

COMMENT

CHASING LOSSES WITH CREDIT: THE DANGERS OF THE ABSENCE OF FINANCIAL INSTRUMENT RESTRICTIONS IN STATE GAMBLING LAW

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*In the landmark 2018 case *Murphy v. NCAA*, the Supreme Court repealed the Professional and Amateur Sports Protection Act. The Act was the federal blockade preventing states from legalizing sports gambling. Just over five years later, almost three-fourths of states have legalized sports wagering and now benefit from millions in tax revenue. Yet, legality does not equate to safety, and gambling can still be an extremely detrimental activity without guardrails. As states have passed their own legal gambling statutes over the past several years, some have decided to require more consumer protection than others.*

This Comment argues that states that do not require sportsbooks to limit the ways in which gamblers can deposit money into their personal gambling accounts violate section 5 of the Federal Trade Commission Act by facilitating an “unfair practice” that will lead to reasonably foreseeable injury. To prevent this injury, this Comment recommends the implementation of two financial instrument restrictions: a federal limit on credit gambling and a state duty to inform those who choose to gamble on credit why such a limit exists.

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“Remember this: The House doesn’t beat the player. It just gives him an opportunity to beat himself.”

—Nicholas Dondalos¹

INTRODUCTION

Widespread legal sports gambling is newer to the United States of America than TikTok.² What was once only legal in tribal reservations, Atlantic City, and the state of Nevada is now approved, legalized, and

1. Nicholas Dondalos, QUOTE FANCY, <https://quotefancy.com/quote/1773195> [<https://perma.cc/JFN3-GZ4H>] (last visited Jan. 30, 2023).

2. See Joe Tidy & Sophia Smith Galer, *TikTok: The Story of a Social Media Giant*, BBC (Aug. 5, 2020), <https://www.bbc.com/news/technology-53640724> [<https://perma.cc/M7CB-HFKK>] (explaining the origin of Tik Tok, which started as an app called “Musical.ly” in 2014); *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018) (holding that the federal government was not allowed to punish states for enacting legal gambling laws).

operational in thirty-five states and the District of Columbia.³ Gambling was not only illegal before 2018, but society viewed it as taboo and dangerous.⁴ As time passes and consumers are bombarded with an endless stream of advertisements promoting online sportsbooks and gambling opportunities, the taboo moniker has started to fade, but the danger remains.⁵

Up until 2018, when the Supreme Court struck down the Professional and Amateur Sports Protection Act (“PASPA”) in the landmark case of *Murphy v. NCAA*,⁶ and gave the states power to create their own legal gambling laws, gambling was illegal at a federal level.⁷ The holding in *Murphy* opened the floodgates to legalized gambling in the United States.⁸ America is not the only place that has undergone

3. See *Responsible Gaming Regulations and Statutes Guide*, AM. GAMING ASS’N 1, 3, 6–7 (2022) [hereinafter AM. GAMING ASS’N], https://www.americangaming.org/wp-content/uploads/2019/09/AGA-Responsible-Gaming-Regs-Book_FINAL.pdf [<https://perma.cc/3KLQ-23FT>] (charting out which states that have legalized gambling).

4. See Sally M. Gainsbury, *Online Gambling Addiction: The Relationship Between Internet Gambling and Disordered Gambling*, 2 CURRENT ADDICTION REPS. 185, 185–86 (2015), <https://doi.org/10.1007/s40429-015-0057-8> [<https://perma.cc/W5JU-DZ44>] (discussing how society used to be more concerned with the dangers of gambling); Timothy L. O’Brien & Elaine He, *The Sports Gambling Gold Rush is Absolutely off the Charts*, BLOOMBERG OP. (Dec. 16, 2021), <https://www.bloomberg.com/graphics/2021-opinion-online-sports-betting-future-of-american-gambling> [<https://perma.cc/DUF2-SAXC>] (asserting that the “cultural disdain” of gambling was present for much of United States history, but has eased in recent years as legal gambling has become more popular).

5. See *Survey Suggests Gambling Participation Continues to Increase in U.S.*, MINN. ALL. ON PROBLEM GAMBLING (Feb. 23, 2022), <https://mnapg.org/survey-suggests-gambling-participation-continues-to-increase-in-us> [<https://perma.cc/EH9W-HYNR>] (recognizing that even though gambling participation has increased, there are still inherent dangers in the activity).

6. See 138 S. Ct. at 1478 (finding the PASPA prohibition on state authorization of sports gambling to violate the anticommandeering doctrine).

7. See *id.* (discussing how PASPA’s prohibition of state gambling made it “as if federal officers were installed” in state legislatures to prevent voting for “offending proposals”).

8. See Jesse Rifkin, *Betting on our Future Act Would Ban Advertising for Sports Betting on Television, Radio, Internet*, GOVTRACK INSIDER (Mar. 22, 2023), <https://govtrackinsider.com/betting-on-our-future-act-would-ban-advertising-for-sports-betting-on-television-radio-internet-ad78e7b704c6> [<https://perma.cc/YWY8-HCZ3>] (describing the *Murphy* opinion as having “opened the floodgates” for states to legalize sports betting); 138 S. Ct. at 1483–84 (declining to establish federal regulations or limitations for gambling).

this type of transition.⁹ Worldwide, “[g]ambling has undergone a ‘profound transformation.’”¹⁰ Gambling was once “regarded as economically marginal, politically corrupt and morally dubious,” but early in the twenty-first century, it emerged as a “global phenomenon”.¹¹

In America, states moved to legalize gambling because of the associated economic benefits.¹² A percentage of losing bets that used to go to unregulated “bookies” and offshore gambling sites are now funneled into the state’s revenue stream through tax dollars.¹³ Yet, even with a newer economic model, gambling is still gambling, and addiction does not concern itself with legality.¹⁴ Addiction rears its ugly head whether the patron (the official term for gambler) is gambling legally or illegally.¹⁵ To combat the dangers of “problem gambling”—the behavior that indicates the likelihood of the patron developing a gambling addiction—states require that sportsbooks and gambling operators follow responsible gaming limits.¹⁶ These limits exist to

9. See Michael Auer, *Behavioural Tracking and the Effects of Responsible Gaming Tools and Personalized Feedback in Online Gambling*, FRONTIERS IN PSYCH. 1, 11 (2015) (asserting that gambling has become much more accepted throughout the world in places such as Australia and Singapore).

10. *Id.* (quoting GERDA REITH, GAMBLING: WHO WINS? WHO LOSES? 9 (2003)).

11. *Id.*

12. See Cal. Bus. J. Newswire Div., *Why Are More States Legalizing Gambling in the U.S.*, CAL. BUS. J. (2022), <https://calbizjournal.com/why-are-more-states-legalizing-gambling-in-the-us> [<https://perma.cc/GW2R-HWMB>] (arguing that a central reason that states are pushing for legal gambling is because they benefit economically from it).

13. See *Sizing the Illegal and Unregulated Gaming Markets in the U.S.?*, AM. GAMING ASS’N (Nov. 30, 2022), <https://www.americangaming.org/resources/sizing-the-illegal-and-unregulated-gaming-markets-in-the-us> [<https://perma.cc/WG45-PLTV>] (estimating that “Americans wager \$63.8 billion with illegal bookies and offshore sites at a cost of \$3.8 billion in gaming revenue and \$700 million in state taxes”).

14. See Eric Adelson, *As Sports Betting Goes Mainstream, Addiction Experts are on High Alert*, WASH. POST: SPORTS BETTING (Sept. 6, 2022, 6:00 AM), <https://www.washingtonpost.com/sports/2022/09/06/sports-gambling-addiction> [<https://perma.cc/C2Z3-W6GS>] (anticipating that as gambling rates increase, gambling addiction rates will also increase).

15. See *id.* (dismissing the idea that gambling is no longer dangerous just because it is legal).

16. See Nicole Shultz, *What is Responsible Gambling? An Interview with Jennifer Shatley*, UNIV. NEV. LAS VEGAS (Sept. 17, 2020), <https://www.unlv.edu/news/article/what-responsible-gambling-interview-jennifer-shatley> [<https://perma.cc/GS89-9YST>] (discussing how responsible gaming limits exist to protect existing problem gamblers and prevent others from developing problem gambling tendencies).

protect the patron from themselves and to prevent responsible gamblers from developing problem gambling behaviors.¹⁷

A category of responsible gambling mechanisms includes placing restrictions on how much patrons may gamble and what means the patron may use to deposit funds into their accounts. One type of responsible gaming limit within this category is financial instrument restrictions.¹⁸ This responsible gaming tool dictates what source of funds patrons can use to deposit money into their online gambling accounts.¹⁹ Not all states have this limit in their respective wagering acts.²⁰ Some states explicitly outlaw the use of credit cards while others limit the amount of cards that can be used to deposit.²¹ These financial instrument restrictions exist to protect the consumer from injury that may come from not being completely aware of the amount they have gambled or the ability to gamble when it is no longer responsible or safe to do so.²²

Section 5 of the Federal Trade Commission Act (“FTCA”) mandates that, in the United States, businesses protect consumers against reasonably foreseeable injury from unfair practices involving commerce.²³ Section 5 of the FTCA dictates a three-pronged test to determine what exactly constitutes an “unfair practice.”²⁴ To be an “unfair practice,” the injury suffered by the consumer must be

17. AM. GAMING ASS’N, *supra* note 3, at 4.

18. *Id.*

19. *Id.*

20. *See id.* at 4 (“[Twenty-five] jurisdictions with account-based online gaming, sports betting or digital wallet wagering in casinos require operators to provide a mechanism through which patrons may self-limit deposits, losses, wagering amounts and/or time spent gambling.”).

21. *See id.* at 6–8 (showing that there are eighteen states with some sort of financial restrictions and illustrating their basic features).

22. *See* Nat’l Endowment for Fin. Educ. & Nat’l Council on Problem Gambling, *Problem Gamblers and Their Finances a Guide for Treatment Professionals*, NAT’L ENDOWMENT FOR FIN. EDUC. 1, 28 (2000) [hereinafter *Problem Gamblers and Their Finances*], https://www.ncpgambling.org/files/public/problem_gamblers_finances.pdf [<https://perma.cc/WDS5-72DE>] (explaining that a common problem with gambling is the “gambler’s access and handling of the household’s finances” and that the gambler’s “spouse, partner, parent, trusted friend or relative, or a third party all can serve as a ‘roadblock’ to the one thing that fuels a gambler’s habit—money”).

23. 15 U.S.C. § 45.

24. § 45(a)(4).

substantial.²⁵ The injury must also be reasonably foreseeable, and it must not be outweighed by any countervailing benefits to consumers or to competition that the practice produces.²⁶ Lastly, the injury must be one that the consumer themselves could not have reasonably avoided.²⁷ In the near century since the FTCA became law, courts have often opined on what type of activity satisfies these three prongs.²⁸

Based on the interpretation of courts, the nature of gambling, and the current legalized gambling landscape, gaming operators subject consumers to an unfair practice that is likely to cause foreseeable injury when a state gambling statute does not require some type of financial instrument restriction on the use of credit to gamble. Therefore, states that do not include these types of restrictions subject their citizens to unfair practices by sportsbooks and are in violation of section 5 of the FTCA.²⁹

Part I of this Comment explains the legal background for sports gambling in the United States and the development of the country's present-day gambling landscape. Then, Part II describes what specifically about sports gambling makes it a dangerous activity and how the harms of the practice are unavoidable for some individuals without protective measures. Next, Part I discusses what methods regulatory bodies take to protect the gambler and how those protections differ between states. Lastly, Part I describes how the Federal Trade Commission Act protects consumers and what constitutes a violation of the act. Part II analyzes how gaps in state legislation that allow the unrestricted use of credit to gamble subject gamblers to reasonably foreseeable injury because gambling with credit promotes irresponsible behaviors. Part III recommends a federal statute that requires states to implement financial instrument restrictions to ensure that gambling legislation does not subject legal gamblers to an unfair practice.

