

## ENTITY WAGERING AND THE DREAM OF MAKING LAS VEGAS THE WALL STREET OF THE WEST

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### I. INTRODUCTION

In 2015, Las Vegas made a bold attempt to become the Wall Street of the West.<sup>1</sup> The city began to blur the lines between gambling and investing.<sup>2</sup> To accomplish this, Las Vegas created a type of sports betting similar to mutual fund investing called “entity wagering.”<sup>3</sup>

However, the young industry seemed cursed from the start. A shadowy past and an uncertain future created an atmosphere of doubt around the budding enterprise, and the dream of creating the Wall Street of the West has since faltered.<sup>4</sup> This note explores the way in which Las Vegas sought to blur the lines between gambling and investing through entity wagering and discusses how the industry’s rocky start has led to its tenuous future. This note will examine: (1) how the dream of Wall Street-style sports betting began and the why the shadowy past behind entity wagering has cast doubt on the industry; (2) the uncertainty in the sports betting industry following the Supreme Court’s decision in *Murphy v. National Collegiate Athletic Association* and its effect on entity wagering; and (3) the future of entity wagering.

### II. THE DREAM OF WALL STREET STYLE SPORTS BETTING

The words “gambling” and “investing” tend to invoke very different images

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<sup>1</sup> See David Purdum, *Nevada legalizes sports betting investment funds*, ESPN CHALK (June 3, 2015), [http://www.espn.com/chalk/story/\\_/id/13006097/nevada-legalizes-sports-betting-investment-funds-espn-chalk](http://www.espn.com/chalk/story/_/id/13006097/nevada-legalizes-sports-betting-investment-funds-espn-chalk) (explaining that the 2015 bill allows individuals to participate in sports betting investment funds).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *infra* Section IV. The Future of Entity Wagering.

in people's minds.<sup>5</sup> Mention gambling to someone and they may think of dingy slot machines and cigarette-smoke-scented hallways.<sup>6</sup> They may envision poker players, dressed in a colorful array, some adorned with sunglasses, others concealed by hoodies, clicking chips around the edges of a poker table.<sup>7</sup> Or maybe they envision a sportsbook, packed with fans drinking beer and proudly wearing their favorite team's colors.<sup>8</sup>

On the other end of the spectrum, the word "investing" may conjure up images of the New York Stock Exchange, with the ringing bell and bustle of somber-faced people in business suits.<sup>9</sup> The stark contrast between the image of a gambler and the image of an investor is a welcome one for Wall Street executives, to whom "gambling" is a dirty word.<sup>10</sup> Many executives appreciate the distinction between "the sober, serious profession of investing" and "the irresponsible, impulsive act of betting."<sup>11</sup>

Las Vegas, however, blurred the distinction between "gambling" and "investing" by passing Senate Bill 443, which Nevada Governor Brian Sandoval signed into law in 2015.<sup>12</sup> Senate Bill 443 legalized sports betting investment funds operated by Nevada entities.<sup>13</sup> The bill also legalized the participation in these investment funds by out-of-state residents.<sup>14</sup> The practice was dubbed "entity wagering" because entities, rather than individuals, place bets.<sup>15</sup> The

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<sup>5</sup> See, e.g., Michael Kaplan, *Wall Street Firm Uses Algorithms To Make Sports Betting Like Stock Trading*, WIRED (Nov. 11, 2010, 12:00 PM), [https://www.wired.com/2010/11/ff\\_midass/](https://www.wired.com/2010/11/ff_midass/).

<sup>6</sup> See, e.g., Things to do in Las Vegas, *Rio casino floor, Las Vegas*, YOUTUBE (May 5, 2017), <https://www.youtube.com/watch?v=vvOKxDbKWPw> (showing a busy casino floor with flashing slot machine lights and other gaming screens).

<sup>7</sup> See, e.g., PokerBestVideos, *Sensational FINAL TABLE World Poker Tour 5 Diamons.High class Poker.*, YOUTUBE (Nov. 17, 2012), <https://www.youtube.com/watch?v=gD-FQBpT2o0> at 2:42-4:46.

<sup>8</sup> See, e.g., KTNV Channel 13 Las Vegas, *Big crowds expected at Las Vegas sports books for March Madness*, YOUTUBE (Mar. 19, 2015), <https://www.youtube.com/watch?v=XXdUDhnS2Rk> at 0:20-0:24.

<sup>9</sup> See, e.g., WWE, *John Cena rings The Closing Bell at the New York Stock Exchange*, YOUTUBE (Apr. 5, 2013), <https://www.youtube.com/watch?v=huMhEuq2Wm0> (showing WWE wrestler ringing the closing bell and being interviewed amid men and women dressed in suits).

<sup>10</sup> See Kaplan, *supra* note 5.

<sup>11</sup> *Id.*

<sup>12</sup> Will Green, *Nevada Governor Signs Bill Legalizing Sports Betting Investment Funds*, SPORTS ILLUSTRATED (June 3, 2015), <https://www.si.com/more-sports/2015/06/03/nevada-sports-wagering-governor-sandoval-legalizes-sports-betting-investment-funds>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., *id.*. See also Will Green, *SEC Subpoenas Nevada Entity Wagering Funds For Information*, LEGAL SPORTS REP. (Nov. 9, 2016, 8:28 AM), <https://www.legalsportsreport.com/12049/sec-subpoenas-nevada-entity-wagering-funds-for-information/>.

emergence of this new style of betting initially caused quite a stir. In 2016, the Las Vegas Review-Journal called entity betting the “next big wave in wagering”<sup>16</sup> and noted the interest that investors and entities alike initially showed in engaging with the new market.<sup>17</sup>

The budding entity wagering industry worked to make the dream of Wall Street-style betting a reality by replacing the words “sports betting” and “gambler” with “mutual fund” and “investor.”<sup>18</sup> The raucous sports betting crowd was joined by professionals hoping to establish themselves as the Wall Street executives of the West.<sup>19</sup> And it all began with one no-nonsense Wall Street executive, Wall Street’s finest technology, and one of the United States’ largest illegal gambling rings.<sup>20</sup>

#### A. *The Emergence of Cantor Gaming*

“We’ve got a story about Wall Street guys trying to act like gamblers, gamblers trying to act like Wall Street guys and a cop from New York City trying to figure out just where all those bags of cash were going.”<sup>21</sup> So begins the story of Cantor Gaming, as told by Keith Romer, reporter and host of NPR’s “Planet Money” podcast.<sup>22</sup> Yet the story of Cantor Gaming is also the story of how entity wagering began in Las Vegas, and one reason why it may be faltering.<sup>23</sup>

Cantor Gaming, when it emerged on the Las Vegas scene, was not a typical sportsbook.<sup>24</sup> Cantor Gaming, now known as CG Technology, was the sports betting branch and affiliate of Wall Street firm Cantor Fitzgerald.<sup>25</sup> The affiliate

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<sup>16</sup> See, e.g., Matt Youmans, *Entity betting could be next big wave in Nevada wagering*, LAS VEGAS REV.-J., (May 13, 2016, 12:22 AM), <https://www.reviewjournal.com/sports/betting/entity-betting-could-be-next-big-wave-in-nevada-wagering/>.

