

AMERICAN MONEYMAKERS: THE FUTURE OF ONLINE POKER AFTER PASPA

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INTRODUCTION

Where competition and chance are found, those willing to gamble on the outcome are often present. In the 21st Century, many people have been enticed by online forms of gambling (known simply as “gaming”).² Traditional forms of gambling, such as parimutuel horse betting, are available online, as well as new forms of gambling like Daily Fantasy Sports (DFS).¹³ Games of chance and games of skill alike are at the fingertips of players. However, there is one particular game that is effectively banned from being played online: poker.

With the advent of the internet, online poker soon followed; the first real money game was played in 1998.⁴ The online poker industry quickly boomed, highlighted by the success of its most storied figure, Chris Moneymaker.⁵ In 2003, the aptly-named accountant and poker player became the first person to qualify for the gargantuan World Series of Poker tournament through an online qualifier—he would go on to win the tournament and the \$2.5 million cash prize.⁶ This spark led to the explosion of online poker in America and abroad.

While his unexpected victory bolstered the online poker industry, Congress made other plans when they passed the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).⁷ While the Act was not a direct ban of online poker *per se*, it effectively rendered the game unplayable in the United States by prohibiting financial institutions from allowing wire transfers to internet gambling sites.⁸ The Act cited internet gambling as a “growing cause of debt collection problems for insured depository institutions and the consumer credit industry.”⁹ However, online poker platforms continued to operate in the United States in direct defiance of the

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² *Global Gambling Industry in Recent Years*, CASINO.ORG www.casino.org/features/gambling-statistics [<https://perma.cc/BX2P-SCF2>].

³ See *Welcome to TwinSpires*, TWINSPIRES, <https://www.twinspires.com/about-us> [<https://perma.cc/53SD-ZCMS>]; FANDUEL, <https://www.fanduel.com> [<https://perma.cc/NR2M-GHP8>]; DRAFTKINGS, <http://www.draftkings.com> [<https://perma.cc/L7NW-DNFF>].

⁴ Erik Smith, *Planet Poker Era*, POKER HIST. (Aug. 10, 2011, 5:15 PM), www.pokerhistory.eu/history/planet-poker-first-online-poker-room [<https://perma.cc/MTB2-UWHU>].

⁵ See Bernard Lee, *Life and Legacy of Chris Moneymaker*, ESPN (May 24, 2018), www.espn.com/poker/story/_/id/23594337/world-series-poker-life-legacy-chris-moneymaker-15-years-2003-wsop-main-event-win-changed-world-poker [<https://perma.cc/MCL9-UX8S>].

⁶ *Chris Moneymaker*, POKERLISTINGS, <https://www.pokerlistings.com/poker-player/chris-moneymaker> [<https://perma.cc/SFS5-A89Z>].

⁷ Unlawful Internet Gambling Enforcement Act of 2006, ch. 53, sec. 802, §§ 5361–67, Pub. L. No. 109-347, 120 Stat. 1952 (codified as 31 U.S.C. §§ 5361–67).

⁸ 31 U.S.C. § 5363 (2006).

⁹ 31 U.S.C. § 5361 (2006).

Act.¹⁰ On April 15, 2011, deemed “Black Friday,” the industry was dealt a death blow when the Department of Justice indicted the three largest poker sites operating in the United States, causing them to leave the American market for fear of violating the UIGEA.¹¹ The industry crumbled in the United States.¹²

One of the most popular and illustrious forms of gambling is sports betting. Until 2018, sports betting had endured a similar ban in the United States under the Professional and Amateur Sports Protection Act (PASPA).¹³ The Supreme Court’s landmark decision in *Murphy v. NCAA* reversed the Congressional ban on sports betting holding that PASPA is unconstitutional and giving states the authority to make sports betting legal within their borders.¹⁴ In the years leading up to this decision, the national sentiment surrounding sports has become increasingly positive.¹⁵ For example, in 2016, one survey found that “[o]f those who watched Super Bowl 50, 80% want to see the country’s current sports betting laws change.”¹⁶ In the wake of this ruling, twenty states have now legalized sports betting and many other states have active legislation moving towards legalization.¹⁷

This Note will argue that the original concerns leading to the enactment of the UIGEA are outdated and unreasonable in light of the Supreme Court’s recent ruling in *Murphy*. With the defeat of PASPA, a way forward can and should be forged for legal online poker to return to its former prominence in America. Any discussion of American gambling post-*Murphy* will necessarily include a discussion of sports betting. Part I contains an initial overview of the UIGEA, including an analysis of case law surrounding the UIGEA. Part II will elucidate the circumstances surrounding the defeat of PASPA in *Murphy* and what impact that has on litigation surrounding the UIGEA. Part III will argue that legalization of online poker will bring greater government oversight and benefit players overall, as many players turned to unregulated offshore sites following Black Friday. Part IV will discuss the state of online poker today, including the benefits the game brings to the four states where online poker is currently legal. Part V will speculate on a possible path forward for states where online poker has been historically banned, utilizing Kentucky as an example.

