102. McNeil, *supra* note 21, at 14.

103. *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292 (D. Ariz. 1992); McNeil, *supra* note 21, at 14.

104. McNeil, *supra* note 21, at 14; *Tribal Gaming History*, *supra* note 14.

105. *Yavapai History & Culture*, *supra* note 101.

one ended up attracting national attention.<sup>106</sup> On May 12, 1992, agents arrived at the Fort McDowell Casino, seized 349 slot machines, and loaded them into trucks.<sup>107</sup> Tribe members organized a blockade of the only road out with “every available car, truck, and piece of heavy machinery,” inducing a standoff.<sup>108</sup> The standoff ended when Governor Symington agreed to a ten-day cooling off period, during which he would negotiate with the tribe about allowing them to continue operating slot machines.<sup>109</sup> After this cooling off period came to a close, Governor Symington released a statement on tribal gaming in Arizona, stating that the State would “accelerate . . . on-going compact negotiations.”<sup>110</sup> However, he did not support any growth of gaming beyond the current level on the reservations and remained firmly opposed to any gaming off the reservations.<sup>111</sup>

One week after Governor Symington’s statement, the District Court of Arizona concluded that the State must negotiate with the Yavapai Nation, or any other tribe that wished to sign a compact, in accordance with IGRA’s provisions.<sup>112</sup> The Court appointed former Arizona Supreme Court Chief Justice Frank X. Gordon as mediator, and in February 1993, he ruled that the tribes were allowed to operate gaming such as slot machines and pokers.<sup>113</sup> Displeased with this ruling, the State called a special legislative session to prohibit slot machines and casino-style gaming.<sup>114</sup> The tribes responded by collecting enough signatures to put forth a statewide ballot initiative.<sup>115</sup> While it appears that this initiative was never put to a vote due to a quick compromise reached shortly thereafter, this action demonstrates that the

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106. Assoc. Press, *F.B.I. Agents Raid Casinos on 5 Indian Reservations*, N.Y. TIMES (May 13, 1992), <https://www.nytimes.com/1992/05/13/us/fbi-agents-raid-casinos-on-5-indian-reservations.html> [<https://perma.cc/DN8P-KEXL>]; McNeil, *supra* note 21, at 14.

107. *Yavapai History & Culture*, *supra* note 101.

108. *Id.*; see also *Indians Blockade Feds in Arizona Casino Raid*, J. TIMES (May 13, 1992), [https://journaltimes.com/news/national/indians-blockade-feds-in-arizona-casino-raid/article\\_657a394d-424c-5c4d-8579-547e753e8c54.html](https://journaltimes.com/news/national/indians-blockade-feds-in-arizona-casino-raid/article_657a394d-424c-5c4d-8579-547e753e8c54.html) [<https://perma.cc/E4HT-UBWW>].

109. Assoc. Press, *supra* note 106.

110. FIFE SYMINGTON, STATE OF ARIZONA EXECUTIVE OFFICE, STATEMENT BY GOVERNOR SYMINGTON FOLLOWING HIS MEETING WITH TRIBAL LEADERS (1992), <http://azmemory.azlibrary.gov/digital/collection/archgov/id/414> [<https://perma.cc/Q3DY-RW6D>].

111. *Id.*

112. *Yavapai–Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292, 1298 (D. Ariz. 1992). This decision occurred before the *Seminole Tribe* decision in 1996 that blocked the tribes’ remedy to sue the state for failing to negotiate a compact in good faith. If it had been after, it would be interesting to think about what the state of tribal gaming in Arizona would be like today. That, however, is a topic for another time.

113. McNeil, *supra* note 21, at 14.

114. *Id.*

115. *Id.*

tribes are willing and able to use state law “to force the state to reckon with its request to [negotiate].”<sup>116</sup>

In June 1993, a compromise was reached, and the first tribal-state gaming compact was finalized.<sup>117</sup> Sixteen tribes signed standard form compacts.<sup>118</sup> Set for a ten-year term, the compacts established a tier system for slot machines based on the number of tribe members, did not allow banked card games,<sup>119</sup> and perhaps most notably, did not include any revenue-sharing agreements.<sup>120</sup>

## 2. Opposition from the Racetracks

From IGRA’s inception, horse-racing tracks have been opposed to Indian gaming.<sup>121</sup> The conflict is obvious: an increase in tribal gaming results in a decrease of the success of gaming operations at the racetracks.<sup>122</sup> The racetracks have argued that the gambling market is not infinite, and saturation of the market will result in “tremendous economic fallout and loss” for the tracks.<sup>123</sup> This is only true if gamers prefer the new tribal gaming to the preexisting gaming operations.<sup>124</sup> However, it has been found that parimutuel

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116. Ron M. Rosenberg, *When Sovereigns Negotiate in the Shadow of the Law: The 1998 Arizona-Pima Maricopa Gaming Compact*, 4 HARV. NEGOT. L. REV. 283, 295 (1999). In 1995, the Salt River Pima Maricopa Indian Community also gathered enough signatures to put Proposition 201 on the November 1996 statewide election ballot when Governor Symington refused to negotiate a compact. Arizona voters were asked whether the tribe should be offered the same standard form compact that was previously offered to the sixteen tribes who had already signed compacts. Proposition 201 passed by a 2-to-1 margin, and newly elected Governor Jane Hull signed the compact in 1998. *Id.* at 296–300.

117. McNeil, *supra* note 21, at 14.

118. McNeil, *supra* note 21, at 13; *Tribal Gaming History*, *supra* note 14. These sixteen tribes were the Ak-Chin, Cocopah, Colorado River, Fort McDowell, Fort Mojave, Gila River, Hualapai, Kaibab Paiute, Pascua Yaqui, Quechan, San Carlos, Tohono O’odham, Tonto Apache, White Mountain Apache, Yavapai–Apache, and Yavapai–Prescott.

119. Banked card games are games like blackjack, where players play against a banker (who can be either another player or the gaming operation). The banker has an odds advantage over all other players. Banked card games are part of Class III gaming. NAT’L INDIAN GAMING COMM’N., *supra* note 64. Banked and non-banked card games are discussed *supra* in text accompanying notes 64–69.

120. McNeil, *supra* note 21, at 14. The more members a tribe had, the more slot machines it could operate. A tribe with 16,000 members could operate up to 1,400 devices at as many as 4 locations. *Id.*

121. See Franke Wilmer, *Indian Gaming: Players and Stakes*, 12 WICAZO SA REV. 89, 96–97 (1997).

122. *Id.*

123. *Id.* at 97.

124. *Id.* at 98. Furthermore, increased competition is a crucial part of the free market and is best for the consumer. *Id.*

wagering, the most common form of betting offered at horse racetracks, is the “biggest loser[] in competition with casinos of any kind, including Indian casinos.”<sup>125</sup>

In 2000, with the first set of compacts set to expire soon, Arizona Governor Jane Hull began to renegotiate with tribes.<sup>126</sup> Led by American Greyhound Racing, a horse and dog racing facility in Arizona, racetrack owners and operators filed a lawsuit against Governor Hull seeking an injunction enjoining her from signing new compacts.<sup>127</sup> The racetracks’ principal argument was that the Governor had no authority to enter into or extend new compacts that authorized gaming otherwise prohibited in Arizona.<sup>128</sup> The District Court of Arizona granted the injunction, reasoning, in part, that the state statute giving the Governor authority to enter into contracts violated “the state separation of powers by granting unrestricted legislative authority to the Governor.”<sup>129</sup> The court also concluded that tribes currently conducting gaming “under compacts were neither necessary nor indispensable parties.”<sup>130</sup>

On appeal, the Ninth Circuit reversed and dismissed the case.<sup>131</sup> The court did not take up the issue of whether the grant of authority to enter into compacts to the Governor was improper, but ultimately decided the case by determining that the tribes were necessary and indispensable parties to the case.<sup>132</sup> The tribes claimed a substantial interest (renewal of the compacts) and were “so situated that this litigation *as a practical matter* impair[ed] or impede[d] their ability to protect it.”<sup>133</sup> Moreover, the tribes enjoyed sovereign immunity and did not consent to be sued.<sup>134</sup> Thus, this case had two significant results: first, it affirmed tribal sovereignty and the tribes’ interests

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125. *Id.*; *Pari-Mutuel Betting*, SPORTS GEEK, <https://www.thesportsgeek.com/sports-betting/horse-racing/pari-mutuel-betting/> [<https://perma.cc/VQ3E-7DJV>].