25. See *FTC v. Klesner*, 280 U.S. 19, 28 (1929) (holding that “the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest” rather “[t]o justify filing a complaint the public interest must be specific and substantial”).

26. § 45(a)(4), (n).

27. *Id.*

28. See *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (identifying what constitutes an unfair practice).

29. See § 45(n) (ordering that consumers must be protected from unfair business practices that are reasonably likely to result in injury).

I. BACKGROUND

This Part will begin with a history on federal gambling legislation. Next, it will discuss how and why states have legalized gambling in the last several years. The Part continues to explain why some states require sportsbooks to follow responsible gaming limits and what those limits look like. Next, this Part dives into what constitutes an unfair practice that is reasonably likely to cause a foreseeable injury. The background concludes with an in-depth breakdown of the three-prong test that courts use to determine if a business is conducting an unfair practice.

A. *Recent History of Gambling in the United States*

In the last thirty years, the legal sports gambling landscape in the United States has shifted drastically.³⁰ To understand why legal sports gambling looks the way it does today, it is important to analyze what it looked like before *Murphy*.³¹ The PASPA was enacted in 1992 and made it unlawful for states to “sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme” based on competitive sporting events.³² PASPA did not create a federal law that made sports betting a federal crime but instead allowed the Attorney General to bring civil actions against a state if the state violated the Act.³³ Jurisdictions that had previously allowed existing forms of gambling were grandfathered in, but PASPA outlawed other jurisdictions from enacting their own legalized gambling laws.³⁴

In 2012, the state of New Jersey started down a path that would challenge the constitutionality of PASPA.³⁵ New Jersey approved a state constitutional amendment that made it lawful for the state legislature to authorize sports gambling,³⁶ in clear violation of PASPA.³⁷

30. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018) (stating that the legal sports gambling landscape was very different when PASPA was enacted).

31. See *id.* (explaining that an overview of the history of legal gambling is beneficial to understanding the current landscape).

32. Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227, 4228 (1992).

33. *Id.*

34. *Id.*

35. See 138 S. Ct. at 1471 (noting that the state of New Jersey was aware that they were in violation of PASPA when the state began the process of approving the amendment).

36. *Id.*

37. *Id.*

Consequentially, professional sports leagues and the National College Athletics Association (NCAA) brought actions against New Jersey asserting that the state had violated PASPA.³⁸ In its defense, New Jersey argued that PASPA violated the anticommandeering principle that prohibits the federal government from dictating what states and their actors can and cannot do.³⁹

These legal challenges led to the landmark case of *Murphy v. NCAA*, which the Supreme Court decided in May 2018.⁴⁰ The Court sided with New Jersey and held that PASPA did violate the anti-commandeering principle because PASPA “unequivocally dictates what a state legislature may and may not do”.⁴¹ By striking down PASPA, the Supreme Court eliminated the federal barrier to states enacting their own legalized gambling statutes.⁴²

States quickly acted following the Court’s decision in *Murphy*.⁴³ Sports betting began in New Jersey in June of 2018, less than one month after *Murphy*.⁴⁴ By May of 2019, West Virginia, Indiana, Mississippi, Rhode Island, Arkansas, Pennsylvania, Montana, Iowa, and District of Columbia had already introduced, passed, and enacted their own sports gambling laws.⁴⁵ Today, nearly three-fourths of the United States has legalized sports gambling.⁴⁶

B. Economics of Legalized Gambling

In just over four years’ time, with legal online sportsbooks allowed to operate in a majority of states, legal online sports gambling

38. *Id.*

39. *Id.* at 1467.

40. *Id.* at 1461.

41. *Id.* at 1478.

42. See Quinn Emanuel Urquhart & Sullivan, LLP, *August 2018: The Implications of the United States Supreme Court’s Murphy v. NCAA Decision on Legalized Sports Betting*, JDSUPRA (Sept. 5, 2018), <https://www.jdsupra.com/legalnews/august-2018-the-implications-of-the-19446> [<https://perma.cc/T4R2-D64Q>] (recognizing that states could now pass their own gambling limitation without being in violation of federal law).

43. *Id.*

44. Nick Corasaniti, *New Jersey Legalizes Sports Betting*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/nyregion/sports-betting-legalized-nj.html> [<https://perma.cc/4225-FNHY>].

45. Sam McQuillan, *Where is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK, <https://www.actionnetwork.com/news/legal-sports-betting-united-states-projections> [<https://perma.cc/CX2H-PRDK>].

46. *Id.*

significantly increased in popularity.⁴⁷ In 2021, Americans bet \$57.2 billion on sporting events through legalized commercial vendors.⁴⁸ That number skyrocketed by 62.9% to \$93.2 billion in 2022. Through the first two quarters of 2023, Americans legally gambled \$56.2 billion, which is 10% higher than the same time frame in 2022. When the final numbers for 2023 are posted, the handle, or total amount wagered on a sportsbook, is expected to blow past the 2022 figure.⁴⁹ Considering the last quarter of the year is the most active time for sports bettors because the National Football League (NFL) is the most popular league to bet on, the total amount Americans gamble on sports in 2023 will pass \$100 billion.⁵⁰

Many people gambled on sports in the United States before PASPA was repealed.⁵¹ Gamblers often placed their bets using offshore sportsbooks and illegal “bookies.”⁵² However, today, with PASPA repealed, states can now benefit financially from gambling.⁵³ Out of

47. See *id.* (explaining what states are going to join in legalizing sports betting); AGA *Commercial Gaming Revenue Tracker*, AM. GAMING ASS’N (Sept. 14, 2023), <https://www.americangaming.org/resources/aga-commercial-gaming-revenue-tracker> [<https://perma.cc/J23W-9CNY>] (illustrating how the amount of money spent on legal gambling has grown year over year).

48. See Chris Altruda, *Legal US Sports Betting Revenue, Handle and Tax Totals Since PASPA Repeal*, SPORTS HANDLE, <https://sportshandle.com/sports-betting-revenue> [<https://perma.cc/DAN2-RE5M>] (identifying how much money states made in tax revenue from legal gambling).

49. See AGA *Commercial Gaming Revenue Tracker*, *supra* note 47 (explaining that 2023 commercial gaming revenue has outpaced the previous year’s record, in-part due to the “industry’s resilience and continued appeal”).

50. See Willy Yakowicz, *Record 46.6 Million Americans Expected to Gamble this NFL Season*, FORBES (Sept. 8, 2022), <https://www.forbes.com/sites/willyakowicz/2022/09/08/record-466-million-americans-expected-to-gamble-this-nfl-season> (asserting that in 2022, it was expected that 46.6 million people would wager on an NFL game); AGA *Commercial Gaming Revenue Tracker*, *supra* note 47.

51. See Heather Vacek, *The History of Gambling*, CTR. FOR CHRISTIAN ETHICS BAYLOR UNIV. 1, 88 (2011), <https://www.baylor.edu/content/services/document.php/144593.pdf> [<https://perma.cc/RJ48-7A6C>] (observing that, in 2006, gambling generated more revenue than the sales from Burger King, Wendy’s, McDonalds and Starbucks combined); Matt Bonesteel, *Sports Betting Timeline: From Las Vegas to the Supreme Court*, WASH. POST: SPORTS BETTING (Aug. 29, 2022, 7:00 AM), <https://www.washingtonpost.com/sports/2022/08/29/history-of-sports-gambling> [<https://perma.cc/R8AB-VASR>] (asserting that out of the nearly \$5 billion gambled on the 2008 Super Bowl, 97% was wagered illegally).

52. See Vacek, *supra* note 51, at 89 (explaining that gambling, in various forms, has been practiced in the United States since the country’s inception).

53. Cal. Bus. J. Newswire Div., *supra* note 12, at 212.

the \$54.9 billion gambled in 2021, \$562,278,829 went directly to the states in tax revenue.⁵⁴ That number does not include other state revenue, including payments contractually required to be made based on sportsbook revenue and annual licensing fees.⁵⁵ The amount of gambling tax revenue collected by states in 2022 was already \$1.1 billion as of September of that year.⁵⁶

While these figures are already massive, they will only continue to balloon in size.⁵⁷ There are still many states that have yet to legalize gambling but plan on doing so in the coming years.⁵⁸ This means that legal sportsbooks are poised to acquire millions of new customers.⁵⁹ The popularity of legal sportsbooks in the first few years of their United States existence point to untold potential revenue for other states in the future.⁶⁰ This access to additional tax dollars provides states an economic incentive to allow their citizens to gamble legally.⁶¹

While the danger in gambling was not eliminated by the repeal of PASPA, states nevertheless chose to legalize the dangerous activity.⁶² States have done this even though gambling is more often than not a financial detriment to the gambler.⁶³ Because of the how sportsbooks

54. See Altruda, *supra* note 48 (identifying how much money states made in tax revenue from legal gambling).

55. See Jackson Brainerd, Brief, *The Early Bets Are in: Is Sports Betting Paying off?*, NAT'L CONF. STATE LEGIS. (Mar. 1, 2021), <https://www.ncsl.org/fiscal/the-early-bets-are-in-is-sports-betting-paying-off> [<https://perma.cc/6KVJ-SJHU>] (outlining what sportsbooks are required to do and pay to operate within a state, such as in-person registration and annual licensing fees).

56. See Altruda, *supra* note 48 (analyzing sports betting revenue figures in the September 2022 portion of the chart).

57. See O'Brien & He, *supra* note 4 (discussing how mobile sports betting will continue to grow exponentially in the future).

58. See Sam Mcquillan, *supra* note 45 (projecting what states will soon legalize gambling).

59. See Cal. Bus. J. Newswire Div., *supra* note 12 (explaining that states are seeing more money flow in from legal online casinos).

60. See *id.*; O'Brien & He, *supra* note 4 (illustrating how the popularity of sports gambling has grown).

61. See Brainerd, *supra* note 55 (examining Table 1 which discusses the different sources of revenues that result from legal sports gambling).

62. *Survey Suggests Gambling Participation Continues to Increase in U.S.*, *supra* note 5.

63. See John V. Culver, *Why 52.4% is the Most Important Percentage in Sports Gambling*, MEDIUM, (Oct. 20, 2018), <https://medium.com/the-intelligent-sports-wagerer/why-52-4-is-the-most-important-percentage-in-sports-gambling-16ade8003c04> [<https://perma.cc/U7AP-HS4V>] (analyzing how much one must win to actually win money when gambling); see also Kurt Streeter, *The Rising Human Cost of Sports Betting*, N.Y. TIMES (Jan.

set their odds, a bettor must win 52.4% of the time to be a profitable sports gambler.⁶⁴ Those who gamble professionally aim for a 53% success rate.⁶⁵ Like professional athletes, these bettors have more resources at their disposal than an average gambler. Thus, for an average gambler to not have gambling be a net negative on their finances, they must perform like a professional would.⁶⁶

While almost all patrons are going to lose money, the quantity that a patron loses differs greatly from gambler to gambler.⁶⁷ Placing one hundred \$5 wagers in a year may not lead to financial hardship, but more aggressive gambling behavior could.⁶⁸ More aggressive gambling is categorized as “problem gambling,”⁶⁹ which is defined as “gambling that is disruptive or damaging to [the gambler] or [their] family,” or gambling that interferes with the gambler’s daily life.⁷⁰ A problem gambler is not necessarily placing bets for fun or to enjoy the game; problem gamblers place bets for financial gain or to recover financial losses incurred from prior gambling.⁷¹ Problem gambling, and the addictive tendencies and impacts that come with the behavior, are the primary reasons that gambling is considered a dangerous activity and was illegal for most of our nation’s history.⁷²

31, 2022), <https://www.nytimes.com/2022/01/31/sports/football/super-bowl-sports-betting.html> [<https://perma.cc/FBS6-M8AB>] (exposing how damaging gambling can be to one’s personal well-being).