¹⁰ Andrew M. Nevill, *Folded Industry? Black Friday’s Effect on the Future of Online Poker in the United States*, 2013 U. ILL. J.L. TECH. & POL’Y 203, 204 (2013).

¹¹ *Id.*

¹² *See id.*

¹³ Professional and Amateur Sports Protection Act, ch. 178, sec. 1–3, §§ 3701–3704, Pub. L. No. 102-559, 106 Stat. 4227 (1992); *see generally* John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U.L. REV. 329, 334–37 (2019) (explaining the events leading up to and the passage of PASPA).

¹⁴ *Murphy v. NCAA*, 138 S. Ct. 1461, 1484–85 (2018).

¹⁵ *See* Justin Fielkow et al., *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 47–49 (2016).

¹⁶ *Id.* at 48.

¹⁷ Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Apr. 7, 2021) https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization [<https://perma.cc/52YC-5W43>].

I. OVERVIEW AND PRELIMINARY REFUTATIONS OF THE UIGEA

Due to being outdated and unfairly restrictive of online poker, the efficacy of the UIGEA needs to be reconsidered. When PASPA was still valid, it imposed a nationwide ban on sports betting.¹⁸ Conversely, the UIGEA does not alter, limit, or extend any Federal or State law “prohibiting, permitting, or regulating gambling within the United States.”¹⁹ Instead, the Act prohibits those “engaged in the business of betting or wagering” from knowingly accepting funds of any kind “in connection with the participation of another person in unlawful internet gambling.”²⁰ Unlawful Internet gambling is defined as placing, receiving, or knowingly transmitting “a bet or wager by any means which involves the use . . . of the Internet where such a bet or wager is unlawful under any applicable Federal or State law” where “the bet or wager is . . . made.”²¹ This definition would later be subject to multiple interpretations by the DOJ; more on that later.²²

The UIGEA describes a “bet or wager” in part as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance.”²³ The Act notably carves out exceptions for other gambling venues such as horse racing, intratribal gaming, securities exchanges, and fantasy sports.²⁴ It is important to reiterate that the Act does not explicitly ban online poker, but rather, it effectively bans players in the United States from depositing funds to these sites through financial institutions.²⁵

While PASPA was inherently unconstitutional, the UIGEA is not. In *Murphy v. NCAA*, PASPA was deemed to have violated foundational principles of federalism and dual sovereignty, holding that the Act “‘regulate[s] state governments’ regulation’ of their citizens.”²⁶ However, the UIGEA notably does not regulate state governments’ regulation of their citizens; it does not alter or limit any existing Federal or State regulation on gambling.²⁷ The language within the Act is not inherently unconstitutional. But, the absence of certain words or phrases reveals important information about the UIGEA.

While the word “poker” or the phrase “online poker” is never explicitly mentioned in the Act, courts have largely considered poker as a “game subject to chance.”²⁸ In an overwhelming display of failure, the Act itself does not include any language aiding courts in the determination of whether a particular game should fall

¹⁸ 28 U.S.C. § 3702 (1992).

¹⁹ 31 U.S.C. § 5361(b) (2006).

²⁰ *Id.* at § 5363.

²¹ *Id.* at § 5362.

²² *See infra* Part III.

²³ 31 U.S.C. § 5362 (2006).

²⁴ *Id.*

²⁵ *Id.* at § 5363.

²⁶ *Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018) (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

²⁷ 31 U.S.C. § 5361(b) (2006).

²⁸ *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 630–31 (N.C. Ct. App. 2007); *Commonwealth v. Dent*, 992 A.2d 190, 195–96 (Pa. Super. Ct. 2010).

under the designation of being “subject to chance.”²⁹ Following the enactment of the statute, state courts were quickly faced with the question of determining whether games are subject to chance or not. Judges employed various tests aimed at solving this problem, one of the most oft utilized being the predominate-factor test.³⁰

In *Joker Club*, a North Carolina Court of Appeals case, the court elucidates the predominate-factor test.³¹ The court noted that “while all games have elements of chance, games which can be determined by superior skill are not games of chance.”³² The court compares poker to games such as bowling and billiards, highlighting that “the instrumentality for victory is in each player’s hands and his fortunes will be determined by how skillfully he use[s] that instrumentality.”³³ In this court’s view, poker does not provide players with the instrumentalities needed for victory; chance takes this out of the player’s hands.³⁴ Further, the court reasoned that while a skilled player may have a statistical advantage, they are always subject to a turn of a card, which is an instrumentality beyond their control.³⁵ In *Dent*, the Superior Court of Pennsylvania, relied on *Joker Club* in their terse discussion of chance and skill, ultimately grafting *Joker Club*’s exact reasoning onto the facts of their case without much further consideration.³⁶ The ambiguity inherent in the UIGEA left trial courts with the burden of making important determinations on whether poker fell under the language of the statute or not.

