PLAYING THE ODDS: THE REALITIES OF STATE-BY-STATE SUITABILITY DETERMINATIONS AND THE NEED FOR FEDERAL REGULATION

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INTRODUCTION

With some exceptions, gaming in the United States is a growing industry.[1] While commercial casino revenue peaked in 2007, which was followed by a sharp decline at the height of the Great Recession, in 2012 national gaming revenues reached the second highest level in history.[2] Not only has the rebound translated into increased revenues, employment rates, and economic development — it has also led to sharp increases in gaming tax revenue for the vast majority of states that permit commercial casinos — Kansas,[3] Maryland,[4] Maine,[5] and New York[6] are most notable.[7] As discussed below, while gaming heavily impacts interstate commerce, the industry is still governed by a patchwork of differing state laws.[8] This article seeks to show that these inconsistencies in state law are especially prevalent in state-by-state suitability determinations, in which states may disagree about the suitability for licensure of a single casino applicant or otherwise make conflicting determinations of similarly situated applicants.[9] Moreover, this article argues that such inconsistencies, coupled with the lack of meaningful judicial review, have caused uncertainty for would-be applicants, and in turn necessitates meaningful

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[1] *See* Am. Gaming Ass'n, State of the States: The AGA Survey of Casino Entertainment, at ii (2013), https://www.americangaming.org/sites/default/files/research_files/aga_sos2013_rev042014.pdf.

[2] *See id.*

[3] *Id*. at 6 (reporting a 604.7% increase in gaming tax revenue during FY 2012).

[4] *Id.* (reporting a 143.7% increase in gaming tax revenue during FY 2012).

[5] *Id.* (reporting a 48.3% increase in gaming tax revenue during FY 2012).

[6] *Id.* (reporting a 38.6 % increase in gaming tax revenue during FY 2012).

[7] *See id.*

[8] *See* INT'L. BUS. PUB., US GAMBLING INDUSTRY LAW AND REGULATIONS HANDBOOK 5-7 (2011).

[9] *See infra* Part II-III.

federal reform.[10]

I. INCONSISTENT APPLICATION OF STATE POLICE POWERS

While Congress is vested with the ability to regulate interstate commerce and may otherwise restrict "permissible state regulation," such a limitation is "'by no means absolute,' as the [s]tates retain their general *police power* to regulate areas of 'legitimate local concern' even though such regulation may affect interstate commerce."[11] Historically, state gaming regulations have fallen within the broad scope of "police powers" because the subject matter necessarily implicates "the state's paramount interest in the health, welfare, safety, and morals of its.citizens."[12] As such, courts have uniformly recognized

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[10] *See infra* Part IV-VI.

[11] Gulch Gaming, Inc. v. South Dakota, 781 F. Supp. 621, 624 (D.S.D. 1991) (emphasis added) (quoting Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35 (1980)). *See* Hughes v. Oklahoma, 441 U.S. 322, 331 (1979); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 128-129 (1978). The term "police power" refers to a "state's Tenth Amendment right, subject to [certain, well delineated exceptions], to establish and enforce laws protecting the public's health, safety, and general welfare." *Police Power*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[12] Johnson v. Collins Entm't Co., 199 F.3d 710, 720 (4th Cir. 1999) (citing Chicago & Alton R.R. Co. v. Tranbarger, 238 U.S. 67, 77 (1915) (noting that "[t]he regulation of lotteries, betting, poker, and other games of chance touch all . . . aspects of the quality of life of state citizens"). *See* Commonwealth v. Wolbarst, 65 N.E.2d 552, 553 (Mass. 1946). As noted in *Wolbarst*, the ability of states to regulate gaming stems from colonial statutes, dating back over three hundred years, for instance:

> Colonial Laws, 57, § 2, prohibited one from bowling, using a shuffleboard or playing any game in a house of common entertainment. Penalties were imposed upon the one in charge of the house and also upon the player. All persons were prohibited from playing with cards or dice or any 'game for any money or money worth.' The preamble of St. 1719-20, c. 8, condemning lotteries as common and public nuisances and imposing heavy penalties for setting up and promoting them, declared that the existence of lotteries tends to the impoverishment of the people, constitutes a reproach to the government, and is 'against the common good, trade, welfare and peace of the province.' Statute, 1732-33, c. 14, §§ 2, 3, further prohibited the setting up of lotteries. Gambling was prohibited further by St. 1785-86, c. 58, which provided that notes, bonds and mortgages given in payment of gambling debts should be void; losers were given a remedy to recover their losses; winners of sums exceeding twenty shillings were subject to a forfeiture of double the amount won and were barred from holding public office for a certain period; and persons were prohibited from playing with cards or dice or at billiards or with any other implement used in gaming in any tavern or house of entertainment or from exposing to public view any such articles in such places. The legislative policy of recognizing gambling as a State wide problem and dealing with it on that basis appears from the preamble of St. 1785-86, c. 58, which stated that 'the practice of gaming for money or other property is not only injurious in a high degree to the

and upheld state regulation of "lotteries, betting, poker, and other games of chance," including the state's ability to license casinos.[13]