64. Culver, *supra* note 63.

65. *How Do Professional Sports Bettors Bet*, BETANDBEAT (Oct. 6, 2022), <https://betandbeat.com/betting/blog/how-do-professional-sports-bettors-bet> [<https://perma.cc/H33E-Q28Y>].

66. *See id.* (distinguishing between professional and recreational gamblers).

67. *Supra* notes 66–69 and accompanying text.

68. *See* Cait Huble, *Responsible Gaming Principles for Sports Gambling Legislation*, NAT’L COUNCIL PROBLEM GAMBLING (Mar. 12, 2018) <https://www.ncpgambling.org/responsible-gaming-principles-for-sports-gambling-legislation> [<https://perma.cc/6MEA-FVTQ>] (issuing guidelines that detail what steps legislators should take to prevent gambling-related harm).

69. *Problem Gambling*, NHS INFORM, (last modified Oct. 12, 2021) <https://www.nhsinform.scot/healthy-living/mental-wellbeing/addictions/problem-gambling> [<https://perma.cc/7PKL-A7B4>]; *see also* W. Spencer Murch & Luke Clark, *Games in the Brain: Neural Substrates of Gambling Addiction*, 22 NEUROSCIENTIST 534, 540 (2015) (explaining why humans develop problem gambling behaviors).

70. *Problem Gambling*, *supra* note 69.

71. *See id.* (discussing the common thought process for problem gamblers).

72. *See* Streeter, *supra* note 63 (illustrating potential negative effects of sports gambling addiction).

C. Mental Health of Problem Gamblers

To understand why certain gambling regulations exist today, one needs to understand why it was illegal in the first place.⁷³ There is no shortage of scientific studies that explain how and why humans become addicted to gambling.⁷⁴ The Fifth Diagnostic and Statistical Manual (DSM-5) even characterizes an addiction to gambling as a non-substance-related addiction.⁷⁵ The DSM-5 states that Gambling Disorder is identified as a “recurrent and persistent pattern of gambling behavior that leads to clinically significant distress and/or dysfunction.”⁷⁶ Gambling Disorder is classified as a behavioral addiction, meaning problem gamblers are addicted to gambling in a similar fashion as one who is addicted to substances.⁷⁷ Those with Gambling Disorder are thought to experience tolerance (the need to bet more and more in order to obtain the same excitement), cravings (a strong physiological desire to gamble), and withdrawal symptoms (anxiety, physiological symptoms) if they cut down or cease gambling.⁷⁸ While sports are not the only thing that one can gamble on, studies have shown that sports betting is “more strongly linked to

73. See Gainsbury, *supra* note 4 (discussing how internet gambling may worsen problem gambling); see also *Problem Gambling*, *supra* note 69 (defining problem gambling and outlining its causes, signs, and effects).

74. See generally Peter A. Bibby, *Loss-Chasing, Alexithymia, and Impulsivity in a Gambling Task: Alexithymia as a Precursor to Loss-Chasing Behavior when Gambling*, 7 FRONTIERS PSYCH. 1, 1 (2016), <https://www.frontiersin.org/articles/10.3389/fpsyg.2016.00003/full> [<https://perma.cc/SQA5-6Y23>]; Gemma Mestre-Bach, Roser Granero, Bernat Mora-Maltas, Eduardo Valenciano-Mendoza, Lucero Munguía, Marc N. Potenza et al., *Sports-Betting-Related Gambling Disorder: Clinical Features and Correlates of Cognitive Behavioral Therapy Outcomes*, 133 ADDICTIVE BEHAV. 1, 2 (2022); Patrick D. Worhunsky, Marc N. Potenza & Robert D. Rogers, *Alterations in Functional Brain Networks Associated with Loss-Chasing in Gambling Disorder and Cocaine-Use Disorder*, 178 DRUG & ALCOHOL DEPENDENCE 363, 365 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5551408/pdf/nihms889207.pdf> [<https://perma.cc/769M-SJTT>]; Timothy W. Fong, *The Biopsychosocial Consequences of Pathological Gambling*, 2 PSYCHIATRY 22, 26 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3004711/pdf/PE_2_3_22.pdf [<https://perma.cc/N6GV-WG4H>].

75. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, AM. PSYCHIATRIC ASS'N 796 (5th ed. 2013).

76. Mestre-Bach et al., *supra* note 74, at 2 (citing to DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, AM. PSYCHIATRIC ASS'N 796 (5th ed. 2013)).

77. AM. PSYCHIATRIC ASS'N, *supra* note 75, at 526.

78. Yvonne H. C. Yau & Marc N. Potenza, *Gambling Disorder and Other Behavioral Addictions: Recognition and Treatment*, 23 HARV. REV. PSYCHIATRY 134, 135–36 (2015).

gambling problems and cognitive distortions” than non-sports betting.⁷⁹

A common activity associated with Gambling Disorder and problem gambling is the act of “chasing losses.”⁸⁰ Chasing losses occur when one “continu[es] to gamble, often with increasing bet size, to recover from losses.”⁸¹ Studies have shown that chasing losses is the most significant step on the road to problem gambling.⁸²

Chasing losses has been found to be “associated with increased activity with the ventro-medial prefrontal cortex . . . and the subgenual anterior cingulate cortex.”⁸³ The former processes risk and the latter has an important role in regulating emotion.⁸⁴ Consequently, gamblers with certain neurological characteristics are more susceptible to becoming problem gamblers and creating financial distress for themselves and those close to them.⁸⁵ The DSM-5 even lists chasing losses as a criterion that indicates problem gambling.⁸⁶ Because gamblers feel the emotion of “shame” after losing, they are more apt to attempt to rectify that emotion with another quick victory.⁸⁷

Problem gamblers feel shame, not only after a loss, but also after continuing to place bets, because they know that their actions will continue to be detrimental.⁸⁸ This continuous pattern lends itself to mental health challenges and a greater susceptibility to depression.⁸⁹ Furthermore, gamblers believe that because they have recently lost,

79. Mestre-Bach et al., *supra* note 74, at 2.

80. Bibby, *supra* note 74, at 2.

81. *Id.*

82. *See id.* (describing a study where over 75% of problem gamblers chased their losses).

83. Bibby, *supra* note 74, at 3; *see also* Murch & Clark, *supra* note 69, at 535 (explaining that most of the evidence supporting gambling disorder as a behavioral addiction came from research comparing problem gambling to substance use disorders).

84. *See* Bibby, *supra* note 74, at 3.

85. *See id.* at 10 (concluding that it could be possible to predict who will develop problem gambling tendencies based on how an individual’s brain operates).

86. AM. PSYCHIATRIC ASS’N, *supra* note 75, at 585–86.

87. *See Problem Gamblers and Their Finances*, *supra* note 22, at 8 (exploring the thought processes and subsequent shame that problem gamblers feel following a string of losing bets).

88. *See* Fong, *supra* note 74, at 26 (identifying how gambling can negatively affect one’s physical and mental health).

89. *Id.* at 27.

they will win the following bet.⁹⁰ This is the "gambler's fallacy," which means that it is not possible to predict a random event's future results from a past result.⁹¹

The aforementioned types of problem gambling behaviors, and emotions that come with them, may negatively impact a person's life the same way that other addictions can.⁹² Many states try to warn gamblers of these risks through testimonials of problem gamblers on their state websites.⁹³ The official State of Massachusetts website describes the story of a Massachusetts man named Robert, who lost \$15,000 in one weekend.⁹⁴ He described the way he was feeling as worse than "when [he] was using heroin."⁹⁵ Another person named Duane described his gambling habit as "like doing drugs."⁹⁶ Duane continued, "You're . . . in debt, maxing out your cards, doing the same thing and getting the same results, every time."⁹⁷ But the harm of gambling does not stop at the gambler.⁹⁸ In the Words of Kaitlin Brown, a licensed counselor for drug, alcohol, and gambling addiction in Connecticut who fields calls from problem gamblers calling the state gambling hotline, "[w]hen we treat people, we don't just treat the gambler, . . . [w]e treat the whole family, because it's a family disease."⁹⁹ Brown told the story about a woman who called the hotline "about her husband, who had gambled away their life savings."¹⁰⁰ The woman told Brown that it took years for the couple to rebuild their financial lives, but her

90. See Rachel Croson & James Sundali, *The Gambler's Fallacy and the Hot Hand: Empirical Data from Casinos*, 30 J. RISK & UNCERTAINTY 195, 195–97 (2005) (explaining the definition of gambler's fallacy).

91. *Id.* at 197.

92. See Mestre-Bach, *supra* note 74, at 2 (comparing the impacts of substance addictions and gambling addiction).

93. See, e.g., *Personal Stories about Problem Gambling*, MASS.GOV, <https://www.mass.gov/service-details/personal-stories-about-problem-gambling> [<https://perma.cc/3LWZ-S8PD>] (offering testimonials of different individuals that live in Massachusetts).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. See Ryan Hockensmith, *Inside the Life of a Gambling Help Line Worker*, ESPN (Feb. 9, 2022), https://www.espn.com/chalk/story/_/id/33237601/inside-life-gambling-help-line-worker [<https://perma.cc/6E8H-WY36>] (describing the role of counselors working on a help hotline for people struggling with gambling addiction).

99. *Id.*

100. *Id.*

husband had unfortunately relapsed.¹⁰¹ The woman said that the relapse's culprit was legalized gambling in Connecticut.¹⁰²

The effect of gambling is not restricted to spouses either.¹⁰³ Brown detailed another conversation with a man in his early 20s.¹⁰⁴ He told Brown that he “blew through thousands of dollars that his parents thought were going toward college.”¹⁰⁵ Kaitlin Brown is employed because the state of Connecticut requires a hotline to be operational for problem gamblers if they are in need of help.¹⁰⁶ However, these stories from Ms. Brown and the testimonials from Massachusetts show how ugly the problems associated with gambling can be and what impact it has on the gambler and those around the gambler.¹⁰⁷

D. Responsible Gaming Limits

In an effort to protect problem gamblers and the average gambler from developing dangerous tendencies, sportsbooks follow and abide by what is called responsible gaming limits.¹⁰⁸ Every state that has legalized gambling has established the responsible gaming limits that sportsbooks must provide to the patron.¹⁰⁹ While responsible gaming limits do not eliminate the danger from gambling, they may be helpful in combatting addiction and preventing a person from losing as much money as the person may have, if the gaming limits were not in place.¹¹⁰ Because there is no federal law or standard that requires specific responsible gaming limits, each state has the power to mandate whichever responsible gaming limits the state sees fit.¹¹¹ For this

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*; *Personal Stories about Problem Gambling*, *supra* note 93.

108. See AM. GAMING ASS'N, *supra* note 3, at 3 (describing the effort of the government to legislate responsible gaming limits); see also *Leading Online Operators Launch Principles for Responsible Gaming*, ENTAIN FOUND. U.S. (Sept. 22, 2022, 1:06 PM), <https://www.prnewswire.com/news-releases/leading-online-operators-launch-principles-for-responsible-gaming-301631419.html> [<https://perma.cc/H23E-SY4G>] (endorsing the responsible gaming limits that major sportsbooks follow).

109. AM. GAMING ASS'N, *supra* note 3, at 3.

110. Auer, *supra* note 9, at 39–40 (examining how responsible gaming limits work to protect problem gamblers from gambling-related harm).