<sup>17</sup> *Id.*

<sup>18</sup> *See id.*

<sup>19</sup> See, e.g., *id.* (Ken Murphy, founder of Nevada Sports Investment fund, described entity wagering as “very similar to a Wall Street exchange.”).

<sup>20</sup> See Planet Money, *Episode 746: Wall Street Goes To Vegas*, NPR (Jan. 6, 2017, 4:30 PM), <https://www.npr.org/templates/transcript/transcript.php?storyId=508588660> [hereinafter Planet Money].

<sup>21</sup> *Id.*

<sup>22</sup> *See id.*

<sup>23</sup> See Glenn Greene, *Entity wagering may quickly become a thing of the past in Nevada*, OFF SHORE GAMING ASS’N (Mar. 1, 2018, 2:18 PM), [http://www.osga.com/online\\_gaming\\_articles.php?Entity-wagering-may-quickly-become-a-thing-of-the-past-in-Nevada-20822](http://www.osga.com/online_gaming_articles.php?Entity-wagering-may-quickly-become-a-thing-of-the-past-in-Nevada-20822).

<sup>24</sup> See Liz Benston, *Technology is king at the M Resorts sports book*, LAS VEGAS SUN (Mar. 20, 2010, 2:01 AM), <https://lasvegassun.com/news/2010/mar/20/technology-new-king/>.

<sup>25</sup> David Purdum, *CG Technology fined \$22.5M by U.S. for role in illegal scheme*, ESPN (Oct. 3, 2016), [http://www.espn.com/chalk/story/\\_/id/17707481/las-vegas-sportsbook-cg-technology-was-fined-225m-illegal-gambling-money-laundering-](http://www.espn.com/chalk/story/_/id/17707481/las-vegas-sportsbook-cg-technology-was-fined-225m-illegal-gambling-money-laundering-)

was started by Cantor Fitzgerald CEO, Lee Amaitis, who was not the typical Wall Street executive.<sup>26</sup>

Unlike most Wall Street executives, Amaitis was not afraid to blur the lines between gambling and investing.<sup>27</sup> In an interview with David Schwartz, the Director for Gaming Research at the University of Nevada, Las Vegas, Amaitis explained how he transitioned between careers in horse training, trading, and eventually gaming: “I was enamored with the horseracing industry. I used to cut my classes. . . and go to Aqueduct, the racetrack, to catch the last few races every day. Then I got sort of interested about the whole pageantry and excitement of horseracing.”<sup>28</sup>

After graduating high school, Amaitis went straight to working at the horse racetrack, where he spent ten years working his way up from hot-walker – someone who cools the horses down when they leave the track – to trainer and racing official.<sup>29</sup> No stranger to moving up in a new industry, Amaitis made a career change in 1977.<sup>30</sup> He began working on Wall Street as a clerk in a back office, eventually becoming a broker, manager, and then an executive before ending up at Cantor Fitzgerald as one of its chief executive officers.<sup>31</sup> Amaitis then moved to London to run Cantor Fitzgerald’s European and Asian operations.<sup>32</sup>

In the United Kingdom, however, the lines between investor and gambler are considerably less sharp than they are in the United States.<sup>33</sup> According to Amaitis, “the bookmaking industry in England is legal, and it’s very highly regarded. . . Bookmakers are treated like bankers[.]”<sup>34</sup> The lack of stigma attached to the sports betting industry, and to gambling as a whole, allowed the United Kingdom to legalize arcade games, betting, bingo games, casino games, lotteries, and gaming machines.<sup>35</sup> The United Kingdom has also legalized online gambling.<sup>36</sup>

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scheme.

<sup>26</sup> See Planet Money, *supra* note 20.

<sup>27</sup> See *id.*

<sup>28</sup> David G. Schwartz, *Podcast w/ Lee Amaitis Is Up*, UNLV GAMING PODCAST #27, <https://www.dgschwartz.com/2011/02/23/podcast-w-lee-amaitis-is-up/>, at 1:30–2:00, 1:01–1:20 (last visited Apr. 11, 2019).

<sup>29</sup> *Id.* at 1:30–2:10.

<sup>30</sup> *Id.* at 2:13–2:22.

<sup>31</sup> *Id.* at 3:18–3:42.

<sup>32</sup> *Id.* at 5:09–5:40.

<sup>33</sup> See *id.* at 6:00–6:15.

<sup>34</sup> *Id.*

<sup>35</sup> See *id.*; *What is gambling?*, GAMBLING COMMISSION, <http://www.gamblingcommission.gov.uk/for-the-public/What-is-gambling.aspx> (last visited Jan. 12, 2019); Martin Rogers & Kim Hjelmgaard, *What the U.S. can learn about legalized sports betting from the U.K.*, USA Today (Jun. 6, 2018, 8:01 AM), <https://www.usatoday.com/story/sports/2018/06/06/sports-betting-what-u-s-can-learn-legalization-uk/664382002/>.

<sup>36</sup> GAMBLING COMMISSION, *supra* note 35.

The United Kingdom's laissez faire attitude toward gambling—particularly online gambling—gave Cantor Fitzgerald the opportunity to develop and test its spread-betting technologies and its own online casino games.<sup>37</sup> Cantor Fitzgerald utilized its technology to offer bookmaking services in the financial markets, allowing people to bet both on sports and on the changes in financial markets.<sup>38</sup> Cantor Fitzgerald's experiences in foreign markets and the technology it developed as a result served as a springboard for Cantor Gaming's arrival on the Las Vegas scene.<sup>39</sup>

### B. *Cantor Gaming Comes to Vegas*

Technology is what helped Cantor Gaming get its foot in the door in Las Vegas.<sup>40</sup> Nevada Assembly Bill 466, initially introduced in 2001, authorized the Nevada Gaming Commission ("the Commission") to adopt interactive gaming regulations with the advice and assistance of the Nevada Gaming Control Board ("the Board").<sup>41</sup> While this bill did not legalize online gambling, it laid the groundwork for internet gambling if it were to ever become legal.<sup>42</sup> Specifically, Assembly Bill 466 established that the Commission may adopt regulations governing the licensing and operations of internet style gaming if it finds that:

Interactive gaming can be operated in compliance with all applicable laws;

Interactive gaming systems are secure and reliable, and provide reasonable assurance that players will be of lawful age and communicating only from jurisdictions where it is lawful to make such communications; and

The regulations are consistent with Nevada's public policy concerning gaming set forth in NRS 463.0129.<sup>43</sup>

The Commission sought input on these enabling provisions from Nevada Gaming Control Board staff, representatives from the gaming industry, computer hardware and software manufacturers and providers, testing laboratories, gaming attorneys, and the Department of Justice ("the DOJ").<sup>44</sup> The response by the DOJ, however, did not inspire confidence in companies wishing to pursue online gaming.<sup>45</sup> In its publicized response, the DOJ informed the Commission and the

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<sup>37</sup> Schwartz, *supra* note 28 at 6:00–8:03, 9:00–9:36.

<sup>38</sup> *Id.* at 6:00–:01.

<sup>39</sup> *See id.* at 6:00–13:08.

<sup>40</sup> *See* Benston, *supra* note 24.