126. *Tribal Gaming History Timeline*, *supra* note 19.

127. *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1020 (9th Cir. 2002); *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1025 (D. Ariz. 2001).

128. *Am. Greyhound*, 305 F.3d at 1020–21.

129. *Id.* at 1021.

130. *Id.* “Necessary parties are those who must be included in an action either as plaintiffs or defendants unless there is a valid excuse for their non-joinder. . . . Indispensable parties are those who must be included in an action before it may properly go forward. No excuse will be accepted for their non-joinder.” Fleming James, *Necessary and Indispensable Parties*, 18 U. MIAMI L. REV. 68, 68 (1963) (footnotes omitted).

131. *Am. Greyhound*, 305 F.3d at 1027.

132. *Id.*

133. *Id.* at 1023.

134. *Id.* at 1027.

in the tribal–state gaming compacts, and second, it allowed the Governor to continue negotiating with the tribes.<sup>135</sup>

Arizona voters did not make it any easier for the racetracks in 2002. They rejected Proposition 201, which would have allowed the tracks to offer slot machines.<sup>136</sup> Tribal gaming continues to face opposition from the racetracks today, although certainly not at the same level as the 1990s to early 2000s.<sup>137</sup> In fact, in 2016, Governor Doug Ducey signed legislation ending dog racing in Arizona.<sup>138</sup> Two horse racing tracks still exist in Arizona, and while a former race track reopened in 2019, it suspended its summer racing season early.<sup>139</sup>

### 3. Current Tribal–State Gaming Compacts

In 2002, Proposition 202 was on the ballot, backed by seventeen tribes.<sup>140</sup> It had resulted from the litigation in *American Greyhound*, as tribes wanted to ensure the Governor’s authority to negotiate gaming compacts.<sup>141</sup> Proposition 202, in addition to soundly giving the Governor authority to enter

135. *American Greyhound* had significant implications in the realm of the indispensable party rule and Rule 19 of the Federal Rules of Civil Procedure. For a discussion of these ramifications, see Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZ. L. REV. 1, 79–83 (2005); Katherine Florey, *Making Sovereigns Indispensable: Pimentel and the Evolution of Rule 19*, 58 UCLA L. REV. 667, 687–97 (2011).

136. ARIZ. SEC’Y OF STATE, 2002 BALLOT PROPOSITIONS 57 (2002), <https://apps.azsos.gov/election/2002/Info/pubpamphlet/english/prop201.pdf> [<https://perma.cc/AGZ9-TMH3>]; *Indian Gaming Proposition 202 Narrowly Wins Approval*, ARIZ. DAILY SUN (Nov. 7, 2002), [https://azdailysun.com/indian-gaming-proposition-narrowly-wins-approval/article\\_46955cde-7fbd-5128-aa02-0e9a62e68348.html](https://azdailysun.com/indian-gaming-proposition-narrowly-wins-approval/article_46955cde-7fbd-5128-aa02-0e9a62e68348.html) [<https://perma.cc/XJS6-W3DE>].

137. See Brendan Kennealy & Miranda Tomlinson, *Legal Gambling in Arizona Has Undergone Dramatic Changes*, KTAR NEWS (Jan. 5, 2017, 5:03 AM), <http://ktar.com/story/1412920/legal-gambling-arizona-undergone-dramatic-changes/> [<https://perma.cc/59NT-PY44>].

138. Howard Fischer, *Governor Signs Bill To End Dog Racing in Arizona*, ARIZ. CAPITOL TIMES (May 13, 2016), <https://azcapitoltimes.com/news/2016/05/13/governor-signs-bill-to-end-dog-racing-in-arizona/> [<https://perma.cc/25Z9-4DN7>].

139. Kennealy & Tomlinson, *supra* note 137; Torrence Dunham, *Arizona Downs To Bring Horse Racing to Prescott Valley in May 2019*, SIGNALS AZ (July 27, 2018), <https://www.signalsaz.com/articles/arizona-downs-to-bring-horse-racing-to-prescott-valley-in-may-2019/> [<https://perma.cc/4HS5-M58Y>]. Turf Paradise in Phoenix and Rillito Park in Tucson are the only two racetracks left. Yavapai Downs closed in 2011, but reopened as Arizona Downs in 2019. Kennealy & Tomlinson, *supra* note 137; Dennis Wagner, *Arizona Downs Ends Its Horse Racing Season Early, Putting Comeback on Hold*, AZCENTRAL (June 23, 2019, 5:49 PM) <https://www.azcentral.com/story/news/local/arizona/2019/06/21/prescott-valleys-arizona-downs-ends-horse-racing-season-early/1525604001/> [<https://perma.cc/G6LD-YAA9>].

140. *Indian Gaming Proposition 202 Narrowly Wins Approval*, *supra* note 136.

141. *See id.*



into gaming compacts, increased the number of slot machines allowed in the casinos and permitted the tribes to offer house-banked table games.<sup>142</sup> Arizona voters narrowly approved it by a margin of fifty-one percent to forty-nine percent.<sup>143</sup>

From December 2002 to January 2003, Governor Hull signed new compacts with sixteen tribes.<sup>144</sup> After taking office in 2003, Governor Janet Napolitano signed compacts with five more tribes.<sup>145</sup> Sixteen tribes currently operate Class III gaming facilities under their compacts, while another six do not have casinos, but do have slot machine rights that they can lease to other tribes who have casinos.<sup>146</sup> Each tribe is allotted a certain number of slot machines based on its location and membership numbers.<sup>147</sup> One tribe may lease its slot machine rights to another through a Transfer Agreement, which would then allow that second tribe to operate more slot machines than permitted under its own compact.<sup>148</sup> This allows a remote tribe to participate in gaming and receive revenue.<sup>149</sup> However, the number of casinos that the second tribe can then operate is reduced.<sup>150</sup> The compacts allow a maximum of forty-three casinos in the state.<sup>151</sup>

The compacts signed in 2002 and 2003 were set for a ten-year term, which would automatically renew for another ten years and could also be extended for an additional three years if the State and tribes agreed to specific conditions.<sup>152</sup> The standard form compact (the “Compact”) is available online.<sup>153</sup> Currently in their second-year term, many compacts are set to expire in 2022 and 2023.<sup>154</sup>

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142. *Id.*

143. ARIZ. SEC’Y OF STATE, 2002 PUBLICITY PAMPHLET 73 (2002); *Indian Gaming Proposition 202 Narrowly Wins Approval*, *supra* note 136.

144. *Tribal Gaming History Timeline*, *supra* note 19.

145. *Id.*

146. Staudenmaier, *supra* note 25, at 14; *Tribal Gaming*, ARIZ. DEP’T GAMING, <https://gaming.az.gov/tribal-gaming-page> [<https://perma.cc/ZV4J-UXEP>].

147. Staudenmaier, *supra* note 25, at 15.

148. *Id.* at 14.

149. *Tribal Gaming*, *supra* note 146.

150. Staudenmaier, *supra* note 25, at 15.

151. *Id.*

152. Heidi McNeil Staudenmaier, *Arizona Tribal Gaming—The Great Compromise and Controversy*, INDIAN GAMING LAW., Autumn 2016 at 22, 24.