111. *Supra* note 42 and accompanying text.

reason, limits vary from state to state.¹¹² Examples of responsible gaming limits include age restrictions, the ability to self-exclude oneself from gambling for a certain period, advertising restrictions, and deposit limits.¹¹³

In recent years, private companies that work with sportsbooks to promote responsible gambling behaviors have become more popular.¹¹⁴ Jonathan Michaels is a senior executive at one of these companies called Sightline Payments.¹¹⁵ Michaels, who works with sportsbooks to manage, organize, and move patron funds, explained that the central feature of responsible gaming limits should be providing the patron with as much information as possible concerning that person's gaming habits.¹¹⁶ Michaels says that the dangers associated with gambling can sometimes not be apparent to the problem gambler.¹¹⁷ A person might not be aware of their losses or money wagered or even how much time they have spent staring at the available odds.¹¹⁸ Michaels also works with sportsbooks to ensure that patrons understand how much money they might be wagering and plan accordingly.¹¹⁹ An example of a responsible gaming tool that Michaels believes helps better promote responsible gaming is the Play+ product developed by Sightline Payments.¹²⁰ Play+ creates a separate account for patrons to deposit their funds into before gambling which creates a natural sequestration of funds allocated to gambling from other funds.¹²¹ The product also gives the patron information on their

112. See AM. GAMING ASS'N, *supra* note 3, at 3 (differentiating responsible gaming mechanisms from state to state).

113. See, e.g., *id.* at 16–17 (including Regulation 9.2, pertaining to self-exclusion programs; Regulations 6.12, 9.4, and 30-416, all pertaining to responsible advertising; and Colorado Revised Statute section 44-30-816, regulating maximum bet amounts).

114. See Geoff Zochodne, *Gambling Industry Trying to Get Proactive with Responsible-Play Efforts*, COVERS (Sept. 28, 2022), <https://www.covers.com/industry/responsible-gambling-operators-getting-proactive-september-2022> [<https://perma.cc/K74P-3AYF>] (highlighting the financial commitment that gambling operators have made to create and cultivate the private responsible gaming industry).

115. Zoom Interview with Jonathan Michaels, ex-Senior Executive, Sightline Payments (Oct. 27, 2022) [hereinafter, Michaels Interview].

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

gaming habits to keep the gambler more informed on if they are showing signs of problem gambling.¹²²

Platforms like Play+ are financial instrument restrictions, which are a type of responsible gaming limit that identifies a type of payment or a deposit source and regulates its use or rejects its use to deposit funds altogether.¹²³ One reason financial instrument restrictions exist is to curb the practice of gambling with money that a patron does not have.¹²⁴ For example, if a patron is depositing funds with credit from their credit card, the patron could theoretically deposit more funds into their gambling account than the person has in their actual bank account.¹²⁵

In the United Kingdom, a nation that has allowed legalized gambling for several decades, research has demonstrated the dangers of gambling with credit.¹²⁶ One study suggested that consumer credit use and debt problems increase with problem gambling severity.¹²⁷ The same study concluded that consumer credit products have the potential to exacerbate gambling-related psychological harms.¹²⁸ The author recommended that legislatures consider prohibiting the use of credit cards for gambling transactions.¹²⁹

In conjunction with a 2020 outright ban on the use of credit cards in the United Kingdom, the United Kingdom's government-run gambling commission released a report explaining its decision.¹³⁰ The

122. *Id.*

123. See AM. GAMING ASS'N, *supra* note 3, at 3, 4, 32, 57, 90 (defining financial instrument restrictions and providing examples of state statutes governing them, including Connecticut's "[r]equirements for conducting sports wagering, online casino gaming, and fantasy contests"; Florida's "[p]rohibited activities and devices" concerning financial instruments restrictions; and Iowa's age restrictions on wagering).

124. See Thomas B. Swanton & Sally M. Gainsbury, *Gambling-Related Consumer Credit Use and Debt Problems: A Brief Review*, 31 CURRENT OP. BEHAV. SCI. 21, 21–23 (2020) (asserting that consumer credit use is a risk factor for problem gambling).

125. *Id.*

126. See U.K. GAMBLING COMM'N, REVIEW OF ONLINE GAMBLING 7 (2018) (concluding that using credit in gambling makes it a more dangerous activity); see also Sally M. Gainsbury, Brett L.L. Abarbanel, Kahlil S. Philander & Jeffrey V. Butler, *Strategies to Customize Responsible Gambling Messages: A Review and Focus Group Study*, 18 BMC PUBLIC HEALTH 1381, 1387–88 (2018) (elaborating on why responsible gaming limits can be effective).

127. Swanton & Gainsbury, *supra* note 124, at 21.

128. *Id.* at 23–24.

129. *Id.* at 25.

130. U.K. GAMBLING COMM'N, *supra* note 126.

commission stated that if a patron is using credit, there are fewer scenarios in which resources are exhausted and a player would be forced to stop gambling.¹³¹ The report also rationalized that easy access to credit during moments of impulsivity may tempt gamblers to use credit cards as a form of virtual cash.¹³² When situations like this occur, gamblers can continue to place wagers without fully realizing the amount of debt that they have incurred.¹³³ This mindset could then facilitate the practice of chasing losses.¹³⁴

Seventeen of the thirty-six jurisdictions that have legalized gambling in the United States require some sort of financial instrument restriction.¹³⁵ This includes measures like an outright ban on the use of credit cards in Tennessee, to an annual credit deposit limit in New York.¹³⁶ However, some financial instrument restrictions are not as straightforward.¹³⁷ For example, the Indiana state gambling statute requires that operators verify the “outstanding indebtedness” of a patron.¹³⁸ The operator is obligated to contact credit providers to determine if a patron has liabilities.¹³⁹ If it is determined that a patron might have outstanding indebtedness, the operator must only record that information in the patron’s credit file.¹⁴⁰ Consequently, the sportsbook is not required to stop a person in Indiana from wagering with credit even if there are concerns about the patron’s outstanding indebtedness.¹⁴¹ The sportsbooks might choose to exclude this person from placing additional wagers, but the state gambling statute does not require it.¹⁴² These restrictions exist to protect the patron from falling

131. *Id.* at 24.

132. *Id.* at 3; see TRAVIS SZTAINERT, DAVID BAXTER, SHEILA MCKNIGHT & JESS VOLL, GAMBLING RSCH. EXCH. ONT., THE ROLE OF CREDIT CARDS IN GAMBLING 7 (2020) (commenting on how easier access to funds can increase the amount that one wagers).

133. U.K. GAMBLING COMM’N, *supra* note 126, at 18.

134. *Id.*; see Bibby, *supra* note 74, at 2 (overserving what thought processes lead to problem gambling and chasing losses).

135. See AM. GAMING ASS’N, *supra* note 3, at 6–7 (categorizing the various responsible gaming laws and regulations in jurisdictions where gambling is legal).

136. TENN. COMP. R. & REGS. 1350-01-.08 (2023); N.Y. COMP. CODES R. & REGS. tit. 9, § 5330.37(a) (2023).

137. See, e.g., 2019 Ind. Legis. Serv. P.L. 293-2019 (West).

138. 68 IND. ADMIN. CODE 16-1-6 (2023).

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

into dangerous behaviors.¹⁴³ It is clear that the strength of that protection differs greatly on a state-to-state basis.¹⁴⁴

E. The Federal Trade Commission Act and the Unfair or Deceptive Acts and Practices Test

Section 5 of the FTCA was enacted to prevent businesses from causing harm to the consumer in the same way financial instrument restrictions attempt to protect the patron.¹⁴⁵ Section 5 seeks to prevent unfair methods of competition and unfair or deceptive acts and practices involving commerce.¹⁴⁶ The Act itself defines unfair or deceptive acts and practices as those that involve foreign commerce that cause or are likely to cause reasonably foreseeable injury within the United States.¹⁴⁷ The Commission established its own test that would be used to evaluate unfairness: (1) The injury “must be substantial”; (2) The injury “must not be outweighed by any countervailing benefits to consumers or competition that the practice produces”; (3) The injury must not be something that consumers could “reasonably have avoided” themselves.”¹⁴⁸

This test has been adopted by courts around the country.¹⁴⁹ The foremost example of a court employing it was *American Financial Services Ass’n v. Federal Trade Commission*.¹⁵⁰ The court noted that the Commission’s approach to consumer unfairness had not been met with congressional objection, thus paving the way for the test to be used in the judiciary.¹⁵¹ The court said that Congress passed the Act wishing to enact the three-part standard into law.¹⁵²

In the 1972 case *Federal Trade Commission v. Sperry & Hutchinson Co.*,¹⁵³ the Supreme Court put its “stamp of approval” on the Federal

143. *Id.*

144. See AM. GAMING ASS’N, *supra* note 3, at 3–4 (identifying the different responsible gaming limits that exist in each state that has legalized gambling).

145. 15 U.S.C. § 45.

146. *Id.* § 45 (a) (1).

147. *Id.* § 45 (a) (4) (A).

148. See *Orkin Exterminating Co., v. FTC*, 849 F.2d 1354, 1364–65 (11th Cir. 1988).

149. See, e.g., *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 (1972); *Orkin*, 849 F.2d at 1364; *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 299 (D. Mass. 2008), *aff’d*, 624 F.3d 1 (1st Cir. 2010) (employing the three-prong test to determine if there was a violation of 15. U.S.C. § 45).

150. 767 F.2d 957 (D.C. Cir. 1985).

151. *Id.* at 966.

152. *Id.* at 982–83.

153. 405 U.S. 233, 233 (1972).

Trade Commission's (FTC) "evolving use of a consumer unfairness doctrine not moored in the traditional rationales of anticompetitiveness or deception."¹⁵⁴ *Sperry* is the building block to which all lower cases cite to determine what "unfair practice" actually is.¹⁵⁵ Under *Sperry*, the Court put all of the power in the FTC's hands to define an "unfair practice."¹⁵⁶ The Court said that it can only "affirm or vacate an agency's judgment to that effect," as a judicial judgment cannot be made to do service for an administrative judgment.¹⁵⁷ Thus, the Supreme Court allowed the FTC to designate something as an unfair practice using the FTC's own standard.¹⁵⁸ This decision shows broad deference to the FTC to determine if an entity is engaging in an unfair practice.¹⁵⁹ By approving the unfairness standard for use, the Supreme Court concluded that courts should give deference to the FTC in determining if a practice meets the standard.¹⁶⁰ In the fifty-two years since *Sperry*, the Supreme Court has not questioned the validity of this standard.¹⁶¹

So, what exactly is this standard, and what does the three-prong test entail? As evidenced below, the test is vague, which lends itself to broad interpretation by courts on what each prong means.¹⁶²

F. Prong One: The Injury Must Be Substantial.

Substantial injury in an FTC context does not require that the injury be large to one person, but rather that it can cause small harm to a large class of people.¹⁶³ This was laid out by Justice Brandeis in the 1929

154. *Orkin*, 849 F.2d at 1363 (emphasis omitted) (concluding that the Supreme Court approved of the three-part test); *Sperry*, 405 U.S. at 234.

155. *Orkin*, 849 F.2d at 1364.

156. *Id.*; *Sperry*, 405 U.S. at 239–40.

157. *Sperry*, 405 U.S. at 249.

158. *See id.* at 250 (granting the FTC the ability to identify an unfair practice).

159. *Id.*

160. *Id.*

161. *See Orkin*, 849 F.2d at 1363 (stating that the Supreme Court had yet to issue any opinion contradicting the interpretation of the test in *Sperry* in 1988, which remains the case to the present day). For a legal work that endorses the test, describes how unfairness is a broad standard, and includes that the practice that might be against public policy, see 4 *Business Torts* § 35.12 (2)(c) (2022).

162. *See* *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 297–99 (D. Mass. 2008), *aff'd*, 624 F.3d 1 (1st Cir. 2010) (attempting to define how the three-prong test should be interpreted).

163. *FTC v. Klesner*, 280 U.S. 19, 28 (1929).

case *Federal Trade Commission v. Klesner*.¹⁶⁴ An injury could also be deemed substantial if it raises a significant risk of concrete harm.¹⁶⁵ Furthermore, the type of harm suffered does not need to be monetary to qualify as an injury.¹⁶⁶ *Orkin Exterminating Co. v. Federal Trade Commission*¹⁶⁷ stated that just because an actual injury to individual consumers may be personally small, does not mean that such injury to a large group of people is not substantial.¹⁶⁸ Another way a court concluded that the prong can be satisfied is if the FTC “establishes that consumers ‘were injured by a practice for which they did not bargain.’”¹⁶⁹

Lastly, courts have agreed that intent is not required to show a substantial injury.¹⁷⁰ Even if a business did not intend for their practice to cause harm for a user, that business can still be found to have violated section 5 of the FTCA.¹⁷¹ The court in *Orkin* said that “[g]iven that a practice may be deceptive without a showing of intent to deceive, it is apparent that a practice may be found unfair to consumers without a showing that the offending party intended to cause consumer injury.”¹⁷² The caselaw therefore shows that the substantial injury prong is satisfied in situations either where the injury is substantial to a few people, or when the injury is minimal but widespread among the population.¹⁷³ The prong is also met in situations where the business did not intend to cause the injury, but their practices did anyway.¹⁷⁴ The courts have also determined that an injury can be substantial, even if it is not financial in nature.¹⁷⁵ The first prong of the test can, therefore, be satisfied in a variety of different ways.¹⁷⁶ Thus, it can be

164. *Id.*

165. *Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d at 299.