<sup>41</sup> Jennifer L. Carleton & Dennis Daly, *Internet Gaming in Nevada, New Jersey & Delaware*, NEVADA GAMING LAW., (Sept. 2013), [https://www.nvbar.org/wp-content/uploads/NVGL\\_2013\\_Internet%20Gaming.pdf](https://www.nvbar.org/wp-content/uploads/NVGL_2013_Internet%20Gaming.pdf).

<sup>42</sup> Marc G. Warren, *Internet Casino-Style Gambling: Is It Legal in Nevada?*, 10 UNLV GAMING RES. & REV. J. 21, 21–22 (2006), <https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1148&context=grj>.

<sup>43</sup> *Id.* at 22.

<sup>44</sup> *Id.*

<sup>45</sup> *See id.*; Schwartz, *supra* note 28 at 12:30–12:45.

Board of its belief that federal law prohibited gambling over the internet.<sup>46</sup>

Cantor Gaming, however, recognized an opportunity.<sup>47</sup> Taking the technology Cantor Gaming had developed in the United Kingdom, Amaitis traveled to Las Vegas in 2003 to introduce the idea of intrastate gaming.<sup>48</sup> Amaitis explained that this type of gaming had nothing to do with the internet and was based on the technology Cantor Fitzgerald had developed to facilitate wireless delivery of financial services information.<sup>49</sup>

The draw of this new technology lay in both its security and its speed, which was necessary in the online trading in which Cantor Fitzgerald had been a frontrunner.<sup>50</sup> Amaitis explained the technology's origins in his interview with David Schwartz:

[W]e were the first people to have an application on a Blackberry where you could actually trade a US Treasury bond. . . wireless[ly] in the United States. If you understand the concept of what that means, it's a millisecond transaction, it's not a ten-second transaction. It's touch it and you're done. So, there's no mistake; the technology has to be flawless and the encryption has to be flawless because you have to know that device, where it is, who's got it, you know are they authorized to trade it. Because we're not talking about ten dollars here, we're talking about hundreds of millions of dollars in bonds and trades.<sup>51</sup>

Confident in its technology and its ability to remain safe and fast, Cantor Gaming contacted Lionel Sawyer & Collins and began drafting a bill which would allow mobile gaming.<sup>52</sup> The result of this drafting was the 2005 "Mobile Gaming Act," which authorized the "manufacturing and operation of hand-held devices for wagering by casino resort patrons in various areas throughout the gaming premises."<sup>53</sup> The Mobile Gaming Act allowed for casino customers to play casino games in public areas of the resort on handheld devices.<sup>54</sup>

In March 2009, Cantor Gaming opened its doors at the M Resort.<sup>55</sup> The buzz surrounding the Wall Street big dog expanding its services to include sports wagering was palpable and evinced by the lines and crowds of people eager to place their bets in the new sportsbook.<sup>56</sup> Cantor Gaming wasted no time

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<sup>46</sup> Warren, *supra* note 42, at 22.

<sup>47</sup> See Schwartz, *supra* note 28 at 12:00-13:00.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 12:54-13:08.

<sup>50</sup> *Id.* at 13:20-14:04.

<sup>51</sup> *Id.* at 13:00-14:00.

<sup>52</sup> *Id.* at 13:30-14:30.

<sup>53</sup> Joseph Asher, *Mobile Gaming Comes to Nevada*, GLS NEWSL., Sept. 2006, at 3, [https://www.nvbar.org/wp-content/uploads/GLS\\_September\\_2006\\_56944ed69a09b.pdf](https://www.nvbar.org/wp-content/uploads/GLS_September_2006_56944ed69a09b.pdf).

<sup>54</sup> *Id.* at 11.

<sup>55</sup> Schwartz, *supra* note 28, at 17:00-17:20.

<sup>56</sup> See Benston, *supra* note 24.

integrating Wall Street lingo into Las Vegas sports wagering.<sup>57</sup> Yet, calling sports bettors “traders” and the sports book a “trading floor” wasn’t all talk.<sup>58</sup>

The new M Resort sportsbook was created with qualities to make it more like a trading floor than a sportsbook.<sup>59</sup> At first glance, the space is different than most sportsbooks because it is occupied by cubicles for sports “traders,” instead of the usual couches.<sup>60</sup> The most notable difference is in the technology on the floor.<sup>61</sup> Touch screens located at each cubicle allow traders to place bets during games and to bet on multiple games.<sup>62</sup> The screens also post the latest betting lines from other Las Vegas casinos, a practice which many other sportsbooks shun, but Cantor Gaming uses to encourage play.<sup>63</sup>

Cantor Gaming was not just interested in changing the way sportsbooks looked and felt; it was also interested in changing the limits on sports wagers.<sup>64</sup> Although most sportsbooks would only allow bets of \$5,000 or \$10,000, Cantor Gaming upped the ante and allowed its traders to bet \$50,000 on a game.<sup>65</sup> This was a hit with big players such as Floyd Mayweather and other serious gamblers.<sup>66</sup> Yet, in the end, it proved to be Cantor Gaming’s downfall.<sup>67</sup>

### C. Cantor Gaming and the “Jersey Boys”

The strategy of allowing patrons to make big wagers proved to be risky for Cantor Gaming due to the nature of running a sportsbook.<sup>68</sup> When a sportsbook takes a bet, it has to find a similar amount of bets to take on the other side of the game.<sup>69</sup> This means that the sportsbook wants to get just as many bets placed on Team A as Team B because it guarantees that the sportsbook will make money.<sup>70</sup> If a sportsbook cannot get bets on the other side of a game, the sportsbook itself is essentially betting against the individuals who place bets on one side of a

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<sup>57</sup> *See id.*

<sup>58</sup> *Id.*

<sup>59</sup> *See id.*

<sup>60</sup> *Id.*

<sup>61</sup> *See id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See Planet Money, supra note 20.*

<sup>65</sup> *Id.*

<sup>66</sup> *See Floyd Mayweather Won \$700k Betting On Basketball*, WAGERMINDS (Feb. 15, 2012), <http://www.wagerminds.com/blog/floyd-mayweather/floyd-mayweather-is-still-betting-4361/>; Benston, *supra* note 24.

<sup>67</sup> *See Planet Money, supra note 20.*

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> Chris Yuscavage, *Everything You Need to Know About How Betting Lines Work*, COMPLEX (Jan. 30, 2015), <http://www.complex.com/sports/2015/01/how-betting-lines-work/>.

game.<sup>71</sup>

Because it was hard to find bettors who would make such large bets on the other side of games, Cantor Gaming set its sights outside of Las Vegas.<sup>72</sup> A Cantor Gaming executive was in touch with an individual named Gadoon Kyrollos, or as he was known to his associates, “Spanky.”<sup>73</sup> Kyrollos ran a sophisticated illegal bookmaking ring out of New Jersey, which police there had dubbed the “Jersey Boys,” and was always looking for new locations to place his bets.<sup>74</sup>

The situation was win-win for both Kyrollos and for Cantor Gaming.<sup>75</sup> When Cantor Gaming took a few too many bets on one side of a game, it would call Kyrollos and ask whether he would be willing to put down \$20,000, \$30,000, or \$50,000 on the other side.<sup>76</sup> Usually Kyrollos would say yes, as this allowed him to place bets on one side of a game in the Las Vegas sportsbook, and place bets on the other side in an offshore sportsbook – a practice called “middling.”<sup>77</sup> This practice made a significant amount of money, but it was illegal, both for Kyrollos and for Cantor Gaming.<sup>78</sup>