153. ARIZ. STANDARD FORM TRIBAL-STATE GAMING COMPACT, *supra* note 15.

154. See Howard Fischer, *Arizona Officials, Tribes Cheer Supreme Court’s Ruling on Sports Betting*, TUCSON.COM (May 15, 2018), [https://tucson.com/news/local/arizona-officials-tribes-cheer-supreme-court-s-ruling-on-sports/article\\_0916e944-4017-59f2-a83b-922ee734caf6.html](https://tucson.com/news/local/arizona-officials-tribes-cheer-supreme-court-s-ruling-on-sports/article_0916e944-4017-59f2-a83b-922ee734caf6.html) [<https://perma.cc/PN3S-HQ84>].

Under the Compact, the tribe must share its gaming revenue with the state.<sup>155</sup> Each tribe's yearly contribution is determined based upon a sliding scale of Net Win, which is also known as Gross Gaming Revenue ("GGR"), or the amount left over after paying out winning bets.<sup>156</sup> The tribe gives 1% of its first \$25 million of Net Win, 3% of its next \$50 million, 6% of the next \$25 million, and 8% for Net Win over \$100 million.<sup>157</sup>

Tribal contributions are allocated among the state, cities, towns, and counties.<sup>158</sup> Eighty-eight percent of a tribe's contributions goes to the Arizona Benefits Fund.<sup>159</sup> The Arizona Benefits Fund was established by Proposition 202 and is administered by the Department of Gaming.<sup>160</sup> The remaining 12% goes directly to Arizona cities, towns, and counties for government services that benefit the general public.<sup>161</sup> In 2016, Arizona ranked fifth in terms of tribal gaming revenue, with total revenue of \$1.9 billion.<sup>162</sup> As of September 3, 2019, cumulative tribal contributions to the state resulting from the compact's revenue-sharing provision totaled over \$1.5 billion.<sup>163</sup>

To avoid having this revenue-sharing provision deemed an illegal tax on the tribes as prohibited by IGRA,<sup>164</sup> the State has effectively granted the tribes substantial exclusivity rights on gaming.<sup>165</sup> While the Compact does not explicitly provide that tribes are the only entities who may operate gaming, a certain provision in the Compact makes it clear that this is the intent. This provision, known as the Poison Pill, states that any change in state law after May 1, 2002 that allows an entity other than an Indian tribe to operate gaming devices or Class III gaming that is not authorized under the Compact triggers

155. ARIZ. STANDARD FORM TRIBAL-STATE GAMING COMPACT, *supra* note 15, § 12(a).

156. *Id.* § 12(b). The Compact defines Net Win as "gross gaming revenue, which is the difference between gaming wins and losses, before deducting costs and expenses." *Id.* § 2(qq).

157. *Id.* § 12(b).

158. *Who Benefits*, BENEFITING ARIZ., <https://www.benefitingarizona.org/who-benefits/> [<https://perma.cc/KW4D-FDE7>].

159. ARIZ. STANDARD FORM TRIBAL-STATE GAMING COMPACT, *supra* 15, § 12(c). This 88% is further broken down as follows: 9% or eight million dollars (whichever is greater) is used for the Arizona Department of Gambling's administrative and regulatory costs; 2% is used to fund the Office of Problem Gambling; 56% to the Instructional Improvement Fund; 28% to the Trauma and Emergency Services fund; 8% to the Arizona Wildlife Conservation Fund; and 8% to the Tourism Fund Account. *Who Benefits*, *supra* note 158.

160. *Proposition 202 Trauma & Emergency Services Fund Payments*, ARIZ. HEALTH CARE COST CONTAINMENT SYS., <https://www.azahcccs.gov/PlansProviders/RatesAndBilling/prop202.html> [<https://perma.cc/X4V6-42ZT>].

161. *Who Benefits*, *supra* note 158.

162. Stutz, *supra* note 11.

163. *Tribal Contributions from Gaming Revenue to the State, Cities, Towns & Counties*, *supra* note 17.

164. 25 U.S.C. § 2710(d)(4) (2018).

165. ARIZ. STANDARD FORM TRIBAL-STATE GAMING COMPACT, *supra* note 15, § 3(h)(1).

three rights for the tribes.<sup>166</sup> In simpler terms, this provision means that if Arizona allows any entity other than a tribe to conduct gaming, the Compact allows the tribe to exercise three rights. First, the tribes may, without amending the Compact, offer unlimited Class III gaming.<sup>167</sup> This means no restrictions on the number of gaming devices, facilities, or the maximum number of gaming devices at each facility.<sup>168</sup> Second, the tribe may offer unlimited table games, also without any required amendment to the Compact.<sup>169</sup> This includes no limitation on the number of card game tables, wagers, or types of games.<sup>170</sup> Third, the tribes' required percentage of shared revenue is significantly reduced to only 0.75% of its Net Win.<sup>171</sup> Together, these three rights show that the State has intended for the tribes to hold exclusive rights to gaming because they are extremely unfavorable to the State, so unfavorable that the State has an incentive to ensure that tribes are the only entities conducting gaming.

The Poison Pill is incredibly favorable for the tribes and should suffice to show that the State made a “meaningful concession” per the Ninth Circuit’s *Rincon* decision in 2010, which held that states may negotiate for a revenue-sharing provision when they offer a meaningful concession—here, exclusive rights to gaming. If Arizona were to allow entities other than the tribes to offer gambling, including sports betting, the Poison Pill would undoubtedly be triggered.

#### 4. Sports Betting in Arizona

In May 2018, the Supreme Court held that PASPA, which had prohibited states from legalizing sports betting, was unconstitutional.<sup>172</sup> After the Court’s ruling, Governor Doug Ducey tweeted that “[the Supreme Court’s decision] is positive news. We have been working on a modernized gaming compact. This ruling gives Arizona options that could benefit our citizens and our general fund.”<sup>173</sup>

Daniel Scarpinato, a spokesman for Governor Ducey, commented that one possible option in regards to legalizing sports betting is to give the tribes exclusivity rights to sports betting in exchange for providing the state with

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166. *Id.*; *Frequently Asked Questions*, *supra* note 28.

167. ARIZ. STANDARD FORM TRIBAL-STATE GAMING COMPACT, *supra* note 15, § 3(h)(1)(A).

168. *Id.*

169. *Id.* § 3(h)(1)(B).

170. *Id.*

171. *Id.* § 3(h)(1)(C).

172. *Murphy v. NCAA*, 138 S. Ct. 1461, 1467 (2018); *see infra* Part II.C.2.

173. Doug Ducey, (@dougducey), TWITTER (May 14, 2018, 10:51 AM), <https://twitter.com/dougducey/status/996085545984974848> [<https://perma.cc/9L8G-HN39>].

more contributions from the revenue.<sup>174</sup> Likewise, the chairman of the Gila River Indian Community, Stephen Roe Lewis, saw a big opportunity for the tribes in the ruling and stated that they “are looking forward to discussing with the state how we can go about working together on developing this opportunity.”<sup>175</sup>

This early show of collaboration is positive news for both the state and the tribes, but it doesn’t come without opposition. The racetracks are again at the forefront of the resistance, disagreeing with giving tribes exclusive rights on sports gambling.<sup>176</sup> They argue that since they already offer betting on horse racing and that horse racing is itself a sport, the racetracks should also be included in the discussions.<sup>177</sup>

### *C. Sports Betting in the United States*

First, this Section discusses PASPA and its downfall. Second, this Section examines Connecticut’s early, albeit failed, attempt to legalize sports betting because the tribal interests in Connecticut align closely with those in Arizona. Lastly, this Section reviews a study analyzing the economic impact of legalized sports betting in all fifty states.

