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A Legislative Path for Sports Betting in California: An Examination of *Hotel Employees* and the California Supreme Court's Dueling Interpretations of the Constitutional Ban on 'Casino-Style' Gaming

Daniel Wallach∗

This Article addresses a timely and important issue of constitutional law in California: namely, does the California Constitution's prohibition against Nevada-and-New Jersey-style casinos expressed in Article IV, Section 19(e) prevent the California Legislature from authorizing sports betting through a statutory enactment? No prior judicial decision or law review article has directly addressed this issue, which has suddenly become relevant with the demise of the federal ban on state-authorized sports betting and increasing state efforts to legalize sports betting in recent years.

In the aftermath of the 2018 U.S. Supreme Court decision striking down the Professional and Amateur Sports Protection Act on constitutional grounds, more than thirty states have enacted new laws authorizing sports betting. However, California—projected to be the largest market for sports betting in the United States by a considerable margin—is not among this group of first-mover states. While many states have been able to proceed expeditiously, passing sports betting statutes following several months of legislative

∗ Mr. Wallach is an attorney in private practice who specializes in gaming and sports law, state constitutional law, and appellate practice. He is the co-founding director of the Sports Wagering and Integrity Program at the University of New Hampshire School of Law, and is an adjunct professor at both the University of New Hampshire School of Law and University of Miami School of Law, where he teaches courses on sports wagering law and regulation. Mr. Wallach has testified before several state legislative bodies as a subject-matter expert on sports betting legalization and related policy issues. He appeared by invitation at a joint informational hearing of the California Senate and California Assembly Governmental Organization Committees on January 8, 2020 to provide expert testimony on whether the legalization of sports wagering in California could be achieved through a statutory enactment rather than by an amendment to the California Constitution. This Article builds upon the Author's legislative hearing testimony on the California constitutional issue. The Author wishes to thank his beautiful wife, Natalia, for her continuing love, support, counsel, and encouragement, without which this Article could not have been written.

deliberations, California's expected ascendancy to the U.S. sports betting throne has been delayed due to the widely-held belief that an amendment to the state constitution—accomplished by way of a ballot measure or ballot initiative approved by voters during a statewide general election—is a prerequisite to the legalization of sports betting in California.

This Article challenges that premise. Building off this author's prior testimony before the California Senate and California Assembly Governmental Organization Committees, this Article examines the Legislature's power to authorize sports wagering through the lens of the California Supreme Court's decision in Hotel Employees & Restaurant Employees Int'l Union v. Davis, which, to date, is the only judicial decision to break down and interpret the individual component parts of section 19(e)'s declaration that the "[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey."

In Hotel Employees, the Supreme Court identified two possible ways to interpret that constitutional language—one which is tied to the specific gambling activities that were "unique to or particularly associated with" Nevada and New Jersey casinos in 1984, and the other more broadly referring to all categories of gambling that were banned in California at that time. This Article will examine these seemingly contradictory interpretations as part of a broader inquiry into whether section 19(e) applies to sports wagering. Dissecting the Supreme Court's dual interpretations of section 19(e) in light of: (1) the facts of Hotel Employees and well-established principles of constitutional interpretation recognized by the California Supreme Court (including the substantial deference that must be shown to the legislative interpretation of a constitutional provision that is reasonably susceptible to two or more interpretations); (2) subsequent decisional law equating section 19(e) with a ban on "casino-style" gaming; and (3) the material differences between sports betting and casino-style gaming—both in terms of their essential characteristics and treatment under the law—this Article ultimately concludes that section 19(e)'s ban on casino-style gaming is not a barrier or obstacle to the legislative authorization of sports betting.

This conclusion, which bucks the conventional wisdom but is deeply rooted in well-established principles of constitutional interpretation, should, in this author's view, lead to a reassessment of the appropriate mechanism—as well as an acceleration of the timeline—for the legalization of mobile sports betting in California.

