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**BET YOU DIDN'T KNOW SHE COULD
GET PAID FOR THAT:**
**Using Sports Betting and the Right
of Publicity To Address the Gender Wage Gap
in Professional Sports**

Torrey M. Feldman

ABSTRACT

May 14, 2018 is among the most significant days in modern American sports history. No one earned a gold medal or played a championship game. There was no World Cup or National Series title on the line. Instead, with just a keystroke, the U.S. Supreme Court held the Professional and Amateur Sports Protection Act (PASPA) unconstitutional, thereby legalizing sports betting across the country. In the two years following the decision, dozens of states have established sports betting operations. For professional sports athletes and their agents, this new era brings with it questions of how state laws regarding the right of publicity will interact with laws governing sports betting operations. Complicating this question is well-established precedent governing fantasy sports and the online platforms that profit off of the name, image, and likeness of professional athletes. Against this backdrop, female professional athletes continue to earn significantly lower salaries than their male counterparts. This Article examines the gender wage gap in professional soccer and basketball, and explains the significance and history of PASPA. It then reviews the case law regarding professional athletes and their right of publicity claims. It concludes by suggesting that some female professional athletes may narrow the gender wage gap by asserting their right of publicity on sports-betting platforms.

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INTRODUCTION

In the United States, women continue to be paid less relative to their male counterparts, and professional sports is no exception.¹

1. See *Equal Pay Day: March 21, 2020*, U.S. CENSUS BUREAU (Mar. 31, 2020), <https://www.census.gov/newsroom/stories/2020/equal-pay.html> [<https://perma.cc/75YY-DZ7L>]; Olivia Abrams, *Why Female Athletes Earn Less Than Men Across Sports*, FORBES (June 23, 2019), <https://www.forbes.com/sites/oliviaabrams/2019/06/23/why-female-athletes-earn-less-than-men-across-most-sports/#2cbc1db940fb> [<https://perma.cc/9YL5-D6YP>]; Maya Salam, *The Long Fight for Pay Equality in Sports*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com>

Fortunately, two intersecting areas of law offer a new tool to narrow the wage gap between female and male professional athletes: laws governing intellectual property and a recent Supreme Court decision regarding sports betting. When viewed through a feminist theory lens, these laws become a vehicle to address pay inequality. Specifically, allowing female professional athletes whose names appear on legal sports betting platforms to claim their right of publicity may help narrow the gender wage gap in certain professional sports. While certainly not a comprehensive solution, this intervention represents one possible step forward.

In Part I, I examine the current pay gap between female and male professional athletes in professional soccer and basketball. I also discuss two recent and pertinent efforts to achieve fair and equal compensation for women athletes: (1) the class action lawsuit filed by members of the United States Women's Soccer Team against the United States Soccer Federation, and (2) the Women's National Basketball Association's decision to opt out of their collective bargaining agreement, with the goal of renegotiating a more just contract. In Part II, I turn to the Supreme Court decision overturning the statute that once barred sports betting in most states. I review the history of the statute, the Professional and Amateur Sports Protection Act (PASPA), including how it became law and what led to its eventual demise. I also explain the differences among the four states that were still legally allowed to operate a sports-betting scheme. I conclude this Part by reviewing the cases that primed the Supreme Court to decide *Murphy v. NCAA*. In Part III, I explain the right of publicity, which is a subset of intellectual property law. I start with a general explanation of the history of the right before exploring the law as applied to professional athletes, including in the context of sports betting. I argue that the analytical approach used by the Eighth Circuit suggests that a limited number of female professional athletes could leverage these two areas of law to narrow the gender wage gap in professional sports.

I. THE GENDER WAGE GAP IN PROFESSIONAL SOCCER AND BASKETBALL

On average, women earn only \$0.82 for every dollar made by a man in the United States.² While this gap has narrowed in recent years, progress has been slow, on the order of one cent per

com/2019/03/11/sports/us-womens-soccer-pay.html [https://perma.cc/AJ3S-HX6X].

2. See U.S. CENSUS BUREAU, *supra* note 1.

year.³ According to researchers, “Gender pay gaps within occupations persist, even after accounting for years of experience, hours worked, and education.”⁴ This Part examines the extent of this gap within U.S. soccer and basketball leagues.

Society has come a long way since 1967, when Katherine Switzer completed the Boston Marathon. At the time, the race prohibited female participants, so Switzer registered as “K.V. Switzer” and outran the men who tried to stop her from finishing.⁵ Earlier this year, more than 450 women raced in the U.S. Olympic Trials marathon.⁶ So, what changed? For one, Congress passed Title IX, which amended the Education Amendments Act of 1972 and protects people from discrimination based on sex in education or other activities that receive federal dollars.⁷ This law had the effect of opening up athletic opportunities for girls and women in schools and universities. It also offers recourse for people participating in athletic activities that receive federal funding. However, for professional female athletes facing pay discrimination, it offers little protection.

Instead, as privately employed people, professional female athletes must seek redress through the Equal Pay Act of 1963, which prohibits arbitrary discrimination against women in the payment of wages.⁸ Under the Equal Pay Act, female athletes can claim

3. See Nikki Graf, et al., *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RESEARCH CTR. (Mar. 22, 2019), <https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts> [<https://perma.cc/LPW4-GAXQ>].

4. Jessica Schieder & Elise Gould, “*Women’s Work*” and the Gender Pay Gap, ECON. POL’Y INST. (July 20, 2016), <https://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/#epi-toc-3> [<https://perma.cc/P8KF-HQJQ>].

5. See Sarah Mervosh & Christina Caron, *8 Times Women in Sports Fought for Equality*. N.Y. TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/sports/women-sports-equality.html> [<https://perma.cc/9B5M-DMLU>].

6. See Talya Minsberg & Kevin Quealy, *Why Are American Women Running Faster Than Ever?*, N.Y. TIMES (Feb. 28, 2020), <https://www.nytimes.com/interactive/2020/02/28/sports/womens-olympic-marathon-trials.html> [<https://perma.cc/25WV-J5GF>].

7. 20 U.S.C.S. § 1681 (1986).

8. 29 U.S.C.S. § 206(d) (2016) (“No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of

gender discrimination in how they are compensated because the Act prevents employers from paying some employees less based on their sex.

