

ROLLING THE DICE WITH DISABILITY RIGHTS: A CRITIQUE OF THE EXCLUSION OF GAMBLING DISORDER FROM THE AMERICANS WITH DISABILITIES ACT

Danielle Oberlander*

I. INTRODUCTION

Gambling has long been one of America's favorite pastimes. In 2023, gross gaming revenue reached \$101.4 billion.¹ The growth and expansion of gambling raises concerns about problem gambling and the protections afforded to people with gambling disorder.

According to the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), gambling disorder is persistent and problematic gambling that leads to significant impairment or distress.² Gambling disorder is classified as a non-substance-related addictive disorder.³ This classification reflects the commonality between gambling disorder and substance use disorders such as alcohol use disorder.⁴ The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities in employment, transportation, public accommodations, communications, and access to government programs and services.⁵ Gambling disorder is notably excluded from the protections afforded by the ADA.⁶

* J.D. Candidate, May 2024, William S. Boyd School of Law, University of Nevada, Las Vegas. Thank you to my family, friends, and mentors at the William S. Boyd School of Law.

¹ *State of Play*, AM. GAMING ASS'N (Dec. 31, 2023), <https://www.americangaming.org/state-of-play/>.

² AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 585 (5th ed. 2013).

³ *Id.*

⁴ Nancy M. Petry et al., *An Overview of and Rationale for Changes Proposed for Pathological Gambling the DSM-5*, 30 J. GAMBLING STUD. 493, 494 (2014).

⁵ Nora McGreevy, *The ADA Was a Monumental Achievement 30 Years Ago, but the Fight for Equal Rights Continues*, SMITHSONIAN MAG. (July 24, 2020), <https://www.smithsonianmag.com/history/history-30-years-since-signing-americans-disabilities-act-180975409/#:~:text=HISTORY->

,The%20ADA%20Was%20a%20Monumental%20Achievement%2030%20Years%20Ago%2C%20but,Fight%20for%20Equal%20Rights%20Continues&text=For%20disability%20rights%20leader%20Judy,work%20remains%20to%20be%20done.

⁶ See 42 U.S.C. § 12211(b) (2018).

The ADA should be amended so that gambling disorder is no longer excluded from the list of protected disabilities. Amending the ADA could reduce social stigmas surrounding problem gambling and gambling disorder and provide legal recourse for victims of discrimination. Additionally, removing gambling disorder from the list of exclusions would promote inclusivity, furthering the intended purpose of the ADA.

Part II of this note addresses the ADA's purpose, history, and application. Part III explores the history of gaming and gaming legislation in the U.S. Part IV defines gambling, problem gambling, and gambling disorder. Part IV also explores the potential impact of COVID-19 on gambling disorder and discusses common comorbidities reported with gambling disorder. Finally, Part V argues in favor of amending the ADA to remove gambling disorder from the list of exclusions and addresses potential counterarguments. Ultimately, the goal of this note is to demonstrate how extending ADA protection to those with gambling disorder aligns with the ADA's purpose and ensures civil rights for this particular group.

II. AMERICANS WITH DISABILITIES ACT: PURPOSE, HISTORY, AND THE EXCLUSION OF GAMBLING DISORDER

A. History and Enactment

On July 26, 1990, the U.S. enacted the ADA, making it the first country to formally codify civil rights protections for people with disabilities.⁷ Before the ADA, most disability laws focused on rehabilitation instead of protection for people with disabilities.⁸ The government funded several vocational programs for people with disabilities, but there was no equal access guarantee.⁹ However, in 1973, Congress adopted the Rehabilitation Act signaling a shift from disability rehabilitation to the preservation of civil rights.¹⁰ The Act improved access to federally funded employment, housing, and transportation for individuals with disabilities.¹¹

⁷ *Id.*; McGreevy, *supra* note 5.

⁸ MICHAEL L. FOREMAN ET AL., THE ROAD TO THE ADA: SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL? A REPORT ON THE AMERICANS WITH DISABILITIES ACT., at 4 (2000).

⁹ *Disability Legislation History*, COLO. STATE UNIV., <https://disabilitycenter.colostate.edu/disability-awareness/disability-history/> (last visited Mar. 24, 2023).

¹⁰ REHABILITATION ACT OF 1973, PUB. L. NO. 93-112 (1973).

¹¹ Donovan W. Frank & Lisa L. Beane, *How the ADA Was Passed*, THE FED. LAW. 63 (June 2015), <https://www.disability.state.mn.us/wp-content/uploads/2017/07/CMA-The-Federal-Lawyer-feature6-jun15.pdf>.

After the Rehabilitation Act of 1973, many disability rights advocates and civil rights agencies began campaigning for additional safeguards.¹² At the time, many businesses were free to exclude and discriminate against disabled patrons.¹³ To resolve this problem, disability advocates worked on creating new comprehensive civil rights guarantee for people with disabilities.¹⁴

The National Council on Disability (NCD) first proposed the ADA in 1986 as a comprehensive piece of legislation to protect civil rights.¹⁵ In the NCD's report, it recommended a law "requiring equal opportunity for individuals with disabilities with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap."¹⁶ Later that year, the initial draft of the ADA made its way to Congress, but it was unsuccessful.¹⁷

When the ADA reached Congress for a second time in 1990, it passed with ease.¹⁸ The House and Senate held several hearings where individuals with disabilities and disability advocates testified about the importance of the ADA and the impact of the earlier Rehabilitation Act.¹⁹ Weeks later, President George H.W. Bush signed the ADA into law.²⁰

B. The ADA's Definition of Disability

The ADA introduced the three-pong definition for disability:

The term "disability" means, with respect to an individual –

- (A) A physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) A record of such an impairment; or
- (C) Being regarded as having such an impairment...²¹

¹² See *Celebrating the Americans with Disabilities Act*, U.S. DEPT. OF HEALTH AND HUM. SERV. (July 12, 2021), <https://acl.gov/ada>.

¹³ See *ADA History - In Their Own Words: Part One*, U.S. DEPT. OF HEALTH AND HUM. SERV., <https://acl.gov/ada/origins-of-the-ada> (July 25, 2023).

¹⁴ See *Celebrating the Americans With Disabilities Act*, *supra* note 12.

¹⁵ See *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities - With Legislative Recommendations*, THE NAT'L COUNCIL ON DISABILITY (Feb. 1986), <https://ncd.gov/publications/1986/February1986>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Helen Dewar, *Senate Approves Disabled Rights Bill*, WASH. POST (July 14, 1990), <https://www.washingtonpost.com/archive/politics/1990/07/14/senate-approves-disabled-rights-bill/b3ab12d6-8e48-41a6-8579-88463338d023/>.

¹⁹ Frank & Beane, *supra* note 11, at 65.

²⁰ 42 U.S.C. §§ 12101–12213; McGreevy, *supra* note 5.

²¹ 42 U.S.C. § 12102(1).