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INTRODUCTION

California has been described as the "holy grail" of United States sports betting.[1] With nearly 40 million residents—by far the most populous state in the country—and nineteen professional sports teams—more than any other state—California is expected to become the largest market for sports betting in the United States.[2] Industry experts project that if sports betting were to become legalized in California, more than $30 billion in wagers would be placed annually, which, in turn, would generate at least $2 billion in annual revenues for sportsbook operators and more than $300 million in state tax collections each year.[3] To put these staggering figures into

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1 *See California Could Open Door to $30 Billion in Annual Bets if Sports Betting is Approved, According to PlayCA.com*, PR NEWSWIRE (May 29, 2020) [hereinafter *California Could Open Door*], http://www.prnewswire.com/news-releases/california-could-open-door-to-30-billion-in-annual-bets-if-sports-betting-is-approved-according-to-playcacom-301067820.html [http://perma.cc/G7T7-842F] (quoting gaming industry analyst Dustin Gouker, the chief analyst for PlayCA.com).

2 *See* Jill R. Dorson, *California Quagmire: Sports Betting Moves, But With Heavy Opposition*, SPORTSHANDLE (June 2, 2020), http://sportshandle.com/california-hearing-sports-betting-moves/ [http://perma.cc/5GAQ-F85N] (explaining California "is projected to be the biggest [sports betting] market in the U.S. and one of the biggest in the world"); Chris Murphy, *Latest California sports betting bill keeps card rooms out in the cold*, SBC AMERICAS (May 29, 2020), http://sbcamericas.com/2020/05/29/latest-california-sports-betting-bill-keeps-card-rooms-out-in-the-cold/ [http://perma.cc/K3D7-L2YV] (stating California is "widely regarded as potentially the biggest market for sports betting"); *see also* America Counts Staff, *California Remained Most Populous State but Growth Slowed Last Decade*, UNITED STATES CENSUS BUREAU (Aug. 25, 2021), http://www.census.gov/library/stories/state-by-state/california-population-change-between-census-decade.html [http://perma.cc/64U2-SQ3P]; *Who Are the Biggest Sports Teams in Southern California?*, THE SIGNAL (Sept. 7, 2021) http://signal.scv.com/2021/09/who-are-the-biggest-sports-teams-in-southern-california [http://perma.cc/ECY8-WRS3] (noting that California has the most teams).

3 *See California Could Open Door*, *supra* note 1; *see also* Katherine Sayre, *Dueling Plans Vie to Put Sports Betting Before California Voters*, WALL ST. J. (Dec. 19, 2019, 5:30 AM), http://www.wsj.com/articles/duelling-plans-vie-to-put-sports-betting-before-california-voters-11576751400 [http://perma.cc/CXT2-78NZ] ("A mature sports-betting market in California that included online betting would generate an estimated $2.2 billion in annual revenue for sportsbook operators, said Chris Grove, a partner and analyst with Eilers & Krejcik Gaming."); *Economic Impact of Legalized Sports Betting*, OXFORD ECON. 1, 39 (May 2017), http://www.americangaming.org/wp-content/uploads/2018/12/AGA-Oxford-Sports-Betting-Economic-Impact-Report1-1.pdf [http://perma.cc/RE5J-DJN8] (projecting that California would generate nearly $36 billion in annual wagers, roughly $2.4 billion in annual revenues, and around $235 million in annual tax collections, assuming a 10% tax rate and convenient availability). These estimates may actually be on the low side, especially considering New York State's record-breaking first month of online sports betting in January 2022 during which nearly $2 billion of online wagers were made in a state that is roughly one-half of California's population size. *See* Robert Linnehan, *New York Online Sports Betting Takes in Nearly $2 Billion During First 30 Days*, ELITE SPORTS NY, (Feb. 14, 2022), http://elitesportsny.com/2022/02/14/new-york-online-sports-betting-takes-in-nearly-2-billion-during-first-30-days/ [http://perma.cc/2PR3-C8BL] ("New York has taken in $1.98 billion in bets in its first 30 days of online sports betting, according to Gov. Kathy Hochul in a press release."). Indeed, the most recent projection by gaming industry analyst Chris

perspective, consider that New Jersey—currently the largest sports betting market in the country—processed $6 billion in sports wagers in 2020, generating nearly $400 million in annual operator revenues and roughly $50 million in tax collections for the state.[4]

California could certainly use new sources of revenue, especially considering that its economy has been devastated by the COVID-19 pandemic.[5] Unlike scores of other states that have moved quickly to capitalize on the sports betting revenue opportunity made possible by the demise of the Professional and Amateur Sports Protection Act ("PASPA"),[6] California remains stalled in the starting blocks. As of the date of this publication, more than three years after PASPA was declared unconstitutional by the United States Supreme Court, thirty-two states plus the District of Columbia have enacted new sports betting laws.[7] The vast majority of the remaining states have introduced bills to legalize sports betting in their respective 2021