A. *The U.S. Women's National Soccer Team*

One of the most visible and vocal organizations advocating for equal pay and working conditions for professional female athletes is the U.S.'s foremost women's soccer team, the Women's National Team (WNT). The WNT consistently outperforms its male counterpart, the Men's National Team (MNT), and has been ranked first in the world in ten out of the last eleven years.⁹ Furthermore, the WNT has won four World Cup victories and four consecutive Olympic gold medals.¹⁰ However, in spite of their superior athletic performance, the U.S. Soccer Federation (USSF) continues to underpay them.¹¹

Consequently, in 2016, five members of the WNT filed a complaint with the Equal Employment Opportunity Commission (EEOC) arguing for equal treatment and pay between the two teams.¹² The five complainants were co-captains Carli Lloyd and Becky Sauerbrunn, forward Alex Morgan, goalkeeper Hope Solo, and midfielder Megan Rapinoe.¹³ Though not one of the formal complainants, Julie Ertz explained why she was proud of her team's leadership on the issue, stating, "We feel it's our responsibility to continue to grow the sport, and this is a way to do that."¹⁴ Two major discrepancies between the teams included a \$15 difference in

production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.").

9. Pl.'s Collective Action Compl. For Violations of the Equal Pay Act and Class Action Compl. For Violations of Title VII of the Civil Rights Act of 1964 at ¶ 40, *Alex Morgan, et al. v. U.S. Soccer Fed'n, Inc.*, No. 2:19-cv-01717 (C.D. Cal.) [hereinafter *Complaint*].

10. See *U.S. Soccer Awards*, U.S. SOCCER, <https://www.ussoccer.com/history/awards/us-soccer-awards> [<https://perma.cc/M4MD-4KHW>] (last visited Aug. 8, 2020).

11. *Complaint*, *supra* note 9, at ¶ 58.

12. See Andrew Das, *Top Female Players Accuse U.S. Soccer of Wage Discrimination*, N.Y. TIMES (Mar. 31, 2016), <https://www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex-morgan-hope-solo-complain.html> [<https://perma.cc/6CYM-74J7>].

13. *Id.*

14. Andrew Das, *Julie Johnston Takes On the World, and the Fight Over Pay*, N.Y. TIMES, (Apr. 28, 2016), <https://www.nytimes.com/2016/04/29/sports/soccer/taking-on-the-world-and-the-fight-over-pay.html> [<https://perma.cc/CEP3-L5JN>].

per diems and a \$750 difference for appearances on behalf of the USSF.¹⁵ The players hoped that the EEOC's involvement would push the USSF to resolve the issue. However, as time went on, they began to doubt that the EEOC could help them achieve their desired goals,¹⁶ especially when the USSF sued the WNT's players' union over the validity of their collective bargaining agreement (CBA). Concerned that the EEOC complaint and investigation would be fruitless, Hope Solo sued the USSF for violation of the Equal Pay Act, arguing that the USSF willfully paid the WNT significantly less than the MNT.¹⁷ Shortly after Solo filed her lawsuit, on February 5, 2019 the EEOC issued a Notice of Right to Sue¹⁸ the USSF based on the WNT payers' original complaint that they were not compensated or treated equally.¹⁹ On March 8, 2019, several WNT team members joined as a class to sue the USSF for violations of the Equal Pay Act and Title VII of the Civil Rights Act.²⁰

The complaint included numerous allegations of discrimination by USSF, including: (1) a top tier WNT player earns only 38 percent of what a similarly situated MNT player makes;²¹ (2) MNT players receive triple to quadruple times the amount that WNT players earn for making the World Cup team;²² (3) the USSF provided seventeen chartered flights for the MNT in 2017, but none for the WNT;²³ and (4) the USSF arbitrarily sets WNT ticket prices

15. Andrew Das, *Pay Disparity in U.S. Soccer? It's Complicated*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html> (“[T]hose payments were equal before 2015, when an adjustment negotiated into the men’s C.B.A. increased them for the men. The problem was that there was no clause in the women’s C.B.A. that would ensure that the payments remained equal in the event that the men.”) [<https://perma.cc/6SMV-DTMO>].

16. Hope Solo, *The Next Step in the Fight for Equal Pay*, HOPE SOLO (Aug. 28, 2018), <http://hopesolo.com/2018/08/28/next-step-fight-for-equal-pay> (“I can no longer continue to put my faith in this process or believe the EEOC will make a significant ruling in this case.”) [<https://perma.cc/C3BZ-Q48V>].

17. HopeSolo.com Staff, *The Fight For Equal Pay Continues | An Update*, HOPE SOLO (Jan. 16, 2019), <http://hopesolo.com/2019/01/16/update-on-fight-for-equal-pay> [<https://perma.cc/6VFT-6E9N>].

18. The EEOC furnishes a Notice of Right to Sue at the time it closes its investigation. This notice gives complainants permission to file a lawsuit in federal or state court. See *Filing Lawsuits*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/filing-lawsuit> [<https://perma.cc/J7FN-Z4SM>] (last visited Aug. 5, 2020).

19. *Complaint*, *supra* note 9, at ¶ 88.

20. *Id.* ¶ 90.

21. *Id.* ¶ 58.

22. *Id.* ¶ 60.

23. *Id.* ¶ 73.

lower than that of the MNT.²⁴ The complaint claims these disparities must exist due to gender discrimination, given that, on all other metrics, the two national teams are the same.²⁵ Though the USSF states that it champions gender equality,²⁶ class members claimed that the USSF had been actively discriminating against them:

[B]y paying [the WNT] less than members of the MNT for substantially equal work and by denying them at least equal playing, training, and travel conditions; equal promotion of their games; equal support and development for their games; and other terms and conditions of employment equal to the MNT.²⁷

Class members were initially optimistic that the court would find blatant discrimination by the USSF and in doing so, signal that pay inequity is an insidious form of discrimination.²⁸ However, on May 1, 2020, Judge, R. Gary Klausner of United States District Court for the Central District of California dismissed the WNT claims about unequal pay and ruled that he would only hear claims regarding unequal working conditions.²⁹ The WNT plans to appeal the decision.³⁰

Inspired by the WNT, other professional female athletes have solicited their advice, including members from the Canadian National Soccer Team, the US National Hockey Team, and the Women's National Basketball Association (WNBA).³¹ As such,

24. *Id.* ¶ 77.

25. *Id.* ¶ 48. (“The plaintiffs and similarly situated male employees of the USSF must adhere to the same rules of the game of soccer as established by the Federation Internationale de Football Association (‘FIFA’). They play on the same size field; use the same size ball; have the same duration of matches and play by the same rules regarding start and restart of play, offside, fouls and misconduct, free kicks, penalty kicks, throw-ins, goal kicks, corner kicks, etc.”).

26. *Id.* ¶ 2. (“The USSF has claimed that its mission is to ‘promote and govern soccer in the United States in order to make it the preeminent sport recognized for excellence in participation, spectator appeal, international competitions and gender equality.’”).

27. *Id.* ¶ 4.

28. David Close & Wayne Sterling, *US Women's National Team Granted Class Action Status in Equal-Pay Lawsuit*, CNN (Nov. 8, 2019), <https://www.cnn.com/2019/11/08/sport/uswnt-soccer-equal-pay-lawsuit-class-action/index.html> [<https://perma.cc/3BYJ-SLX5>].