This note focuses on the first prong, known as the actual disability requirement.²² An actual disability may be physical or mental.²³ A physical disability is “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems.”²⁴ A mental disability is “any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”²⁵

A physical or mental impairment is not enough to establish a disability, the impairment must substantially limit one’s ability to perform one or more major life activity or bodily function.²⁶ Major life activities and bodily functions include caring for oneself, performing manual tasks, walking, seeing, and hearing.²⁷ To determine a substantial limitation, courts consider “the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long-term impact.”²⁸

Title I of the ADA requires employers to provide reasonable accommodations for qualifying employees and equal access to employment opportunities and benefits.²⁹ Title II prohibits public entities from discriminating based on disability and requires public entities to make programs, services, and activities accessible.³⁰ Title III prohibits discrimination in public accommodations, including privately owned and operated facilities.³¹ Title IV requires accessible telephone and internet services and mandates closed captioning of federally funded public service announcements.³² Title V is a miscellaneous provision and expressly excludes compulsive gambling from the ADA’s definition of disability.³³ This note will focus on Title I and Title V, the provisions most impacted by the addition of gambling disorder to the ADA.

²² *Id.*

²³ *Id.*

²⁴ 29 C.F.R. § 1630.2(h)(2).

²⁵ *Id.*

²⁶ 42 U.S.C. § 12102(2)(A).

²⁷ *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 195 (2002); 42 U.S.C. § 12102.

²⁸ 29 CFR § 1630.2 (referencing *Burgos v. Chertoff*, 510 F. Supp. 2d 993, 1000 (S.D. Fla. 2007)).

²⁹ 42 U.S.C. §§ 12111–12117.

³⁰ *Id.* §§ 12131–12165.

³¹ *Id.* §§ 12181–12189.

³² *See id.* §§ 12204, 12206; 47 U.S.C.A. § 611.

³³ FOREMAN ET AL., *supra* note 8, at 85.

1. *Title I of the ADA*

Title I of the ADA prohibits private employers, state and local governments, labor unions, and employment agencies from discriminating against qualified individuals because of a disability.³⁴ Title I states:

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.³⁵

Discrimination against a qualified individual can include “limiting, segregating, or classifying a job applicant or employee” in a way that adversely affects the individual.³⁶ The ADA does not list specific protected disabilities because legislatures wanted the language to be inclusive. Drafters were concerned that scientific advances and expanding medical knowledge would cause frequent amendments.³⁷ Therefore, courts decide disability status on a case-by-case basis without strict reliance on disability determinations in prior cases.³⁸

Title I of the ADA offers a path for employees who have faced discrimination to seek legal recourse.³⁹ The employee must file a charge with the U.S. Equal Employment Opportunity Commission (EEOC).⁴⁰ If the EEOC issues a right-to-sue letter, the employee may start collecting evidence to file a complaint in the appropriate federal court.⁴¹ The complaint must include a detailed account of the discrimination and request for relief.⁴²

2. *Title V of the ADA*

Title V of the ADA is a miscellaneous provision.⁴³ It covers the ADA's relationship with other laws, state immunity, the ADA's impact on insurance,

³⁴ See 42 U.S.C. § 12112(a).

³⁵ *Id.*

³⁶ *Id.* § 12112(b)(1).

³⁷ S. REP. NO. 101-116, at 20 (1989) (“It is not possible to include . . . all the specific conditions . . . that would constitute physical or mental impairments . . . particularly in light of the fact that new disorders may develop in the future.”).

³⁸ See generally *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 472 (1999); see also *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999).

³⁹ *Filing A Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/filing-charge-discrimination> (last visited Apr. 13, 2023).

⁴⁰ See generally *Betanzos v. Kinney Sys.*, 96-9066, 1997 U.S. App. LEXIS 11762 (2d Cir. May 19, 1997).

⁴¹ *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/filing-lawsuit> (last visited Nov. 8, 2023).

⁴² *Id.*

⁴³ 42 U.S.C. § 12201 (2018).

retaliation and coercion, illegal drug use, and attorney's fees.⁴⁴ Additionally, Title V states: "The term disability shall not include...compulsive gambling."⁴⁵

The ADA's exclusions stem from public opinion at the time of enactment.⁴⁶ Compulsive gambling, more appropriately called gambling disorder, is the uncontrollable urge to gamble despite negative or harmful consequences.⁴⁷ As history shows, people have often viewed gambling as a moral opprobrium.⁴⁸ However, "with the rapid expansion of legal gambling in America, traditional assumptions about gambling are losing their salience."⁴⁹ Additionally, most Americans now believe gambling is morally acceptable.⁵⁰

C. Evolution of the ADA and the Enactment of the ADAAA

1. *Title I of the ADA*

In 1999, the U.S. Supreme Court issued three decisions that limited the definition of disability.⁵¹ In the first case, *Sutton v. United Air Lines*, the Supreme Court held "the determination of whether an individual is disabled should be made with reference to measures to mitigate the individual's impairment."⁵² The petitioners, twin sisters, were diagnosed with severe myopia, a vision

⁴⁴ *What is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, <https://adata.org/learn-about-ada> (last visited Nov. 12, 2023).

⁴⁵ 42 U.S.C. § 12211(b)(2) ('Disability' also excludes "transvestism, transsexualism...gender identity disorders not resulting from physical impairments, or other sexual behavior disorder." In 2017, however, the District Court for the Eastern District of Pennsylvania interpreted the ADA to include gender dysphoria, essentially invalidating the ADA's Title V exclusion. *See* Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822, 2017 U.S. Dist. LEXIS 75665, at *8 (E.D. Pa. May 18, 2017)).

⁴⁶ *Gender Dysphoria Discrimination*, THE ADA PROJECT, <http://www.adalawproject.org/gender-dysphoria-discrimination> (last visited Nov. 12, 2023); *see* 135 CONG. REC. 19,853 (1989) (statement of Sen. Armstrong) (Senator Armstrong "could not imagine the [ADA's] sponsors would want to provide a protected legal status to somebody who has such [mental] disorders, particularly those [that] might have a moral content to them or which in the opinion of some people have moral content")

⁴⁷ *See* AM. PSYCHIATRIC ASS'N, *supra* note 2, at 586.

⁴⁸ *See* Rachel Volberg et al., *From Back Room to Living Room: Changing Attitudes Toward Gambling*, 10 PUB. PERSP. 8, 8 (1999).

⁴⁹ *Id.* at 9.

⁵⁰ Jim Norman, *Acceptance of Gambling Reaches New Heights, Politics*, GALLUP (June 7, 2018), <https://news.gallup.com/poll/235379/acceptance-gambling-reaches-new-heights.aspx>.

⁵¹ *The Sutton Trilogy*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/1999/02/22/sutton-trilogy/> (last visited Nov. 12, 2023).