Poker players who are more skilled and knowledgeable can certainly increase their chance of winning over less-skilled players by studying odds, playing stronger hands, and making quick determinations with the limited information available on the table at any given time.³⁷ However, courts have maintained that the game itself is ultimately predicated on chance.³⁸ This is likely due to an overall unfamiliarity with the mechanics of the game coupled with ambiguous statutory language. Because poker has historically been understood as a game which is “subject to chance,” it falls under the purview of the UIGEA. However, there is a strong argument to be made that any game may be interpreted as a game “subject to chance.”

To begin, the phrase “subject to chance” is subject to many competing interpretations. It can be construed either quite liberally or quite narrowly. It is difficult for one to imagine a game which does not include some element which happens to be “subject to chance.” The strike of a golf ball, no matter how perfect, is subject to the chance that a gust of wind will cause the ball to miss its target ever

²⁹ 31 U.S.C. §§ 5361–67.

³⁰ See, e.g., *Joker Club*, 643 S.E.2d at 629–30.

³¹ *Id.*

³² *Id.* at 630.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 630–31.

³⁶ *Commonwealth v. Dent*, 992 A.2d 190, 196 (Pa. Super. Ct. 2010).

³⁷ See generally, *Poker Starting Hands Percentage & How to Play Your Position*, CARDSCHAT, <http://www.cardschat.com/poker-starting-hands-percentage.php> [https://perma.cc/KLU6-NAVQ] (explaining different poker strategies).

³⁸ E.g., *Dent*, 992 A.2d at 195–96.

so slightly.³⁹ Is the wind an instrumentality which is essential to the game of golf, yet “beyond the player’s control?” Clearly. Golf, like poker, is a game subject to chance. Under the reasoning of *Joker Club*, golf should also be considered a game of chance, not skill. This example highlights the shortcomings of the outdated and unclear statutory language employed in the UIGEA’s construction.

The UIGEA’s prohibition on games “subject to chance” makes even less sense when posed with a list of legal, regulated games which are also “subject to chance.” For example, parimutuel horse betting, DFS, and most recently, sports betting, are all games which are able to be legalized and regulated by states if they so choose.⁴⁰ Employing the predominate-factor test leads to the realization that all three of these are subject to more chance than skill; the instrumentalities essential to these games are all out of the player’s control. The results of sports matches are wholly determined by the players in the particular game, not any bet placed on the contest. The accuracy of LeBron James’ jump shot is dependent on LeBron James, not a person sitting on their couch watching the game and betting on whether the shot will go in. Conversely, a poker player controls whether they choose to play the hand they are dealt as well as whether they would like to bet, and if so, how much. The poker player competes against other individual agents. However, online poker remains held hostage by the UIGEA. The argument that online poker should be effectively banned because it is “subject to chance” fails.

Another criticism of the UIGEA is that it unduly restrains citizens’ pursuit of happiness.⁴¹ The restrictions of the Act limit citizens’ ability to spend their money how they so choose. It also requires citizens to adhere to the moral code of the State—the outdated paternalistic argument that the State is protecting its citizens by restricting them from internet gambling.⁴² The UIGEA contains serious statutory and conceptual flaws, which will be discussed below.

II. WHAT DOES PASPA’S DEFEAT SIGNAL FOR THE UIGEA?

There is hope that the UIGEA will fall subject to a similar fate as PASPA. The Supreme Court’s decision in *Murphy v. NCAA* was the culmination of a long battle against PASPA.⁴³ The citizens of New Jersey ultimately voted for an amendment to the state constitution which allowed sports gambling to be conducted within its borders.⁴⁴ Multiple lawsuits were brought by the NCAA and three major sports organizations, eventually culminating in *Murphy*.⁴⁵ The plaintiffs argued that New Jersey’s legislature violated PASPA’s language which prohibited states from

³⁹ See Roman V. Yampolskiy, *Game Skill Measure for Mixed Games*, 1 INT’L J. COMPUTER & INFO. ENGINEERING, 662, 663 (2007), <https://publications.waset.org/4769/pdf> [<https://perma.cc/ZB5Q-FRT5>].

⁴⁰ 31 U.S.C. § 5362.

⁴¹ See Michael A. Tselnik, Note, *Check, Raise, Or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 HOFSTRA L. REV. 1617, 1669 (2007).

⁴² *Id.*

⁴³ *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

⁴⁴ *Id.* at 1471.

⁴⁵ See *id.* at 1465–66.

enacting laws authorizing sports betting.⁴⁶ In the majority opinion, Justice Alito stated that PASPA violated the anti-commandeering principle by dictating what the New Jersey legislature may or may not do.⁴⁷ After holding that no provision of PASPA was severable, it was no longer the law.⁴⁸ Unfortunately, the constitutional principles leading to the Supreme Court's abrogation of PASPA do not transpose to the UIGEA. Thus, the decision in *Murphy* does not provide any corollary legal precedent which can be utilized.