29. Andrew Das, *U.S. Women's Soccer Team's Equal Pay Demands Are Dismissed by Judge*, N.Y. TIMES (May 1, 2020), https://www.nytimes.com/2020/05/01/sports/soccer/uswnt-equal-pay.html?algo=als1&fallback=false&imp_id=262750071&action=click&module=moreIn&pgtype=Article®ion=Footer [<https://perma.cc/W3JY-N6XN>].

30. *Id.*

31. Andrew Das, *In Fight for Equality, U.S. Women's Soccer Team Leads the Way*, N.Y. TIMES (Mar. 4, 2018), <https://www.nytimes.com/2018/03/04/sports/>

female professional athletes are enlisting the help of one another and the court system to rectify the pay disparity that they have faced for years.

B. *The Women's National Basketball Association*

The WNBA recently reached its twenty-third birthday³² (the so-called "Jordan year") but the wage discrepancy between male and female basketball players persists. The National Basketball Association (NBA) is a majority owner of the WNBA, controlling 70 percent of the league's operations.³³ However, the NBA operates the WNBA differently from the men's league, namely, the salary cap for female professional basketball players is \$115,500,³⁴ while the lowest paid member of an NBA team must make at least \$560,000.³⁵ NBA referees also make more than WNBA players, earning at least \$150,000.³⁶

Citing this pay discrepancy and poor working conditions,³⁷ the WNBA players voted to opt out of their CBA after the 2019 season, hoping to tip-off negotiations for equal pay and treatment.³⁸ Nneka Ogwumike of the Los Angeles Sparks, the president of the WNBA's

soccer/us-womens-soccer-equality.html?module=inline [https://perma.cc/GLW8-5C3Q].

32. Jacob Bortgage, *WNBA Players Opt Out of Labor Deal, Set Up Showdown Over Pay, Financial Transparency*, THE WASHINGTON POST (Nov. 11, 2018), https://www.washingtonpost.com/sports/2018/11/01/wnba-players-opt-out-labor-deal-set-up-showdown-over-pay-financial-transparency/?utm_term=.1b79bdfd6d5e [https://perma.cc/M4X9-TBHW].

33. *Id.*

34. Victor Mather, *W.N.B.A. Players Opt Out of Collective Bargaining Agreement*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/sports/wnba-union-opt-out.html> [https://perma.cc/6PVX-KEU3].

35. Jessica Dickler, *This WNBA Superstar Earns Just 20% of an NBA Player's Salary*, CNBC (Oct. 3, 2017), <https://www.cnn.com/2017/10/03/this-wnba-superstar-earns-just-20-percent-of-an-nba-players-salary.html> [https://perma.cc/M97B-XWYU].

36. Paulana Lamonier, *The Business of Being a WNBA Player*, FORBES (Jul. 7, 2018), <https://www.forbes.com/sites/plamonier/2018/07/02/the-business-of-being-a-wnba-player/#6c32e9915af1> [https://perma.cc/LZ4L-XK4D].

37. Nneka Ogwumike, *Bet on Women*, THE PLAYERS' TRIBUNE (Nov. 1, 2018), <https://www.theplayertribune.com/en-us/articles/nneka-ogwumike-wnba-cba-bet-on-women>. [https://perma.cc/5RE2-5XF8] ("This is about a six-foot-nine superstar taking a red-eye cross-country and having to sit in an economy seat instead of an exit row. Often with delays. Imagine the last time you took a red-eye business trip and you sat in the middle seat with your knees all cramped up, and how shook you were for that entire rest of the day. And now imagine that, after you land, you have to go out and compete against the best in the world that night. We can't even get an exit row? A TSA precheck? Nope!").

38. *Id.*

Players' Association, a first draft pick, and a league champion, addressed the decision to opt out in an article she wrote for *The Players' Tribune*.³⁹ The article discussed the ways in which some players were pursuing other opportunities to survive financially.⁴⁰ Ogwumike emphasized that the players resented the need to break with the CBA, but that equal pay and treatment were nonnegotiable for her, for her teammates, and for the girls who might one day stand in their basketball shoes.⁴¹ In January 2020, the WNBA and the Player's Association reached a tentative deal that, at the time of this writing, is awaiting ratification by the players and the league's Board of Governors.⁴²

Despite the WNT's and WNBA's best efforts, the gender pay gap persists in their respective leagues and in professional sports at large. The professional female soccer players hope that their legal course of action will act both as a remedy to their financial inequity and create a path for other female professional leagues to follow. At the same time, WNBA players are demanding equality by rejecting their CBA and forcing the league to negotiate and problem solve. Both of these battles will be hard fought, but they are waged with the betterment of their leagues' futures in mind. While professional female athletes continue to push for equality, sports betting may help these female athletes capitalize on their status as professional athletes and thus narrow, to some degree, the gender pay gap.

II. THE LEGALITY OF SPORTS BETTING

Federal legislation often reflects societal beliefs, even where those beliefs may contradict the Constitution. That was the case with the Professional and Amateur Sports Protection Act (PASPA).

39. *Id.*

40. *Id.*

41. *Id.*

42. *WNBA And WNBPA Reach Tentative Agreement On Groundbreaking Eight-Year Collective Bargaining Agreement*, WNBA (Jan. 14, 2020), <https://www.wnba.com/news/wnba-and-wnbpa-reach-tentative-agreement-on-groundbreaking-eight-year-collective-bargaining-agreement> [<https://perma.cc/AEM6-R69P>] (“Foremost among the deal terms is a 53 percent increase in total cash compensation, consisting of base salary, additional performance bonuses, prize pools for newly created in-season competitions, and league and team marketing deals. Under the new CBA, the league’s top players will be able to earn cash compensation in excess of \$500,000, representing a more than tripling of the maximum compensation under the prior deal. Other top players will have an opportunity to earn between \$200,000 and \$300,000. And for the first time in WNBA history, the average cash compensation for players will exceed six figures, averaging nearly \$130,000, resulting in an increase for all players from rookies to veterans.”).

An exploration of the recently overturned legislation regarding sports betting shows that its passing was never a question of what was best for the sovereignty of the states, but what was morally or ethically thought to be correct. State sovereignty is relevant to sports betting because these operations provide a means for state governments to benefit financially by taxing sports betting operations within their borders.⁴³ This Part explains the PASPA, discusses its legislative history, and explores the line of cases that preceded its eventual demise in 2018.

A. *The Professional and Amateur Sports Protection Act*

Congress passed PASPA in October 1992. PASPA made sports betting illegal in the United States unless a state had an established sports betting program between 1976 and 1990.⁴⁴ Only four states were able to grandfather their programs in under PASPA: Nevada, Delaware, Montana, and Oregon.⁴⁵ However, PASPA prohibited these states from amending or expanding their programs.