⁵² *Sutton v. United Air Lines*, 527 U.S. 471, 475 (1999).

impairment.⁵³ Each sister's uncorrected visual acuity was 20/200 or worse in the right eye and 20/400 or worse in the left eye.⁵⁴ The sisters applied to be commercial airline pilots but were denied because their vision did not meet the minimum requirement, an uncorrected visual acuity of 20/100 or better.⁵⁵ In response, they filed a suit for disability discrimination under the ADA.⁵⁶

The majority, written by Justice O'Connor, held that the sisters' visual impairment was fully mitigated by their glasses; therefore, the severe myopia did not fall within the ADA's definition of disabled.⁵⁷ Additionally, the Court relied on the fact that "substantially limits" is in the "present indicative verb form."⁵⁸ Accordingly, the disability must "presently—not potentially or hypothetically—substantially limit" daily activities.⁵⁹ In this instance, the petitioners did not show that their myopia substantially limited any major life activity, or that they were foreclosed from applying to other positions because of their glasses.⁶⁰

In the second case, *Murphy v. UPS*, the Court emphasized its narrow definition of "substantially limit."⁶¹ In *Murphy*, an employee at United Parcel Service (UPS) was fired because "his blood pressure exceeded the DOT's requirement for drivers of commercial vehicles."⁶² Considering *Sutton*, the Court held high blood pressure could be mitigated by medication, and therefore the petitioner was not disabled according to the ADA.⁶³ Additionally, "to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job."⁶⁴ Instead, employees must show that they are precluded from a class of jobs.⁶⁵

In the third case of the *Sutton* Trilogy, *Albertson's Inc. v. Kirkingburg*, the Court ruled petitioners must provide a record of substantial limitation and expanded mitigating factors to include "measures undertaken" by the body.⁶⁶ The employee worked as a commercial truck driver but was fired because his vision was monocular.⁶⁷ The Court held the driver's monocular vision was not a disability because there was no evidence of substantial impairment.

After the *Sutton* Trilogy, the Court continued to limit the scope of the ADA's protections. In *Toyota Motor Manufacturing v. Williams*, the Court

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Sutton*, 527 U.S. at 484.

⁵⁸ *Id.* at 482.

⁵⁹ *Id.* at 482–83.

⁶⁰ *Id.* at 489.

⁶¹ *Murphy v. UPS*, 527 U.S. 516, 519 (1999).

⁶² *Id.* at 521.

⁶³ *Id.*

⁶⁴ *Id.* at 523.

⁶⁵ *See id.* at 525.

⁶⁶ *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–67 (1999).

⁶⁷ *Id.* at 560.

further narrowed the terms “substantially limits” and “major life activities.”⁶⁸ Before the suit, the employee was diagnosed with carpal tunnel, and the manufacturing plant assigned her to “various modified duty jobs.”⁶⁹ Years later the company decided that employees needed to perform tasks unmodified. After the abrupt policy change, the employee was fired. She subsequently sued the company for its failure to “reasonably accommodate her disability and terminating her employment.”⁷⁰ In the unanimous decision, the Court clarified that a substantial limitation precludes impairments that interfere in a minor way.⁷¹ The Court also restricted “major life activity” to “activities that are of central importance to daily life.”⁷²

In response to the Supreme Court’s narrow interpretation of disability, Congress passed the Americans with Disabilities Amendments Act of 2008 (ADAAA).⁷³ Congress explicitly rejected the Supreme Court’s holdings in the cases above in favor of a broad and inclusive reading of the ADA.⁷⁴

The holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect...⁷⁵

President George W. Bush signed the ADAAA on September 25, 2008.⁷⁶ The ADAAA eliminates the consideration of mitigating factors for the ‘actual disability’ prong, broadens the Court’s interpretation of a ‘substantial limitation’, and includes major bodily functions in the definition of major life activities.⁷⁷

⁶⁸ Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. OF POVERTY L. AND POL’Y 384, 388 (2019).

⁶⁹ *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 188 (2002).

⁷⁰ *Id.* at 190.

⁷¹ *Id.* at 197.

⁷² *Id.*

⁷³ *A Brief History of Civil Rights in the United States: ADA Amendments Act of 2008*, HOW. UNIV. SCH. OF L.: RSCH. GUIDES, <https://library.law.howard.edu/civilrightshistory/disabled/adaamendments> (Jan. 6, 2023).

⁷⁴ See 42 U.S.C. § 12101(a)(5) (2018).

⁷⁵ Americans with Disabilities Act Amendment Acts of 2008, Pub. L. 110-325 § 2, 122 Stat. 3553, 3553 (2008).

⁷⁶ Press Release, ACLU, *ACLU Praises House Passage of ADA Amend. Act of 2008* (Sept. 17, 2008) (on file with author).

⁷⁷ *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/questions-and-answers-final-rule-implementing-ada-amendments-act-2008> (last visited Nov. 25, 2023).

First, the ADAAA rejects the Court's requirement "that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures."⁷⁸ The ADAAA broadens the definition of a "substantial limitation", without regard for the effects of mitigating measures.⁷⁹ Now, a lower degree of functional limitation is required to prove a "substantial limitation."⁸⁰ In response to the *Sutton* Trilogy, Congress clarified the meaning of a "substantial limitation." Congress's findings expressly state: "current [EEOC] ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent."⁸¹

Finally, the ADAAA extends "major life activities" to include major bodily functions.⁸² Before the ADAAA, plaintiffs with impairments such as cancer, diabetes, and epilepsy, had a hard time proving a "substantial limitation" to a "major life activity."⁸³ Therefore, their cases rarely survived the summary judgment stage.⁸⁴ Now, "major life activities" also include "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."⁸⁵

III. LEGISLATIVE HISTORY AND OVERVIEW OF GAMING IN U.S.

Gambling has been a form of entertainment for centuries. The Commerce Clause of the U.S. Constitution gives Congress the power to regulate interstate and international gambling.⁸⁶ However, federal law defers to state law on matters concerning intrastate gambling.⁸⁷ Despite its storied history, social

⁷⁸ Americans with Disabilities Act Amendment Acts of 2008, Pub. L. 110-325 § 2, 122 Stat. 3553, 3553 (2008).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, Office of Civil Rights, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html> (Mar. 31, 2023).

⁸³ See Allison Ara, *The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problems of Perceived Disabilities?*, 50 SANTA CLARA L. REV. 255 (2010). See generally Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1 (2014).

⁸⁴ See LAURA ROTHSTEIN & ANN C. MCGINLEY, *DISABILITY LAW: CASES, MATERIALS, PROBLEMS* 10–11 (6th ed. 2017).

⁸⁵ 42 U.S.C. § 12102(2)(B) (2018).

⁸⁶ *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964). See generally *Champion v. Ames*, 188 U.S. 321 (1903).