Police in New Jersey, having caught wind of illegal bookmaking, began investigating the transactions of suspected bookies.<sup>79</sup> One former New Jersey officer explained how the suspicion arose: “Through this vast network of people, someone would get paid off in Manhattan, and the next day someone else would get paid off in Las Vegas. Or money would appear in offshore betting accounts in Curacao—hundreds of thousands—millions of dollars.”<sup>80</sup> This investigation eventually led detectives to Kyrollos, and then to Cantor Gaming.<sup>81</sup>

Investigators uncovered illegal gambling activity that had taken place from 2009 until 2013, during which time Cantor gaming allowed “runners” to place bets for the third-party illegal gambling rings.<sup>82</sup> Investigators also uncovered that Cantor failed to file reports of large payouts in order to keep these illegal bettors happy.<sup>83</sup> Three years after the investigations, Cantor Gaming, which had changed its name to CG Technology, agreed to pay \$22.5 million in penalties for its

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<sup>71</sup> See Planet Money, *supra* note 20.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Nate Raymond, *Cantor Fitzgerald affiliate pays \$22.5 Million to end U.S. gambling probe*, REUTERS (Oct. 3, 2016, 10:45 AM), <https://www.reuters.com/article/us-cantor-ftzgerld-settlement/cantor-ftzgerald-affiliate-pays-22-5-million-to-end-u-s-gambling-probe-idUSKCN1231XM>.

<sup>83</sup> Planet Money, *supra* note 20.

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involvement with illegal gambling.<sup>84</sup>

If the illegal gambling was not enough, the Nevada Gaming Control Board then uncovered failures in CG Technology's computerized system which led to incorrect payouts to patrons.<sup>85</sup> Most of these failures resulted in patrons' being underpaid, while a number of other patrons were overpaid.<sup>86</sup> The Board fined CG Technology \$1.5 million dollars and required that Lee Amaitis resign.<sup>87</sup>

Along with these two stipulations, the Board required that CG Technology retain an independent third party for one year to review its software and product development process and that the company set aside an escrow account of \$25,000 for underpaid bettors.<sup>88</sup> With two big strikes against CG Technology, the Board was keeping the sportsbook on a short leash.<sup>89</sup> Yet investigations into and complaints against CG Technology did not discourage the company from working to pursue its dream of making Las Vegas the Wall Street of the West by introducing entity wagering.<sup>90</sup>

#### D. *The Emergence of Entity Wagering In Las Vegas*

In 2015, Governor Sandoval passed into law Senate Bill 443, the entity wagering bill.<sup>91</sup> This bill allows for Nevada entities to place bets on behalf of investors who pay into a sports betting pool.<sup>92</sup> These investors include people who are participating outside the State of Nevada, as long as they are 21 years of age and provide personal identification, including social security number or tax identification.<sup>93</sup>

CG Technology was one of the driving forces behind the bill.<sup>94</sup> Despite setbacks due to its involvement in illegal gambling and problems with its computerized systems, CG Technology did not let go of the dream to make Las

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<sup>84</sup> Raymond, *supra* note 82.

<sup>85</sup> Dustin Gouker, *Sportsbook Operator CG Technology Will Pay \$1.5 Million Fine In Nevada, CEO To Resign*, LEGAL SPORTS REP. (July 21, 2016, 8:21 AM), <https://www.legalsportsreport.com/10093/sportsbook-operator-cg-technology-nevada-fine/>.

<sup>86</sup> *Id.*; Richard Velotta, *CG Technology agrees to Pay \$1.5 million fine and pay bettors who were shorted*, LAS VEGAS REV.-J. (July 21, 2016, 3:28 PM), <https://www.reviewjournal.com/business/casinos-gaming/cg-technology-agrees-to-pay-1-5-million-fine-and-pay-bettors-who-were-shorted/>.

<sup>87</sup> Gouker, *supra* note 85; Velotta, *supra* note 86.

<sup>88</sup> Gouker, *supra* note 85.

<sup>89</sup> *See id.*

<sup>90</sup> *See Purdum, supra* note 1.

<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *Id.*

<sup>94</sup> Zack Hall, *First 'Mutual Funds' For Sports Betting Set To Go Live In Nevada*, LEGAL SPORTS REP. (Feb. 3, 2016, 7:34 AM), <https://www.legalsportsreport.com/7709/entity-sports-betting-launch/>.

Vegas sports wagering like Wall Street investing.<sup>95</sup> CG Technology developed Senate Bill 443, lobbied for its passage, and became the first sportsbook to take entity wagers.<sup>96</sup>

The bill was not welcomed with open arms by everyone in the State, however.<sup>97</sup> Most sports books, including the Westgate, William Hill, and MGM have adopted a ‘wait-and-see’ approach.<sup>98</sup> As of this writing, CG Technology remains the only sportsbook to take entity bets.<sup>99</sup> William Hill officials have declined to comment on entity betting, while Westgate’s vice president of race and sports operations said the book has no plans to accept entity betting.<sup>100</sup> MGM Resorts International is the most hopeful sounding of the bunch, stating that it is reviewing the potential, although it is “too premature” to say whether they will accept entity wagers.<sup>101</sup>

Although, at the outset, most sportsbooks were unwilling to take entity wagers, entities willing to place wagers cropped up in the Las Vegas Valley.<sup>102</sup> The budding “investment groups” included Athletics Investments, Nevada Sports Investment Group, Bettor Investments, Hi-Line, and Contrarian.<sup>103</sup> The managers of these young funds structured their businesses like traders rather than gamblers.<sup>104</sup> Indeed, the entity wagering bill worked to create funds that turn sports betting into a field for “sophisticated, aggressive investors seeking to diversify their assets and earn a high return[,]”<sup>105</sup> as opposed to a pastime for the casual sports fan. Those involved in the entity wagering industry seemed to shy away from the term “gambler” and have instead resorted to terms such as “investor.”<sup>106</sup>

Yet, despite the initial buzz of activity in entity wagering, some funds have dropped off, or changed their mode of operation.<sup>107</sup> Nevada Sports Investment Group is no longer accepting investors and was struck with litigation from the

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<sup>95</sup> See Gouker, *supra* note 85; Planet Money, *supra* note 20.

<sup>96</sup> Green, *supra* note 15.

<sup>97</sup> See Buck Wargo, *Entity betting off to slow start with Nevada sports books*, LAS VEGAS REV.-J. (Sept. 17, 2016, 10:02 PM), <https://www.reviewjournal.com/business/casinos-gaming/entity-betting-off-to-slow-start-with-nevada-sports-books/>.

<sup>98</sup> See *id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* See also *Entity Wagering Questions Answered*, WAGERTRADERS, <https://web.archive.org/web/20180815110454/http://www.wagertraders.com/> (last visited Mar. 30, 2019).

<sup>103</sup> See WAGERTRADERS, *supra* note 102.