Gaming licensing is not a unique practice.[14] States regularly exercise their "police powers" by imposing licensing requirements on various routine activities and professions for the ultimate protection of the public.[15] Just as states require attorneys to be licensed in order to ensure they do not abuse their position of trust to the detriment of clients, states license casinos to ensure the integrity of gaming activity.[16] In the context of gaming, not only do licensing requirements ensure the protection of the public from "rigged" or otherwise unfair gaming, but it also ensures public trust in the industry.[17]

While states are freely able to regulate gaming within their borders to protect their citizenry and to benefit the industry as a whole, the localization of regulation has led to a patchwork of contradictory licensing structures and outcomes.[18] In determining whether an applicant is suitable for a gaming

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> individuals concerned therein, but also in its tendency, ruinous and destructive to the State.

Id. at 553-54.

[13] *Johnson*, 199 F.3d at 720. *See* Stone v. Mississippi, 101 U.S. 814, 821 (1879) ("[c]ertainly the right to suppress [gaming activity] is governmental, to be exercised at all times by those in power, at their discretion."). *Wolbarst*, 65 N.E.2d at 553 ("[t]he suppression of gambling lies within the domain of the police power of the Commonwealth.").

[14] ANTHONY N. CABOT & KEITH C. MILLER, THE LAW OF GAMBLING AND REGULATED GAMING 87 (2011).

[15] *See id.*

[16] *Id.* (noting that licensing "assur[es] that certain persons are not involved in [the] casino industry . . . includ[ing] those who are so incompetent that they cannot detect and prevent schemes by employees or patrons to cheat other patrons"). The need for this licensing regime is clear, especially compared to the Italian model in which Italy legalized gambling with little to no licensing requirement — the result of which has been soaring mafia involvement and profit. *See* Steve Scherer, *Mafia Thrives on Italy's Legalized Gambling Addiction*, REUTERS (Mar. 11, 2015, 4:50 PM), http://www.reuters.com/article/2015/03/11/us-italy-mafia-slots-idUSKBN0M720R20150311.

[17] *See* CABOT & MILLER, *supra* note 14, at 87.

[18] As of 2012, only seventeen states permitted stand-alone commercial casinos, each with distinct licensing requirements, including: Colorado, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nevada, New Jersey, Ohio, Pennsylvania, South Dakota, and West Virginia. *Types of Gaming by State*, AM. GAMING ASS'N, https://web.archive.org/web/20150423165104/http://www.americangaming.org/industry-resources/research/fact-sheets/states-gaming (last visited Jan. 5, 2018). Conversely, twenty-eight states permit Indian Casinos (Class II or Class III facilities), including: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming. *Id.* Each of these states has adopted unique licensing structures that, based upon a common model, may be in irreconcilable conflict with one another. *See id.* For instance, both the

license,[19] licensing authorities are guided by their respective state statutes, which require consideration of several fairly common factors and criteria (e.g. financial stability; character, integrity, and responsibility; experience and competence; etc.).[20] However, as independent agencies, most licensing authorities or gaming commissions are given *very* broad discretion in determining the weight and impact of each of the statutory factors on the final determination of suitability.[21] Because of this very broad discretion, licensing authorities may — and sometimes do — come to contradictory conclusions about an applicant's suitability.

A. The MGM Determination

In March 2010, MGM Resorts International ("MGM") was forced to surrender its New Jersey gaming license as part of a settlement with the New Jersey Casino Control Commission ("New Jersey Commission") after a 2009