⁸⁷ *United States v. Masino*, 869 F.3d 1301, 1302 (11th Cir. 2017).

attitudes toward gambling are divided.⁸⁸ Considerations that may impact attitudes toward gambling include customs, traditions, religion, morals, and context. Today, “public policies of most states have switched from prohibition to reluctant legalization to outright promotion.”⁸⁹

A. Early Gaming Legislation

Much like today, U.S. settlers during the Colonial Era disagreed about the fate of gambling. Some groups, including the Puritans, discouraged gambling as a social and moral evil.⁹⁰ To them, gambling went against the principles of constraint, community, and holiness.⁹¹ On the other hand, many groups advocated for government-funded lotteries to boost morale and raise funds for state-sponsored amenities.⁹²

Despite the popularity of gambling in the eighteenth century, the U.S. Government effectively banned all lotteries by 1830.⁹³ Additionally, many states, including Louisiana, made the operation of gambling houses a felony.⁹⁴ However, public opinion of gambling began to shift again in the mid-nineteenth century; riverboat gambling became quite common and early forms of coin-

⁸⁸ See generally *Is Gambling Harmful to Our Society, Debate*, CTR. FOR ETHICAL ORGANIZATIONAL CULTURES AUBURN UNIV., https://harbert.auburn.edu/binaries/documents/center-for-ethical-organizational-cultures/debate_issues/gambling.pdf (last visited Apr. 3, 2023).

⁸⁹ I. Nelson Rose, *Gambling and the Law: An Introduction to the Law of Internet Gambling*, 10 UNLV GAMING L. J. 1, 3 (2006).

⁹⁰ Ed Crews, *Apple-Pie American and Older Than the Mayflower*, COLONIAL J., Autumn 2008, <https://research.colonialwilliamsburg.org/Foundation/journal/Autumn08/gamble.cfm>.

⁹¹ Act of Nov. 27, 1741, ch. 722, *reprinted in* 3 THE COLONIAL LAWS OF NEW YORK 194 (1894) (Reenacted by Act of Nov. 20, 1745, ch. 796, *reprinted in* 3 THE COLONIAL LAWS OF NEW YORK 460-62 (1894)). The Act states: “[G]aming in the Colony of New York at Taverns & Other Publick Houses, for Moneys or Strong Liquors hath by Fatal Experience been found to be attended with many evil Consequences, not only by Corrupting & Vitiating the manners of many of the People of the said Colony, Encouraging Them to Idleness, Deceit & many other Immoralities but hath moreover a manifest Tendency to the Ruin of many.”

⁹² See generally Chil Woo, Note, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L. J. 569, 571 (2013); George Fenich, *A Chronology of (Legal) Gambling in the U.S.*, 3 UNLV GAMING RSCH. & REV. J. 65, 66-67 (1996).

⁹³ Fenich, 3 UNLV GAMING RSCH. & REV. J. 65, 67 (1996).

⁹⁴ See *id.*

operated gambling machines emerged.⁹⁵ Gambling once again fell out of favor during the early twentieth century.⁹⁶

In 1931, Nevada legalized commercial gaming after Phil Tobin, a republican assemblyman from Humboldt County, introduced Assembly Bill 98, the Wide Open Gambling Bill.⁹⁷ Notorious mobsters, including Benjamin “Bugsy” Siegel, came to Nevada with hopes of making gambling the primary local industry.⁹⁸ By many accounts, they succeeded.⁹⁹ Nevada became the gambling capital of the Western Hemisphere and a safe harbor for organized crime.¹⁰⁰

In response to the growth of legal and illegal gambling across the country, the U.S. Senate established a Special Committee to Investigate Organized Crime in Interstate Commerce.¹⁰¹ The Special Committee held hearings, known as the Kefauver Hearings, after Senator Estes Kefauver.¹⁰² During these hearings, the committee heard testimony regarding organized crime from law enforcement, organized crime leaders, and people with a general understanding of organized crime in America.¹⁰³

B. The Wire Act

In September 1961, President John F. Kennedy signed the Interstate Wire Act to combat organized crime and racketeering.¹⁰⁴ The Wire Act makes it illegal to “engage in the business of betting or wagering [to] knowingly use... a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers.”¹⁰⁵

⁹⁵ *See id.* at 68.

⁹⁶ *See id.* at 69.

⁹⁷ RESEARCH DIVISION, LEGISLATIVE COUNSEL BUREAU, POLICY AND PROGRAM REPORT: GAMING IN NEVADA 3 (Apr. 2016), <https://www.leg.state.nv.us/Division/Research/Publications/PandPReport/11-GN.pdf>.

⁹⁸ *See* Hal Rothman, NEON METROPOLIS: HOW LAS VEGAS STARTED THE TWENTY-FIRST CENTURY 10 (2002).

⁹⁹ *See generally id.*

¹⁰⁰ *Id.* at 14.

¹⁰¹ *See* Thomas Doherty, *Frank Costello's Hands: Film, Television, and the Kefauver Crime Hearings*, 20 FILM HIST. 359, 359–60 (1998).

¹⁰² *Id.*

¹⁰³ *Id.* at 361.

¹⁰⁴ I. Nelson Rose, *Gambling and the Law: and Introduction to the Law of Internet Gambling*, 10 UNLV GAMING RSCH. & REV. J. 1, 4 (2006); Michell Minton, *The Original Intent of the Wire Act and Its Implications for State-Based Legalization of Internet Gambling*, CTR. FOR GAMING RSCH. (2014).

¹⁰⁵ 18 U.S.C. § 1084(a) (2006).

For nearly fifty years, the scope of the Wire Act went unquestioned. However, with the expansion of internet gaming, the Wire Act's breadth has been up for debate. First, in 2002, the Fifth Circuit ruled that the Wire Act "does not prohibit non-sports internet gambling."¹⁰⁶ Despite this ruling, many states were still in limbo.¹⁰⁷ To remedy this, the Department of Justice issued a memorandum opinion stating the Wire Act only applies to "transmissions concerning sports-related wagering."¹⁰⁸

In 2018, the DOJ rescinded its 2011 guidance, opting for a broader interpretation of the Wire Act.¹⁰⁹ The 2018 Memorandum Opinion states, "[T]he words of the statute are sufficiently clear and that all but one of its prohibitions sweep beyond sports gambling."¹¹⁰ The DOJ's newest interpretation "brought lotteries and casino gaming back within the purview of the Wire Act and ... suggested that intermediate routing could be a basis for a Wire Act violation."¹¹¹

C. Professional and Amateur Sports Protection Act of 1992

In 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA). PASPA prohibited states from creating intrastate sports gambling schemes.¹¹² Supporters of PASPA believed sports gambling was "particularly addictive and especially attractive to young people."¹¹³ In 2018, the U.S. Supreme Court overturned PASPA in *Murphy v. NCAA*.¹¹⁴ The Court held that PASPA "unequivocally dictates what a state legislature may and may not do" in violation of the anti-commandeering doctrine.¹¹⁵ *Murphy* effectively

¹⁰⁶ *In re Mastercard Int'l Internet Gambling*, 313 F.3d 257, 263 (5th Cir. 2002).