However, the Supreme Court's decision reveals the defeat of the rationale which originally supported the passing of PASPA in 1992. The same rationale which supported the former ban on sports gambling undergirds the current ban on online poker. Opponents reason that both are particularly addicting, especially to young people.⁴⁹ Both bans led to significant illegal activity which flew in the face of federal legislation. Reports from 2017 (before *Murphy*) indicated that an estimated amount of \$150 billion annually was illegally wagered on sports while PASPA was still in effect.⁵⁰ Much like the era of Prohibition on alcohol, Americans have proven that they will continue to gamble despite federal regulation attempting to change their behavior.⁵¹ The American spirit endures.

In years past, opponents of sports gambling included representatives from all four major professional sports organizations: the NBA (National Basketball Association), MLB (Major League Baseball), NFL (National Football League), and NHL (National Hockey League).⁵² Interestingly, the NFL has now turned to partnering with major sports betting and DFS sites such as DraftKings.⁵³ The NBA has also come to partner with sports betting operators, even amidst infamous scandals of game fixing throughout its history.⁵⁴ Former opponents have come to be proponents. The growing acceptance of sports gambling signals hope for advocates of online poker. As states pursue legislation seeking to legalize sports gambling, it will provide the perfect venue for discussing the legalization and regulation of poker. *Murphy* signals a turning of the tides. If states are willing to consider legalizing sports betting,

⁴⁶ *Id.* at 1471. Holden's article provides a much deeper analysis of the litigation history surrounding PASPA. Holden, *supra* note 13, at 353–64.

⁴⁷ *Murphy*, 138 S. Ct. at 1478.

⁴⁸ *Id.* at 1484.

⁴⁹ *Id.* at 1469.

⁵⁰ See Holden, *supra* note 13, at 336.

⁵¹ See generally Jack S. Blocker, Jr., *Did Prohibition Really Work?*, 96 AM. J. PUB. HEALTH 233 (2006) (arguing that Prohibition did not eliminate alcohol consumption in America, but it significantly reduced it).

⁵² Holden, *supra* note 13, at 337, 339–42, 346.

⁵³ *DraftKings to Open Fantasy Lounges at AT&T Stadium, Gillette Stadium & Arrowhead Stadium to Kick Off the Football Season*, PRNEWswire (Aug. 26, 2015, 11:52 PM), <http://www.prnewswire.com/news-releases/draftkings-to-open-fantasy-lounges-at-att-stadium-gillette-stadium--arrowhead-stadium-to-kick-off-the-football-season-300133579.html> [https://perma.cc/4LS7-AKEX].

⁵⁴ See *NBA Announces Sports Betting Partnership with William Hill*, NBA (Oct. 2, 2019, 12:40 PM), <http://www.nba.com/article/2019/10/02/nba-partnership-william-hill-official-release> [https://perma.cc/J5PV-8FQT]; see also Scott Eden, *How Former Ref Tim Donaghy Conspired to Fix NBA Games*, ESPN (Jul. 9, 2020), http://www.espn.com/nba/story/_/id/25980368/how-former-ref-tim-donaghy-conspired-fix-nba-games [https://perma.cc/R4C3-VGYC] (showing game-fixing in the NBA).

which is undoubtedly “subject to chance,” they should also consider legalizing online poker—arguably a game of skill.

III. THE STATE OF ONLINE POKER IN AMERICA TODAY

The online poker industry has been in a constant state of development and fluctuation since its inception. Historically, violations of the UIGEA have relied on underlying violations of the Federal Wire Act of 1961.⁵⁵ The Wire Act makes it illegal to knowingly use a wire communication facility for the placing of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest.⁵⁶ Since its enactment, “the federal government repeatedly employed the Wire Act as a tool to prosecute individuals engaged in unlawful interstate gambling, including sports wagering and non-sports wagering.”⁵⁷ Once the internet age arrived, the government utilized the phrase “wire communication facility” to directly reach those using their computers and the internet in their transmissions.⁵⁸ Much like people use phones to contact their local bookie to place bets, people use computers to compete in online poker tournaments. The Department of Justice (DOJ) utilized the broad language of the Wire Act to gain control over the online gambling industry in the modern age.⁵⁹

In a surprising move in 2011, the Department of Justice’s Office of Legal Counsel (OLC) released a memo regarding the Wire Act that led to major changes for online poker.⁶⁰ The OLC stated that “the Wire Act does not reach interstate transmission of wire communications that do not relate to a ‘sporting event or contest.’”⁶¹ With these words, the DOJ seemingly lost its foothold for prosecutions unrelated to sports contests. Finally, the laws surrounding online gambling seemed clear and discernable. Relying on this newly printed memo, multiple states—Nevada, New Jersey, Delaware, and Pennsylvania—passed legislation legalizing online poker within their borders.⁶²

The industry took one great stride forward, but shortly took two steps back. The OLC surprisingly reversed their 2011 opinion in a recent memo from 2018 regarding their interpretation of the Wire Act.⁶³ This opinion asserted that “all but one of the Wire Act’s four prohibitions go beyond sports wagering and extend to all internet gambling, including online casino games, poker, and lotteries.”⁶⁴ With the 2018 memo, states were again left in the dark on the federal legality of online poker. States that passed legislation regulating online poker have continued to operate despite the

⁵⁵ See Gregory A. Brower & Mark R. Starr, *The Wire Act Revisited: How the DOJ’s Recent Reinterpretation May Affect Gaming in Nevada*, NEV. LAW., Apr. 2019, at 8, 10.