#### 1. PASPA Is Enacted

In 1992, Congress enacted the Professional and Amateur Sports Protection Act (“PASPA”). This made it illegal for any

governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . 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.<sup>178</sup>

Thus, Congress had now extended its regulation of sports gambling to intrastate activities. States could not offer sports betting unless they qualified for one of two major exemptions. First, any state that conducted sports betting at any time between 1976 and 1990 was exempt from PASPA’s

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174. Fischer, *supra* note 154.

175. *Id.*

176. *Id.*

177. *Id.*

178. 28 U.S.C. § 3702, *invalidated by* Murphy v. NCAA, 138 S. Ct. 1461 (2018).

prohibitions.<sup>179</sup> Similarly, if a state had a statute allowing sports gambling in effect on October 2, 1991 and actually conducted sports betting between September 1, 1989 and October 2, 1991, it was also exempt.<sup>180</sup> Second, PASPA did not apply to any casino gambling that had been consistently occurring in a municipality from 1982–1992, so long as that municipality passed legislation authorizing sports gambling by 1993.<sup>181</sup> Atlantic City was the only place that could meet these requirements.<sup>182</sup> New Jersey attempted to pass legislation that would permit sports betting, but ultimately was unable to qualify for the exemption.<sup>183</sup>

Lastly, PASPA applied to tribal lands,<sup>184</sup> and also allowed for any professional or amateur sports organization to bring a civil action against any state that violated PASPA.<sup>185</sup>

## 2. *Murphy v. NCAA*: PASPA Declared Unconstitutional

Throughout its life, PASPA faced multiple challenges. Many are outside the scope of this Comment, and for that reason, this Part will discuss only New Jersey’s final battle that ultimately led to the downfall of PASPA.<sup>186</sup>

In 2014, New Jersey enacted Senate Bill 2460 (the “2014 Law”).<sup>187</sup> Rather than authorizing the legislature to permit sports betting, New Jersey partially repealed its old state law prohibitions on sports betting, thus effectively permitting sports betting in casinos and racetracks licensed by the State.<sup>188</sup> New Jersey chose to do this because of the Third Circuit’s 2013 ruling in

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179. *Id.* § 3704(a)(1) (2018).

180. *Id.* § 3704(a)(2).

181. *Id.* § 3704(a)(3).

182. Justin Fielkow et al., *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 32 (2016).

183. Christopher L. Soriano, *The Efforts to Legalize Sports Betting in New Jersey—A History*, N.J. LAW. 22, 23 (Apr. 2013), [https://www.duanemorris.com/articles/static/soriano\\_njlawyer\\_0413.pdf](https://www.duanemorris.com/articles/static/soriano_njlawyer_0413.pdf) [https://perma.cc/SSP4-S7WE] (discussing why New Jersey did not pass legislation in time to qualify for the exemption).

184. 28 U.S.C. § 3704(b) (2018).

185. *Id.* § 3703 (2018).

186. See Fielkow et al., *supra* note 182, at 33–34 for a discussion of other challenges to PASPA.

187. S. Res. 2460, 216th Leg., Reg. Sess. (N.J. 2014); see Act of Oct. 17, 2014, 2014 N.J. Laws ch. 62 (codified at N.J. Stat. Ann. §§ 5:12A-7 to -9 (West 2014)), *invalidated by* NCAA v. Chris Christie (Christie I), 832 F.3d 389 (3d Cir. 2016).

188. N.J. S. Res. 2460; see Act of Oct. 17, 2014, 2014 N.J. Laws ch. 62 (codified at N.J. Stat. Ann. §§ 5:12A-7 to -9 (West 2014)), *invalidated by* Christie I, 832 F.3d 389; see also Fielkow et al., *supra* note 182, at 39.

*NCAA v. Governor of New Jersey*.<sup>189</sup> In this case, the Third Circuit struck down New Jersey’s attempt to legalize sports betting in the 2012 Sports Wagering Law as a violation of PASPA, but suggested that New Jersey was free to repeal its ban on sports wagering as opposed to authorizing sports betting.<sup>190</sup>

The major professional sports leagues and the NCAA challenged the 2014 Law, contending that it was just a “de facto authorization of sports gambling.”<sup>191</sup> Therefore, like the 2012 Sports Wagering Law, it violated PASPA.<sup>192</sup> New Jersey, in addition to arguing that it had merely done what the Third Circuit said was permissible in 2012, contended that PASPA violated the anti-commandeering principle.<sup>193</sup> This principle prevents the federal government from ordering state legislatures to pass regulations in conformity with federal standards.<sup>194</sup>

As it did in 2012, the Third Circuit rejected New Jersey’s argument and held that the 2014 Law violated PASPA.<sup>195</sup> Moreover, the court held that PASPA did not violate the anti-commandeering clause because it did not affirmatively order states to take action.<sup>196</sup> In a rehearing en banc, the Third Circuit came to the same conclusion: “PASPA does not command states to

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189. *NCAA v. Governor of N.J. (Christie I)*, 730 F.3d 208 (3d Cir. 2013); Fielkow et al., *supra* note 182, at 38–39. Chris Christie was the Governor of New Jersey during this lawsuit; thus, the case is named *Christie I*.

190. *Christie I*, 730 F.3d at 232. In 2012, the legislature passed the Sports Wagering Law, which enabled authorities to license sports gambling in casinos and racetracks and permitted them to operate “sports pools.” N.J. Stat. Ann. §§ 5:12A-1 to -6 (West 2012) (repealed 2014); Fielkow et al., *supra* note 182, at 35. The major professional sports leagues and the NCAA brought suit pursuant to PASPA. *Christie I*, 730 F.3d at 217. New Jersey contended that PASPA was unconstitutional because it violated the anti-commandeering principle. *Id.* at 214. The Third Circuit held that the 2012 law violated PASPA, and that PASPA was not unconstitutional because it did not command the states to take any affirmative action. *Id.* at 231 (“PASPA does not *require* or coerce the states to lift a finger . . .”). The Supreme Court denied certiorari. *Christie v. NCAA*, 573 U.S. 931 (2014).

191. Complaint for Declaratory & Injunctive Relief at 3, *NCAA v. Christie*, 61 F. Supp. 3d 488 (D. N.J. 2014) (No. 3:14-cv-06450-MAS-LHG), 2014 WL 5395199.

192. *Id.* at 4.

193. *NCAA v. Governor of N.J. (Christie II)*, 832 F.3d 389, 398–99 (3d Cir. 2016) (en banc), *rev’d sub nom*, *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

194. *Id.*; *see also* *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)) (“Congress may not simply ‘commande[e]r the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”).

195. *NCAA v. Governor of N.J.*, 799 F.3d 259, 264 (3d Cir. 2015), *aff’d on reh’g*, *Christie II*, 832 F.3d 389 (3d Cir. 2016) (en banc).

196. *Christie II*, 832 F.3d at 401.

take affirmative actions.”<sup>197</sup> This time, however, the Supreme Court granted certiorari.<sup>198</sup>

In May 2018, the Supreme Court reversed the Third Circuit and struck down PASPA as unconstitutional.<sup>199</sup> The Court held that PASPA violated the anti-commandeering clause, reasoning that the distinction between imposing action on states and telling states what actions they cannot take was “empty.”<sup>200</sup> States are now free to authorize sports betting.

### 3. Sports Betting After PASPA: Connecticut

As of December 2019, some states have already enacted laws permitting sports betting, whereas others have proposed legislation but not yet passed anything.<sup>201</sup> Congress can still pass legislation on the issue. On September 27, 2018, Congress held a hearing on sports betting.<sup>202</sup> While legislators did not come to a final solution, they discussed many critical topics in sports betting, such as the leagues’ interest in protection of their data as intellectual property, the integrity of the game,<sup>203</sup> and the states’ fast pace in enacting legislation.<sup>204</sup>

One state worth noting is Connecticut. Connecticut has a provision in its tribal-gaming compact that is similar to Arizona’s Poison Pill: the tribes have exclusive rights to offer slot machine gambling, and in return, they share twenty-five percent of the revenue from slot machines with the state.<sup>205</sup> If

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197. *Id.* at 401.