166. *Id.*

167. 849 F.2d 1354 (11th Cir. 1988).

168. *Id.* at 1365.

169. *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010) (quoting *FTC v. Windward Mktg., Ltd.*, No. 1:96-CV-615F, 1997 WL 33642380, at *11 (N.D. Ga. Sept. 30, 1997)).

170. *Orkin*, 849 F.2d at 1368.

171. *Id.*

172. *Id.*

173. *Id.* at 1365.

174. *Id.* at 1368.

175. *See* *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 299 (D. Mass. 2008), *aff'd*, 624 F.3d 1 (1st Cir. 2010) (stating that a substantial injury can include an injury that harms a large amount of people or risks significant harm).

176. *Supra* notes 163–75 and accompanying text.

argued that injuries suffered by gamblers can be substantial if they destroy a marriage or cause a gambler to develop a mental illness. The caselaw makes it clear that courts are not looking for a narrow fact pattern to determine if a substantial injury has occurred.¹⁷⁷

G. Prong Two: The Injury Must Not Be Outweighed by any Countervailing Benefits to Consumers or Competition That the Practice Produces.

In *American Financial Services*, the court analyzed the rule against which the FTC brought suit through prong two by determining if the cost of limiting or regulating something outweighed the avoidance of the harms incurred by consumers.¹⁷⁸ The court ruled that a marginal cost to consumers was overshadowed by a much greater risk because of the use of the opposing party's security interests and wage assignments.¹⁷⁹ In *Hibdon v. Safeguard Properties, LLC*,¹⁸⁰ the defendant broke into the plaintiff's home and took personal property after the plaintiff did not make his mortgage payments on time.¹⁸¹ To determine if there were any countervailing benefits to the consumer, courts must examine whether a practice is "injurious in its net effect."¹⁸² The court acknowledged that "business practices entail a balancing of costs and benefits to the consumer," but if a practice's costs outweigh the benefits, then the second prong of the test will be met.¹⁸³

In *Neovi*,¹⁸⁴ the FTC shut down a website that allowed consumers to create and send checks by mail or email, called Qchex.com, after the FTC found that the site was highly vulnerable to con artists and fraudsters.¹⁸⁵ The Ninth Circuit Court of Appeals determined that because large banks offered the same services at a cheaper price and with greater security, the risk of injury that consumers would undertake by using Qchex.com was not outweighed by countervailing benefits for the site to remain operational.¹⁸⁶ These cases demonstrate that to satisfy the second prong of the FTC unfairness standard, courts

177. *Id.*

178. *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 976 (D.C. Cir. 1985).

179. *Id.* at 976.

180. No. CIV. PJM 14-591, 2015 WL 4249525 (D. Md. July 9, 2015).

181. *Id.* at *2-3.

182. *Id.* at *6 (quoting *Legg v. Castruccio*, 642 A.2d 906, 916 (Md. Ct. Spec. App. 1994)).

183. *Id.* at *5-6.

184. *FTC v. Neovi, Inc.*, 604 F.3d 1150 (9th Cir. 2010).

185. *Id.* at 1158.

186. *Id.* at 1159.

attempt to balance the risks and harms associated with a practice, as well as the benefits to the consumer that the practice provides.¹⁸⁷

H. Prong Three: The Injury Must be One That Consumers Themselves Could Not Have Reasonably Avoided.

Courts have determined that action should be taken for unfair consumer practices in regard to prong three of the test when there is “some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.”¹⁸⁸ In *American Financial Services*, the D.C. Circuit Court of Appeals determined that the injury of defaulting satisfies this prong, as it is unpredictable and avoidable.¹⁸⁹ In the aforementioned *Neovi* case, the court said that in order to determine if a consumer injury was reasonably avoidable, one should look to whether the consumer had a free and informed choice.¹⁹⁰ Courts have also defined an injury as avoidable if consumers have reason to anticipate impending harm and the means to avoid it, or if consumers are aware of, and are reasonably capable of, pursuing potential avenues toward mitigating injury after the fact.¹⁹¹ Subsequent mitigation is not determined by either convenience or the cost it might take to mitigate, but instead whether it was reasonably possible to avoid.¹⁹²

In a 1986 FTC case, the Commission stated that “[w]hether some consequence is ‘reasonably avoidable’ depends not just on whether people know the physical steps to take in order to prevent it, but also on whether they understand the necessity of actually taking those steps.”¹⁹³ This means that the consumer should be aware of the risks of partaking in a practice offered by a business as well as how serious those

187. See generally *id.* at 1158–59; *Hibdon*, 2015 WL 4249525, at *5–6; *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 975–76 (D.C. Cir. 1985).

188. *Am. Fin. Servs. Ass’n*, 767 F.2d at 976 (quoting H.R. REP. NO. 98-156, at 37 (1983)).

189. *Id.* at 977.

190. *Neovi*, 605 F.3d at 1150; see also *Am. Fin. Servs. Ass’n*, 767 F.2d at 976–77 (finding injuries to be unavoidable both because consumers were unable to bargain over remedial provisions and because default is generally out of consumers’ control); *Orkin Exterminating Co.*, 108 F.T.C. 263, 377 (1986) (determining that an injury is not reasonably avoidable when a market impediment prevents consumers from protecting themselves), *aff’d*, 849 F.2d 1354 (11th Cir. 1988).

191. *Orkin Exterminating Co.*, 108 F.T.C. at 366.

192. *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988).

193. *Orkin Exterminating Co.*, 108 F.T.C. at 366 (quoting *International Harvester Co.*, 104 F.T.C. 949, 1061 (1984)).

risks might be.¹⁹⁴ If a consumer was not able to make a free and informed decision on partaking in a risky practice, was not able to mitigate harm as a result of those risks, and was not aware of the severity of the risks, then courts and the FTC have found the resulting injury to not be reasonably avoidable.¹⁹⁵

The three-part unfairness standard demonstrates what is required to find that a business practice is unfair and is likely to cause foreseeable harm to a consumer.¹⁹⁶ Without any limitations or protections, gambling with credit is an unfair practice that is likely to cause a substantial injury to a consumer. In the following Part, this Comment demonstrates how unrestricted financial instrument usage while gambling satisfies this three-prong standard.¹⁹⁷

II. ANALYSIS

Gambling may be dangerous, but it is not likely to be an unfair practice so long as patrons are provided the requisite guardrails.¹⁹⁸ In the ecosystem of legalized gambling, responsible gaming limits are these guardrails.¹⁹⁹ In states without the responsible gaming limit of credit card restrictions, gamblers are subjected to reasonably foreseeable injury due to unfair practices by creditors and gaming operators.

By walking through each prong of the unfair practice test, this Comment demonstrates how allowing a patron to use credit to deposit funds with which they plan to gamble is an unfair practice. Prong one requires that the injury be substantial.²⁰⁰ This prong is satisfied because of the large harm that problem gambling can inflict on a gambler, including financial ruin and mental health issues.²⁰¹ Prong two states that the cost of avoiding the harm is not outweighed by countervailing benefits that the practice provides.²⁰² Because limitations on depositing with credit do not limit responsible gameplay or prevent states from

194. *Id.*

195. *Id.*

196. *Id.*

197. *See id.*; *infra* Part II.

198. *See* Huble, *supra* note 68 (urging sportsbooks to take certain specific measures to make gambling a safer practice).

199. *Id.*; *see also* AM. GAMING ASS'N, *supra* note 3, at 4 (outlining the different responsible gaming limits in each state).

200. 15 U.S.C. § 45(n).

201. *See supra* notes 62–70, 87–107 and accompanying text.

202. 15 U.S.C. § 45(n).

availing themselves of tax benefits, this prong is fulfilled.²⁰³ Finally, prong three requires that the injury suffered must be one that consumers could not have reasonably avoided.²⁰⁴ This prong is met because those who suffer from Gambling Disorder and have problem gambling tendencies do not have the ability to gamble responsibly or protect themselves from their own problematic behaviors.²⁰⁵ With all three prongs satisfied, this Part demonstrates that a lack of legal limitation on gambling with credit subjects consumers to an unfair practice and allows legal gamblers to suffer unavoidable injury.

A. Prong One: Substantial Harm

Gambling with credit directly leads to substantial monetary and non-monetary injuries to the gambler.²⁰⁶ Courts have said that consumers can show substantial injury if there is a small harm suffered by a large group of people or a more serious harm suffered by an individual.²⁰⁷ Thus, because of the large number of problem gamblers, and the likelihood of exacerbated harm to the gamblers when using credit, gambling with credit causes a substantial injury.²⁰⁸ The house wins when one gambles.²⁰⁹ Only those that can consider themselves professional gamblers, those who win 52.4% of their bets, will turn a profit off of their bets.²¹⁰ However, just because one loses money while gambling, does not mean that they have suffered an injury.²¹¹

203. See *supra* notes 114–34 and accompanying text.

204. 15 U.S.C. § 45(n).

205. See *supra* notes 74–91 and accompanying text.

206. See *supra* notes 92–107 and accompanying text; Fong, *supra* note 74, at 22, 24 (identifying the physical and mental harms that can result from gambling); Streeter, *supra* note 63, at 1, 34 (drawing a link between legal gambling and gambling related harms).

207. See *FTC v. Klesner*, 280 U.S. 19, 28 (1929) (explaining substantial harm can be met by a widespread threat where the loss to each individual would not warrant private suits).

208. *Id.* at 28; see *Statistics of Gambling Addiction 2016*, N. AM. FOUND. GAMBLING ADDICTION HELP (2016) (citing a study that stated that there were over ten million problem gamblers in the United States; the study occurred over two years before gambling popularity boomed due to the repeal of PASPA).

209. Culver, *supra* note 63.

210. *Id.*

211. Alice LaPlante, *Most Gamblers Are Just out for Fun*, STAN. GRADUATE SCH. BUS. (Feb. 1, 2009), <https://www.gsb.stanford.edu/insights/most-gamblers-are-just-out-fun> [<https://perma.cc/GAA4-A59B>].

Gambling is a form of entertainment.²¹² One might spend \$50 on a dinner date, but no rational person would consider that an injury because the person who spent the money received a meal and entertainment in return. However, problem gamblers and those who develop Gambling Disorder suffer a monetary injury when they continue to lose money and attempt to recoup their losses by chasing them.²¹³ When a patron is chasing their losses, they are not doing so for the entertainment of rooting on their wagers, they are doing so to recover money that they have already lost.²¹⁴ When gambling with credit, the patron has the ability to continue to make bets even when they have no more actual money to make those wagers with, which increases the likelihood of suffering a substantial injury and satisfying the first prong of the test.²¹⁵

With a large number of legal gamblers on a state-by-state basis, and with many states granting the patron the ability to gamble with credit without restriction, those who have problem gambling tendencies could be suffering a substantial injury if the patron is losing more money than the person would have if a limitation was in place.²¹⁶ Patrons who have problem gambling tendencies are more susceptible to losing additional money because they suffer involuntary impulses to continue to place bets.²¹⁷ Without information or messages to indicate that the gambler has exhausted their funds, the patron could continue to gamble.²¹⁸ As the United Kingdom Gambling Commission stated, the exhaustion of funds is a natural break in play.²¹⁹ Those who suffer

212. *Id.* (asserting that for most gamblers, the activity is not for making money, but for entertainment purposes).