Massachusetts Expanded Gaming Act and the Pennsylvania Race Horse Development and Gaming Act were based upon the New Jersey Casino Control Act, with some modifications. *See generally* Comprehensive Analysis: Projecting and Preparing for Potential Impact of Expanded Gaming on Commonwealth of Massachusetts, Spectrum Gaming Group (2008), http://www.mass.gov/hed/docs/eohed/ma-gaming-analysis-final.pdf (laying the predicate analysis to the Massachusetts Expanded Gaming Act). Under this common model, Pennsylvania's Gaming Control Board consists of seven members — three members appointed by the governor, and one member appointed by each legislative caucus leader (i.e. the President pro tempore of the Senate; the Minority Leader of the Senate; the Speaker of the House of Representatives, and the Minority Leader of the House of Representatives). 4 PA. STAT. AND CONS. STAT. ANN. § 1201(b) (West 2017). Further, licensing decisions must be made by a qualified majority of the members, consisting of at least one gubernatorial appointee and all four legislative appointees. *Id.* at § 1201(f)(1). In contrast, the Massachusetts Gaming Commission consists of only five members, all appointed by the executive branch — one member appointed by the governor, one member appointed by the attorney general, one member appointed by the treasurer, and two members appointed by a majority vote of the governor, attorney general, and treasurer. MASS. GEN. LAWS ANN. ch. 23K, § 3(a) (West 2017). All licensing decisions are made by a simple majority vote of three commissioners. *Id.* at § 3(d). Further, and more important to this analysis, Massachusetts prohibits legislative appointment to executive commissions, thus creating an irreconcilable conflict with Pennsylvania's licensing structure. *See In re* Opinion of the Justices to the Governor, 341 N.E.2d 254, 258 (1976).

[19] Depending on the states statutory provisions regarding the "depth" of the suitability determination, this may include the prospective casino's officers, directors, major shareholders (5-15% ownership stakes), significant vendors ($250,000 / annually), key employees, etc. *See* CABOT & MILLER, *supra* note 14, at 109-10.

[20] *See id.* at 120-37 (discussing the "criteria" component of suitability determinations).

[21] *Exhibit 99.3 Gaming and Regulatory Overview*, SEC. & EXCH. COMM'N, http://www.sec.gov/Archives/edgar/data/858339/000119312512115625/d268435dex993.htm (last visited Jan. 23, 2018).

inquiry recommended that MGM's joint-venture partners were unsuitable, and that MGM's due diligence/compliance efforts with New Jersey's Casino Control Act were inadequate.[22] Of particular interest to the New Jersey Commission was MGM's relationship with Pansy Ho Catilina Chiu King ("Pansy Ho") during a 2007 joint venture in which the parties built and operated a casino in Macau, China.[23] Specifically, the New Jersey Commission was concerned with the "numerous public allegations suggesting that Stanley Ho, the father of. . . Pansy Ho, ha[d] ties to Asian organized crime" and that Pansy Ho was merely acting as a third-party standing-in for Stanley Ho.[24]

The investigation into the suitability of Pansy Ho largely confirmed the public allegations.[25] The investigation revealed that Pansy Ho "had no prior gaming experience before the joint venture, bringing to the partnership [with MGM] primarily opportunities and influence provided by her business and personal relationship with her father," and that ninety percent of the funds for her stake in the joint venture were derived from her father.[26] Additionally, throughout the joint venture, Pansy Ho maintained positions of leadership and governance in her father's companies — some of which likely had ties to organized crime.[27] While the New Jersey Commission was unable to establish a direct tie between Pansy Ho and the criminal activity of her father, the commission still deemed Pansy Ho unsuitable, concluding that "Pansy Ho's

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[22] *See* Paula T. Dow & Josh Lichtblau, *N.J. Office of the Attorney Gen., Casino Control Commission Approves Settlement Under Which MGM Mirage Will Divest Interest in Borgata Hotel Casino*, OFFICE OF THE ATTORNEY GEN. (N.J.) (Mar. 17, 2010), http://www.nj.gov/oag/newsreleases10/pr20100317c.html. *See also* STATE OF N.J. DEP'T OF LAW & PUB. SAFETY, SPECIAL REPORT OF THE DIVISION OF GAMING ENFORCEMENT TO THE CASINO CONTROL COMMISSION ON ITS INVESTIGATION OF MGM MIRAGE'S JOINT VENTURE WITH PANSY HO IN MACAU, SPECIAL ADMINISTRATIVE REGION, PEOPLE'S REPUBLIC OF CHINA 1-4 (2009), http://www.state.nj.us/casinos/home/info/docs/MGM/dge_%20report_redacted.pdf [hereinafter SPECIAL REPORT]. This follows a 2006 New Jersey Commission order, in which one of MGM's board members — Terry Christensen — was required to resign following his indictment for wiretapping former MGM owner Kirk Kerkorian's ex-wife. *See* Matthew Sturdevant, *MGM Settles Allegations in New Jersey to Regain Gaming License*, HARTFORD COURANT (Aug. 22, 2014, 5:14 PM), http://www.courant.com/business/hc-mgm-new-jersey-20140822-story.html. While these allegations were not germane to the 2009 New Jersey determination, they were considered by the Massachusetts Gaming Commission in its subsequent determination. *Id.*

[23] *See* SPECIAL REPORT, *supra* note 22, at 1. While the joint venture was created in 2007, as of the date of investigation, MGM and Pansy Ho still maintained a one-half interest each in the casino. *Id.*

[24] *See id.* at 2-3.