198. *Murphy v. NCAA*, 138 S. Ct. 1461, 1473 (2018).

199. *Id.* at 1467.

200. *Id.* at 1478.

201. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (last updated Mar. 11, 2020), [http://www.espn.com/chalk/story/\\_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states) [https://perma.cc/ACZ7-3SES]. In addition to Nevada, which had already legalized sports gambling prior to *Murphy*, Arkansas, Delaware, Illinois, Indiana, Iowa, Michigan, Mississippi, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, New Hampshire, and West Virginia now offer full-scale legalized sports betting. Colorado, Montana, North Carolina, Tennessee, and Washington D.C. have recently passed legislation, while twenty-seven other states have introduced bills. Only three states have taken no action. *Id.*

202. *Post-PASPA: An Examination of Sports Betting in America: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security & Investigations of the H. Comm. on the Judiciary*, 115th Cong. (2018).

203. Integrity of the game refers to the confidence that the general public has in the oath that players and coaches take to uphold the honor of sports and refrain from cheating in any sense.

204. Nicholas Garcia, *The Five Major Takeaways from the Congressional Sports Betting Hearing*, PLAY USA (Sept. 28, 2018), <https://www.playusa.com/sports-betting-hearing-takeaways/> [https://perma.cc/MD57-SZKT].

205. Christopher Keating, *Sports Betting off the Table This Year in Connecticut*, HARTFORD COURANT (Aug. 28, 2018), <https://www.courant.com/politics/hc-pol-no-sports-betting->

Connecticut allows any entity other than the tribes to operate casinos, the revenue-sharing ceases.<sup>206</sup> The tribes in Connecticut believe they have exclusive rights to sports betting and want to offer it at their casinos.<sup>207</sup> The State Attorney General has taken the opposite stance.<sup>208</sup> However, legislators seem to lean towards the tribes' position, voicing concerns that any changes to the gambling laws would jeopardize the compacts and Connecticut's slot machine revenue.<sup>209</sup>

Although it initially looked like Connecticut's Governor would call a special session for legislators to pass a bill authorizing sports betting, negotiations between the Governor and the tribal nations about an agreement to legalize sports betting ultimately stalled in late August 2018, due to timing obstacles preventing legislators from discussing all issues sufficiently.<sup>210</sup> The failed agreement involved "two tiers of sports betting."<sup>211</sup> One would be for sports betting at tribal casinos, and the other would be for commercial sites like sports bars and racetracks.<sup>212</sup> The bars and racetracks would offer wagers on only the outcomes of games, whereas gambling on tribal lands would offer more wager choices, such as "quirky bets like the length of the National Anthem sung before the Super Bowl."<sup>213</sup> On the topic of amateur sports, legislators informally agreed that no state university sporting events would be available for any bets made in-state.<sup>214</sup> Because Connecticut's tribal-state gaming compacts contain a similar provision to Arizona's Poison Pill, Arizona should model its legislation after Connecticut's proposal.

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20180828-story.html [https://perma.cc/8G28-CN8P]. The two tribes that share gaming revenue with the state are the Mashantucket Pequot and Mohegan tribes. *Id.*

206. Katie Eidson, *Will States Continue To Provide Exclusivity in Tribal Gaming Compacts or Will Tribes Bust on the Hand of the State in Order To Expand Indian Gaming*, 29 AM. INDIAN L. REV. 319, 333 (2005).

207. Keating, *supra* note 205.

208. *Id.*

209. *Id.*

210. Max Reiss, *The Details on How Sports Gambling Died This Year in Connecticut*, NBC CONN. (Aug. 30, 2018, 4:03 PM), <https://www.nbcconnecticut.com/news/politics/The-details-on-how-Sports-Gambling-Died-this-Year-in-Connecticut-492112721.html> [https://perma.cc/YUU5-9PE8]. While these 2018 negotiations ultimately stalled, four different sports betting bills have emerged in 2019. *Connecticut Sports Betting*, LEGAL SPORTS REP. (last updated Dec. 11, 2019), <https://www.legalsportsreport.com/ct/> [https://perma.cc/VXN5-JCRG]. This Comment does not focus on these 2019 bills because the Author believes the 2018 discussions provide a more succinct and reasonable model for Arizona to follow.

211. Reiss, *supra* note 210.

212. *Id.*

213. *Id.*

214. *Id.*



#### 4. Economic Impact of Legalized Sports Betting

In May 2017, perhaps anticipating the Supreme Court's decision a year later, Oxford Economics released a report (the "Economic Impact Study") analyzing the possible economic impacts of legalized sports betting on the United States as a whole and on a state-by-state basis.<sup>215</sup> The Economic Impact Study studied three scenarios in which sports betting would be legal: (1) limited availability, where betting would be offered on-site at casinos only; (2) moderate availability, where betting would be available at on-site casinos and retail locations like bars; and (3) convenient availability, where betting would be available at on-site casinos, retail locations, and online.<sup>216</sup> There were three potential tax scenarios studied: (1) base tax rate (10% of GGR); (2) low tax rate (6.75% of GGR); and (3) high tax rate (15% of GGR).<sup>217</sup> For comparison, Nevada's tax rate on GGR is 6.75%, Pennsylvania's is 36%, and New Jersey's is 8.5% on in-person bets and 13% on online wagers.<sup>218</sup> It is important to remember that IGRA does not allow states to tax tribal casino revenue.<sup>219</sup> The Economic Impact Study took this into account and assumed that "sports betting conducted by Native American tribal operators would support compact payments to state governments equivalent to the assumed gaming tax."<sup>220</sup> Thus, for example, the Economic Impact Study assumed that the gaming tax revenue calculated in Arizona is equivalent to the percentage of revenue that the tribes will share with the state under the Compact.

Pennsylvania's tax rate is especially notable because it is over double the tax rate in the Economic Impact Study's high tax rate scenario. In addition to this high tax rate, Pennsylvania has also implemented a \$10 million license

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215. OXFORD ECON., ECONOMIC IMPACT OF LEGALIZED SPORTS BETTING 3 (2017). A refresher on sports betting vocabulary may be helpful here. First, Gross Gaming Revenue ("GGR") is the amount a sportsbook retains after paying out winning bets and is also known as Net Win. Second, handle means the total amount wagered—a casino's sports betting revenue before any winning bets are paid out. *Id.* at 4.

216. *Id.* at 3–4.

217. *Id.* at 4. These taxes are in addition to the current federal handle tax of 0.25%. *Id.*

218. Ryan Prete, *States Cash in on Sports Betting Taxes, More Expected To Play*, BLOOMBERG TAX (Aug. 1, 2018), <https://news.bloombergtax.com/daily-tax-report-state/states-cash-in-on-sports-betting-taxes-more-expected-to-play> [<https://perma.cc/Q5E8-2L6F>]. Prete states that Pennsylvania's tax rate is 34%; this is not incorrect, but only represents the state tax. Pennsylvania also enacted a 2% local tax, bringing the total tax rate to 36%. Jill R. Dorson, *How States Are Spending Their Sports Betting Tax Revenue*, SPORTS HANDLE (Oct. 25, 2018), <https://sportshandle.com/how-states-are-spending-their-sports-betting-tax-revenue/> [<https://perma.cc/C5BM-KLCM>].

219. 25 U.S.C. § 2710(d)(4) (2018).