¹⁰⁷ *See* Steven A. Engel *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, U.S. DEP'T OF JUST., 1 (Nov. 2, 2018), <https://www.justice.gov/olc/file/1121531/download>.

¹⁰⁸ Virginia A. Seitz, *Whether Proposals by Illinois and New York to Use the Internet and Out-Of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, U.S. DEP'T OF JUST. 3 (Sept. 20, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>.

¹⁰⁹ Engel, *supra* note 110, at 2.

¹¹⁰ *Id.* at 1.

¹¹¹ Mark A. Clayton & Erica L. Okerberg, *The Latest (Re)Interpretation of the Wire Act*, NEV. GAMING LAW. 54, 55 (2019).

¹¹² PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT, 28 U.S.C. §§ 3701–3704 (1992).

¹¹³ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1469 (2018).

¹¹⁴ *Id.* at 1485.

¹¹⁵ *Id.* at 1463.

opened the door for states to legalize sports betting.¹¹⁶ Today, sports betting is legal in thirty-three states.¹¹⁷

D. Unlawful Internet Gambling Enforcement Act of 2006

The Unlawful Internet Gambling Enforcement Act (UIGEA) is a federal law enacted in 2006 created to address concerns about problem gambling and money laundering.¹¹⁸ Under the UIGEA, financial institutions, such as banks, are required to identify and block transactions related to unlawful internet gambling.¹¹⁹ The statute prohibits anyone “engaged in the business of betting or wagering” from accepting payments in connection with unlawful gambling.¹²⁰ The UIGEA restricts how individuals can fund their online gambling accounts but does not prohibit online gambling.¹²¹

E. Responsible Gambling Protocol

Responsible gaming refers to practices and policies in place that mitigate the potential negative consequences of gambling.¹²² In 1978, Maryland became the first state to recognize excessive gambling as a threat to public health and subsequently opened the first treatment center for gambling disorder.¹²³ Within the next decade, several states followed suit.¹²⁴

In 2018, the National Council on Problem Gambling (NCPG) released legislative recommendations for states planning to legalize commercial gambling and sports wagering.¹²⁵ The recommendations include: (a) dedicating funds to

¹¹⁶ Mark Brnovich, *Betting on Federalism: Murphy v. NCAA and the Future of Sports Gambling*, 2017 CATO SUP. CT. REV. 247, 254 (2017-2018) <https://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2018/9/2018-cato-supreme-court-review-10.pdf>.

¹¹⁷ *Interactive U.S. Map: Sports Betting*, AM. GAMING ASS'N (Apr. 4, 2023), <https://www.americangaming.org/research/state-gaming-map/>.

¹¹⁸ 31 U.S.C. §§ 5361–5367 (2006).

¹¹⁹ 31 U.S.C. § 5363 (2006).

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *See AGA Responsible Gaming Code of Conduct*, AM. GAMING ASS'N, https://www.americangaming.org/wp-content/uploads/2020/11/AGA-Responsible-Gaming-Code-of-Conduct_Nov-2020.pdf (last visited Feb. 03, 2024).

¹²³ Joseph A. Dunne, *Increasing Public Awareness of Pathological Gambling Behavior: A History of the National Council on Compulsive Gambling*, 1 J. OF GAMBLING BEHAV. 8, 12 (1985).

¹²⁴ *Id.*

¹²⁵ Cait Huble, *Responsible Gaming Principles for Sports Gambling Legislation*, NAT'L COUNCIL ON PROBLEM GAMBLING (Mar. 12, 2018), <https://www.ncpgambling.org/wp-content/uploads/2018/03/Responsible-Gaming-Principles-for-Sports-Gambling-Legislation.pdf>.

prevent and treat gambling addiction, (b) requiring operators to implement responsible gaming programs which limit the time and money spent on betting, and (c) conducting surveys regarding the prevalence of gambling and problem gambling among patrons.¹²⁶ Additionally, the NCPG has called for states to donate 1% of their earnings to responsible gaming and problem gaming programs because underfunding reduces the effectiveness of recovery programs.¹²⁷

Today, responsible gaming laws and regulations vary greatly between the thirty-five jurisdictions where commercial gaming is legal.¹²⁸

In recent years, responsible gaming regulations have evolved to include a greater emphasis on self-limit tools that empower players to control their time... More than two-thirds of gaming jurisdictions now require operators to offer self-limit tools.¹²⁹

Twenty-eight jurisdictions have codified a commitment to services for people experiencing problem gambling and gambling disorder.¹³⁰ Additionally, twenty-one jurisdictions require land-based and online gaming operators to create a plan for addressing responsible gaming.¹³¹

IV. DEFINING GAMBLING, PROBLEM GAMBLING, AND GAMBLING DISORDER

Gambling, problem gambling, and gambling disorder are three related concepts with different definitions. Gambling is the “practice of risking money or other stakes in a game or bet.”¹³² Common forms of gambling include slot machines, lotteries, bingo, and fantasy sports. In most cases, gambling can be enjoyable and virtually harmless. However, in some cases, the rush of dopamine associated with winning can lead to problem gambling, or in extreme cases, diagnosable gambling disorder.¹³³

¹²⁶ *Id.*

¹²⁷ Barbara Rollins, *BettingUSA.com Dedicates 1% for Responsible Gambling*, NAT’L COUNCIL ON PROBLEM GAMBLING (Jan. 29, 2020), <https://www.ncpgambling.org/bettingusa-dedicates-1-for-responsible-gambling/>.

¹²⁸ See AM. GAMING ASS’N., RESPONSIBLE GAMING REGULATIONS AND STATUTES GUIDE 3 (2022).

¹²⁹ *Id.*

¹³⁰ *Id.* at 4–5.

¹³¹ *Id.* at 4.

¹³² *Gambling*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gambling> (last visited Nov. 9 2023).

¹³³ *Gambling Addiction: Resources, Statistics, and Hotlines*, UNIV. OF NEV., RENO, <https://onlinedegrees.unr.edu/blog/gambling-addiction-resources/> (last visited Mar. 23, 2023).