213. *See* Gainsbury, *supra* note 4, at 185, 187, 189 (arguing that chasing losses can and will lead to a substantial loss of money).

214. *Id.*; Noel Bell, *Here's Why Gamblers Chase Losses*, COUNSELLING DIRECTORY (Apr. 20, 2018), <https://www.counselling-directory.org.uk/memberarticles/heres-why-gamblers-chase-losses> [<https://perma.cc/NC6T-XRMP>] (suggesting that gamblers will “double up” on their bets in an attempt to remedy the hurt feeling of past losses).

215. *See* FTC v. Direct Mktg. Concepts, Inc., 569 F. Supp. 2d 285, 299 (D. Mass. 2008) (holding that a substantial injury occurs if there is a significant increase in the risk of concrete harm), *aff'd*, 624 F.3d 1 (1st Cir. 2010).

216. *See* SZTAINERT ET AL., *supra* note 132, at 18 (highlighting that problem gamblers might be more susceptible to suffering the harms that escalate by allowing gambling with credit).

217. *Supra* notes 75–78 and accompanying text.

218. *See id.* (explaining why a gambler might continue to place more bets than they would have otherwise if they used credit as a deposit source).

219. SZTAINERT ET AL., *supra* note 132, at 18.

from Gambling Disorder, and are not provided with this natural break in play, may not be able to control themselves from placing additional bets with credit.²²⁰ Therefore, patrons who are not required to take a break in play and cannot control when they cease gambling are susceptible to a substantial injury.²²¹

Similarly, allowing credit usage encourages the practice of chasing losses, which often results in a substantial monetary injury.²²² Over 75% of problem gamblers chase their losses.²²³ Because of the inherent nature of odds determination, gamblers will lose at some point.²²⁴ If a gambler has already lost, and places a wager to try to recoup what has been lost, they are in danger of losing even more and suffering a larger injury.²²⁵ If gamblers use credit, and have a high credit line, that gambler has the ability to chase losses to a more extreme level because that person is using money that they do not actually possess.²²⁶ Additionally, patrons can continue to gamble without realizing the amount of debt they have incurred.²²⁷ The gambler's fallacy, in which many gamblers believe, is that because that gambler lost before, they will win the following time.²²⁸ However, it is impossible to predict

220. See Gainsbury, *supra* note 4, at 185, 189 (concluding that the ease of internet gambling facilitates a patron placing more bets than they would have if they had placed wagers in person).

221. See *supra* notes 206–20; FTC v. Direct Mktg. Concepts, Inc., 569 F. Supp. 2d 285, 299 (D. Mass. 2008) (explaining that a significant increase in the risk of concrete harm can be deemed a substantial injury), *aff'd*, 624 F.3d 1 (1st Cir. 2010).

222. See SZTAINERT ET AL., *supra* note 132, at 20 (stating that without a natural break in a play, patrons are more likely to continue gambling); Bibby, *supra* note 74, at 2 (finding that chasing losses is a very common source of financial harm when gambling); see also FTC v. Neovi, Inc., 604 F.3d 1150, 1157 (9th Cir. 2010) (finding that a substantial injury can occur if the consumer is injured in a practice for which they did not bargain or could not control), *aff'g* 598 F. Supp. 2d 1104 (S.D. Cal. 2008).

223. Bibby, *supra* note 74, at 2.

224. Culver, *supra* note 63 (explaining that, for a wager with two outcomes, the house generally requires the patron to wager slightly more than they would win).

225. See Bibby, *supra* note 74, at 3 (identifying why gamblers feel the impulse to chase their losses); see also Culver, *supra* note 63 (underscoring that nearly all gamblers will suffer a long term financial loss).

226. See *Gambling on Credit Cards to be Banned from April 2020*, UK GAMBLING COMM'N (Jan. 14, 2020), <https://www.gamblingcommission.gov.uk/news/article/gambling-on-credit-cards-to-be-banned-from-april-2020> [<https://perma.cc/95TA-PQ2N>] (noting the rationale behind the United Kingdom's ban on the use of credit cards for sports gambling).

227. See SZTAINERT ET AL., *supra* note 132, at 20 (asserting that misunderstanding the chances of success in gambling can lead to inadvisable future bets).

228. Croson & Sundali, *supra* note 90, at 195, 197.

future results of a random event from past results.²²⁹ Believing in that fallacy, and then acting on it with credit, inevitably leads to a greater potential loss than if that person was using actual cash or possessed funds.²³⁰ A greater potential loss, suffered by a population of problem gamblers collectively would constitute a substantial injury according to *Klesner*.²³¹

Furthermore, without any restrictions on the use of credit to gamble, gamblers are at serious risk of suffering substantial non-monetary injuries, thus satisfying prong one of the unfairness test.²³² Courts have held that an injury suffered by a patron does not need to be monetary for it to qualify as a substantial one under this standard.²³³ Injuries suffered by problem gamblers are not limited to losing money.²³⁴ Because of the emotional detriments that come with losing bets and continuing to place bets even after losing, gamblers are susceptible to depression and mental health challenges.²³⁵ These types of harms are a non-monetary substantial injury.²³⁶

The shame that one suffers from continual losses creates a higher incidence of depression found among problem gamblers than in the rest of the population.²³⁷ Additionally, gambling away a patron's personal money, or using a spouse's or family member's money can cause tension and potential household issues.²³⁸ As discussed in Part I, Kaitlin Brown, who is a licensed addiction counselor and gambling hotline operator in Connecticut, has shared stories about the impact problem gambling has on the household.²³⁹ Brown told ESPN about a

229. *Id.*

230. *Id.*; see also Bibby, *supra* note 74, at 3 (describing what types of personal beliefs can lead to additional future wagers).

231. See *FTC v. Klesner*, 280 U.S. 19, 28 (1929) (concluding that a smaller size injury suffered by a widespread population constitutes a substantial injury), *aff'g* 25 F.2d 524 (D.C. Cir. 1928); see also SZTAINERT ET AL., *supra* note 132, at 20 (identifying using credit as a cause of a loss chasing behavior).

232. See *FTC v. Direct Marketing, Inc.*, 569 F. Supp. 2d 285, 299 (D. Mass. 2008) (concluding that an increase in risk of concrete harm constitutes a substantial injury under the unfairness standard), *aff'd*, 624 F.3d 1 (1st Cir. 2010); Fong, *supra* note 74, at 22, 23 (examining common negative impacts of irresponsible gambling behavior).

233. *Legg v. Castruccio*, 642 A.2d 906, 916 (Md. Ct. Spec. App. 1994).

234. See Fong, *supra* note 74, at 22, 23 (explaining that a gambler's mental health and personal life can be damaged because of problematic gambling behavior).

235. *Problem Gambling*, *supra* note 69.

236. See *supra* note 166 and accompanying text.

237. *Problem Gamblers and Their Finances*, *supra* note 22, at 1.

238. *Id.*

239. *Supra* notes 98–105 and accompanying text.

young man who had gambled away thousands of dollars that his parents had saved for his education and about a married couple who had lost their life savings as a result of a husband's gambling problem.²⁴⁰ Yes, the injury suffered in those two stories was a massive loss of money, but the relationships between son and parents and husband and wife were fractured as well.²⁴¹ Because the availability of credit exacerbates the practice of chasing losses, a state allowing a gambler to deposit funds with credit may result in similar examples of household and personal issues.²⁴² That type of injury might not be quantifiable, but within the household it is certainly substantial, and would meet the first prong of the unfairness standard.²⁴³

Even if a state does not intend to cause substantial injury, the state still does so when a legal gambling statute allows the unrestricted use of credit to gamble. The state does not need to intend to cause a substantial injury for the injury to satisfy the first prong of the standard.²⁴⁴ The states have legalized gambling to bring in tax revenue.²⁴⁵ The states have done this seemingly without the intention of bringing in additional money from problem gamblers who use credit.²⁴⁶ Because intent is not necessary for a substantial injury to occur, by simply allowing gamblers the option to use credit, states provide the potential for a substantial injury.²⁴⁷

Lastly, those who use credit to gamble suffer a substantial injury if they are not provided an opportunity to limit their deposit methods within the sportsbooks. The FTC has said that consumers can be

240. Ryan Hockensmith, *Inside the Life of a Gambling Help Line Worker*, ESPN (Feb. 9, 2022), https://www.espn.com/chalk/story/_/id/33237601 [<https://perma.cc/RQ3W-VK7U>].

241. *Id.*

242. *See* Legg v. Castruccio, 642 A.2d 906, 916 (Md. Ct. Spec. App. 1994) (acknowledging that substantial injury may include financial harm and health and safety risks, but that emotional harm or other “subjective” types of harm will not ordinarily constitute substantial injury). Therefore, chasing losses could result in both monetary and non-monetary types of injury. However, subjective types of harm that come from chasing losses would be more difficult to prove as a “substantial injury.” *Id.*

243. *Id.*

244. *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988).

245. Cal. Bus. J. Newswire Div., *supra* note 12.

246. *Id.* (explaining that while some states do not contemplate gamblers using credit, states that do not restrict credit usage can bring in tax revenue from problem gamblers).

247. *See Orkin Exterminating Co.*, 849 F.2d at 1368 (explaining that a substantial injury can happen even if there was no intent for anyone to suffer any harm).

“injured by a practice for which they did not bargain.”²⁴⁸ If states do not even provide the opportunity for the gambler to create limitations within their wagering accounts, the gambler’s options to limit their own play are restricted from the start.²⁴⁹ When considering the impulsive nature of Gambling Disorder, problem gamblers have not been given the ability to “bargain” for their own safe practices and can be subject to substantial injury.²⁵⁰

For the aforementioned reasons, prong one of the unfairness test is satisfied because gambling with unrestricted credit provides no protection to the patron who has no ability to prevent their own addictive impulses from leading to additional future loss.²⁵¹ The lack of a natural break in play and awareness that funds are exhausted lead to chasing losses for those with problem gambling tendencies, which can result in financial ruin and upheaval in their personal lives.²⁵² These potentially life-altering implications that result from the unrestricted use of credit clearly meets the first prong of the unfairness standard.

B. Prong Two: The Cost of Avoiding the Harm

Gambling with credit is an unfair practice because the countervailing benefits that come with the option to gamble with credit are substantially outweighed by the risks and harms that result from the practice.²⁵³ To determine if a practice satisfies the second

248. *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010) (quoting *FTC v. Windward Mktg.*, No. 1:96-CV-615F, 1997 WL 33642380, at *1, *11, (N.D. Ga. Sept. 30, 1997)), *aff’d* 598 F. Supp. 2d 1104 (S.D. Cal. 2008).

249. AM. GAMING ASS’N, *supra* note 3, at 4 (demonstrating that some states have zero financial instrument restrictions); *see also* SZTAINERT ET AL., *supra* note 132, at 20 (implying that a lack of knowledge on how successful one is gambling can lead to inadvisable additional bets).

250. *Neovi*, 604 F.3d at 1157 (quoting *FTC v. Windward Mktg.*, No. 1:96-CV-615F, 1997 WL 33642380, at *1, *11, (N.D. Ga. Sept. 30, 1997)) (concluding that if consumers cannot or did not bargain for a practice that resulted in injury, the injury can qualify as a substantial injury under the three part standard); Swanton & Gainsbury, *supra* note 129, at 21, 23; *see* Bibby, *supra* note 74, at 3 (arguing that some gamblers do not have the self-control to cease gambling even in detrimental situations).

251. *Supra* notes 198–249 and accompanying text.

252. *See id.* (elaborating on the specific reasons why allowing unrestricted credit causes a substantial injury).