⁵⁶ *Id.* at 9 (citing 18 U.S.C. § 1084(a)).

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* (citation omitted).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

2018 memo.⁶⁵ Unfortunately, they face the possibility that courts may adopt the DOJ's interpretation and invalidate their legislation.⁶⁶ The relative ease with which the DOJ continues to interpret and reinterpret this provision is unsettling and may cause hesitation from states attempting to pass future legislation surrounding online gambling.

Nevertheless, a few states have moved forward in the midst of uncertainty. By 2014, three states had legalized online poker: Nevada, New Jersey, and Delaware.⁶⁷ Players located in these three states can legally play online poker through WSOP.com.⁶⁸ These states have fairly small populations: Nevada and Delaware are only the 35th and 45th most populous states respectively.⁶⁹ Therefore, to increase the overall health of the player pool, they signed an interstate agreement allowing them to consolidate the player pools.⁷⁰ This means that a poker player located in Nevada can compete online against a player in Delaware at any given time. Recently in 2017, New Jersey joined in this agreement, adding to the player population.⁷¹ This partnership should continue to flourish as more states join the agreement.

Pennsylvania is relatively new to the online poker scene, passing legislation legalizing online gambling in 2017 in the midst of the OLC's initial Wire Act interpretation.⁷² Following a soft launch in late 2019, December brought the official launch of online poker in Pennsylvania through PokerStars.⁷³ The most prominent online poker site has partnered with Mount Airy Casino Resort to obtain their license to operate in Pennsylvania.⁷⁴ At this point, Pennsylvania has not joined the interstate agreement with the few other states allowing regulated online poker.⁷⁵ In the month of December alone, online poker generated \$2.5 million in revenue in the state.⁷⁶ Analysts predict that the online market as a whole will continue to grow as more players move online in the years to come.⁷⁷

⁶⁵ See *id.* at 10.

⁶⁶ *Id.*

⁶⁷ Pete Kaminski, *Legal Nevada Online Poker*, LEGAL US POKER SITES (Feb. 23, 2021), www.legaluspokersites.com/state-laws/nevada [https://perma.cc/EHM7-WXSF].

⁶⁸ *Id.*

⁶⁹ Cliff Spiller, *Nevada and Delaware Sign an Agreement to Share iPoker Player Pools*, LEGAL US POKER SITES (Nov. 2, 2018), www.legaluspokersites.com/news/nevada-and-delaware-sign-an-agreement-to-share-ipoker-player-pools/3212 [https://perma.cc/UVA8-8K4F].

⁷⁰ *Id.*

⁷¹ Kaminski, *supra* note 67.

⁷² Steve Schult, *Pennsylvania Online Poker Generates \$2.5 Million Worth of Revenue in First Month*, CARD PLAYER (Jan. 21, 2020), www.cardplayer.com/poker-news/24602-pennsylvania-online-poker-generates-2-5-million-in-revenue-in-first-full-month [https://perma.cc/YR7V-P789].

⁷³ *Id.*

⁷⁴ *PokerStars Launches in Pennsylvania*, POKER STARS (Nov. 4, 2019), https://www.pokerstars.com/en/news/pokerstars-launches-in-pennsylvania/57916/?no_redirect=1 [https://perma.cc/U7ZQ-PQJF].

⁷⁵ *Multi-State Legal Online Poker*, ONLINE POKER REP. (Mar. 22, 2021), www.onlinepokerreport.com/multi-state-poker [https://perma.cc/DB2Z-9XRT].

⁷⁶ Schult, *supra* note 72.

⁷⁷ *Id.* The outset of the COVID-19 pandemic has kept most gamblers at home. As anticipated, the online gaming industry has only continued to thrive due to widespread restrictions on in-person betting. If more states had online options available, gamblers may not have to risk their health by going to a casino during a pandemic in order to make their bets. See FN Media Group, *How Sports Betting is Thriving Despite COVID-19 Lockdowns*, PRNEWswire (July 17, 2020, 8:00 PM), www.prnewswire.com/news

As the industry matures and continues to develop, online poker will play a significant role in the ultimate success of gaming. As it stands, there are only six states with laws authorizing online poker.⁷⁸ The path to legalization looks different for many states, however there is hope that the law will catch up with the public consensus in due time. For citizens of most states, players must get creative in order to find a table to deal them in.