Problem gambling is the persistent urge to gamble despite potentially negative consequences.¹³⁴ “Participation in multiple gambling forms, high gambling expenditure, commencing gambling at a young age and experiencing an early big win” are risk factors for problem gambling.¹³⁵ According to a 1999 Gallup poll, 11% of adults self-reported problem gambling.¹³⁶ Today, estimates predict approximately six to eight million Americans experience problem gambling.¹³⁷

In some cases, problem gambling may lead to a diagnosable gambling disorder. Gambling disorder is the recurrent and persistent urge to gamble despite severe or extreme consequences.¹³⁸ According to the American Psychiatric Association (APA), gambling disorder is a non-substance-related addictive disorder.¹³⁹ To diagnose a gambling disorder, a person must meet at least four of the following criteria each year:

1. Need to gamble with increasing amount of money to achieve the desired excitement;
2. Restless or irritable when trying to cut down or stop gambling;
3. Repeated unsuccessful efforts to control, cut back on or stop gambling;
4. Frequent thoughts about gambling (such as reliving past gambling experiences, planning the next gambling venture, thinking of ways to get money to gamble);
5. Often gambling when feeling distressed;
6. After losing money gambling, often returning to get even (referred to as “chasing” one’s losses);
7. Lying to conceal gambling activity;
8. Jeopardizing or losing a significant relationship, job or educational/career opportunity because of gambling; or

¹³⁴ Seyed Amir Jazaeri & Mohammad Hussain Bin Habil, *Reviewing Two Types of Addiction – Pathological Gambling and Substance Use*, INDIAN J. OF PSYCH. MED. 6 (2012).

¹³⁵ Max Abbott, *The Epidemiology and Impact of Gambling Disorder and Other Gambling-Related Harm*, W.H.O. FORUM ON ALCOHOL, DRUGS, AND ADDICTIVE BEHAVIOURS (2017), <https://www.who.int/docs/default-source/substance-use/the-epidemiology-and-impact-of-gambling-disorder-and-other-gambling-relate-harm.pdf>.

¹³⁶ *Id.*

¹³⁷ See *Help & Treatment FAQ*, NAT’L COUNCIL ON PROBLEM GAMBLING, <http://www.ncpgambling.org/help-treatment/faq> (last visited Apr. 12, 2023) (estimating populations of four to six million adults with problematic gambling habits and another two million adults whose gambling patterns are sufficiently severe to meet the criteria for pathological gambling disorder).

¹³⁸ AM. PSYCHIATRIC ASS’N, *supra* note 2, at 586.

¹³⁹ *Id.*

9. Relying on others to help with money problems caused by gambling.¹⁴⁰

Current estimates suggest 1% of the United States population, or 3,400,000 people have a gambling disorder.¹⁴¹ Additionally, “an estimated .4% to 4% of adults in the [U.S.] will develop a gambling disorder in their lifetime.”¹⁴²

A. COVID-19 and the Potential Impact on Problem Gambling

The COVID-19 pandemic had a significant impact on land-based gambling, forcing many casinos, bingo halls, lottery retailers, and racetracks to shut down indefinitely; which paved the way for the emerging online gambling market to thrive.¹⁴³ The entire Las Vegas strip went dark for an unprecedented period.¹⁴⁴ According to the Commercial Gambling Revenue Tracker, revenue dropped by 75.6% from the first quarter of 2020 to the second quarter.¹⁴⁵

Despite the decrease in land-based gambling, regulated online gambling increased during the COVID-19 pandemic.¹⁴⁶ With the “demise of [the Professional and Amateur Sports Protection Act] and the outbreak of COVID-19, sports betting has consistently been growing at a higher rate.”¹⁴⁷ As of January 2024, twenty-nine states offer mobile sports betting through retail or online sportsbooks.¹⁴⁸ The National Council on Problem Gambling (NCPG)

¹⁴⁰ *What Is a Gambling Disorder?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/gambling-disorder/what-is-gambling-disorder#:~:text=A%20diagnosis%20of%20gambling%20disorder,back%20on%20or%20stop%20gambling> (last visited Nov. 7, 2023).

¹⁴¹ Jon E. Grant, *As Americans Turn Increasingly to Internet Betting, APA Releases New Edition of Gambling Disorder Guide*, AM. PSYCHIATRIC ASS'N. (Nov. 22, 2021), <https://www.psychiatry.org/news-room/news-releases/as-americans-turn-increasingly-to-internet-betting>.

¹⁴² *Gambling Disorder Screening Day: What You Should Know*, AM. PSYCHIATRIC ASS'N. (Mar. 14, 2023), <https://www.psychiatry.org/news-room/apa-blogs/gambling-disorder-screening-day>.

¹⁴³ See David C. Hodgins & Rhys M.G. Stevens, *The Impact of COVID-19 on Gambling and Gambling Disorder: Emerging Data*, NAT'L LIBR. OF MED. (Apr. 19, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8183251/>.

¹⁴⁴ See Anna Merlan, *After the End of the World: The Eerie Silence of the Las Vegas Strip*, THE GUARDIAN (Apr. 14, 2020), <https://www.theguardian.com/world/2020/apr/14/las-vegas-strip-closed-coronavirus>.

¹⁴⁵ *Commercial Gaming Revenue Tracker 2020 Second Quarter*, AM. GAMING ASS'N, 1 (2020).

¹⁴⁶ *Id.* at 2.

¹⁴⁷ *Id.*

¹⁴⁸ *Interactive U.S. Map: Sports Betting*, AM. GAMING ASS'N (Apr. 4, 2023), <https://www.americangaming.org/research/state-gaming-map-mobile/>.

reported approximately 45% more calls to its hotline for problem gambling from 2021 to 2022.¹⁴⁹

Stressful life events, such as a global pandemic, may lead people to engage in maladaptive behaviors, including gambling.¹⁵⁰ COVID-19's social distancing protocol increased the feeling of loneliness, depression, and anxiety in many Americans.¹⁵¹

B. Gambling Disorder and Comorbidity

Comorbidity occurs when a person has two or more concurrent medical conditions.¹⁵² Several studies reveal a high rate of comorbidity between gambling disorder and mental health disorders.¹⁵³ Unfortunately, comorbidity has created a potential loophole for disability discrimination in the workplace.¹⁵⁴ For instance, if an employer is aware that the employee is doubly afflicted, the employer may choose to fire an employee for a gambling disorder rather than a protected disability.¹⁵⁵ If Title V of the ADA is not amended, "the employer could potentially use the excluded gambling disorder as a defensive bar to defeat the employee's claim" for an otherwise covered disability.¹⁵⁶

V. AMENDING THE ADA TO INCLUDE GAMBLING DISORDER

In *Trammell v. Raytheon*, an employee sued his employer for disability discrimination connected to his gambling disorder.¹⁵⁷ The employee's gambling

¹⁴⁹ Cait Huble, *NCPG Statement on the Betting on Our Future Act*, News, NAT'L COUNCIL ON PROBLEM GAMBLING (Feb. 10, 2023), <https://www.ncpgambling.org/ncpg-statement-on-the-betting-on-our-future-act/>.

¹⁵⁰ See Alex Blaszczynski & Lia Nower, *A Pathways Model of Problem and Pathological Gambling*, 97 ADDICTION 487–88 (Apr. 25, 2002), <https://doi.org/10.1046/j.1360-0443.2002.00015.x>.

¹⁵¹ See Jennifer W. Robientte et al., *Perceived Neighborhood Cohesion Buffers COVID-19 Impacts on Mental Health in a United States Sample*, 285 SOC. SCI. & MED. 5–6 (2021), <https://doi.org/10.1016/j.socscimed.2021.114269>.