[25] *See id.* at 4-5.

[26] *Id.* at 4.

[27] *See id*. Somewhat passively, the New Jersey Commission noted that prior to partnering with Pansy Ho, MGM originally negotiated with Pansy Ho to enter into the joint venture directly with Stanley Ho, before determining that Stanley Ho was unsuitable. *Id.*

susceptibility to her father's influence and issues of personal suitability render the joint venture and MGM vulnerable to improper associations and influences and compromise MGM's suitability as a New Jersey licensed entity."[28]

Based on this adverse determination, the New Jersey Commission then turned its focus to MGM's suitability, and ultimately concluded that MGM failed to abide its diligence and reporting requirements under the state's Casino Control Act.[29] The commission specifically noted that "MGM failed to examine the most critical aspects of Pansy Ho's suitability, namely, her ability to finance her contribution to the joint venture and her independence from her father . . ."[30] Despite the lack of a meaningful review of Pansy Ho's suitability, MGM did possess derogatory information regarding her suitability; however, MGM failed to disclose this information to the New Jersey Commission or the regulatory bodies of other states in which MGM was licensed.[31] Based on these conclusions, the New Jersey Commission determined that MGM failed to fulfill its obligations under state law, and thus adverse action against the company was warranted.[32]

The New Jersey Commission's decision to take adverse action against MGM was significant, especially in light of the fact that other states have since considered MGM's association with the Ho family, but none have made an adverse determination regarding MGM's suitability for a gaming license.[33] In fact, Nevada regulators "determined that Pansy Ho, under [Nevada] law, was sufficiently independent . . . there were adequate protections in place, there wouldn't be any ability of a third party to exert any influence over the joint venture, whether that be Stanley Ho or anyone else."[34] Therefore, despite the

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[28] *Id.*

[29] *See id.* at 4-5. The New Jersey Commission noted deficiencies in MGM's regulatory compliance during the Macau operations, but also highlighted MGM's failures domestically. *Id.*

[30] *Id.* at 5. The New Jersey Commission noted that this was not an instance where MGM conducted due diligence and merely made a flawed conclusion, but rather failed to do *any* meaningful diligence regarding Pansy Ho's suitability. *Id.*

[31] *Id.* at 4-5.

[32] *See id.* at 5. Initially the New Jersey Commission ordered that MGM "disengage itself from any direct or indirect business or financial associations with Pansy Ho." *Id* at 74. However, MGM negotiated a settlement in which it would surrender its gaming license and divest its interest in the New Jersey Casino, without otherwise impacting its Macau operations or disassociating with Pansy Ho. *Id*. *See also* Dow & Lichtblau *supra* note 22.

[33] MASS. GAMING COMM'N, INVESTIGATIVE REPORT FOR THE MASSACHUSETTS GAMING COMMISSION: BLUE TARP REDEVELOPMENT, LLC 116 (2013), http://massgaming.com/wp-content/uploads/MGM-Report-REDACTED.pdf ("The view of the [New Jersey Commission] has not been followed in other jurisdictions. To the contrary, no other U.S. gaming regulator in any jurisdiction where MGM conducts gaming business has raised an objection to the MGM/Pansy Ho partnership.").

[34] Beth Jinks, *MGM Partner Ho is 'Unsuitable,' Gaming Agency Says (Update2)*, BLOOMBERG (Mar. 18, 2010, 4:48 PM), https://web.archive.org/web/20140428191330/http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aqZga1sai1Lg.

exact same suitability considerations and evidence, MGM was deemed suitable in Nevada despite New Jersey's contrary opinion.[35]

Similarly, Massachusetts seemed to give little-to-no weight to the findings and decision of the New Jersey Commission, even though the New Jersey Casino Control Act served as the model for the Massachusetts Expanded Gaming Act.[36] The Massachusetts Gaming Commission acknowledged that "[t]here is no dispute about the fact that when MGM was negotiating the 2004 partnership deal with Pansy Ho, MGM did not conduct any investigation into her source of funds . . . nor did MGM conduct any investigation into whether she was acting independently from her father, whom MGM apparently agreed would not have satisfied the suitability requirements for licensure . . ."[37] However, the commission rejected the New Jersey Commission's fear that Pansy Ho, and thus MGM, was susceptible to her father's influence.[38] Instead, the Massachusetts Commission noted that in June 2011, Pansy Ho's status as an equal joint-venture partner was reduced to twenty-nine percent, whereas MGM's interest increased to fifty-one percent.[39] Further, Pansy Ho had "no day-to-day operational duties and no involvement in gaming," instead her duties consisted of "real estate development, design, marketing, entertainment, special events and 'big picture stuff.'"[40] As such, the internal structure of MGM served as a check on her susceptibly to corrupt influences.[41] These factors, combined with Maryland's favorable determination regarding MGM's suitability prior to the completion of the Massachusetts investigation, prompted Massachusetts to deem MGM suitable for a gaming license in June 2014.[42]