<sup>104</sup> See Albert Chen & Will Green, *Mutual Attraction*, SPORTS ILLUSTRATED VAULT (June 27, 2016), <https://www.si.com/vault/2016/06/28/mutual-attraction#>.

<sup>105</sup> *Id.*

<sup>106</sup> See Brandon James, *Bet as an Entity!*, THE WIZARD OF ODDS (Feb. 9, 2017), <https://wizardofodds.com/games/sports-betting/bet-as-an-entity/> (interviewing two entity owners who called participants in entity wagering “investors”).

<sup>107</sup> See *Entity Wagering Questions Answered*, *supra* note 102.

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SEC in 2018.<sup>108</sup> Bettor Investments switched entirely to a subscription model before its founder went “radio silent” and seems to have closed the original entity betting operation.<sup>109</sup> Contrarian, which started out strong in 2016, faced slow returns in early 2017 and fines in 2018.<sup>110</sup> The initial growth of the industry seemed to be stifled in part by the lack of participation by more sportsbooks.<sup>111</sup> This lack of participation likely stems not only from doubt surrounding Senate Bill 443 and its proponent, CG Technology, but also from the uncertainty surrounding the Supreme Court’s recent decision in *Murphy v. National Collegiate Athletic Association* (“*Murphy*”) which struck down the law preventing states from legalizing sports betting.<sup>112</sup>

### III. MURPHY V. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

In May of 2018, the Supreme Court decided *Murphy v. National Collegiate Athletic Association*.<sup>113</sup> The result was that the Professional and Amateur Sports Protection Act (“PASPA”), the act that prevented states other than Delaware, Montana, Nevada, and Oregon from allowing sports betting, was declared unconstitutional.<sup>114</sup> The outcome of the case is monumental for the sports betting industry, but it may be contributing to the decline of the entity wagering industry. To understand the importance of the Supreme Court’s decision to the entity wagering industry, it is important to understand both PASPA and the Supreme Court’s reasoning behind its complete upheaval of the law.

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<sup>108</sup> *Nevada Sports Investment Group*, WAGERTRADERS, <https://web.archive.org/web/20170825002256/http://www.wagertraders.com/nsig.html> (last visited Mar. 30, 2019); Dustin Gouker, *SEC Files, Settles Litigation Against Nevada Sports Betting Funds*, LEGAL SPORTS REP. (Sept. 10, 2018, 11:15 PM), <https://www.legalsportsreport.com/23953/sec-files-litigation-nevada-sports-betting-funds/>.

<sup>109</sup> Todd Prince, *Complaints hit one of Nevada’s sports betting mutual funds*, LAS VEGAS REV.-J. (Feb. 22, 2018, 7:35 PM), <https://www.reviewjournal.com/business/casinos-gaming/complaints-hit-one-of-nevadas-sports-betting-mutual-funds/>.

<sup>110</sup> Todd Prince, *One of Nevada’s First Sports Betting Funds Shines, Then Stumbles*, LAS VEGAS REV.-J. (Mar. 24, 2017, 2:18 PM), <https://www.reviewjournal.com/business/casinos-gaming/one-of-nevadas-first-sports-betting-funds-shines-then-stumbles/>; see Dustin Gouker, *supra* note 108.

<sup>111</sup> See James, *supra* note 106.

<sup>112</sup> See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1485 (2018) (striking down the Professional and Amateur Sports Protection Act).

<sup>113</sup> *Id.* at 1485.

<sup>114</sup> See *Id.* at 1471; Noah Frank, *How Supreme Court’s Decision on sports gambling could have seismic implications*, WTOP (Dec. 4, 2017, 5:08 AM), <https://wtop.com/sports/2017/12/how-the-supreme-courts-decision-on-sports-gambling-could-have-seismic-implications/>.

A. *The Professional and Amateur Sports Protection Act*

PASPA is short for the Professional and Amateur Sports Protection Act.<sup>115</sup> Congress passed the Act to protect the integrity of professional and amateur sports betting by prohibiting sports gambling under state law.<sup>116</sup> The Act worked to prohibit states from legalizing sports wagering.<sup>117</sup>

Before PASPA, only four states offered some form of sports betting.<sup>118</sup> The other forty-six states, although not previously prohibited from legalizing sports betting, were prohibited from regulating or taxing sports betting by the Act.<sup>119</sup> Yet, after facing scandals within the industry, sports leagues voiced concerns with the states' ability to venture into sports gambling.<sup>120</sup> The professional and amateur sports leagues took to the legislature to:

stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime. . . [because] [s]ports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling. It undermines public confidence in the character of professional and amateur sports. Furthermore, State-sanctioned sports gambling will promote gambling among our Nation's young people.<sup>121</sup>

The leagues were particularly concerned that the ability to wage money on the outcome of sports matches would lead to match-fixing and would ultimately destroy the integrity of America's favorite pastimes.<sup>122</sup> Collegiate sports are particularly vulnerable to match-fixing, as athletes' lack of compensation raises the potential for "point shaving," a particular type of match-fixing that doesn't throw the game, but makes sure that the team wins or loses by a certain number of points to satisfy those who bet on the difference between the winning and losing score—otherwise known as the "point spread."<sup>123</sup> The leagues also feared

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<sup>115</sup> 28 U.S.C. §§ 3701-3704 (1992).

<sup>116</sup> *Professional and Amateur Sports Protection*, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified as 28 U.S.C. §§ 3701-3704 (1992)); Andrew Vacca, *Sports Betting: Why the United States Should Go All In*, 11 WILLAMETTE SPORTS L.J. 1, 3-4 (2014).

<sup>117</sup> See Frank, *supra* note 114.

<sup>118</sup> See A.J. Perez, *What it means: Supreme Court strikes down PASPA law that limited sports betting*, USA TODAY (May 14, 2018), <https://www.usatoday.com/story/sports/2018/05/14/supreme-court-sports-betting-paspa-law-new-jersey/440710002/>.

<sup>119</sup> See *id.*

<sup>120</sup> See Chil Woo, *All Bets are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 575-76 (2013).

<sup>121</sup> S. REP. No. 102-248, at 4 (1991) as reprinted in 1992 U.S.C.C.A.N. 3553, 3555.

<sup>122</sup> See Woo, *supra* note 120, at 576.

<sup>123</sup> See Frank, *supra* note 114; Ray Gustini, *How Point Shaving Works*, THE ATLANTIC (Apr. 12, 2011), <https://www.theatlantic.com/entertainment/archive/2011/04/how-point-shaving-works/349575/>; *Point Spread Betting*, ODDS SHARK, <https://www.odds shark.com/sports-betting/point-spread-betting> (last visited Apr. 19, 2019).

that a disproportionate number of bets would be placed by low-income populations.<sup>124</sup>

The legislature agreed with the leagues' fears and expressed two major concerns, which it drafted PASPA to confront: (1) the exposure of children to sports gambling, and (2) the likelihood of corruption within the sports industry.<sup>125</sup> With these concerns in mind, Congress in 1992 passed PASPA, which states, in relevant part:

*Unlawful Sports Gambling*

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>126</sup>

However, the prohibition against government-sponsored sports gambling only went so far.<sup>127</sup> PASPA's drafters faced a unique problem: four states already had some form of legalized sports gambling.<sup>128</sup> Because Oregon, Delaware, Montana, and Nevada already had some form of sports wagering infrastructure in place, Congress was forced to address the existence of long-standing, state-sponsored gambling.<sup>129</sup>

Congress members and proponents of the bill did not desire for PASPA to harshly effect these state economies that had already developed and relied in part on sports gambling, so it included two important exemptions in the Act.<sup>130</sup> First, the Act discussed existing state-authorized sports gambling schemes, stating:

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<sup>124</sup> Frank, *supra* note 114.