IV. AMERICAN PLAYERS ACCESS OFFSHORE SITES TO PLAY ONLINE POKER TODAY

During Prohibition, those who desired a bit of a stronger drink than others had to come by that drink through alternative means.⁷⁹ However, the creativity and ingenuity of the American people ensured that liquor was readily available in the midst of its illegality.⁸⁰ Similarly, online poker remains under prohibitive regulation. Today, crafty online poker players must access offshore sites which are not under the purview of American regulation.⁸¹

There are numerous offshore sites offering online poker including Bovada and BetOnline which receive heavy traffic from American players.⁸² The UIGEA failed to keep American players from simply accessing alternative websites at the click of a mouse and a few keystrokes. The overarching issue with a multiplicity of offshore sites is that players often struggle determining which ones to trust.⁸³ Additionally, players may use alternate means of funding their accounts, such as utilizing cryptocurrency, which is not backed by any regulated financial institution.⁸⁴ These difficulties underscore the need for further reconsideration of the UIGEA and its unintended consequences for American players.

One illustrious scandal occurred shortly after the passage of the UIGEA in 2007. A prominent site called Absolute Poker was founded in 2003 by a group of Montana fraternity brothers with no previous experience.⁸⁵ The company was moved to Costa Rica where it was able to operate without a legitimate gaming license.⁸⁶ After the exodus of established sites in America following the passage of the UIGEA, “Absolute Poker remained and became a legitimate contender in the market despite

releases/how-sports-betting-is-thriving-despite-covid-19-lockdowns-301095319.html
[<https://perma.cc/2ACF-9SUN>].

⁷⁸ *Multi-State Legal Online Poker*, *supra* note 75.

⁷⁹ See Blocker, *supra* note 51, at 237 (discussing the sale of dehydrated grapes and how consumers would rehydrate and ferment them to make wine).

⁸⁰ *See id.*

⁸¹ Nevill, *supra* note 10, at 217.

⁸² Adrian Sterne, *Offshore Poker Sites*, TOP 10 POKER SITES, <https://www.top10pokersites.net/offshore-poker-sites> [<https://perma.cc/3L28-MBUC>].

⁸³ See Jake Patel, *Offshore Gambling*, COMPARE.BET, www.compare.bet/en-us/offshore-gambling [<https://perma.cc/BL4K-MBTW>].

⁸⁴ See generally Avery Minor, Note, *Cryptocurrency Regulations Wanted: Iterative, Flexible, and Pro-Competitive Preferred*, 61 B.C.L. Rev. 1149, 1150 (discussing cryptocurrency in the United States).

⁸⁵ Natalie Faulk, *Ultimate Bet and Absolute Poker: What Happened?*, UPSWING POKER (Mar. 27, 2018), www.upswingpoker.com/ultimate-bet-absolute-poker-scandal [<https://perma.cc/4EAH-J7R6>].

⁸⁶ *Id.*

its rudimentary software.”⁸⁷ In 2007, players began noticing suspicious activity from one particular player named “Potripper” who was located in Costa Rica.⁸⁸ It was discovered that Potripper had access to every other player’s hole cards throughout the tournament through the use of a separate master account.⁸⁹ In poker, every piece of information is incredibly valuable and he had access to it all. This account would follow Potripper from table to table, revealing complete information on the cards of the other contestants.⁹⁰ The site was eventually shut down in 2011, resulting in a 100 percent loss of player funds.⁹¹ Unfortunately, these stories are common, especially with players utilizing offshore sites.

There is a myriad of solutions to this predicament, but some are more viable than others for the long-term success of online poker in America. It is abundantly clear that the UIGEA and the Wire Act have not worked to ban online gambling in America. One possible solution is inaction—the federal government could certainly continue allowing American players to send their money to offshore sites and incur difficulties using Bitcoin. This would avoid the problem of American financial institutions accepting funds associated with gambling. It would accomplish the letter of the law, but not accomplish the intended effect of enacting the UIGEA in the first place, which is to stop Americans from gambling online.⁹² They will find a way to work around the strictures of the UIGEA. Another possible solution is for the DOJ to issue another clarifying memo regarding the Wire Act and the UIGEA. While this would provide states with a quick solution, uncertainty as to the enforcement of these provisions would yet remain. We cannot have another situation on an unregulated site such as the Potripper debacle. Realistically, there are two solutions that take precedent and are more viable over any others.

First, the Department of Justice should repeal the UIGEA. States which have already offered regulated online poker to their citizens deserve to know their hard work will not be taken away from them at a moment’s notice by the Department of Justice’s interpretative memos. Many of the games the UIGEA sought to ban are subject to carve outs or other exceptions, which now includes sports betting.⁹³ It is only a matter of time before the language on online poker is chipped away as well, rendering the statute meaningless. This is one possible solution, but there is more that can be done.

Second, citizens should take action to show their state legislators that online gambling is here to stay. States should capitalize on these tax revenue streams as quickly as possible by implementing and maintaining infrastructure in order to accommodate the demand. With the defeat of PASPA, states can choose to offer

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Absolute Poker*, SAFEST POKER SITES, www.safestpokersites.com/absolute-poker [https://perma.cc/QAS9-T8VD].