Grove, a partner at Eilers & Krejcik Gaming, suggests that a mature, online sports betting market in California could generate more than $3 billion in annual revenues for online sports betting companies. *See* David Purdum, *High-stake Battle Rages over California Sports Betting Push*, ESPN, (Feb. 10, 2022), http://www.espn.com/chalk/story/_/id/33254799/high-stake-battle-rages-california-sports-betting-push [http://perma.cc/AG93-SPC5] ("Grove's most bullish projections suggest a mature, online sports betting market in California could generate more than $3 billion in annual revenue.").

4 *See* David Purdum, *Record $6 Billion Bet with New Jersey Sportsbooks in 2020*, ESPN (Jan. 13, 2021), http://www.espn.com/chalk/story/_/id/30705676/record-6-billion-bet-new-jersey-sportsbooks-2020 [http://perma.cc/X9Y5-ZUQD]; *DGE Announces December 2020 Total Gaming Revenue Results*, N.J. OFF. OF THE ATT'Y GEN. 1, 5 (Jan. 13, 2021), http://www.nj.gov/oag/ge/docs/Financials/PressRel2020/December2020.pdf [http://perma.cc/M4X8-6LSF].

5 *See* Margot Roosevelt, *California Economy Is Fast Losing Momentum; 327,600 Give Up on Seeking Jobs*, L.A. TIMES (Dec. 18, 2020, 5:58 PM), http://www.latimes.com/business/story/2020-12-18/california-economy-loses-momentum-covid-19-surge [http://perma.cc/455C-HWFM].

6 PASPA was a federal statute which made it unlawful for:

> a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based on . . . one or more competitive games in which amateur or professional athletes participate . . . or on one or more performances of such athletes in such games.

Pub. L. No. 102-559, § 2, 106 Stat. 4227, 4228 (1992) (codified as amended at 28 U.S.C. § 3702). In short, PASPA prohibited most states and federally-recognized Indian tribes from enacting laws authorizing or permitting sports gambling. *See id.* On May 14, 2018, in a 6-3 decision, the Supreme Court declared PASPA unconstitutional under the Tenth Amendment's anti-commandeering doctrine. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478–80 (2018).

7 *See* Darren Rovell, *Where Is Sports Betting Legal? Projections for All 50 States*, ACTION NETWORK, http://www.actionnetwork.com/news/legal-sports-betting-united-states-projections [http://perma.cc/EM8Q-XK42] (last updated Feb. 12, 2022, 1:05 PM).

legislative sessions.[8] Incredibly, California—a trailblazer in so many industries (i.e., film, entertainment, and technology, to name just a few) and long known as the "Gold Rush State"—is not in either group.

One reason why California has remained on the sidelines is because of a widely held belief that an amendment to the state constitution is a prerequisite to the legalization of sports betting.[9] Amending the California Constitution is a time-consuming and arduous process, requiring either an extensive signature-gathering effort (in the case of a voter initiative to amend the state constitution)[10] or a two-thirds vote by both houses of the California Legislature (in the case of a legislatively-referred ballot measure to amend the state constitution),[11] followed by a majority vote of the statewide electorate.[12] "In either case, substantial funds are required to organize and fund the statewide campaign that follows the initiative qualification procedure or requisite legislative approval."[13] As one California federal judge noted nearly twenty-five years ago, "the size of California make[s] this endeavor particularly expensive."[14]

Despite these formidable barriers, in the year following the repeal of PASPA, California legislative leaders and a coalition of California's Native American tribes introduced competing

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8 *See* Alex Sherman, *Here's Where Sports Betting Is Legal, and the 19 States Set to Vote on It This Year*, CNBC (Mar. 13, 2021, 2:38 PM), http://www.cnbc.com/2021/03/13/is-sports-betting-legal-in-my-state.html [http://perma.cc/J3QX-4H2U].

9 *See* Don Thompson, *California Sports Betting Would Need Constitutional Change*, AP NEWS (May 14, 2018), http://apnews.com/article/63263205d1f74b8b9d9b583959a53c1a [http://perma.cc/DB22-PL2D] ("Voters would have to change California's Constitution before legal sports betting could come to the nation's most populous state . . . .").