220. OXFORD ECON., *supra* note 215, at 16.

fee for any casinos wishing to operate a sportsbook.<sup>221</sup> Combined with the exceptionally high tax rate, this license fee makes it difficult for casinos to turn a profit on sports betting.<sup>222</sup> Many commentators have noted that this structure may actually advance illegal sports gambling instead of reducing it.<sup>223</sup>

Predictably, the Economic Impact Study found that for the United States as a whole, the largest impact for gaming revenue was linked to the convenient availability scenario, and the largest employment and income impacts were associated with the low tax rate scenario.<sup>224</sup> However, the “direct fiscal impacts [were] largely consistent across the different tax rate scenarios.”<sup>225</sup> This is because as the tax rate decreases, betting activity increases so tax payments will be higher.<sup>226</sup>

In Arizona, the overall findings are similar to the results for the United States. The largest impact for gaming tax revenue is correlated with the convenient availability and high tax rate combination at \$55.8 million.<sup>227</sup> The most jobs are created in the low tax rate and convenient availability scenario at 5,344.<sup>228</sup> Table 1 shows gaming tax revenue for all nine scenarios.<sup>229</sup> Table 2 displays employment numbers for the nine scenarios.<sup>230</sup>

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221. Andrew Maykuth, *Pa.’s Sports Betting Taxes So High Legal Bookmakers May Shun State*, PHILA. INQUIRER (July 16, 2018, 5:00 AM), <http://www.philly.com/philly/business/pa-legal-sports-bookmakers-taxes-new-jersey-casinos-20180716.html> [https://perma.cc/QUF4-6KA6].

222. *Id.*

223. *Id.*

224. OXFORD ECON., *supra* note 215, at 5, 26.

225. *Id.* at 5.

226. *Id.*

227. *Id.* at 63.

228. *Id.* at 50.

229. Table 1 was created using the data in the Oxford Economics study. *See id.* at 29–66.

230. Table 2 was created using the data in the Oxford Economics study. *See id.*

**Table 1: Gaming Tax Revenue Impacts of Legalized Sports Betting in Arizona  
(amounts in millions of dollars)**

	Limited Availability	Moderate Availability	Convenient Availability
Base Tax Rate (10%)	15.0	26.1	41.4
Low Tax Rate (6.75%)	10.8	18.8	29.3
High Tax Rate (15%)	19.1	33.3	55.8

**Table 2: Employment Impacts of Legalized Sports Betting in Arizona**

	Limited Availability	Moderate Availability	Convenient Availability
Base Tax Rate (10%)	2171	3662	5054
Low Tax Rate (6.75%)	2258	3881	5344
High Tax Rate (15%)	1792	3021	4388

### III. ANALYSIS

This Part first analyzes whether Arizona should legalize sports gambling by providing policy arguments. Upon concluding that Arizona should legalize sports betting, this Part next discusses a proposal for legalized sports betting in Arizona, including provisions for tribal exclusivity rights, online gambling, restrictions on types of wagers, and a tax rate.

#### *A. Should Arizona Legalize Sports Betting?*

Arizona should legalize and regulate sports betting for numerous policy reasons. First, legalized sports gambling can bring in more revenue for the state. The Economic Impact Study demonstrated that the legalization of sports gambling could potentially provide, at a minimum, \$10.8 million in

extra gaming tax revenue or, as the report assumes, shared revenue from the tribes.<sup>231</sup> This is revenue that can be used for things like funding education and repairing infrastructure. Moreover, to alleviate concerns that legalized sports gambling will encourage problem gambling, some of this additional revenue can be dedicated towards fighting problem gambling by providing more resources and programs. This recommendation is consistent with the current Compact, which currently gives two percent of the shared revenue to the Office of Problem Gambling.<sup>232</sup>

Second, Arizona can prevent millions of dollars from going to criminal enterprises simply by creating a legal market.<sup>233</sup> The numbers have shown that Americans will place bets on sports whether or not it is legal. Anything that Arizona can do to displace illegal gambling should be done. Redirecting gambling revenues away from criminal enterprises to the state is a strong policy.

Similarly, legalized sports gambling can help provide more administrative jobs, both at the casinos and at the state level. The Economic Impact Study illustrated that a minimum of 1,700 jobs could be created, both directly and indirectly by the legalization of sports gambling.<sup>234</sup> Employees will be needed to work the casino's new sports betting operations. If casinos need to renovate their facilities to accommodate sports betting, construction jobs will be available.

Finally, legalizing sports betting gives the leagues a more efficient way to track unusual betting patterns and to discover any attacks on the integrity of the game. Professional sports leagues are generally in agreement that legalization will help "stymie such schemes."<sup>235</sup> While increased betting does heighten the chances of rigged outcomes, the "sportsbook operators have the best technology in tracking unusual betting patterns and other irregularities that can tip off game-fixing, far better than offshore websites or underground markets."<sup>236</sup> With legalized sports betting, leagues can work with sportsbooks to monitor irregularities more efficiently than if sports gambling remained

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231. *Id.* at 42.

232. *Tribal Contributions*, ARIZ. DEP'T GAMING, <https://gaming.az.gov/tribal-gaming/tribal-contributions> [<https://perma.cc/7HXU-2XXY>].

233. This assertion assumes that the implemented tax rate will be reasonable such that people are incentivized to gamble legally in Arizona rather than illegally offshores. This is further discussed *infra* Part III.B.4.

234. OXFORD ECON., *supra* note 215, at 47.

235. Adam Kilgore, *For Sports Leagues, Legalized Sports Betting Offers New Risks, and Massive Rewards*, WASH. POST (May 14, 2018), [https://www.washingtonpost.com/sports/for-sports-leagues-legalized-sports-betting-offers-new-risks-and-massive-rewards/2018/05/14/5ce4caf4-5790-11e8-858f-12becb4d6067\\_story.html?utm\\_term=.4672c1d89bed](https://www.washingtonpost.com/sports/for-sports-leagues-legalized-sports-betting-offers-new-risks-and-massive-rewards/2018/05/14/5ce4caf4-5790-11e8-858f-12becb4d6067_story.html?utm_term=.4672c1d89bed) [<https://perma.cc/6H76-3FKQ>].

236. *Id.*

illegal. Arizona can be part of the solution to potential corruption rather than an obstacle by legalizing sports gambling.

Some may argue that sports betting should not be legalized because of other policy concerns. Sports betting has historically been seen as a “sin” and legalizing it now only encourages more “sinful” activity. It can lead to increased problem gambling and a higher threat of betting scandals. Access to sports gambling opens up a slippery slope that could inevitably lead to casinos on every street, perhaps even next to an elementary school. Moreover, sports gambling is not predicted to bring in *that* much revenue or provide *that* many jobs.<sup>237</sup> Revenue can be raised and jobs can be created in other ways that are more “worthy.” In sum, there are also plenty of reasons why sports betting should not be legalized.

Nonetheless, this Comment argues that Arizona should legalize sports betting because regulation is better than non-regulation, and the opportunity to reduce illegal gaming is too great to pass up. However, regulation of sports betting must effectively displace enough illegal gambling to have a significant effect on the market.

Furthermore, there is a current trend in favor of legalization of sports betting. As of March 2020, sixteen states have full-scale legalized sports betting.<sup>238</sup> Another five have recently passed legislation legalizing sports betting.<sup>239</sup> Twenty-seven states, including Arizona, have introduced bills.<sup>240</sup> Thus, a majority of states have either legalized or are on the path to legalizing sports gambling. Arizona should not be left on the sidelines.

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237. Many studies have been done on the economic impact of legalized sports betting. One study estimated that gaming tax revenue could bring in between \$486,000 to \$2.3 million for the state. Brenna Goth, *Sports Betting in Arizona Requires Tribal Compact Rework*, BLOOMBERG TAX (Aug. 27, 2018, 9:41 AM), <https://news.bloombergtax.com/daily-tax-report-state/sports-betting-in-arizona-requires-tribal-compact-rework> [<https://perma.cc/7CZL-MNFB>] (discussing the Wells Gaming Research study). This is significantly lower than the estimates of the Economic Impact Study discussed in this Comment. The author has chosen to use the numbers from the Economic Impact Study instead because that study was commissioned by the AGA, and Wells Gaming Research stated that its study is in “no way intended to be representative of a full, comprehensive study” and that “a thorough study was not completed.” RICHARD WELLS, WELLS GAMING RESEARCH, *THE ECONOMICS OF SPORTS BETTING* 30, 33–35 (Aug. 24, 2018) (unpublished PowerPoint) (on file with author).