PASPA created a private right of action for sports leagues whose competitions were the subject of illegal betting.⁴⁶ By suing a particular state, the U.S. Attorney General or a private entity could leverage federal law against that state to significantly affect the states' internal operations. Hence, PASPA empowered State Attorneys General and sports organizations to bring civil suits against states that were allegedly offering sports betting operations that were in violation of the act.⁴⁷ This ability to commandeer state law was PASPA's fatal flaw, and the Supreme Court struck it down on these grounds in *Murphy v. NCAA*.⁴⁸

1. The Legislative History of PASPA

In this Subpart, I walk through the underlying motivations for PASPA, the inequalities that the act created on a state level, and how the PASPA inadvertently infringed on citizens' rights as well as states' rights. The analysis reveals the tactics that legislators used to legally commandeer states' rights for twenty-six years, thereby prohibiting the majority of Americans from spending their own money to bet on their favorite sports teams. The analysis also explores the

43. See *US Sports Betting Revenue and Handle*, LEGAL SPORTS REP. (May 12, 2020), <https://www.legalsportsreport.com/sports-betting/revenue> [https://perma.cc/KGG7-RD].

44. See 28 U.S.C. §§ 3702-04 (1992).

45. Joshua Winneker, et al., *Sports Gambling and the Expanded Sovereignty Doctrine*, 13 VA. SPORTS & ENT. L.J. 38, 39 (2013).

46. 28 USC § 3703 (1992).

47. *Id.*

48. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

extent to which lawmakers considered the U.S. Constitution when they wrote and passed the law.

Congress passed PASPA with a goal of protecting children from the risks of gambling.⁴⁹ Supporters of the bill argued that legalized sports gambling, even with an age requirement, would encourage young people to participate in addictive and harmful behavior.⁵⁰ Yet young people were able to drink alcohol at age 21 and to purchase cigarettes and lottery tickets at age 18. These addictive behaviors were not targeted by the legislature, suggesting that the true motivation behind PASPA was something else entirely.

So, what was the likely motivation? Morality. Senator Dennis DeConcini, author of PASPA, stated in a Congressional hearing on Prohibiting State-Sanctioned Sports “[i]s sports gambling a good thing? I think most people would agree that it is not. The spread of legal sports gambling . . . [t]hreatens the very foundation of professional and amateur sports events.”⁵¹ Here, DeConcini appears to impose moral judgment upon those who wished to legally bet on sports, and he was leaning on his fellow lawmakers to do the same. Thus, the lawmakers advocating for PASPA were able to pass the law by appealing to the ethos of those with a vote. If they had instead emphasized states-rights, states and their citizens would have had the freedom to decide on legal sports betting themselves.

Additionally, this proposed law created distinct inequalities among the states because only a few could rely on sports betting dollars in their budgets. PASPA advocates acknowledged that sports betting revenue would only be available to the states with existing schemes and noted that they did not wish to disrupt the economies of those states that had come to rely on sports betting dollars,⁵² thus implying that sports betting revenue could not be a means for any other states wishing to grow their economies.⁵³ Yet, this result was discriminatory and, perhaps, hypocritical: at the time PASPA was passed and shortly thereafter, various states were operating education lotteries which allowed adults to engage in games

49. Anthony G. Galasso, Jr., *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 Ky. L.J. 163, 166 (2010).

50. *Id.*

51. DARREN A. HEITNER, *HOW TO PLAY THE GAME: WHAT EVERY SPORTS ATTORNEY NEEDS TO KNOW* 99 (2nd ed. 2018) (quoting *Prohibiting State-Sanctioned Sports: Hearing on S. 473 and S. 474. Before the Subcomm. On Patents, Copyrights and Trademarks of the S. Comm. On the Judiciary*, 102d Cong. 1 (1991)).

52. *Id.*

53. *Id.*

that could have remedial, high value, or no reward.⁵⁴ Education lotteries provide funding for state budgets that are used for a myriad of expenses.⁵⁵ Yet, in the age of PASPA, only the four states with sports betting regimes could count on profits from those taxable operations.

PASPA also created inequalities among the states that had existing sports betting programs. Nevada had the obvious gambling advantage over those grandfathered in and those left out: it already had a robust sports betting scheme thanks to its popular and highly regulated casinos.⁵⁶ As a result of such widespread sports gambling, the estimated gross revenue generated from the sports books in Nevada alone was \$224.6 million.⁵⁷ In contrast, the other three states grandfathered in under PASPA did not and could not have earned this much because each state had a less expansive sports betting law in 1993, the year PAPSAs locked in sports betting regimes.⁵⁸ Specifically, prior to 1993, Delaware only allowed betting on the NFL, so going forward, the state could not introduce other leagues into its sports betting operation.⁵⁹ Oregon's laws allowed betting on NFL games, but, in an effort to gain favor with the National Collegiate Athletic Association (NCAA), the state abandoned its sports betting operation in 2007, meaning PASPA prohibited NCAA involvement if legal sports betting occurred in the state.⁶⁰ Therefore, even among the states that could practice sports betting, there was really only one that could do so unencumbered: Nevada.

Finally, PASPA impacted a citizen's right to choose where to allocate their own resources depending on their domiciliary state. The lawmakers who passed PASPA did so believing that most people frowned upon sports betting and that the practice undermined the integrity of the games being played. Opponents of PASPA questioned whether the American people elected their representatives

54. See *Florida Lottery Timeline*, FLA. LOTTERY, <https://www.flalottery.com/timeline> [<https://perma.cc/XJ27-SM8A>]; *Missouri Lottery History*, Mo. LOTTERY, <http://www.molottery.com/learnaboutus/history.shtm> [<https://perma.cc/36CC-UYAL>]; *Minnesota Lottery*, MINN. LEGIS. REFERENCE LIBR., <https://www.leg.state.mn.us/lrl/agencies/detail?AgencyID=1799> [<https://perma.cc/NML3-HXGM>]; California, CAL. LOTTERY, <https://www.calottery.com/about-us> [<https://perma.cc/4ZQU-5YJL>].

55. See CAL. LOTTERY, *supra* note 54.

56. Winneker, et. al., *supra* note 45, at 40–41.

57. OXFORD ECONOMICS, ECONOMIC IMPACT OF LEGALIZED SPORTS BETTING 29 (2017).

58. Winneker, et. al., *supra* note 45, at 38–39.

59. *Id.* at 41–42.