¹⁵² See Carrie N. Klabunde et al., *Assessing Comorbidity Using Claims Data: An Overview*, 40 MED. CARE IV-26, IV-26 (2002) ("Comorbidities are additional diseases beyond the condition under study").

¹⁵³ See e.g., Victoria Manning et. al, *Problem Gambling and Substance Use in Patients Attending Community Mental Health Services*, 6 J. OF BEHAV. ADDICTIONS, 678, 680–83 (2017); William N. Thompson & R. Keith Schwer, *Beyond the Limits of Recreation: Social Costs of Gambling in Southern Nevada*, 17(1) J. OF PUB. BUDGETING, ACCT. & FIN. MGMT. 62, 85–86 (2005).

¹⁵⁴ Kathleen V. Wade, *Challenging the Exclusion of Gambling Disorder as a Disability Under the Americans with Disabilities Act*, 64 DUKE L. J. 947, 975 (2015).

¹⁵⁵ *Id.* at 975–76.

¹⁵⁶ *Id.* at 976.

¹⁵⁷ *Trammell v. Raytheon Missile Sys.*, 721 F. Supp. 2d 876, 877 (D. Ariz. 2010).

became “aggressive,” and his depression worsened after his marriage ended.¹⁵⁸ After the employee was involved in a fatal accident, his employer got wind of his gambling activities and related hardship.¹⁵⁹ The employee was fired without the opportunity to seek equitable relief under the ADA because Congress expressly excludes gambling disorder.¹⁶⁰ This experience is not unique among people with gambling disorders.

The ADA does not exclude alcohol use disorder; therefore, employees may file a charge with the EEOC.¹⁶¹ This opportunity is not afforded to people who have been discriminated against because of a gambling disorder. This section will analyze the potential social and economic benefits of amending the ADA. The increase in awareness and information available about gambling disorders could increase funding for research and treatment. Finally, this section will address counterarguments to amending the ADA.

A. Treating Gambling Disorder like Alcohol Use Disorder Under the ADA

Gambling disorder should be treated like alcohol use disorder under the ADA. Alcohol use disorder is not a listed exception, despite negative public opinion towards excessive alcohol use.¹⁶² According to the ADA:

A person with alcohol use disorder may be a person with a disability and protected by the ADA if they are qualified to perform the essential functions of the job. An employer may be required to provide an accommodation to a person with alcohol use disorder. However, an employer can discipline, discharge, or deny employment to a person with alcohol use disorder whose use of alcohol adversely affects job performance and conduct.¹⁶³

Employers may prohibit alcohol in the workplace and require employees to be sober during working hours but generally cannot fire employees for alcohol use outside of work.¹⁶⁴ If the ADA is amended, cases like John Trammell’s would turn on whether the employee could prove (1) the existence of a disability, (2) that he was otherwise qualified for the job, (3) and that he was subject to adverse

¹⁵⁸ *Id.* at 876–77.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 878.

¹⁶¹ *Are People With Alcohol Use Disorder Protected by the ADA?*, ADA NAT’L NETWORK, <https://adata.org/faq/are-people-with-alcohol-use-disorder-covered-ada> (last visited Apr. 14, 2023).

¹⁶² Megan Brenan, *Most in U.S. Say Alcohol Adversely Affects Drinkers, Society*, GALLUP (Aug. 5, 2022), <https://news.gallup.com/poll/395867/say-alcohol-adversely-affects-drinkers-society.aspx>.

¹⁶³ *Are People With Alcohol Use Disorder Protected by the ADA?*, *supra* note 164.

¹⁶⁴ 42 U.S.C. § 12114(c) (2018).

employment action because of the disability.¹⁶⁵ However, as the ADA currently reads, employers are free to wrongly discriminate, discipline, and fire employees for gambling disorder without consequence.

B. Impact of Treating Gambling Disorder Like Alcohol Use Disorder Under the ADA

If the ADA is amended so that gambling disorder is no longer excluded there could be significant social and economic benefits. First, amending the ADA would reduce stigma toward people with problem gambling and gambling disorder. If social stigma is reduced, it could eliminate a significant barrier to seeking help and rehabilitation for people with gambling disorder. The social impact would also be coupled with positive economic impacts. For instance, more employees could keep their jobs and avoid filing for unemployment.

A stigma is the devaluation of one person, or a group of people based on perceived mental, physical, or social otherness.¹⁶⁶ People with gambling disorder are generally seen as having a lower addiction liability and it is generally more attributed to flawed character.¹⁶⁷ Commonly, “[f]actors such as shame, denial . . . are the primary barriers to help-seeking among individuals experiencing a gambling-related problem.”¹⁶⁸ When it comes to addiction, “the public and even many in healthcare and the justice system continue to view it as a result of moral weakness and flawed character.”¹⁶⁹ Unfortunately, people with addictive use disorders may internalize this stigma, and as a result, refuse to seek treatment.¹⁷⁰

To eliminate the social stigma surrounding problem gambling and gambling addiction, the ADA should be amended. One way to reduce stigma is to “shine a light on people who are in recovery and, in doing so, expose the long-hidden reality that people actually do recover” from addiction.¹⁷¹ The first step

¹⁶⁵ *Evans v. E. Baton Rouge Par. Sch. Bd.*, No. 19-542-SDD-RLB, 2022 U.S. Dist. LEXIS 40825, at *21 (M.D. La. Mar. 8, 2022).

¹⁶⁶ *Stigma*, AM. PSYCH. ASS’N, <https://dictionary.apa.org/stigma> (Apr. 19, 2018).

¹⁶⁷ See Barna Kokolj Thege et al., *Social Judgments of Behavioral Versus Substance-Related Addictions: A Population-Based Study*, 42 ADDICTIVE BEHAVS. 24, 29 (2015).

¹⁶⁸ See Justin Pulford et al., *Barriers to Help-Seeking for a Gambling Problem: The Experiences of Gamblers Who Have Sought Specialist Assistance and the Perceptions of Those Who Have Not*, 25(1) J. OF GAMBLING STUD. 33, 36–37 (2009).

¹⁶⁹ Nora Volkow, *Addressing the Stigma That Surrounds Addiction*, NAT’L INST. ON DRUG ABUSE: NORA’S BLOG (Apr. 22, 2020), <https://nida.nih.gov/about-nida/noras-blog/2020/04/addressing-stigma-surrounds-addiction>.

¹⁷⁰ *Id.*

¹⁷¹ *Smashing the Stigma of Addiction*, HAZELDEN BETTY FORD FOUND., <https://www.hazeldenbettyford.org/addiction/stigma-of-addiction> (last visited Apr. 15, 2023).

to normalizing the experience of problem gambling and gambling disorder would be to remove it from the ADA's list of exclusions.