238. Rodenberg, *supra* note 201.

239. *Id.*

240. *Id.*

## B. Proposal for Legal Sports Betting in Arizona

### 1. Exclusivity Rights for the Tribes

Arizona should continue to give the tribes exclusive rights to offer gaming by providing that only tribal entities can conduct sports gambling. If Arizona were to allow other entities than the tribes to operate sports betting, it would trigger the Poison Pill in the Compact. Triggering the Poison Pill means a significant reduction of gaming revenue shared with the state and unlimited Class III gaming. While the loss of the gaming revenue may not ultimately be huge because it could be offset by new gains from new gaming entities, the consequences of allowing tribes to conduct unlimited gaming with practically no regulations are enormous. This kind of unregulated gaming would lead down the slippery slope that anti-gambling proponents warn against.

Alternatively, the State can avoid the Poison Pill by waiting for the current Compact to expire. However, this tactic is unlikely to be successful. History has shown that the tribes have success in using the courts to force the State to negotiate, even despite the Supreme Court's 1996 decision in *Seminole Tribe*, which eliminated the tribes' ability to sue a state for failure to negotiate a compact in good faith.<sup>241</sup> The tribes overcame opposition from Governor Symington in 1993 and from the racetracks in 2002.<sup>242</sup> Litigation on this issue alone would delay any possible sports betting statute and the accompanying revenue, while also racking up the State's cost in defending its position. Therefore, while Arizona may elect to allow entities other than the tribes to offer sports betting, it is unadvisable.

Moreover, the tribes have a solid argument that they should have exclusive rights on sports gambling simply because the current Compact provides exclusivity. Because the tribes are the only entities currently operating Class III gaming, they are in the best position to most effectively implement sports gambling. They understand the gaming industry and already have the casino infrastructure built.

Despite these reasons to give the tribes exclusive rights, there is one obstacle in the way of allowing only tribes to conduct sports gambling. Many tribes are located in remote, rural areas. Without convenient access to place wagers, Arizonians are not likely to participate in sports gambling in Arizona and will not displace much of the illegal market. To combat this problem, Arizona should model its legislation after Connecticut's early (failed)

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241. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

242. *See supra* discussion in Part II.B.

proposal and allow bets at commercial sites. To accomplish this without triggering the Poison Pill, tribes should be permitted to contract with urban sports bars to offer sports betting there. The tribes would still retain ultimate control of sports betting, but could merely license their rights to sports bars to provide more convenient betting options. Gaming revenue from these establishments would still be subject to the Compact's revenue-sharing provision.

In sum, Arizona should enact a statute legalizing sports betting with exclusive rights given to the tribes. This is a faster route to legalization than waiting for the Compact to expire in 2022, thus ensuring that Arizona does not fall behind other states that have legalized sports betting, while also allowing the tribes and the state to generate revenue sooner rather than later.

## 2. Online/Mobile Betting

Similarly, online (mobile) betting should be offered for the same reason justifying tribal partnerships with urban sports bars. Many Americans currently illegally place bets online with offshore sites. Mobile betting is much more convenient than driving to a casino. Without a legal online platform, bettors will continue to place bets online illegally, which will not reduce the illegal market. Arizona should develop an online platform, owned and operated by the tribes, to eliminate as much of the illegal market as possible.

The characteristics and traits of Millennials and Generation Z-ers further demonstrate why online sports betting is necessary. Both Millennials and Generation Z-ers are inclined to wager on the Internet,<sup>243</sup> so offering online gambling will attract their business. On the other hand, older Americans generally oppose online gambling,<sup>244</sup> and therefore, the sports bars, with rights to operate sports betting licensed from tribes, and tribal casinos will be available for them to place wagers.

Revenue from online sports betting should be subject to the gaming tax rate because it is not physically located at a tribal casino, and it should also be subject to the revenue-sharing provision in the compacts.

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243. Paul Hiebert, *Millennials Favor Legalizing Online Gambling, Find Casinos Depressing*, YOUgov (May 17, 2018, 10:00 AM), <https://today.yougov.com/topics/politics/articles-reports/2018/05/17/millennials-favor-legalizing-online-gambling> [https://perma.cc/UU6L-URUF]; Devin O'Connor, *Generation Z Poses Even Greater Challenges for Land-Based Casinos than Millennials*, CASINO.ORG (Oct. 11, 2018), <https://www.casino.org/news/generation-z-poses-even-greater-challenges-for-casinos-than-millennials>.

244. Hiebert, *supra* note 243.

### 3. Limitations on Wagers

Arizona should model its wager limitations after Connecticut's proposal to help ensure the integrity of the game. First, the State should prohibit wagers on in-state university events. For example, in Arizona, no bets would be allowed on Arizona State University sporting events. While the professional sports leagues have now generally agreed that legalized sports betting will not significantly increase threats of corruption, the NCAA has a different perspective.<sup>245</sup> The major difference between professional athletes and college athletes is payment. Professional athletes often make millions per year, so a \$5,000 bribe to shave some points is not appealing. On the other hand, college athletes are not paid to play, so \$5,000 is attractive to them. For example, during the 1978–79 college men's basketball season, student athletes at Boston College were allegedly paid up to \$1,000 to participate in a point-shaving scheme.<sup>246</sup> Similarly, in the 1994–95 college men's basketball season, two players for Northwestern were indicted and subsequently sentenced to one month in prison for their roles in a point-shaving scheme.<sup>247</sup> Thus, banning bets on college sports will reduce the likelihood of corruption by eliminating the incentive to participate in schemes like these.

In addition, Arizona should follow Connecticut's tiered system of sports betting, in which more types of bets could be placed at tribal casinos than at off-reservation locations. For example, at tribal casinos, bettors could place bets on what color the Gatorade dumped on the head of winning coach of the Super Bowl will be, but not at a sports bar that has licensed rights to betting from a tribe. This incentivizes people to go to a tribe's casino, thereby increasing the chance that they will also spend money on other items at the casino—things like food and slot machines.

### 4. Tax Rate

While IGRA does not allow states to tax a tribe's gaming revenues, and therefore Arizona would not need to implement a tax rate if the only sports gambling was conducted on tribal reservations, any off-site locations to whom a tribe licenses its sports betting rights would be subject to a tax, along

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245. Kilgore, *supra* note 235.

246. David Purdum, *The Worst Fix Ever*, ESPN (Oct. 3, 2014), [http://www.espn.com/espn/chalk/story/\\_/id/11633538/betting-chronicling-worst-fix-ever-1978-79-bc-point-shaving-scandal](http://www.espn.com/espn/chalk/story/_/id/11633538/betting-chronicling-worst-fix-ever-1978-79-bc-point-shaving-scandal) [<https://perma.cc/Y427-CJXM>].

247. Matt O'Connor, *4 Sentenced in Gambling Plot at NU*, CHI. TRIBUNE (Nov. 25, 1998), <https://www.chicagotribune.com/news/ct-xpm-1998-11-25-9811250093-story.html> [<https://perma.cc/VW4C-DVXQ>].



with the online platforms.<sup>248</sup> This Comment proposes that the tax rate be in the range of the Economic Impact Study's low tax rate to base tax rate, 6.75% to 10%, and placed on the net win.

Pennsylvania's 36% tax rate on net win demonstrates why a low tax rate is necessary. Sportsbook operators have commented that they are not interested in investing in the Pennsylvania market because it would be too difficult to turn a profit. Pennsylvania effectively made sports betting less attractive. With little to no sportsbooks operating in Pennsylvania, it is unlikely that the illegal market has been reduced. This high tax rate will have a similar effect as Congress's 10% tax on the Nevada sportsbooks in 1951, where the sportsbooks were essentially forced out of business.