60. *Id.* at 42.

so that they might turn their qualms with sports betting into a law that violates federalism and questions how adults spend their money. Under PASPA, states could host sporting events and consumers could attend them, but no one could place bets unless the state had a legal sports betting program. Attendees of legal age could purchase alcohol at the events without federal interference, but they could not place a legal bet on the sporting event. Essentially, under PASPA, the only way Americans could cash in on sports betting was by taking a trip to Vegas. How, then, are the ethical purposes of the law served? Requiring Americans to travel to Nevada in order to bet on a sporting event does not eradicate the activity from the American landscape. Rather, it simply makes it more difficult for Americans to bet on sports and impossible for the other states to cash in on the opportunities. Thus, given PASPA's uneven application, only the citizens in particular states—Nevada, Delaware, Montana, and Oregon—could allocate their resources freely within their home states.

By 2007, PASPA prevented 47 states from operating sports gambling within their borders. The excluded states began to question why they could not benefit from such a lucrative practice. New Jersey, under the leadership of Former Governor Chris Christie, led the charge against PASPA in *NCAA v. Governor of N.J.* This case laid the foundation for the ultimate defeat of PASPA in *Murphy v. NCAA*.

2. *NCAA v. Governor of N.J.*

Beginning in 2008, around the start of the Great Recession, states began to experience difficulties balancing their budgets.⁶¹ Then, in 2012, after Hurricane Sandy devastated New Jersey's coast and tourism industry, then-Governor Chris Christie sought additional revenue streams.⁶² If he had been the governor of Nevada, Delaware, or Montana, he could have asked the appropriations committee in the state's House of Representatives to redirect funds from sports gambling programs to aid New Jersey's citizens. But, as the governor of New Jersey, he was forbidden from establishing a legal sports wagering operation under PASPA. In a state constitutional amendment approved by a ballot initiative, New Jersey's

61. See Jake Grovum, *2008 Financial Crisis Impact Still Hurting States*, USA TODAY (Sept. 14, 2013, 12:00 PM), <https://www.usatoday.com/story/money/business/2013/09/14/impact-on-states-of-2008-financial-crisis/2812691> [<https://perma.cc/ZK7D-RR6S>].

62. See Erin McClam, *Game On: Christie fights for sports betting*, (July 15, 2013, 5:45 AM), <https://www.cnn.com/id/100885834> [<https://perma.cc/6JHG-47Q4>].

legislature enacted the Sports Wagering Act of 2012.⁶³ Since PASPA created a private right of action for professional sports leagues, the NCAA, the NBA, the National Football League, the National Hockey League, and the Office of the Commissioner of Baseball (on behalf of Major League Baseball) joined together (the Leagues) and filed a complaint for declaratory and injunctive relief in opposition to New Jersey's repeal of the law.⁶⁴ The District Court upheld PASPA's constitutionality, granted summary judgment to the Leagues, and enjoined the Sports Wagering Law from going into effect.⁶⁵ The Third Circuit Court of Appeals ultimately denied Christie's summary judgment motion and the leagues prevailed again.⁶⁶ However, one judge on the panel, concurring in part and dissenting in part, argued that PASPA enabled the federal government to meddle inappropriately in state affairs.⁶⁷ This judge wrote, "*New York* and *Printz* clearly established that the federal government cannot direct state legislatures to enact legislation and state officials to implement federal policy."⁶⁸

Discouraged but not defeated, New Jersey filed a writ of certiorari to the Supreme Court on the issue of anticommandeering and PASPA.⁶⁹ In a brief opposing certiorari, the United States wrote that even under PASPA, New Jersey was free to repeal the laws that restricted sports betting within the state, it just couldn't create new laws that allowed sports betting.⁷⁰ So in 2014, Governor Christie decided to put the question to the voters via a ballot initiative yet again.⁷¹ The voters approved the initiative, and New Jersey partially repealed the laws banning sports gambling in New Jersey.⁷² The initiative specifically reversed "the provisions of state law prohibiting sports gambling insofar as they concerned the 'placement and acceptance of wagers' on sporting events by persons 21 years of age or older at a horseracing track or a casino or gambling house in

63. *NCAA v. Governor of New Jersey*, 832 F.3d 389, 392 (3d Cir. 2016) (overruled by *Murphy v. NCAA*, 138 S. Ct. (2018)).

64. Compl. for Declaratory and Injunctive Relief, *NCAA v. Governor of New Jersey*, No.2:12CV04947 (D.N.J. Aug. 7, 2012), 2012 WL 3191255.

65. *NCAA v. Governor of New Jersey*, 730 F.3d 208, 217 (3d Cir. 2013) (abrogated by *Murphy v. NCAA*, 138 S. Ct. (2018)).

66. *Id.* at 244.

67. *Id.*

68. *Id.* (analyzing *New York v. United States*, 505 U.S. 144 (1992) & *Printz v. United States*, 521 U.S. 898 (1997)).

69. *Murphy*, 138 S. Ct. at 1472.

70. Br. for United States in Opp'n 11, *Christie v. National Collegiate Athletic Assn.* (O. T. 2013) No. 13-967 etc.

71. *Murphy*, 138 S. Ct. at 1472.

72. N.J. STAT. ANN. §§ 5:12A-1–A-9 (West 2014).

Atlantic City.”⁷³ In addition, the rescission legalized placing wagers on sporting events not involving a New Jersey collegiate event.⁷⁴ Thus ensued yet another flood of litigation almost overnight as private entities sued under PASPA’s private right of action.

The Leagues brought suit against New Jersey for a second time.⁷⁵ The complaint alleged that New Jersey was in violation of PASPA because, even though it had only reversed its sports betting laws, the effect of doing so made sports gambling legal within its borders.⁷⁶ In other words, when the state government partially repealed the laws banning sports gambling in New Jersey, that action put the state in violation of PASPA.⁷⁷ Again, the Leagues won in the District Court and the Third Circuit, sitting en banc, affirmed that even the partial repeal of laws banning sports betting within the state was a violation of PASPA.⁷⁸ In 2017, Phil Murphy was elected Governor of New Jersey,⁷⁹ which changed the case name to *Murphy v. NCAA*. Governor Murphy continued to press the anticommandeering argument up to the Supreme Court, which granted certiorari to decide on PAPSAs constitutionality.⁸⁰

3. *Murphy v. NCAA* and its Fallout

PASPA’s demise hinged on the Constitution’s anticommandeering doctrine, which is understood to exist in the Tenth Amendment.⁸¹ The anticommandeering provision prevents the federal government or any private entity from interfering with state action when the action itself is not constitutionally prohibited.⁸² Thus, a federal law may be unconstitutional if it compels

73. *Murphy*, 138 S. Ct. at 1472.

74. *Id.* Also, New Jersey is commonly referred to as the Garden State, so much so that it appears on the state issued license plates.

75. *Murphy*, 138 S. Ct. at 1472.