In September 2014, shortly after the suitability determination by the Massachusetts Gaming Commission, the New Jersey Commission again granted MGM a gaming license, allowing the company to resume operations and regain control of its fifty percent stake in an existing New Jersey casino.[43]

(internal quotations and citations omitted) (quoting former chairman of the Nevada Gaming Control Board, Dennis Neilander).

[35] *See id.*

[36] *See* MASS. GAMING COMM'N, *supra* note 33, at 116; *see generally* AM. GAMING ASS'N *supra* note 18.

[37] *Id.* at 115.

[38] *See id.* at 115-17.

[39] *Id.* at 52.

[40] *Id.* at 117. The investigation did conclude that Pansy Ho executes all agreements with gaming promoters. *Id.* However, such execution could only occur upon the unanimous vote of all five members of the board of directors. *Id.*

[41] *See id.* at 121.

[42] *See id.* at 115-17; *see also* Jon Kamp, *MGM Gets Approval to Build Massachusetts' First Resort Casino*, WALL STREET J. (June 13, 2014, 12:33 PM), http://www.wsj.com/articles/mgm-gets-approval-to-build-massachusetts-first-resort-casino-1402677210.

[43] Robert Rizzuto, *MGM Once Again Granted New Jersey Gaming License to Regain Control Over Stake in Atlantic City's Borgata Hotel Casino*, MASSLIVE.COM (Sept. 11, 2014, 11:45 AM), http://www.masslive.com/politics/

While MGM still retained its ties with Pansy Ho, the New Jersey Commission unanimously viewed her reduced interest in the Macau joint venture as having a minimal impact on MGM's suitability as a whole.[44] While this sudden shift in the New Jersey Commission's reasoning may have been influenced by the Nevada and Massachusetts decisions, some commentators have suggested that the shift was merely the product of market conditions as opposed to a broader suitability scheme.[45]

B. The Caesars Determination

The conflicting MGM suitability determination between New Jersey, Massachusetts, Maryland, and Nevada is not unique or isolated. Rather, Massachusetts has also found itself at odds with New Jersey and Nevada regarding its suitability investigation of Caesars Entertainment.[46] In October 2013, a subsidiary of Caesars Entertainment ("Caesars") was forced to withdraw from an East Boston casino joint-venture with Suffolk Downs, an established Massachusetts racetrack, after the Massachusetts Gaming Commission investigators uncovered a tenuous link to a Russian organized crime syndicate.[47]

Specifically, in 2013, Caesars entered into a branding agreement with Gansevoort Hotel Group ("Gansevoort"), a New York boutique hotel

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index.ssf/2014/09/mgm_borgata_casino_atlantic_city.html.

[44] *See* Steven Stradbrooke, *Revel Finds Buyer; Trump Entertainment Gets Lifeline; MGM Welcomed Back*, CALVINAYRE (Sept. 11, 2014), http://calvinayre.com/2014/09/11/casino/revel-finds-buyer-trump-entertainment-lifeline-mgm-reclaim-ac-license/.

[45] *See* Peter Amsel, *Trump Plaza Sold for $20m; MGM Okayed to Reapply in AC; Pinnacle's Vietnam Writedown*, CALVINAYRE (Feb. 15, 2013), http://calvinayre.com/2013/02/15/casino/trump-plaza-sold-for-20m-pinnacle-vietnam-writedown/. Under the 2010 settlement with the New Jersey Commission, in addition to surrendering its license, MGM was also forced to sell its interest in the existing Borgata Hotel and Casino. *See id.* However, after searching for a buyer for over thirty months, MGM was unable to generate interest. *See id*. While the terms of the settlement provided extensions until the sale, New Jersey can, at best, be described as "a dying casino market." *See id.*; *see also* SPECIAL REPORT, *supra* note 22, at 4. As such, it can be said that New Jersey needs the investment and revenue streams that a powerhouse like MGM will bring back to the state.