253. *See* Swanton & Gainsbury, *supra* note 124, at 21, 23 (explaining the harms that can result through gambling with credit); SZTAINERT ET AL., *supra* note 132, at 20 (concluding that gambling with credit is dangerous).

prong of the unfairness standard, courts balance the risks and harms associated with a practice and the countervailing benefits to the consumer and the business that the practice provides.²⁵⁴

Firstly, the success of states that already employ restrictions on credit usage demonstrate that states can still reap the financial benefits of legalized gambling without subjecting their citizens to an unfair practice.²⁵⁵ For example, New York requires credit limits that promote responsible gambling, while Tennessee bans credit cards outright.²⁵⁶ The restriction in Tennessee, and limitation in New York, has not stopped either state from receiving hundreds of millions of dollars in tax revenue.²⁵⁷ New York has seen the most amount of tax revenue from legal gambling collected in one month; in December 2022, even with a blanket restriction on credit cards, Tennessee collected the highest monthly total of tax revenue via online gambling outside of the four most populous states that have already legalized gambling: New York, New Jersey, Illinois and Pennsylvania.²⁵⁸ These statistics prove that any argument asserting that the countervailing benefit of state tax revenue outweighs potential harms from the absence of financial instrument restrictions must fail because states have been successful with credit limitations.²⁵⁹ Yet, even though there is no evidence that restricting credit cards make patrons less likely to gamble, most states

254. See *supra* Section I.G and accompanying text.

255. See CONN. GEN. STAT. § 12-863 (requiring minor restrictions on the use of credit like limiting a user to one credit card per account). Compare N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1367, with TENN. CODE ANN. § 4-49-105.

256. TENN. CODE ANN. § 4-49-105; see N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1367 (stating that New York caps the amount of potential credit used by each patron to \$2,500 per year; essentially, even if a gambler were to use credit, the hard cap of \$2,500 creates a ‘natural break in play’ and prevents many of the risks that come with gambling using credit from materializing).

257. N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1367; see Swanton & Gainsbury, *supra* note 124, at 21, 23 (asserting that a natural break in play is an excellent protective measure for problem gamblers); see Altruda, *supra* note 48 (showing state gambling tax revenue of \$1,167,823,284 in New York since June 2019 and \$157,607,429 in Tennessee since November 2020).

258. *New York State Collects Record Amount of Sports Betting Tax Revenue*, WRGZ (May 31, 2022), <https://www.wgrz.com/article/news/local/record-setting-tax-revenue-from-sports-betting-new-york-state/71-dc52d5c6-61a8-48d2-96ab-7f7a78f337bd> [<https://perma.cc/KWQ7-RYJJ>]; Altruda, *supra* note 48.

259. See *Hibdon v. Safeguard Props., LLC*, No. CIV 14-591, 2015 WL 4249525, at *1, *6 (D. Md. July 9, 2015) (stating that the second prong of the unfairness standard is met by balancing the costs and future injuries of the practice with the countervailing benefits of the practice).

that have legalized gambling do not require any sort of restriction on the use of credit to deposit funds and leave their citizens susceptible to an unfair practice.²⁶⁰

The ease of access to patron funds with credit is not a countervailing benefit that outweighs the cost of substantial injury and thus not a defense to the argument that the second prong of the unfairness standard is met.²⁶¹ Courts have ruled that marginal costs to consumers can be overshadowed by the potential of a much greater risk.²⁶² In this scenario, the marginal “cost” to consumers is the restriction on using credit as a source of gambling funds to wager with.²⁶³

An example of what a marginal cost to consumers looks like exists in land-based casinos in Pennsylvania.²⁶⁴ In Pennsylvania, gamblers at land-based casinos are not allowed to use credit to play a table game.²⁶⁵ A gambler at a casino must therefore take the extra step to withdraw cash from an ATM in order to play.²⁶⁶ Yet, Pennsylvania has no similar restriction on using credit to gamble on internet sportsbooks.²⁶⁷ If Pennsylvania believes that it is not overly burdensome to require to land-based casino patrons to use payment other than credit, what would the state’s defense be in arguing that restricting credit usage for

260. AM. GAMING ASS’N, *supra* note 3, at 6–7.

261. *See* FTC v. Neovi, Inc., 604 F.3d 1150, 1158 (9th Cir. 2010) (explaining that the second prong of the unfairness standard is satisfied if the cost to consumers outweighs any countervailing benefits that the practice provides), *aff’d* 598 F. Supp. 2d 1104 (S.D. Cal. 2008).

262. *See* Am. Fin. Servs. v. FTC, 767 F.2d 957, 976 (D.C. Cir. 1985) (ruling that if the potential of a large risk exists, the second prong of the three-part test is met, even if there is a marginal cost to consumers).

263. *See id.* (holding that the second prong of the unfairness standard is evaluated using a balancing test of cost and countervailing benefits).

264. *See* 4 PA. CONS. STAT. ANN. § 1504 (West 2017) (stating that credit cannot be used as a source of funds at land-based casinos).

265. *Id.*

266. *Id.*

267. *Compare* 4 PA. CONS. STAT. ANN. § 13C01 (offering no restriction in allowing gamblers to use credit to deposit money into their sports wagering accounts), *with* 4 PA. CONS. STAT. ANN. § 1504 (offering restrictions to use credit to deposit money into slot machines and similar games). *But see* W. VA. CODE § 29-22D-6 (2018) (stating that there is no restriction on using credit for traditional gambling or online sports gambling).

online gambling is a cost for consumers that outweighs potential benefits.²⁶⁸

The Play+ platform is another excellent example of what a marginal cost to consumers looks like, while simultaneously limiting the risk of likely injuries that result from unrestricted gambling with credit.²⁶⁹ Instead of having the ability to deposit from a bank account directly into a wagering account, the Play+ platform requires an additional deposit into a sequestered account that allocates funds specifically for gambling.²⁷⁰ Using the platform might take more time and is not as straightforward as one single deposit from the bank account to wagering account, but the benefits it provides outweighs that “cost[.]”²⁷¹ Not only does Play+ keep money set aside for gambling, but it also provides the user with information about how much is deposited in a certain period as well as how many times they have accessed the platform.²⁷² Michaels said that, while being told how much money a user deposits into and withdraws from of a Play+ account might be an unpleasant experience, the value of that information being provided to the patron is that it promotes responsible gambling behavior.²⁷³ Without a platform like Play+ or a state restriction, the risk of substantial injury clearly outweighs the ease of access to funds that exists in states with no such credit restriction.²⁷⁴ In these states, prong two of the unfairness standard is satisfied.

A proponent of unlimited credit usage would argue that, even with a restriction, those with Gambling Disorder will do what is possible to replenish their accounts with funds even if depositing with credit is no

268. *Supra* notes 264–67 and accompanying text; *see* 4 PA. CONS. STAT. ANN. § 13C11 (detailing what is required of land-based casinos and internet gaming operators in Pennsylvania).

269. Michaels Interview, *supra* note 115.

270. *Id.*

271. *Id.*; *see* Am. Fin. Servs. Ass’n v. FTC, 767 F.2d 957, 976 (D.C. Cir. 1985) (analyzing the second prong of the unfairness standard using a simple balancing test of cost and countervailing benefits).

272. Michaels Interview, *supra* note 115.

273. *Id.*

274. *See supra* Section II.A (explaining why unrestricted credit usage in gambling is an unfair practice); *Am. Fin. Servs. Ass’n*, 767 F.2d at 976 (concluding that if the cost of a practice outweighs the potential benefits, then the second prong of the unfairness standard is satisfied).

longer an option.²⁷⁵ This argument would hold water with some gamblers.²⁷⁶ This person would assert that the countervailing benefit of credit usage, creating an easier way for patrons to deposit funds, outweighs the risk of a potential injury that will likely be incurred by a problem gambler anyways, thus failing prong two of the unfairness standard.²⁷⁷ However, because of the risks of credit usage—such as enabling continuous play and obscuring incurred debts—the mere potential of preventing the substantial injuries of a loss chasing habit and Gambling Disorder greatly outweighs any potential benefit of making a dangerous activity a little easier to participate in.²⁷⁸

All responsible gaming limits exist to protect consumers.²⁷⁹ Gaming limits are there to prevent a patron from losing as much money as they might have lost otherwise.²⁸⁰ The countervailing benefits of a state requiring a financial instrument restriction on the use of credit do not outweigh the risk of patrons gambling away more money than they possess.²⁸¹ The result of this simply balancing test satisfies prong two of FTCA section 5's unfairness standard.²⁸²

C. Prong Three: Consumers' Reasonable Ability to Avoid

Those with Gambling Disorder are not reasonably capable of pursuing potential avenues towards mitigating injuries after the fact because of the compulsion that comes with the condition of Gambling

275. See Michaels Interview, *supra* note 115 (explaining that even the completely restrictive ban on credit in Tennessee does not stop problem gamblers from gambling irresponsibly).

276. See Mestre-Bach et al., *supra* note 74, at 1, 3 (explaining that there are varying levels of gambling addiction, like there is with any addiction, and that for those with a Gambling Disorder, responsible gaming limits are not going to prevent problematic behavior).

277. Mestre-Bach et al., *supra* note 74.

278. *Supra* notes 215–50 and accompanying text.

279. Huble, *supra* note 68.

280. *Id.* (acknowledging that these limitations could prevent future harms incurred by gamblers).

281. *Supra* notes 253–78.

282. Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 976 (D.C. Cir. 1985); Hibdon v. Safeguard Props., LLC, No. CIV 14-591, 2015 WL 4249525 *1, *6 (D. Md. July 9, 2015); FTC v. Neovi, Inc., 604 F.3d 1150, 1158 (9th Cir. 2010) (holding that the second prong of the unfairness standard is met through a balancing test of cost to the consumers and business and the potential risk of injury to the consumer). Because the potential negative impacts of a restriction fall well short of the injury that may result from the absence of a restriction, this practice meets this prong of the unfairness test.

Disorder.²⁸³ Gambling Disorder is a non-substance related addiction according to the DSM-5.²⁸⁴ In the same way that one can build tolerance to, have cravings for, and suffer from withdrawal from a substance like alcohol, so, too, do those with Gambling Disorder.²⁸⁵ Therefore, problem gamblers are not always capable of stopping, and mitigating the damage from, the action that is causing the harm in the first place.²⁸⁶ If a practice causes this type of chain reaction, the injury is unavoidable and meets the third part of the unfairness standard.²⁸⁷

Many problem gamblers are unable to avoid substantial injury if not provided with a free and informed decision when choosing what funds to gamble with.²⁸⁸ To determine if consumers could have reasonably avoided the substantial injury, courts look to whether consumers made a free and informed decision when faced with the unfair practice.²⁸⁹ Without a state requiring any information be provided to the gambler about the risks associated with gambling with credit—if the state does allow credit to be used as a source of funds—the gambler is not adequately informed about what they are potentially subjecting themselves to by using credit as a source of funds.²⁹⁰ Jonathan Michaels said, “The best thing we can do in order to have people responsibly gamble is to provide [the gambler] with as much information as possible.”²⁹¹ Thus, any gap in information leads to a less informed decision on how much to gamble and what is safe to gamble.²⁹²

283. See Murch & Clark, *supra* note 69, at 537 (identifying that some problem gamblers are unable to remedy their own bad decisions and behaviors).

284. *Id.*

285. *Id.*

286. *Id.* at 538.

287. See *Orkin Exterminating Co.*, 108 F.T.C. 263, 377 (1986) (holding that if consumers are unable or not reasonably capable of pursuing avenues that avoid the harm, then the injury is one that the consumer could not have reasonably avoided).

288. See Murch & Clark, *supra* note 69, at 538 (describing that because of the nature of gambling addiction, many problem gamblers are unable to make responsible decisions about when to quit); see also Swanton & Gainsbury, *supra* note 124, at 25 (explaining how credit usage creates a more dangerous gambling experience for problem gamblers).

289. *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010).

290. See Michaels Interview, *supra* note 115 (discussing how a lack of information about one’s gambling habits can increase the chance that the gambler develops bad habits).