Furthermore, the Economic Impact Study found that the largest employment impact was associated with the low tax rate scenario. While a low tax rate will likely result in less gaming tax revenue, the creation of more jobs is a strong reason to make this trade-off.

#### IV. CONCLUSION

The downfall of PASPA indicates a changing landscape surrounding sports betting—that it is now becoming more acceptable in today's world. Perhaps no longer seen as a “sinful activity,” the legalization of sports gambling has the opportunity to provide a new source of revenue and jobs for the states while also displacing the illegal market for sports betting. Arizona should be at the forefront of the movement towards legalized sports betting.

The proposed solution for legalizing sports gambling in Arizona will be a win-win for both the state and tribal interests within the state. Legalizing sports betting will improve the State's economy, while keeping gaming within the exclusive control of the tribes will satisfy their concerns. However, the tribal-state gaming compact's Poison Pill poses an obstacle to legalization. Arizona can avoid triggering the Poison Pill simply by ensuring that only the tribes may operate sports betting.

In January 2019, Arizona Senator Sonny Borrelli introduced a bill that would legalize sports betting.<sup>249</sup> The original bill did not make it out of the Arizona Senate Commerce and Public Safety Committee, so Senator Borrelli

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248. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–50 (1943) (holding that the tribe was subject to state tax on income earned from a ski resort operated by the tribe outside of the reservation).

249. Derek Staahl, *Bill Would Allow Sports Betting at AZ Casinos, Bars, Stadiums*, AZ FAMILY (Jan. 25, 2019), [https://www.azfamily.com/news/bill-would-allow-sports-betting-at-az-casinos-bars-stadiums/article\\_74d64a2a-2107-11e9-81ff-37458ee1ed10.html](https://www.azfamily.com/news/bill-would-allow-sports-betting-at-az-casinos-bars-stadiums/article_74d64a2a-2107-11e9-81ff-37458ee1ed10.html) [https://perma.cc/FEG6-L3WY].

struck the original bill and imported the language into a bill that he already had in the Appropriations Committee.<sup>250</sup> Governor Ducey and all tribes in attendance at a February 2019 hearing, except for the Navajo Nation, opposed the measure.<sup>251</sup> Instead, they believed that sports betting should be discussed as part of pre-existing negotiations with Governor Ducey over changes to the Compact.<sup>252</sup> Although the Appropriations Committee voted to move the bill further along in the legislative process,<sup>253</sup> the bill ultimately did not make out of the Senate.<sup>254</sup>

On February 4, 2020, Senator Borrelli again introduced the same sports betting bill, S.B. 1525.<sup>255</sup> This bill substantively embodies the proposal; one major difference is that it does not provide for any mobile betting.<sup>256</sup> However, because this is the same bill that ultimately died in 2019, it is likely that Governor Ducey and many tribes will also oppose this bill. Furthermore, this bill's progress has stalled as of March 2020.<sup>257</sup> Consequently, this bill's future is dim at this point.

On February 11, 2020, Representative Steve Pierce introduced a sports betting bill in the House; Senator Borelli co-sponsored this bill.<sup>258</sup> This bill, H.B. 2813, has progressed to a floor reading in the House as of March 9,

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250. Howard Fischer, *Arizona Senate Panel OKs Sports Betting Legislation*, AP NEWS (Feb. 27, 2019), <https://www.apnews.com/fc7581b5e3614232bc89bd93854abacc> [<https://perma.cc/XZ7W-YU5U>].

251. Ben Giles, *Tribes, Ducey Oppose Bill to Legalize Sports Betting*, AZ CAPITOL TIMES (Feb. 26, 2019), <https://azcapitoltimes.com/news/2019/02/26/tribes-oppose-sports-betting-bill/> [<https://perma.cc/NH2W-JG95>].

252. *Id.*

253. Fischer, *supra* note 250.

254. *Bill History for SB1163*, BILL STATUS INQUIRY, <https://apps.azleg.gov/BillStatus/BillOverview/71717?SessionId=121> [<https://perma.cc/JZ6N-27UB>].

255. *Bill History for SB1525*, BILL STATUS INQUIRY, <https://apps.azleg.gov/BillStatus/BillOverview/73868?SessionId=122> [<https://perma.cc/J5YZ-7NQB>]; see also Daniel Borjas, *Arizona Bill Introduced To Bring Sports Betting Through Tribes*, LEGAL SPORTS BETTING (Feb. 5, 2020, 11:18 AM), <https://www.legalsportsbetting.com/news/arizona-bill-introduced-to-bring-sports-betting-through-tribes/> [<https://perma.cc/2Q4B-6XUV>]; Christina Monroe, *AZ Sports Betting Bill, Hopping Through House Committees*, LEGAL SPORTS BETTING (Feb. 19, 2020, 7:39 AM), <https://www.legalsportsbetting.com/news/az-sports-betting-bill-hopping-through-house-committees/> [<https://perma.cc/P4W7-A7UH>].

256. See S. 1525, 54th Leg., 2d. Reg. Sess. (Ariz. 2020), <https://www.azleg.gov/legtext/54leg/2R/bills/SB1525P.pdf> [<https://perma.cc/U56H-MELZ>] (no mention of mobile or online betting in the proposed language of the bill); Borjas, *supra* note 255.

257. Monroe, *supra* note 255.

258. Monroe, *supra* note 255.

2020.<sup>259</sup> H.B. 2813 provides for legalized sports betting at retail locations, horse race tracks, and, with state permission, tribal casinos.<sup>260</sup> Like S.B. 1525, H.B. 2813 does not legalize online or mobile betting.<sup>261</sup> But H.B. 2813 differs from S.B. 1525 as it effectively eliminates the poison pill in the current Compact by allowing entities other than tribes to operate sports betting without triggering a reduction in tribal contributions to the state.<sup>262</sup> Likely due to this significant change, the American Indian Gaming Association and Arizona tribes oppose H.B. 2813.<sup>263</sup> As the Arizona legislative session ends April 25, 2020, H.B. 2813 must progress quickly to land on Governor Ducey's desk in time. Therefore, legalized sports betting in Arizona seems unlikely to occur in 2020.

As of February 2020, sports betting tax revenue in New Jersey has totaled over \$51 million since the state legalized sports betting in June 2018.<sup>264</sup> Now, it's Arizona's turn to jump off the bench and join the playing field in legalizing sports betting.

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259. Christina Monroe, *Committee Passes Arizona Sports Betting Bill to House Floor*, LEGAL SPORTS BETTING (Mar. 9, 2020, 11:49 PM), <https://www.legalsportsbetting.com/news/committee-passes-arizona-sports-betting-bill-to-house-floor/>.

260. Christina Monroe, *AZ Sports Betting Bill Passed by House Committee*, LEGAL SPORTS BETTING (Feb. 27, 2020, 8:42 PM), <https://www.legalsportsbetting.com/news/az-sports-betting-bill-passed-by-house-committee/>.

261. Monroe, *supra* note 260; *see* H.B. 2813, 54th Leg., 2nd Reg. Sess. (Ariz. 2020), <https://www.azleg.gov/legtext/54leg/2R/bills/HB2813P.pdf> [<https://perma.cc/DJR6-EVTR>] (no mention of online or mobile sports betting).

262. H.B. 2813, 54th Leg., 2nd Reg. Sess. (Ariz. 2020), <https://www.azleg.gov/legtext/54leg/2R/bills/HB2813P.pdf> [<https://perma.cc/DJR6-EVTR>].

263. Monroe, *supra* note 260.

264. *U.S. Sports Betting Revenue and Handle*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/sports-betting/revenue/> [<https://perma.cc/22U9-5W6K>].