[46] *See generally* Mark Arsenault, *Ceasars* [sic] *Signed Deal with Hotelier Accused of Having Tie to Russian Mob*, BOSTON GLOBE (Oct. 24, 2013), http://www.bostonglobe.com/metro/2013/10/23/report-details-concerns-about-caesars/cK6K3OjC5ZeJ362QygGRvK/story.html.

[47] *See id.* In addition to Caesars' connection with Russian organized crime, "[c]ommission investigators also took issue with Caesars' debt, its treatment of a high-roller who claimed the company encouraged him to gamble while intoxicated, and the work history of a Caesars executive who was chief executive of two companies that came under scrutiny by the Department of Justice for illegal internet gaming operations while he ran them." *Id.*

company.[48] As a part of the Massachusetts Gaming Commission suitability determination, investigators uncovered a 2012 New York Post article which alleged that Arik Kislin ("Kislin"), one of the principles of Gansevoort, had ties to Russian mobsters.[49] Even more significantly, investigators uncovered an internal background check conducted by Caesars which revealed even more concerns about Kislin.[50] A review of Caesars' internal background check revealed that Kislin's uncle was allegedly a member of Russian organized crime who was involved in ongoing scheme to defraud and embezzle from Russian banks.[51] Further, a company held by Kislin once co-sponsored a United States travel visa for a known Russian assassin.[52] Caesars withdrew itself from consideration before the Massachusetts Gaming Commission made a final determination as to its suitability; however, Caesars' decision to withdraw only occurred after state investigators indicated they would recommend an adverse ruling.[53] A subsequent report revealed that while Kislin would in no way benefit from gaming revenues, investigators were still concerned with Caesars' association with Kislin, and the fact that Caesars' Compliance Committee approved the transaction after learning of Kislin's nefarious background.[54]

This recommendation stands in stark contrast to the Massachusetts Gaming Commission's previous suitability determination of MGM. As discussed above, MGM was deemed suitable despite the fact that its joint-venture partner in Macau had more direct ties to organized crime, had funded a significant portion of the joint venture with funds directly linked to organized crime, and would directly benefit from gaming revenues.[55]

II. CHALLENGING CONFLICTING SUITABILITY DETERMINATIONS

As demonstrated by the conflicting New Jersey and Massachusetts

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[48] *Id.*

[49] *See id.*; *see generally* Mitchel Maddux, *Hotel Big Caught in 'NYet,'* N.Y. POST (Mar. 26, 2012, 4:00 AM), http://nypost.com/2012/03/26/hotel-big-caught-in-nyet/.

[50] Arsenault, *supra* note 46.

[51] *Id.* (citing to a Center for Public Integrity Article published in 2000). Sources also revealed that Kislin's uncle's partner in the fraud scheme was Michael Chernoy, who was the subject of an Interpol worldwide arrest warrant issued by Spain for money-laundering and organized crime charges. *Id.*

[52] *Id.*

[53] *See id.*

[54] *See* MASS. GAMING COMM'N, INVESTIGATIVE REPORT FOR THE MASSACHUSETTS GAMING COMMISSION: STERLING SUFFOLK RACECOURSE, LLC 5, 237 (2013), http://massgaming.com/wp-content/uploads/SSR-Report-REDACTED.pdf. As discussed above, the Commission was also influenced by: (1) Caesars' debt load; (2) its treatment of a high-roller who claimed the company encouraged him to gamble while intoxicated; and (3) the work history of a Caesars executive implicated in illegal internet gaming. *See* Arsenault, *supra* note 46.

[55] *See* SPECIAL REPORT, *supra* note 22, at 3.

suitability determinations of MGM and Caesars, a state is not bound and need not recognize the licensing decisions of other states.[56] Instead, states generally give full and free discretion to their respective gaming commissions to make licensing and suitability determinations with little to no opportunity for judicial review.

While many administrative agency decisions are subject to judicial review,[57] most state gaming acts preclude judicial review of gaming commission determinations under the justification that gaming licenses do not convey a liberty or property interest, and thus do not trigger Due Process protections.[58] For instance, the Massachusetts Expanded Gaming Act provides that "[t]he commission shall have full discretion as to whether to issue a license. Applicants shall have no legal right or privilege to a gaming license and shall not be entitled to any [judicial] review if denied by the commission."[59] Instead, after an adverse suitability determination:

> [A]n applicant . . . may request a hearing before the [investigative division of the gaming commission] to contest the findings. After the hearing, the applicant may appeal the decision of the [investigative division] to the commission and the commission may hear the appeal on the record. The decision of the commission shall be final and an applicant . . . shall not be entitled to further review.[60]

Similarly, the Mississippi Gaming Act expressly provides that "[j]udicial review is not available for actions, decisions and orders of the commission

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[56] The Full Faith and Credit Clause of the United States Constitution "requir[es] states to give appropriate respect to the official acts of other states." Elizabeth Redpath, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records*, 62 Emory L.J. 639, 639 (2013). However, the constitution also " . . . leaves each state with the authority to decide who is licensed do what within that state." *Id.* at 673 n. 210 (citing Eugene Volokh, *Interstate Recognition of Licenses*, VOLOKH CONSPIRACY (July 18, 2007, 2:26 AM), http://volokh.com/posts/1184739962.shtml).