<sup>125</sup> Woo, *supra* note 120, at 575.

<sup>126</sup> 28 U.S.C. § 3702 (1992).

<sup>127</sup> See Vacca, *supra* note 116, at 4.

<sup>128</sup> *Id.*

<sup>129</sup> See *id.*; Perez, *supra* note 118.

<sup>130</sup> James C. W. Goodall, *Bringing Down the House: An Examination of the Law and Policy Underpinning the Professional and Amateur Sports Protection Act of 1992*, 67 RUTGERS U. L. REV. 1097, 1108 (2015).

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity.<sup>131</sup>

Next, the Act addressed casinos with the potential to include sports betting:

(3) [A] betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality;. . .<sup>132</sup>

The exemptions under sections (1) and (2) worked to exclude state-run lotteries and other gambling schemes that had been enacted between January 1, 1976 and August 31, 1990, and gambling schemes that, although not state-run, were state-authorized any time between September 1, 1989 and October 2,

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<sup>131</sup> § 3704(a)(1)–(2).

<sup>132</sup> § 3704(a)(3).

1991.<sup>133</sup> The second important exemption, Section (3), created one of the issues that eventually brought PASPA before the United States Supreme Court to determine whether the Act's prohibition on state-determined sports betting was constitutional.<sup>134</sup>

Section (3) identified casinos that had existed in a municipality for at least ten years prior to the Act's effective date.<sup>135</sup> The exemption went on to state that these municipalities, if they were to adopt legislation permitting sports betting within one year of PASPA's effective date, would fit under the same exemptions granted to Delaware, Oregon, Montana, and Nevada.<sup>136</sup> This exemption was created to encompass Atlantic City, New Jersey, which had a similar casino infrastructure as Nevada, with many of the same casino entities.<sup>137</sup>

The clock for New Jersey to legalize sports betting in order to be considered exempt under PASPA began running on January 1, 1993, giving the state one year to enact legislation legalizing sports betting.<sup>138</sup> New Jersey initially made efforts to beat this time-frame, placing a referendum on its November general election ballot to amend the state's constitution to allow for sports betting.<sup>139</sup> Yet, the resolution authorizing the referendum never reached the Assembly, and New Jersey's time ran out.<sup>140</sup>

Not to be thwarted, New Jersey casinos explored alternative ways to allow for sports betting in the state, such as attempting to simply allow New Jersey's Casino Control Commission to implement sports betting by regulation.<sup>141</sup> This attempt, however, failed when the Commission, along with New Jersey's Appellate and Supreme Court, rejected the plan.<sup>142</sup> The New Jersey judiciary

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<sup>133</sup> § 3704(a).

<sup>134</sup> Johnathan Wood, *Symposium: In Sports-Betting case, the Supreme Court should bet on federalism*, SCOTUSBLOG (Aug. 16, 2017, 3:06 PM), <http://www.scotusblog.com/2017/08/symposium-sports-betting-case-supreme-court-bet-federalism/>. See also Ryan M. Rodenberg & John T. Holden, *Sports Betting Has An Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 1–2 (2017), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1024&context=dlj> on line (describing how the equal sovereignty issue posed by Section (3) of PASPA became one of the issues in the cases between the sports leagues and New Jersey Governor at the time, Chris Christie).

<sup>135</sup> § 3704(a)(3)(B).

<sup>136</sup> § 3704(a)(3)(A).

<sup>137</sup> See Christopher L. Soriano, *The Efforts to Legalize Sports Betting in New Jersey—A History*, N.J. LAW., Apr. 2013, at 22. Compare *Casinos Gaming & Poker*, CASINO REINVESTMENT DEV. AUTH. (2013), <http://www.atlanticcitynj.com/explore/casinos/>, with *Las Vegas Hotels & Casinos*, LAS VEGAS, <https://www.visitlasvegas.com/hotels-casinos/> (last visited Apr. 15, 2019) (showing that Las Vegas and Atlantic City have many of the same casino entities including the Tropicana, Hard Rock, and Harrah's, amongst others).

<sup>138</sup> Soriano, *supra* note 137, at 23.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

came to the conclusion that sports betting could only be legalized through constitutional amendment.<sup>143</sup>

In 2011, New Jersey made another attempt at sanctioning sports betting, this time launching a direct attack by including the issue on a second referendum.<sup>144</sup> The New Jersey voters passed the state-wide referendum to legalize sports betting by an astonishing two-to-one margin.<sup>145</sup> New Jersey's then-Governor Chris Christie signed the legislation, authorizing New Jersey gaming officials to begin creating regulations for the new industry.<sup>146</sup>

This bold, almost taunting, move did not go unnoticed by the sports leagues, which had long been PASPA's most ardent supporters.<sup>147</sup> In response to the new state legislation, the National Collegiate Athletics Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Major League Baseball ("MLB") all sued Governor Christie to force the State to comply with PASPA and abandon its attempt to legalize sports wagering.<sup>148</sup> New Jersey struck back, arguing that PASPA violates the Commerce Clause, the Due Process Clause, the Equal Protection Clause, and the Tenth Amendment.<sup>149</sup>

New Jersey initially failed in the lower courts, yet succeeded on one, distinct argument: that PASPA violates the constitution by "commandeering" State law.<sup>150</sup> New Jersey pointed out two unique ways that PASPA commandeers state law.<sup>151</sup> First, the Act regulates states and discriminates between states by allowing a select four to maintain sports betting, without giving any states the option to cede the issue of sports betting to the federal government.<sup>152</sup> Second, rather than creating a federal ban on sports betting, the Act forbade states from legalizing sports betting, unless they fit under the Act's strict exemptions.<sup>153</sup>

These arguments proved compelling enough for the United States Supreme Court to take notice.<sup>154</sup> In June of 2017, The Supreme Court granted certiorari to determine whether PASPA unconstitutionally commandeers state law by taking the choice of whether or not to legalize gambling out of States' hands.<sup>155</sup>

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<sup>143</sup> *Id.*

<sup>144</sup> See David Purdum & Ryan Rodenberg, *Supreme Court will hear New Jersey sports betting appeal: What's next?*, ESPN (June 28, 2017), [http://www.espn.com/chalk/story/\\_/id/19736525/the-supreme-court-hear-new-jersey-sports-betting-appeal-happens-next](http://www.espn.com/chalk/story/_/id/19736525/the-supreme-court-hear-new-jersey-sports-betting-appeal-happens-next).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> See *id.*; Woo, *supra* note 120.

<sup>148</sup> See Purdam, *supra* note 144.

<sup>149</sup> Soriano, *supra* note 137, at 24.