76. *Id.*

77. *Id.*

78. *Id.*

79. Nick Corasaniti, *Phil Murphy Is Elected Governor of New Jersey, in a Lift for Democrats*, NY Times, (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/nyregion/phil-murphy-governor.html> [<https://perma.cc/G7U8-ELHL>].

80. *Murphy*, 138 S. Ct. at 1471.

81. See U.S. CONST., art. X; Steven Schwinn, *Symposium: It’s Time to Abandon Anti-Commandeering (But Don’t Count on This Supreme Court to Do It)*, SCOTUSBLOG (Aug. 17, 2017), <https://www.scotusblog.com/2017/08/symposium-time-abandon-anti-commandeering-dont-count-supreme-court> [<https://perma.cc/28BM-NTAC>]; *On This Day, the Supreme Court Reinforces the 10th Amendment*, NAT’L CONST. CTR. (June 27, 2020), <https://constitutioncenter.org/blog/on-this-day-the-supreme-court-reinforces-the-10th-amendment> [<https://perma.cc/7J75-RP26>].

82. See Schwinn, *supra* note 81.

state action that is not constitutionally mandated, or if it requires a state to refrain from action that is otherwise constitutionally permissible.⁸³ In 2018, the Supreme Court addressed the latter issue in *Murphy*, asking if PASPA violated the anticommandeering principle by prohibiting sports betting in particular states.⁸⁴

The respondents in *Murphy*—the Leagues and the United States—argued that they opposed New Jersey's partial repeal of the sports betting ban, not New Jersey's action itself.⁸⁵ That is, the Leagues argued that the reversal of the sports betting laws put New Jersey in direct statutory violation of PASPA because the state was altering a sports gambling scheme that was not in effect prior to PASPA's enactment. The Leagues were not challenging New Jersey for creating a sports betting scheme, but rather for the act of violating the statute. Thus, respondents argued that PASPA was constitutional because it did not force states to act affirmatively on behalf of the federal government.⁸⁶ Petitioners responded that PASPA inhibited New Jersey's ability to orchestrate legal sports betting because the state could neither launch sports betting nor repeal the laws that banned it.⁸⁷ Ultimately, the Supreme Court found that PASPA violated the anticommandeering provision of the Constitution because it barred states from creating or amending their own laws on sports betting.⁸⁸ Justice Stephen Breyer, writing for the majority, reasoned:

In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.⁸⁹

In *Murphy*'s wake, states across the country once again have the ability to decide for themselves whether or not legal sports gambling operations will be welcomed in their state.⁹⁰

In anticipation of the Supreme Court's decision, other states had already designed plans for implementing sports betting within their borders.⁹¹ These states include Connecticut, Pennsylvania,

83. *Murphy*, 138 S. Ct. at 1471.

84. *Id.* at 1472.

85. *Id.* at 1473.

86. *Id.*

87. *Id.* at 1481.

88. *Id.*

89. *Id.* at 1473.

90. *Id.* at 1478.

91. HEITNER, *supra* note 51, at 107.

and Michigan.⁹² As of May 2020, eighteen states were running fullscale sports betting operations.⁹³ In fact, only three states have thus far foregone the opportunity to establish legal sports betting programs,⁹⁴ while the remaining states are actively working on creating sport betting operations within their borders.⁹⁵ The number of states now embracing sports betting demonstrates that PASPA was indeed a hinderance to the generation of state revenue. With a surge in sports betting schemes across states, the right of publicity will prove lucrative for the professional athletes who wish to capitalize on their images and likenesses in these programs.

III. THE RIGHT OF PUBLICITY AND SPORTS BETTING: OPPORTUNITIES AND LIMITATIONS

In what follows, I explain the right of publicity, how it may be in tension with First Amendment rights, and review examples of when professional athletes have successfully brought right of publicity claims. I also explain how professional female athletes may bring successful right of publicity claims in the Eighth Circuit when their images or information are used in the context of legalized sports betting. I conclude by discussing the limitations of this proposed intervention in closing the gender wage gap in professional sports.

A. *The Right of Publicity*

Property jurisprudence in the United States revolves around personal exclusionary rights—an individual’s ability to exert dominance over what is legally and rightfully theirs. The drafters of the Constitution included provisions that provided scientists, inventors, writers, artists, and other innovators a means of incentivizing their discoveries, creations, and art forms while also providing them exclusive rights to their works.⁹⁶ Over time, this clause has expanded to protect patents, copyrights, trademarks, trade secrets, and the

92. *Id.*

93. *State-by-State Sports Betting Bill Tracker*, ESPN, http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states [<https://perma.cc/5SPC-SBPE>] (Nevada, Delaware, New Jersey, Mississippi, West Virginia, New Mexico, Pennsylvania, Rhode Island, Arkansas, New York, Iowa, Oregon, Indiana, New Hampshire, Illinois, Michigan, Montana, Colorado).

94. *Id.* (Idaho, Wisconsin, and Utah).

95. *Id.*

96. U.S. CONST., art. 1, § 8, cl 8.

right of publicity, which serves to protect the commercialized interest of public figures.⁹⁷

The right of publicity is typically protected by state statutory or common law, and is recognized in most states.⁹⁸ However, the First Amendment often prevents claimants from bringing successful right of publicity claims because courts must weigh freedom of speech rights against the exploitation of another's name, image, or likeness for commercial gain.⁹⁹ The Supreme Court has only addressed the First Amendment in the right of publicity context once, and that was in 1977 when it decided *Zacchini v. Scripps-Howard Broadcasting Co.*¹⁰⁰ In *Zacchini*, the Court "called for a balancing test to weigh the interest underlying the First Amendment against those underpinning the right of publicity."¹⁰¹ Since this decision, courts have struggled to "find[] a standardized way for performing this balancing inquiry."¹⁰² As a result, at least four approaches have emerged across six different circuits.¹⁰³ In what follows, I focus on the analytical approach adopted by the Eighth Circuit, which balances "public value and commercial exploitation considerations."¹⁰⁴ I focus on this approach because established precedent offers a clear pathway for female professional athletes bringing right of publicity claims. Specifically, I argue that because they are underpaid relative to their male counterparts,

97. See Restatement (Third) of Unfair Competition § 46 (Am. Law Inst. 1995).

98. See *id.* See also *Publicity*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/publicity> [<https://perma.cc/Z6V9-22SM>].

99. See MATTHEW J. MITTEN, *SPORTS LAW IN THE UNITED STATES* 159 (3d ed. 2017).

100. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574–75 (1977) (holding that "[w]herever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent. The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner.").

101. WILLIAM D. HENSLEE & ELIZABETH HENSLEE, *ENTERTAINMENT LAW AND BUSINESS* 506 (2018).

102. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 152 (3d Cir. 2013) (discussing the different balancing tests available and determining that the Transformative Use Test was the appropriate test to use in the case at hand).