[57] UNIF. LAW COMM'N, MODEL STATE ADMIN. PROCEDURE ACT (1981) provides:

> Except to the extent that this Act or another statute provides . . . the court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more the following . . . [t]he agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court . . . [or] [otherwise, unreasonable, arbitrary or capricious].

Id. at § 5-116.

[58] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262-264 (1970) (determining triggers for Due Process); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569 (1972); Cleveland Bd. of Educ. V. Loudermill, 470 U.S. 532, 541 (1985).

[59] MASS. GEN. LAWS ANN. ch. 23K, § 17(g) (West 2017).

[60] MASS. GEN. LAWS ANN. ch. 23K, § 30(g) (West 2017).

relating to the denial of a license or to limited or conditional licenses."[61] As such, subject to a few, well-delineated carve-backs (primarily for the actions outside of the commissions' statutory authority), gaming license applicants are statutorily precluded from challenging conflicting state suitability determinations.

III. IMPACT OF UNCERTAINTY AND THE LACK OF REDRESSABILITY

Coupled with the lack of meaningful judicial review, the uncertainty of state-specific suitability determinations makes licensing applications a gamble. While all professional licensing determinations carry a certain level of uncertainty (i.e. character and fitness determinations for lawyers), gaming licenses are unique in the sheer expense associated with the application process. For instance, the State of New York requires casino applicants to pay a $1 million application fee to the state's gaming commission "to defray the costs associated with the processing of the [a]pplication, the investigation of the [a]pplicant and related matters."[62] Similarly, Massachusetts requires a $400,000 application fee — in addition to an $85 million licensing fee if approved.[63] While these application fees are designed to be prohibitively expensive to poorly capitalized companies, and are relatively de minimus to large operators such as MGM (which posts billions of dollars in net revenues annually), they do not account for the applicant's own due diligence expenses in preparing the application, or internal structuring or restructuring expenses associated with garnering a favorable suitability determination.[64] As such, expenses associated with suitability determinations can far exceed the initial application fee, making the lack of state-by-state consistency or judicial oversight especially problematic to would-be applicants.[65]

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[61] MISS. CODE ANN. § 75-76-127(2) (West x2017).

[62] N.Y. GAMING COMM'N, REQUEST FOR APPLICATIONS TO DEVELOP AND OPERATE A GAMING FACILITY IN NEW YORK STATE, 30 (2015), http://gaming.ny.gov/pdf/03.23.15.RFA.PDF.

[63] Casino/Slots Parlor Development, MASS. GAMING COMM'N, https://web.archive.org/web/20140715001509/https://massgaming.com/about/casinoslots-parlor-development/ (last visited Jan. 8, 2018).

[64] *See generally* Bradley Seth McNew, *3 Reasons MGM Resorts International Stock Could Rise*, MOTLEY FOOL (Jan. 1, 2015, 11:32 AM), https://www.fool.com/investing/general/2015/01/01/3-reasons-mgm-resorts-international-stock-could-ri.aspx?source=isesitlnk0000001&mrr=1.00.

[65] Nearly a decade ago, the International Association of Gaming Advisors, along with the International Association of Gaming Regulators, introduced the "Multi-Jurisdictional Personal History Disclosure Form," a model application for key licensees (individuals in responsible positions). DAVID O. STEWART, IMPROVING GAMING REGULATIONS: 10 RECOMMENDATIONS FOR STREAMLINING PROCESSES WHILE MAINTAINING INTEGRITY 3 (2011), https://www.americangaming.org/sites/default/files/research_files/reg_reform_white_paper_final.pdf. While this form has been widely adopted, many states — Illinois, Colorado, Indiana, Missouri, and Michigan – still retain state-specific forms. *Id.* Further, even though

Based on this expense and lack of certainty, the gaming industry's primary lobbying organization, the American Gaming Association ("AGA"), has advocated that the states voluntarily adopt a system of reciprocity in which a state will grant a license to an applicant when the applicant is already licensed in a different jurisdiction, and in so doing, "avoid[] duplicative background investigations for individuals and entities already . . . approved by reputable authorities."[66] While the reciprocity system proposed by the AGA has merit, the organization has overlooked a seemingly more viable solution — federal regulation.