⁹² 31 U.S.C. § 5361.

⁹³ *Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018).

sports betting.⁹⁴ Many states already allow parimutuel horse betting.⁹⁵ Daily Fantasy Sports are growing rapidly in many states.⁹⁶ Online poker should be available alongside these companions.

While there is no direct legal precedent supporting an immediate challenge of the UIGEA, there is still action to be taken. Of the two possible solutions, it would be more economically and politically efficient for the federal government to return the right to decide back to the individual states through a repeal of the UIGEA. Individual states are better suited to understand the desires of their citizens and the challenges that may come with implementation in their specific contexts. Moreover, with so many carve outs already in place for the various forms of gambling mentioned above, the UIGEA is merely a shell of what it was originally intended to accomplish. Its scope has narrowed to only effectively ban online poker and online casino games.⁹⁷ With a repeal, state legislatures would be able to act without fear that a simple DOJ interpretation may invalidate an entire piece of legislation. There must be a better environment for Americans to play online poker other than untrustworthy offshore websites often funded through backdoor cryptocurrency transactions.

V. AN EXAMPLE OF A PATH TO LEGALIZATION: THE BLUEGRASS STATE

State lawmakers must work against the broad federal laws in place if they want to pass legislation allowing online gambling—that is, a muddy interpretation of the Wire Act and confusion as to the DOJ’s enforcement of the UIGEA. The path to legalization will likely be more difficult for states which have not historically embraced online gambling and which do not have land-based casinos. Kentucky has historically embraced gambling related to horse racing.⁹⁸ Historical racing machines, which functionally operate like classic slot machines using past horse races, have been used in the Bluegrass state for nearly a decade.⁹⁹ Currently, there is a bill in progress to protect the operation of these machines after the Kentucky Supreme Court ruled that they did not fall under the Kentucky statute’s definition of parimutuel wagering.¹⁰⁰ Nevertheless, Churchill Downs offers online and mobile betting through their TwinSpires subsidiary.¹⁰¹ The same enthusiasm, however, has not surrounded other forms of gambling in Kentucky.

⁹⁴ *Id.* at 1484–85.

⁹⁵ *States with Legal Horse Betting*, LEGAL SPORTS BETTING (Mar. 29, 2021), <https://www.legalsportsbetting.com/states-with-horse-betting/> [<https://perma.cc/7ASA-8HK5>].

⁹⁶ Fielkow et al., *supra* note 15, at 48–49.

⁹⁷ 31 U.S.C. § 5361.

⁹⁸ *States with Legal Horse Betting*, *supra* note 95; *see generally* KY REV. STAT. ANN. § 230.260 (West 2011) (providing authority to the Kentucky Horse Racing Commission)

⁹⁹ Steve Bittenbender, *Kentucky Legislation Begins Action to Legalize Historical Horse Racing Machines*, CTR. SQUARE (Feb. 4, 2021), https://www.thecentersquare.com/kentucky/kentucky-legislature-begins-action-to-legalize-historical-horse-racing-machines/article_3ec45258-6721-11eb-b253-a7a291baf292.html [<https://perma.cc/JR8A-VKAP>].

¹⁰⁰ *Id.*; *Family Tr. Found., Inc. v. Ky. Horse Racing Comm'n*, No. 2018-SC-0630-TG, 2020 WL 5806813, at *5 (Ky. Sept. 24, 2020), *reh'g denied* (Jan. 21, 2021).

¹⁰¹ *Bet Online with TwinSpires*, TWINSPIRES, www.twinspires.com [<https://perma.cc/G64M-DE24>].

Kentucky has notoriously been opposed to online poker for over a decade. In 2008, then-governor, Steve Beshear, attempted “to seize 141 domain names registered to online companies” in order to prevent Kentuckians from accessing the sites.¹⁰² The Governor’s rationale included many familiar arguments, including the claim that minors had easy access to the sites and the sites took away taxes that would usually go to the state.¹⁰³ The state recently won litigation against PokerStars, though it is still seeking recovery of the \$1.3 billion.¹⁰⁴ The case was originally brought in 2010 following the enactment of the UIGEA.¹⁰⁵

Even in a state as hostile to online poker as Kentucky, there is surprisingly a chance that legalization will occur in the near future. Ironically, the current Governor, Andy Beshear, Steve Beshear’s son, is advocating for the online poker industry to come to Kentucky.¹⁰⁶ The revenue raised by the gambling industry will predominantly be used to help fund a severely underfunded pension plan for state educators—a viable solution to an overwhelming issue in the Commonwealth.¹⁰⁷

The Governor also has legislators on his side. On the first day of the 2020 session, Representative Adam Koenig introduced HB 137 which purported legalization of sports betting, DFS, and online poker.¹⁰⁸ Under HB 137, players who would like to bet online would have to register in person with a licensed organization—likely one of the state’s racetracks.¹⁰⁹ Although this bill was approved by the House, it was killed by partisan politics before it could reach the Kentucky Senate.¹¹⁰ Unfortunately, in 2021, a similar bill, HB 241, failed in the Kentucky House, because of the more pressing issue of historic horse betting.¹¹¹ Koenig plans to reintroduce

¹⁰² Bob Pajich, *Kentucky Attempts to Seize Online Poker Domains*, CARD PLAYER (Sep. 22, 2008), www.cardplayer.com/poker-news/5121-kentucky-attempts-to-seize-online-poker-domains [<https://perma.cc/QZC6-HPVT>].