The COVID-19 pandemic and the growth of internet gambling have increased the prevalence of gambling disorder. Therefore, amending the ADA would promote awareness, understanding, and acceptance of gambling disorder during a time when it is increasingly necessary.

Additionally, in the post-*Murphy* era, sports betting has become universal. In a survey conducted by the NCPG, researchers found the rate of problem gambling in sports bettors is at least twice as high as other gamblers.¹⁷² Therefore, the importance of responsible gambling and education on problem gambling cannot be understated.¹⁷³

If the ADA is amended, knowledge regarding gambling disorder will increase. With increase in knowledge, people may be more inclined to view gambling disorder in the medical and scientific context, rather than as a moral shortcoming. This shift in attitude could lead to increased funding and resources for problem gambling and gambling disorder.

C. Economic Impact

The positive economic impact of gambling can be easily seen and described, but the economic burdens of problem gambling and gambling disorder are often hidden and difficult to quantify. Experts argue that addictions, like gambling disorder, diminish a person's capacity to evaluate and can cause the person "to act impulsively, without accurately weighing future consequences."¹⁷⁴ The persistent urge to gamble can affect an individual's ability to work and participate in society.¹⁷⁵

From the community standpoint, amending the ADA could alleviate the economic burden of gambling disorder on state and local governments which bear the cost of unemployment. DSM-5 lists nine criteria to diagnose gambling disorder.¹⁷⁶ The criteria include, "frequent thoughts about gambling" and "jeopardizing or losing significant relationship, job or educational/career opportunity because of gambling."¹⁷⁷ Despite being diagnosable symptoms,

¹⁷² *A Review of Sports Wagering & Gambling Addiction Studies Executive Summary*, NAT'L COUNCIL ON PROBLEM GAMING, https://www.ncpgambling.org/wp-content/uploads/2020/01/Sports-gambling_NCPGLitRvwExecSummary.pdf (last visited Apr. 12, 2023).

¹⁷³ See generally Diana Moreira et al., *Risk Factors for Gambling Disorder: A Systematic Review*, 39(2) J. OF GAMBLING STUD. 483 (2023).

¹⁷⁴ *United States v. Hendrickson*, 25 F. Supp. 3d 1166, 1173 (N.D. Iowa 2014).

¹⁷⁵ See Iman Parhami & Timothy W. Fong, *A Brief Review of Gambling Disorder and Five Related Case Vignettes*, 32(4) PSYCH. TIMES 4 (Apr. 30, 2015), <https://www.psychiatrictimes.com/journals/psychiatric-times/vol-32-no-4>.

¹⁷⁶ AM. PSYCHIATRIC ASS'N, *supra* note 2.

¹⁷⁷ *Id.*

these may also be grounds for employee termination or retaliation by an employer.¹⁷⁸

In some instances, people who are terminated for problem gambling or gambling disorder will need to enroll for state-sponsored unemployment benefits.¹⁷⁹ If the ADA is amended, employees with gambling disorder can pursue equitable relief against employers. This shift could effectively reduce the number of people with gambling disorder on unemployment and positively impact attitudes towards people with gambling disorder in the workplace.

In addition to impacting local and state economies, gambling disorder can be detrimental to personal finances. DSM-5 also lists “increasing amount of money to achieve the desired excitement” and “after losing money gambling, often returning to get even” as criteria for gambling disorder.¹⁸⁰ These symptoms may have a negative impact on personal finances because people with gambling disorder are likely to engage in risky and impulsive behavior.¹⁸¹ People with gambling disorder may bet more than they can afford, chase losses, and borrow money.¹⁸² In extreme instances, this can result in bankruptcy or borrowing with aggressive lending companies.

D. Potential Pushback to Amending the ADA

Critics may argue that allowing employees to sue for gambling disorder discrimination would open the door for frivolous lawsuits and thereby delegitimize the ADA.¹⁸³ This argument fails to consider the safeguards the EEOC has put in place to prevent frivolous employment discrimination claims. The concern over increased litigation and abuse of the ADA is myopic. Before filing an employment discrimination claim, the employee must file a charge with the EEOC.¹⁸⁴ An EEOC staff member will review the claim and assess whether litigation is the proper channel.¹⁸⁵ In 2020, 67,448 charges were filed with the

¹⁷⁸ See *Trammell v. Raytheon Missile Sys.*, 721 F. Supp. 2d 876, 877 (D. Ariz. 2010).

¹⁷⁹ See William N. Thompson & R. Keith Schwer, *Beyond the Limits of Recreation: Social Costs of Gambling in Southern Nevada*, 17(1) J. of Pub. Budgeting, Accounting & Financial Management 62, 77 (2005).

¹⁸⁰ AM. PSYCHIATRIC ASS'N, *supra* note 2.

¹⁸¹ Bill Leonard, *Problem Gamblers Pose Workplace Safety and Security Risks*, SOC. FOR HUMAN RESOURCES MGMT. (Apr. 16, 2014), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/gambling-workplace.aspx>.

¹⁸² See AM. PSYCH. ASS'N, *supra* note 3, at 586.

¹⁸³ See 135 CONG. REC. 19,853 (1989) (statement of Sen. Armstrong) (§ 12211 exclusions would remove “some of the mental disorders that would have created the more egregious lawsuits.”).

¹⁸⁴ 42 U.S.C. § 12117.

¹⁸⁵ *Id.*

EEOC; 37% of those were disability charges.¹⁸⁶ The number of charges has been steadily decreasing over the last decade.¹⁸⁷ Therefore, the EEOC has the capacity to field charges for discrimination related to gambling disorder.

Another argument made by many critics is that people with gambling disorder are free to bring discrimination suits for gambling-related discrimination under state law. It is true that when employers are covered by state or local law and by the ADA, “the entity must comply with each provision...according to which provision is the most generous to individuals with disabilities.”¹⁸⁸ Because states do not exclude gambling disorder from disability legislation, an employee may pursue claims for discrimination in state court. However, in instances when a federal employer is exclusively covered by the ADA, employees do not have the same option. Amending the ADA will provide an additional guardrail to prevent discrimination against people with gambling disorder, and ensure federal employees have access to the same protection.

VI. CONCLUSION

The ADA should be amended to remove gambling disorder from the list of excluded disabilities. Gambling disorder is a DSM-5 non-substance addictive disorder, and there is research to support gambling disorder’s devastating impact on individuals and the community. Therefore, people with gambling disorder should be afforded the same protections and accommodations as people with other disabilities. Amending the ADA to include gambling disorder is a necessary step toward ensuring equal access and protections.

¹⁸⁶ *Charge Statistics FY 1997 Through FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (2022) <https://www.eeoc.gov/dat/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022>.

¹⁸⁷ *See id.*

¹⁸⁸ *Federal, State, and Local Laws: Conflicts or Complements?*, MID-ATLANTIC ADA CTR., <https://www.adainfo.org/content/federal-state-and-local-laws-conflicts-or-complements> (last visited Apr. 13, 2022).