IV. THE NEED FOR FEDERAL REGULATION[67]

As noted above, Congress is vested with the ability to regulate interstate commerce and may otherwise restrict "permissible state regulation" — including licensing requirements — subject to some limitations.[68] Both Congress and the judiciary have recognized that "gambling involves the use, and has an effect upon, interstate commerce," and is permissibly subject to federal regulation.[69] In fact, Congress has already used this authority to regulate gaming in between and among the several states, including the prohibition of unauthorized transportation of lottery tickets between states,[70] outlawing sports betting under the Professional and Amateur Sports Protection Act of 1992 ("PASPA"),[71] and regulating gaming on Native American lands.[72] As such, Congress has the legal ability to enact regulatory reforms.

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the industry recognizes that a uniform application form is needed for business entities licensed in multiple jurisdictions, no such form exists — further leading to discrepancies in state-by-state suitability determinations. *See id.* at 4.

[66] *Id.* at 4.

[67] The author recognizes that such a proposal necessarily implicates a profusion of issues, including but not limited to: funding (most likely in the form of the application fee), on-going reviews of suitability, etc.; however, the purpose of this paper is to begin a dialogue about the possibility of sweeping federal reforms that have not otherwise been contemplated by the industry. *See infra* Conclusion.

[68] Gulch Gaming, Inc. v. South Dakota, 781 F. Supp. 621, 624 (D.S.D. 1991); U.S. CONST. art. I, § 8, cl. 3.

[69] *See* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 225 (3d Cir. 2013) (quoting United States v. Riehl, 460 F.2d 454, 458 (3d Cir. 1972)).

[70] 18 U.S.C. § 1301 (2012).

[71] 28 U.S.C. § 3702 (2012).

[72] 25 U.S.C. §§ 2701-2721 (2012). *See Gambling Law: An Overview*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/gambling (last visited Jan. 8, 2018). Even though Congress has exercised the power to regulate gaming in some instances, it has consistently declined to bring all gaming activity under federal control. *See* H.R. REP. NO. 91-1549, at 53 (1970) ("The intent of [the Organized Crime Control Act] . . . is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions.").

Due to the realities and effect of inconsistent suitability determinations under the current state-by-state licensing approach, Congress should enact a nationwide suitability scheme while retaining the ability of the states to otherwise regulate gaming within their borders pursuant to their police power.[73] Under this scheme, prospective casino applicants would apply for a federal suitability determination in a manner similar to the state-level applications detailed above. After the appropriate investigation and hearings, federal regulators would then make a suitability determination. Based on this determination, the applicant could apply for licensure in states that allow gaming, subject to each state's respective regulations and licensing requirements unrelated to the suitability determination. While such a scheme would still be free from judicial review, a single suitability determination would eliminate conflicting state decisions and likely bring greater confidence to the industry.

CONCLUSION

While the proposal contained here is high-level and merely designed to facilitate a discussion in the gaming industry about federal level regulations regarding suitability as an alternative to voluntary state reciprocity agreements advocated by the AGA, it is clear that state-by-state suitability determination must be relegated to the past. The gaming industry continues to grow, both in terms of revenue and the number of states which permit gaming. As such, state state-by-state suitability determinations are not only a waste of resources and unnecessarily duplicative, but also result in inconsistent determinations about the suitability of a single casino applicant or similarly situated applicants. There is no question that gaming heavily impacts interstate commerce and the current system is untenable — therefore Congress must act.

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[73] While such a regulatory scheme would necessarily call into question the proper role of federalism, states and federal regulators already engage in a joint-licensing determinations in the context of Indian Gaming. Specifically, under the Indian Gaming Regulatory Act ("IGRA"), Congress permits Native American to offer casino-style gaming (Class III) only when: (1) the tribe enters into a compact with a state that allows tribal gaming; and (2) a federal agency, the Bureau of Indian Affairs, approves the compact. *See generally* 25 U.S.C. §§ 2701-2721 (establishing dual state and federal requirements for Indian gaming). While this interplay between the states and the federal government was largely the by-product of the federal government's exclusive jurisdiction over Indian affairs, it may serve as a basic framework for the federalized suitability determination proposed here. Although ancillary to this discussion, it is also worth noting Congress requires that before the Native American tribe may enter into a compact with the state, they must: (1) possess tribal land to which they are able to prove a historic and continuous connection; and (2) this land must be placed into a trust established for gaming purposes. *See id.*