291. *Id.*

292. See *Neovi, Inc.*, 604 F.3d at 1158 (concluding that the third prong of the test is met if consumers did not have a free and informed decision on the practice that

As the FTC stated in *In re Orkin Exterminating Company, Inc.*,²⁹³ consumers not only need to understand the risks involved in a practice but also the necessity of taking precautions to avoid those risks.²⁹⁴ If a patron were to deposit funds into their account and be given options on deposit methods (Debit Cards, PayPal, Venmo, Credit Cards, etc.), then the patron should theoretically be told that depositing with credit is different than depositing with other sources of funds.²⁹⁵ Without this sort of information or warning, patrons are not aware of pitfalls that come with gambling with credit and are not informed of the severity of those risks.²⁹⁶ Without this type of warning, a substantial injury suffered as a result of gambling with credit becomes more unforeseeable because the patron was not aware of the fact that they were increasing the already heightened risks associated with gambling.²⁹⁷

States that place restrictions on gambling with credit but do not inform the patron why the limitation exists also prevent the gambler from making a truly free and informed decision. Connecticut requires that a person may only use one debit card or only one credit card for an account.²⁹⁸ While this sort of restriction prevents a patron from using multiple lines of credit to wager with, which is one dangerous possibility when allowing credit to be used for gambling, it does not require sportsbooks to inform their patrons why a limit exists.²⁹⁹ Without any sort of information, the patron might not be aware that the limit exists to protect the patron, but instead is required for another reason that does not promote responsible gaming.³⁰⁰

caused the injury); *see also* Murch & Clark, *supra* 74, at 534–45 (explaining that problem gambling tendencies can be caused by neurological traits).

293. 108 F.T.C. 263 (1986).

294. *Id.* at 360 (discussing the court's role in determining if a consumer's injury was unavoidable).

295. *See id.* (highlighting the importance of providing consumers with information as to why a practice might be dangerous); Michaels Interview, *supra* note 120 (explaining that the gambler should be provided as much information as possible about why something might be an example of irresponsible gaming behavior).

296. Michaels Interview, *supra* note 115.

297. *Supra* notes 225–30; *see Orkin Exterminating Co.*, 108 F.T.C. at 264, 349 (discussing how the danger of a practice needs to be explained to the consumer).

298. CONN. GEN. STAT. § 12-863(c)(2); REVIEW OF ONLINE GAMBLING, *supra* note 135, at 3; *see* GAMBLING RSCH. EXCH. ONT., THE ROLE OF CREDIT CARDS IN GAMBLING 7 (2020).

299. *Id.*; *see also* Huble, *supra* note 68 (suggesting that requiring sports betting operators to inform patrons why there are limits is a good thing).

300. Huble, *supra* note 68; Michaels Interview, *supra* note 115.

Gamblers are more likely to make “free” decisions when using credit to deposit funds.³⁰¹ The state is allowing the sportsbook to offer deposit methods, and the patron then gets to choose how they wish to fund their wagering account.³⁰² However, without warnings about the dangers of gambling with credit, gamblers may not have reason to anticipate the impending potential harm associated with wagering using credit.³⁰³ Consumers who cannot anticipate a practice’s impending harm suffer an injury that satisfies the third prong of the unfairness test.³⁰⁴

When using credit, gamblers are much less likely to understand how much debt they have incurred, leading to a greater potential for default, and, thus an unforeseeable and unavoidable injury.³⁰⁵ The FTC has successfully asserted in Court that because default is “ordinarily the product of forces beyond the debtor’s control,” it is unforeseeable and unavoidable.³⁰⁶ Those with problem gambling tendencies and Gambling Disorder truly believe that at some point they will crawl out of the hole they have dug themselves.³⁰⁷ By allowing this practice to continue with credit usage even after the patron’s actual funds have been exhausted, the patron can barrel down the path towards default without as much protection as would exist if the patron was not allowed to use credit initially.³⁰⁸

301. *Supra* notes 72–82 and accompanying text; *see also* Swanton & Gainsbury, *supra* note 124, at 22–23 (discussing how “consumer credit use and debt problems are risk factors for increased problem gambling severity”); SZTAINERT ET AL., *supra* note 132, at 18 (discussing the impact removing a potential natural break in play has on a problem gambler).

302. AM. GAMING ASS’N, *supra* note 3, at 6–7.

303. Michaels Interview, *supra* note 115; *see* SZTAINERT ET AL., *supra* note 132, at 18–23 (2020) (explaining why gambling with credit can lead to more debt for gamblers who participate in the practice without knowing how much debt they have actually incurred).

304. SZTAINERT ET AL., *supra* note 132; *see* Orkin Exterminating Co., 108 F.T.C. 263, 362 (1986) (ruling that if a consumer cannot reasonably anticipate impending harm, the practice that causes that harm meets the third prong of the unfairness standard).

305. SZTAINERT ET AL., *supra* note 132, at 23; *see* Am. Fin. Servs. Ass’n v. FTC, 767 F.2d 957, 977–78 (D.C. Cir. 1985) (holding that defaulting on a debt can be an unforeseeable and unavoidable injury in certain circumstances).

306. *Am. Fin. Servs. Ass’n*, 767 F.2d at 976–78.

307. *See* Croson & Sundali, *supra* note 90, at 195–209 (describing the skewed thinking that problem gamblers often employ).

308. *See generally* Swanton & Gainsbury, *supra* note 124, at 25 (elaborating on the dangers of gambling with credit); SZTAINERT ET AL., *supra* note 132, at 23 (finding that using credit to gamble can increase the chances of injury to gamblers).

Conversely, states that require additional gaming limits to prevent some of the harms of wagering with credit give consumers the chance to avoid an injury and are thus not in violation of section 5 of the FTCA.³⁰⁹ Oregon is an example of a state that requires some restriction on credit.³¹⁰ While Oregon allows patrons to use credit for online sports wagering, the statute requires that the gambler establish a personal deposit limit when creating an account.³¹¹ By mandating that a patron do this, Oregon creates a natural break in play when a deposit limit is reached.³¹² A patron can change their limits, but even requiring one additional step provides the information to a problem gambler about when the patron has exhausted their personalized maximum deposit limit.³¹³ This helps the patron avoid the problem gambling pitfalls that may have resulted had the personal deposit limit requirement not been established.³¹⁴ Because Oregon puts the burden on the gambler to establish their own deposit limit and informs the gambler about the limitation, the gambler now has reason to anticipate impending harm and has a free and informed choice as to whether they will choose to avoid the harm.³¹⁵

Without any restriction on the use of credit, or information on why the restriction exists, states subject gamblers to unforeseeable and unavoidable injury because patrons cannot make a free and informed decision on when to stop gambling and are unable to properly anticipate the impending harm.

309. See *Am. Fin. Servs. Ass'n*, 767 F.2d at 976 (holding that if an injury is foreseeable and avoidable, there will not be a violation of the FTCA); see also AM. GAMING ASS'N, *supra* note 3, at 279 (differentiating between the types of responsible gaming limits in legal gambling states); 15. U.S.C. § 45 (2022). Compare N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1367 (allowing credit to be used as a deposit method but requiring some limitations on its use), with TENN. CODE ANN. § 4-49-105 (imposing a complete ban on the use of credit for online sports gambling). It should be noted that because the legal gambling statute in Oregon is so new, it has yet to be tested under the law in a courtroom. That is what makes this evaluation so difficult on a state-by-state basis because without any caselaw, and with varying degrees of protection, one cannot be sure of exactly where the line is located.

310. OR. REV. STAT. ANN. § 167.109 (2022).

311. *Id.*

312. *Id.*

313. *Id.*

314. See SZTAINERT ET AL., *supra* note 132, at 20 (finding that without a break in play or limitation, credit usage may lead to chasing losses and ultimately financially detrimental results).

315. *Supra* notes 289–314.

III. SOLUTION

State gambling statutes inherently recognize that gambling may lead to harm for the patron.³¹⁶ It is for this reason that states require hotlines for problem gamblers, airtight self-exclusion lists, and advertising restrictions for gambling content.³¹⁷ Yet, even with these protections in place, many states have chosen to not place any sort of limitation on patrons using credit to deposit funds into their accounts.³¹⁸ This is the case even though gambling with credit has a high association with loss chasing, removes chances for a natural break in play for the patron, and obscures the actual amount of money that a patron has lost.³¹⁹

To place a restriction on credit would not prevent a state from reaping the economic benefits that legalized gambling brings.³²⁰ It might require a patron to take one extra step in accessing funds for wagering, but states with a credit limitation like New York and Tennessee have shown that this extra step does not stop those who want to gamble responsibly.³²¹ However, for the irresponsible gamblers, and those with Gambling Disorder, this sort of restriction protects the gambler from themselves, as many problem gamblers are unable to avoid suffering an injury if they are given the ability to gamble with funds that they cannot access.³²² For these reasons, states that do not require any limitation on the use of credit are in violation of section 5 of the FTCA because the ability to gamble with credit in an unrestricted fashion is an unfair practice that subjects gamblers to reasonably foreseeable injury.

To remedy this issue, the federal government should establish a limit on the amount of credit that one person can use for gambling purposes over a certain period of time. Along with this type of restriction, the states should be required to inform the patron why there is a limitation on credit each time a gambler chooses to use credit as a deposit method.

316. *Supra* Section I.D.

317. *Id.*

318. *See* AM. GAMING ASS'N, *supra* note 3, at 4 (illustrating that only eighteen of thirty-six jurisdictions that have legalized gambling have enacted any sort of financial instrument restrictions).

319. *Supra* Part II.

320. *Supra* notes 51–56.

321. *Supra* notes 255–57.

322. *Supra* Part II.

States would likely argue that this proposal would create the same constitutional issue that PASPA did. This law would require that the states include restrictions within their gambling statutes which would theoretically violate the anti-commandeering principle. While the topic of whether such an action would survive judicial challenge is beyond the scope of this Comment, the proposal would be more legally sound if it was included in a more far-reaching federal gambling bill that preempted state gambling laws.

With that said, this proposed federal credit restriction would place a hard floor on the amount of money a gambler can lose with credit in a period, while also alerting the patron that the practice of gambling with credit has greater risks associated with it than gambling with other funds. States would not be required to completely ban credit cards as a deposit method like Tennessee does. It would give states leeway to institute some sort of guardrail against the dangers of gambling with credit. It is not important that the protections are identical from state to state, what is important is that the guardrails exist.

CONCLUSION

Gambling is an activity with inherent risks and the potential for serious injury.³²³ Responsible Gaming Limits are in place to protect the gambler from developing dangerous tendencies and to decrease the chance that the patron suffers these injuries.³²⁴ The United States' responsible gaming limit landscape ranges from loose to restrictive, thus offering different degrees of protection to patrons depending on the state.³²⁵ The dangers of gambling increase with the use of credit because the patron has less clear information on how much debt has potentially been incurred and a lack of an obvious natural break in play when funds are exhausted.³²⁶ Because those with Gambling Disorder may be unable to make a free and informed choice about what wagers to place and how much they can afford to wager, a lack of restriction on using credit subjects a patron to a reasonably foreseeable consumer injury under section 5 of the Federal Trade Commission Act.³²⁷ Therefore, states that do not require any sort of credit restriction are in violation of section 5 and allow sportsbooks to

323. *Supra* Section I.B.

324. *Supra* Section I.D.

325. *Supra* Section I.D.

326. *Supra* Section II.C.

327. *Supra* Part II.

conduct an unfair practice by allowing patrons to use credit to wager with.

There is no clear and obvious specific legislative directive that would remedy this violation. However, a federal law or regulation that requires states to institute some sort of credit limitation and warning about the dangers of gambling with credit would create a gambling ecosystem in which many of the deep potholes associated with the risky behavior would be paved over. This sort of federal law would not make gambling completely safe, but it would make it more likely that those most at risk do not suffer a substantial injury from wagering with credit. An unavoidable consequence of legal gambling is the government allowing some citizens the opportunity to make irresponsible decisions. It is up to the states to prevent those irresponsible decisions from resulting in a completely foreseeable injury.