103. . See *id.* See also PATRICK KABAT, YALE LAW SCHOOL, *THE RIGHT OF PUBLICITY: THROUGH THE THICKET?* 15 (2015), https://law.yale.edu/sites/default/files/area/center/isp/documents/yls_right_of_publicity_workshop_report_final.pdf [<https://perma.cc/2RQL-FYPK>].

104. KABAT, *supra* note 103, at 15.

female professional athletes may succeed in bringing right of publicity claims under this approach where male professional athletes have failed.

B. *Professional Athletes and Right of Publicity Claims*

Professional athletes have a unique interest in being able to assert right of publicity claims. As Matthew J. Mitten, director of the National Sports Law Institute at Marquette University Law School, explains, “infringement of an athlete’s right of publicity occurs if an aspect of his identity was used without permission to advertise and sell a product or service.”¹⁰⁵ This is important because endorsement deals are only effective when athletes can leverage their fame for fortune. Sherri Burr, legal scholar and author of *Entertainment Law in a Nutshell* affirms, “it is the legal right of publicity that permits athletes to capitalize on their names and images by endorsing products.”¹⁰⁶ Thus, athletes should not be barred from the same protections shared by those who gained their fame off of the field.¹⁰⁷

Professional athletes are not new to the game of asserting their proper right of publicity claims when their name, image, and likeness appeared without their consent. The Second Circuit decided *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.* in 1953.¹⁰⁸ *Haelan Labs* was the first prominent case brought by athletes who wanted to protect their likenesses’ through the right of publicity.¹⁰⁹ At the time, various players had exclusive contracts with the plaintiff, a manufacturer of chewing gum, that allowed the manufacturer to use the players’ names and photographs to sell gum.¹¹⁰ Upon learning that the defendant, a rival gum manufacturer, was exploiting the players’ names and photographs as well, Haelan Labs brought suit.¹¹¹ In finding for the plaintiff, the court reasoned that, “in addition to and independent of the right of privacy . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture.”¹¹²

105. MITTEN, *supra* note 99, at 158.

106. Sherri Burr, *Athletes as Television Celebrities: Why We Watch; How They Benefit; Must They Be Responsible*, in REVERSING FIELD: EXAMINING COMMERCIALIZATION, LABOR, GENDER, AND RACE IN 21ST CENTURY SPORTS LAW 72 (Andre Douglas et al. eds., 2010).

107. See C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823 (8th Cir. 2007).

108. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

109. See *id.*

110. See *id.* at 867.

111. See *id.*

112. *Id.* at 868.

Following this precedent-setting case, the 1970s brought with it a string of athletes who successfully won their right of publicity claims for misappropriations or infringements of their name, sporting activities, and accolades;¹¹³ a strikingly similar racecar;¹¹⁴ a drawing of the athlete;¹¹⁵ and an abandoned name.¹¹⁶ However, none of these cases involved bringing right of publicity claims in the context of sports betting. I review this issue next, focusing closely on an Eighth Circuit decision regarding the right of publicity in *fantasy* sports platforms, which use information similar to that used in sports betting—names and statistics.

C. *The Significance of C.B.C. Distribution and Marketing, Inc.*

In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, the Eighth Circuit addressed whether the unlicensed use of baseball player names and statistics in online fantasy baseball products would infringe on players' rights of publicity, as protected by Missouri common law.¹¹⁷ While the court held that such use would infringe on their rights because the use was for a commercial purpose, the First Amendment trumps such rights and allows the free use of names and statistics in fantasy baseball products.¹¹⁸ In making this determination, the court balanced "the interests that states typically intend to vindicate by providing rights of publicity to individuals" against the First Amendment considerations, specifically the "public value of information about the game

113. See *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (holding for plaintiff-athletes where several hundred Major League Baseball players sued a game manufacturer because it was producing a game using the players' names, sporting activities, and accomplishments, without the consent of the players, for the sole purpose of commercial gain).

114. See *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (holding for plaintiff where defendant company used a racecar that was nearly identical to that of then internationally famous racecar driver Lothar Mostchenbacher in a nationally televised commercial for Winston cigarettes, upon finding that Mostchenbacher's car was so identifiable that consumers associated him with the product being advertised).

115. See *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (holding for plaintiff where Playgirl, Inc. published a portrait of a nude Black man sitting in the corner of a boxing ring that was recognizable as Muhammad Ali, then the reigning heavy weight boxing champion in the world).

116. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (holding that although the basketball star Kareem Abdul-Jabbar had legally changed his name from Lew Alcindor, that abandonment did not give General Motors Corporation, or anyone else operating without a license, the right to use Abdul-Jabbar's former name).

117. See *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 820 (8th Cir. 2007).

118. See *id.* at 824.

of baseball. . . .”¹¹⁹ The interests states intend to vindicate include both (1) “economic interests . . . [like] the right of an individual to reap the rewards of his or her endeavors and an individual’s right to earn a living” or “the desire to provide incentives to encourage a person’s productive activities” and (2) “non-monetary interests” such as “protecting natural rights, rewarding celebrity labors, and avoiding emotional harm.”¹²⁰

Crucially, the court’s balancing hinged on two facts that make the case distinguishable from claims professional female athletes bring in the future. First, the court cited and relied on earlier cases recognizing baseball in particular as “national pastime”¹²¹ that is “followed by millions of people across this country on a daily basis.”¹²² The court reasoned that the information commands a “substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.”¹²³ While female professional athletes are undoubtedly deserving of such following, their fan base is substantially smaller; thus, there is no “substantial public interest.”

Second, when considering the economic interests that Missouri might want to protect through the right of publicity, the court relied upon the fact that “major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements.” Thus, the players are not at risk of not being able to earn a living, nor will they be dissuaded from playing baseball. Again, this is distinguishable from the reality facing female professional athletes, who are compensated at far lower levels than their male counterparts.¹²⁴ Because the income generated from licensing their identities and information in sports betting might be a significant share of their income, female professional athletes might find more success than their counterparts in the MLB. The court also briefly addressed the nonmonetary interests that publicity rights may advance,¹²⁵ but dismissed these interests as not “especially relevant here, where baseball players are rewarded separately

119. *Id.* at 823.

120. *Id.* at 824.

121. *Id.* at 823 (citing *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972 (10th Cir. 1996)).

122. *Id.* (citing *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 411 (2001)).

123. *Id.*

124. See discussion *supra* Part I.

125. Recall, this includes “rewarding celebrity labors.” See *C.B.C.*, 505 F.3d at 824.

for their labors. . . .”¹²⁶ Again, female professional athletes are not compensated or rewarded adequately or separately for their labors, suggesting their claims may fair differently.