<sup>150</sup> Wood, *supra* note 134.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See *id.*

<sup>155</sup> *Id.*; David Purdum, *Supreme Court Agrees to Rule on Sports Betting*, ESPN.COM

*B. The Supreme Court Declares PASPA Unconstitutional*

From the beginning, it seemed certain that the Supreme Court would declare PASPA unconstitutional.<sup>156</sup> The Supreme Court held oral arguments for *Christie v. National Collegiate Athletic Association* on December 4, 2017.<sup>157</sup> During the hour of oral argument, the justices seemed to agree with New Jersey's position.<sup>158</sup> Yet, some of the more liberal justices likened PASPA to the long-established doctrine of preemption, indicating that it would be constitutional if considered as such.<sup>159</sup>

However, Chief Justice Roberts, Justice Kennedy, Justice Gorsuch, Justice Breyer, and Justice Alito were receptive to arguments that PASPA unconstitutionally commandeered state officials and that, had Congress wanted to create an Act *preempting* state law, it could have specified its intent.<sup>160</sup> Indeed, the justices did not seem to take to the suggestion that PASPA did not unconstitutionally commandeer state officials, particularly because the argument to the contrary was so sweeping.<sup>161</sup> Deputy Solicitor General Jeffery B. Wall advocated for the United States and proposed that PASPA did not act as a commandeer because although New Jersey could not peel back its prohibition against gambling only where it wanted (such as with sports betting), it could do away with all prohibitions on gambling.<sup>162</sup>

Chief Justice Roberts reacted somewhat incredulously to this statement.<sup>163</sup>

CHIEF JUSTICE ROBERTS: But what if the repeal – what if the repeal is across the board, no exceptions?

MR. WALL: If New Jersey just repeals its prohibitions, we have said we don't have a problem with that.

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(June 28, 2017), [http://www.espn.com/chalk/story/\\_/id/19749356/us-supreme-court-hear-new-jersey-sports-betting-case](http://www.espn.com/chalk/story/_/id/19749356/us-supreme-court-hear-new-jersey-sports-betting-case).

<sup>156</sup> See Wood, *supra* note 134.

<sup>157</sup> Amy Howe, *Argument analysis: Justices seem to side with state on sports betting*, SCOTUSBLOG (Dec. 4, 2017, 2:51 PM), <http://www.scotusblog.com/2017/12/argument-analysis-justices-seem-side-state-sports-betting/>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See *id.*

<sup>161</sup> See The Legal Blitz, *SCOTUS Oral Arguments Suggest That America's Sports Betting Ban Could Soon End*, ABOVE THE LAW (Dec. 11, 2017, 12:59 PM), <https://abovethelaw.com/2017/12/scotus-oral-arguments-suggest-that-americas-sports-betting-ban-could-soon-end/?rf=1>.

<sup>162</sup> *Id.*

<sup>163</sup> See *id.*

CHIEF JUSTICE ROBERTS: Well, is that serious? You have no problem if there's no prohibition at all and anybody can engage in any kind of gambling they want, a 12-year-old can come into the casino and—you're not serious about that.

MR. WALL: I—I'm very serious about it, Mr. Chief Justice. The problem that Congress was confronting was state sponsored and sanctioned sports gambling schemes. It didn't care if I bet with my buddy on the Redskins game or we had an office pool. It wasn't going after all sports gambling.

CHIEF JUSTICE ROBERTS: Well, but when you put the state in a position that that's the only thing they can do, that's not a real choice.

MR. WALL: Oh, it's not the only thing they can do. They can strengthen or they can repeal in whole, or they can repeal in part in various ways. The one thing they can't do is affirmatively engage in the one kind of conduct that Congress took off the table as a policy matter, and that's the definition of preemption.<sup>164</sup>

Justice Breyer also seemed to prefer the arguments made on behalf of New Jersey, and even made a few of them himself.<sup>165</sup>

JUSTICE BREYER: Okay. And then—now, I'm seeing this, I think. Is this your argument? And don't just say yes if it isn't, please.

(Laughter.)

JUSTICE BREYER: . . . Now I think what you actually say is the federal government makes a determination of what interstate commerce will be like in respect to this particular item. . . . Once it makes that determination, it can forbid state laws inconsistent with that determination. That's called preemption. But what it can't do is say that our determination is that the states roughly can do it as they want, but they can't do it that way; for to do that is to tell the state how to legislate,

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<sup>164</sup> *Id.*; Transcript of Oral Argument at 61–63, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018) (Nos. 16-476, -477).

<sup>165</sup> The Legal Blitz, *supra* note 161.

in which case, it is the state and not the person who becomes the subject of a federal law.

MR. OLSON: I wish I had said that myself, Justice Breyer.

(Laughter.)<sup>166</sup>

In response to the oral arguments, some journalists took Wall's sweeping explanation and the Justices' responses to suggest a win for New Jersey.<sup>167</sup> SCOTUS blog writer Amy Howe opined that the justices were sympathetic to New Jersey's cause and would potentially declare PASPA unconstitutional this summer.<sup>168</sup> Even the American Gaming Association, the national trade group, seemed hopeful in a press release statement issued December 4, following oral argument.<sup>169</sup>

Today is a positive day for the millions of Americans seeking to legally wager on sporting events. While we can't predict the intentions of Supreme Court Justices, we can accurately predict the demise of the Professional and Amateur Sports Protection of 1992 (PASPA). The justices of the Court expressed deep interest in the role of the federal government—a role that we believe has created a thriving illegal market that has driven trillions of dollars to offshore websites and corner bookies. States and tribal sovereign nations have proven to be effective regulators of gaming and today's oral arguments before the Supreme Court moved them one giant step closer to offering a new product that Americans demand.<sup>170</sup>

On May 14, 2018, the Supreme Court issued its opinion declaring PASPA to be unconstitutional.<sup>171</sup> In *Murphy v. National Collegiate Athletic Association*, re-named to reflect the new governor of New Jersey, the Court adhered relatively

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<sup>166</sup> *Id.*; Transcript of Oral Argument, *supra* note 152, at 11–12.

<sup>167</sup> See Ilya Somin, Opinion, *Place your bets on federalism – thoughts on today's oral argument in Christie v. NCAA*, WASH. POST (Dec. 4, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/12/04/place-your-bets-on-federalism-thoughts-on-todays-oral-argument-in-christie-v-ncaa/?utm\\_term=.fb2abe821383](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/12/04/place-your-bets-on-federalism-thoughts-on-todays-oral-argument-in-christie-v-ncaa/?utm_term=.fb2abe821383). See also The Legal Blitz, *supra* note 161.

<sup>168</sup> Howe, *supra* note 157.

<sup>169</sup> See Press Release, American Gaming Ass'n, American Gaming Association Statement on Supreme Court Oral Arguments on Christie v. NCAA (Dec. 4, 2017), <https://www.americangaming.org/new/american-gaming-association-statement-on-supreme-court-oral-arguments-on-christie-v-ncaa/>.