¹⁰³ *Id.*

¹⁰⁴ John Cheves, *Online Poker Site Owes KY \$1.3 Billion. The State is Reaching for First \$100 Million.*, LEXINGTON HERALD LEADER (Mar. 25, 2021, 3:29 PM), <https://www.kentucky.com/news/politics-government/article250204085.html#:~:text=The%20high%20court%20said%20Kentucky's,poker%20is%20illegal%20in%20Kentucky>.

¹⁰⁵ Steve Schult, *Kentucky Wins \$1.3 Billion Lawsuit Against PokerStars*, CARD PLAYER (Dec. 17, 2020), <https://www.cardplayer.com/poker-news/25559-kentucky-wins-1-3-billion-lawsuit-against-pokerstars> [<https://perma.cc/MY2G-Y96Y>].

¹⁰⁶ Jennifer Newell, *Online Poker Remains in Kentucky Gubernatorial Debates*, LEGAL US POKER SITES (Oct. 17, 2019), www.legaluspokersites.com/news/online-poker-kentucky/19482 [<https://perma.cc/W8MB-JLN8>].

¹⁰⁷ *Id.*

¹⁰⁸ Alex Weldon, *Kentucky Online Poker Bill Clears First Committee Hurdle with Ease*, ONLINE POKER REP. (Jan. 22, 2020, 5:00 PM), www.onlinepokerreport.com/39654/kentucky-online-poker-bill-advances [<https://perma.cc/E9VY-P4M2>].

¹⁰⁹ *Id.*

¹¹⁰ Tim Sullivan, *Despite Majority Support in Kentucky House, Odds Were Against Sports Betting Bill*, LOUISVILLE COURIER J. (Apr. 8, 2020, 5:50 PM), <https://www.courier-journal.com/story/sports/2020/04/08/kentucky-house-politics-kills-kentucky-sports-betting-bill/2970078001/> [<https://perma.cc/2KYY-JXGT>].

¹¹¹ Christina Monroe, *Kentucky Kills Bill for Legal Sports Betting in 2021*, LEGAL SPORTS BETTING (Mar. 14, 2021, 12:03 PM), <https://www.legalsportsbetting.com/news/kentucky-kills-bill-for-legal-sports-betting-in-2021/> [<https://perma.cc/5TY5-K76J>].

the bill in the 2022 session.¹¹² Kentucky should look to surrounding states as guides in determining tax rates that will be most beneficial to its businesses as well as its citizens. With each passing year, Kentucky loses tax revenue to Indiana, Ohio, and other surrounding states.¹¹³

The Commonwealth will, however, still have to contend with challenges by the federal government under the UIGEA. If the DOJ's Criminal Division chooses to prosecute online poker operators again as in Black Friday, states would have to argue against the UIGEA and the Wire Act. This matter is complicated given the OLC's 2018 memo.¹¹⁴ If Kentucky follows the solution offered above, however, there is greater hope that online gambling will be here to stay in the Bluegrass State for good. If the Governor and Legislature work together to bring gambling to Kentucky, it could serve as a viable solution to the pension crisis facing the state.

VI. CONCLUSION

The path to legalization among states is encouraging in light of the multi-state online agreement. The foundation has been laid for states to legalize poker in their jurisdiction and then join the multi-state agreement. This would exponentially increase the player pools across the states, adding to the overall health and continuity of the industry. The fact that states like Kentucky are pursuing legalization of online gaming is promising for the future of the industry.

Now is the time for the federal government and individual states to embrace the legalization of many forms of gaming, including online poker. Public approval for online gambling is increasing, offering a prime opportunity for states to act. Rather than allowing offshore gaming websites to infiltrate the American market, states should reclaim the market share. Online gaming will give states access to additional tax revenue which can be put to use improving the lives of their citizens. States are merely delaying the inevitable legalization of online poker if they choose to wait. For now, states should play their hand right instead of folding.

¹¹² *Id.*

¹¹³ James McNair, *How Kentucky Money Fuels Cross-Border Casinos, Other State Budgets*, KY. CTR. INVESTIGATIVE REPORTING (Mar. 6, 2015), <https://kycir.org/2015/03/06/how-kentucky-money-fuels-cross-border-casinos-other-state-budgets/> [<https://perma.cc/K3BF-5KF6>]. While the article's numerical data is outdated in this rapidly growing industry, it is a detailed empirical analysis of the problem, and the same issues yet remain for Kentuckians today.

¹¹⁴ Brower & Starr, *supra* note 55, at 9.