Of course, female professional athletes bringing right of publicity claims in the Eighth Circuit will need to bring claims in a state that both recognizes the right of publicity *and* has legalized sports betting. For example, both Missouri and Minnesota recognize the right of publicity but have yet to legalize sports betting, while Iowa has legalized sports betting but has yet to recognize the right of publicity.¹²⁷ Arkansas has legalized sports betting and recognizes the right of publicity, but only for citizens of the state.¹²⁸ However, as more states legalize sports betting, more opportunities to bring such claims will arise. Finally, to remain in federal court, claimants will also need to meet the requirements of diversity jurisdiction.

With the growth of these platforms comes the ability for users to bet on a wide swath of sports—from the most popular to the most remote. Fortunately, the right of publicity does not have a threshold of fame test. Instead, perceived fame is largely determined by the market.¹²⁹ Illegal sports betting websites like Bovada¹³⁰ have various options for betting on obscure sports, suggesting that the popularity of sports betting is of more importance than the popularity of the sport itself. As such, anyone whose name appears on these platforms is of perceived value to the market. This means that for women whose sports are not being offered on these platforms, it is certainly not for lack of interest in wagering. It is, yet again, an issue of market forces working against the female professional athlete.

126. The Eighth Circuit also recognized that nonmonetary interests are less important than monetary interests. *See id.*

127. *Id.* *See also* S.F. 3609, 89th Leg. (Minn. 2016); *see also* Jennifer E. Rothman, *Iowa*, ROTHMAN'S ROADMAP TO THE RIGHT OF PUBLICITY (Jul. 19, 2019), <https://www.rightofpublicityroadmap.com/law/iowa#:~:text=Iowa%20has%20recognized%20a%20right,a%20separate%20right%20of%20publicity.&text=Although%20the%20state%20has%20not,appropriation%20branch%20of%20that%20tort> [<https://perma.cc/54JV-2VGR>].

128. *See* Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN.COM (June 9, 2020), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization [<https://perma.cc/2CJB-4FBW>]; *see also* H.B. 1002, 90th Gen. Assemb., 3rd Extraordinary Sess. (Ark. 2016).

129. *See* Harriet F. Pilpel, *The Right of Publicity—The Tenth Donald C. Brace Memorial Lecture*, 27 BULL. COPYRIGHT SOC'Y U.S.A. 249, 256 (1980); *see also* Factors Etc. Inc. v. Pro Arts, Inc., 579 F.2d 215, 222 n.11 (2d Cir. 1978); *see also* Hirsch v. S. C. Johnson & Son, Inc., 280 N.W.2d 129, 139 (Wis. 1979).

130. BOVADA, <https://www.bovada.lv> [perma.cc/NYA6-7C2K] (last visited JUL. 19, 2020).

The sports betting industry is growing, and the platforms on which these bets are being placed are becoming more sophisticated. If female athletes are able to license their name, image, and likeness to these sports betting platforms, it would offer them the opportunity to generate additional and much-needed income. If critics take issue with female professional athletes prevailing where highly compensated male professionals have not, those critics may consider redirecting their energy to focus instead on solving the broader issue of gender inequity in professional sports. After all, once male and female professional athletes are compensated at equal rates, the issue will be moot.

D. *The Limitations of Leveraging Right of Publicity Claims in Sports Betting Platforms*

Because of market forces and gender bias, professional female athletes engaged in team sports are not frequently showcased on current sports betting platforms. Furthermore, of the female athletes featured, most cannot benefit from the platform as individuals because participants are not able to wager on these athletes' individual outcomes. This is because—with the exception of select female Mixed Martial Artists (MMA)—those engaging with the sports betting platforms cannot place bets on individual female athletes. This will change for female athletes only when sports betting platforms allow individualized bets on athletes engaged in team sports, a move that may be a natural progression of the expansion of the sports betting practice. Once those avenues are available, female professional athletes should be able to license their name, image, and likeness to the sports betting platforms.

When New Jersey first established sports betting, it initially tried to limit betting to male sports. This alone is indicative of the gender bias facing female athletes. In fact, on the five most popular sports betting websites in New Jersey, the professional female sports selection is limited to female MMA fighters, tennis players, and WNBA players.¹³¹ Therefore, to be able to bring successful

131. See CAESARS CASINO AND SPORTSBOOK, <https://www.caesarscasino.com/sports> [<https://perma.cc/R7B6-M684>] (last visited July 19, 2020) (hosting betting for women's MMA only); FANDUEL, <https://sportsbook.fanduel.com> [perma.cc/79H4-47D9] (last visited July 19, 2020) (hosting betting for women's MMA and tennis); FOXBET, <https://nj.foxbet.com> [perma.cc/45VJ-PTQS] (last visited July 19, 2020) (hosting betting for women's tennis only); GOLDEN NUGGET, <https://www.nj-casino.goldennuggetcasino.com/sports> [perma.cc/AS8B-YZGV] (last visited July 19, 2020) (hosting betting for women's MMA, women's tennis, and WNBA); SUGAR HOUSE, <https://www.playsugarhouse.com> [perma.cc/3BK3-59WU] (last visited July 19, 2020) (hosting betting for women's MMA and tennis).

claims, advocates must increase the number of female professional athletes on these platforms. and athletes must license their name, image, and likeness.

Notably, female professional MMA fighters are among the few female professional athletes who are currently active in the New Jersey sportsbooks, meaning their names, images, and likenesses are displayed in individual capacities on sports betting platforms. Thus, these female athletes are currently in the best position to assert right of publicity claims. Furthermore, they are also are significantly underpaid compared to their male counterparts.¹³² These women are thus well-positioned to land the first blow in the fight for pay equality, though the balancing analysis established in the Third Circuit does not mirror the Eighth Circuit.¹³³

CONCLUSION

The right of publicity exists so that those who are recognizable are compensated fairly for that recognition. Where possible, professional female athletes should consider asserting their right of publicity when their likeness is used on sports betting platforms. While only a select group of well-established female athletes may ultimately be able to take advantage of this opportunity, they should be compensated for any use of their image.

132. Kate Ryan, *This UFC Star's Latest Fight Is Against the Gender Pay Gap*, WORLD ECONOMIC FORUM, (Aug. 30, 2019), <https://www.weforum.org/agenda/2019/08/ufc-gender-pay-gap> [<https://perma.cc/Q5UJ-8RPW>] (“In this month’s UFC 241 event, the highest-paid male fighter earned over \$700,000 . . . while the top-paid female fighter earned under \$30,000. . .”).

133. Rather, the Third Circuit applies the Transformative Use Test. *See Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 163 (3d Cir. 2013) (“[T]he Transformative Use Test maintains a singular focus on whether the work sufficiently transforms the celebrity’s identity or likeness, thereby allowing courts to account for the fact that misappropriation can occur in any market segment, including those related to the celebrity.”).