<sup>170</sup> *Id.*

<sup>171</sup> See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018).

closely to the speculation following oral arguments.<sup>172</sup> Justice Alito wrote the opinion, with which Justice Thomas concurred and Justice Breyer concurred in part.<sup>173</sup> Justice Ginsburg wrote a dissent, which Justice Sotomayor joined and Justice Breyer joined in part.<sup>174</sup>

Importantly, the crux of the disagreement between the justices was the issue of whether 28 U.S.C. § 3702(2) was severable from the challenged portion of § 3702(1).<sup>175</sup> Justice Breyer summarized the argument:

The challenged part of subsection (1) prohibits a State from “author[izing]” or “licens[ing]” sports gambling schemes; subsection (2) prohibits individuals from “sponsor[ing], operat[ing], advertis[ing], or promot[ing]” sports gambling schemes “pursuant to the law. . . of a governmental entity.” The first says that a State cannot authorize sports gambling schemes under federal law; the second says that (just in case a State finds a way to do so) sports gambling schemes that a State authorizes are unlawful under federal law regardless. Justice Ginsburg makes clear, the latter section can live comfortably on its own without the first.<sup>176</sup>

The majority opinion, however, found that subsection (2) was not severable from the rest of the Act and declared PASPA unconstitutional in its entirety.<sup>177</sup> The Court reasoned that:

if § 3702(2) is severed from § 3702(1), it implements a perverse policy that undermines whatever policy is favored by the people of the State. If the people of a State support the legalization of sports gambling, federal law would make the activity illegal. But if a State outlaws sports gambling, that activity would be lawful under § 3702(2). We do not think that Congress ever contemplated that such a weird result would come to pass.<sup>178</sup>

The fact that the Court struck down PASPA in its entirety is important because it means that states can now go forward with plans to legalize sports

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<sup>172</sup> See Press Release, *supra* note 169. See generally *Murphy*, 138 S. Ct. at 1474–77.

<sup>173</sup> *Id.* at 1468.

<sup>174</sup> *Id.*

<sup>175</sup> See *id.* at 1483, 1488, 1490.

<sup>176</sup> *Id.* at 1488 (internal quotations omitted).

<sup>177</sup> *Id.* at 1484, 1485.

<sup>178</sup> *Id.* at 1483–84.

wagering.<sup>179</sup> This means that the future of sports wagering in the United States, while ripe with potential, is more uncertain than ever as states determine whether or not they will offer sports wagering and how their legislative frameworks will be structured to support the new industries.<sup>180</sup> With the buzz surrounding the Supreme Court's decision on PASPA and the potential for future sports wagering jurisdictions, the interest in entity wagering may wane.<sup>181</sup>

#### IV. THE FUTURE OF ENTITY WAGERING

It is hard to say whether there is a future for entity wagering, which is plagued by its shadowy past and the uncertain future of sports betting in the United States following *Murphy*, particularly because the industry came under even more scrutiny in 2018.<sup>182</sup> In February 2018, Bettor Investments, one of Nevada's sports betting mutual funds, was hit with complaints from its investors after its founder, Matt Stuart, went "radio silent."<sup>183</sup> After attempting to contact the founder regarding unpaid promissory notes, two clients filed complaints with the Nevada Secretary of State and the Attorney General.<sup>184</sup> Three other clients have indicated their intent to do the same.<sup>185</sup>

This is not the first time that Bettor Investments has shut down.<sup>186</sup> In a 2016 email to the Las Vegas Review-Journal, Stuart explained that the fines with which CG Technology was hit in 2016 for illegal gambling and money laundering made him question the health of the market, particularly because CG Technology was, and is, the only sportsbook taking entity wagers.<sup>187</sup> Yet Stuart did not pay the investors their money back when Bettor Investments initially shut down.<sup>188</sup> Rather, he issued promissory notes, the collection of which is the crux of the 2018 complaints against him.<sup>189</sup>

In September 2018, another blow to the entity wagering industry came in the form of complaints from the Securities and Exchange Commission ("SEC").<sup>190</sup>

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<sup>179</sup> Tyler Lauletta, *The Supreme Court has overturned the federal ban on sports betting—here's what that means for the immediate future of gambling in America*, BUS. INSIDER (May 14, 2018, 5:35 PM), <https://www.businessinsider.com/supreme-court-sports-betting-decision-what-it-means-2018-5>.

<sup>180</sup> *See id.*

<sup>181</sup> Prince, *supra* note 109. *See* Lauletta, *supra* note 179.

<sup>182</sup> *See* Gouker, *supra* note 108.

<sup>183</sup> *See* Prince, *supra* note 109.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *See* John Mehaffey, *More Legal Woes Tied To CGT Sportsbooks, This Time For Entity Betting*, PLAY NEVADA (Sept. 14, 2018), <https://www.playnevada.com/3333/sports-betting-nevada-settlement/>; Gouker, *supra* note 108.

The SEC charged both Contrarian Investments and Nevada Sports Investment Group with “violating the federal securities laws” because “[w]hile the funds appear[ed] to be in compliance with Nevada law, the SEC believed they were not in compliance federally.”<sup>191</sup> Specifically, both complaints alleged that the companies “did not file a registration statement complying with Section 5 of the Securities Act in support of [their] sports betting fund[s], and did not fulfill the requirements necessary to qualify for an exemption from registration.”<sup>192</sup> Both companies “consented to judgment ‘without admitting or denying the allegations in the Complaint’[.]”<sup>193</sup>

If the problems with entities were not enough, CG Technology again faced scrutiny in 2018 from the Nevada Gaming Commission.<sup>194</sup> That time, the fines are for “allowing out-of-state mobile wagers, accepting bets after the conclusion of an event, and paying out both too much and too little on certain wagers. . . [and taking] improper bets at a Super Bowl party when the wrong lines were displayed on a terminal.”<sup>195</sup> The Nevada Gaming Commission even considered revoking the company’s license.<sup>196</sup> The recent difficulties that the entity wagering industry has faced, the history and ongoing trend of CG Technology’s legal violations, and the uncertainty following the Supreme Court’s decision in *Murphy* have all created what appears to be a dismal future for entity wagering.

But perhaps there is a thread of optimism for entity wagering. If sports wagering spreads to more states and involvement in legal sports betting grows, there may potentially be a new-found interest in the idea of sports “investing.” If this happens, Nevada entities and sportsbooks are armed with not only a familiarity of the industry and legislation, but a deep understanding of the potential pitfalls of entity wagering.<sup>197</sup> If an interest in entity wagering grows following the aftermath of *Murphy*, the industry may not be doomed. It remains to be seen whether the early industry players have made a bad gamble, or a good investment. Only time will tell.

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<sup>191</sup> Gouker, *supra* note 108.

<sup>192</sup> Complaint at 3, Sec. & Exch. Comm’n v. Contrarian Inv., LLC, No. 2:18-cv-01725 (D. Nev. Sept. 7, 2018); Complaint at 3, Sec. Exch. Comm’n v. Nev. Sports Inv. Group, No. 2:18-cv-01726 (D. Nev. Sept. 7, 2018).

<sup>193</sup> Gouker, *supra* note 108.

<sup>194</sup> Adam Candee, *Nevada Sportsbook Operator CG Technology Still In Hot Water With Regulators: License ‘Revocation Is Not Off The Table’*, LEGAL SPORTS REP. (Aug. 23, 2018, 12:13 PM), <https://www.legalsportsreport.com/23248/nevada-sportsbook-cg-technology-still-trouble/>.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See *supra* Section II. The Dream of Wall Street Style Sports Betting.