10 *See* CAL. CONST. art. II, § 8(b).

11 *See id.* art. XVIII, § 1.

12 *See* Brantley I. Pepperman, *Guilty Until Proven Innocent: California's Prop. 50 Turns the Concept of Due Process on its Head*, 51 LOY. L. REV. 609, 644 (2018) ("The California Constitution can be amended in two ways: upon a two-thirds vote of each house, the Legislature may propose an amendment to the voters, or voters themselves may amend the Constitution through the initiative process. Either method requires statewide approval by a majority of votes."); *see also* Coal. for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1498–99 (N.D. Cal. 1996) (describing the two primary methods for amending the California Constitution, independent of convening a constitutional convention), *vacated on other grounds*, 110 F.3d 1431 (9th Cir. 1997).

13 *Coal. for Econ. Equity*, 946 F. Supp. at 1499.

14 *See id.* The spending on statewide initiative campaigns has reached unprecedented levels in California, as evidenced by the recent campaign expenditures for Proposition 22. *See* Brian Melley, *Uber, Lyft Spend Big, Win in California Vote About Drivers*, AP NEWS (Nov. 4, 2020), http://apnews.com/article/business-california-837ebb151c7aa65596537b4a5f7a2f9d [http://perma.cc/5M8G-F9VK] (noting that Uber, Lyft, and other app-based ride-hailing and delivery services spent nearly $200 million in support of a ballot initiative that would allow them to classify their drivers as independent contractors rather than employees eligible for benefits and job protections).

proposals to legalize sports betting through an amendment to the state constitution.[15] The legislative ballot measure would have allowed Native American tribes and state-licensed horse racetracks to operate both in-person and online sports wagering.[16] The tribal ballot initiative was more restrictive: it would allow only in-person betting at tribal casinos and state-licensed horse racetracks, but, notably, online sports betting would not be permitted under the tribal proposal.[17] While presenting starkly different visions for the future of sports betting in California, both proposals sought to utilize a similar vehicle for legalization: a statewide vote of the electorate to amend section 19 of article IV of the California Constitution.[18]

From the vantage point of California's Native American tribes, the use of a ballot initiative to legalize sports betting through a constitutional amendment offers several important advantages. First, it enables the tribes to bypass the traditional legislative process[19] (which would inevitably need to take into account the divergent interests of California's other gaming

15 *See* Gambling: Sports Wagering, S. Const. Amend. 6, 2019–20 Reg. Sess. (Cal. 2020), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SCA6 [http://perma.cc/ZA24-K2CC]; Gambling, Assemb. Const. Amend. 16, 2019–20 Reg. Sess. (Cal. 2019), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200ACA16 [http://perma.cc/X7V9-8XPU]; Letters from Mark Macarro, et al., Proponents, to Anabel Renteria, Initiative Coordinator, Atty. Gen. of Cal., Authorizes New Types of Gambling. Initiative Constitutional and Statutory Amendment, Att'y Gen. No. 19-0029A1, (filed Nov. 4, 2019; amended Dec. 23, 2019), http://oag.ca.gov/system/files/initiatives/pdfs/19-0029A1%20%28Sports%20Wagering%20%26amp%3B%20Gambling%29.pdf (last visited April 3, 2022) [http://perma.cc/BP3Q-4FXT] [hereinafter Tribal Retail Initiative].

16 *See* Matthew Kredell, *New California Sports Betting Bill Tries To Bridge Gaps for Tribes, Cardrooms*, LEGAL SPORTS REP. (May 29, 2020), http://www.legalsportsreport.com/41316/new-california-sports-betting-bill/ [http://perma.cc/V4K5-TLMZ].

17 *See* Patrick McGreevy, *Native American Tribes Propose Initiative To Legalize Sports Betting in California*, L.A. TIMES (Nov. 13, 2019, 6:45 PM), http://www.latimes.com/california/story/2019-11-13/native-american-tribes-initiative-legalize-sports-betting-california [http://perma.cc/7TRK-MX6U].

18 *See id.*; Kredell, *supra* note 16. Section 19 of article IV houses the various state constitutional provisions relating to gambling, and includes subsections addressing lotteries, horse race wagering, tribal compacts, casino-style gambling, and charitable gaming. *See* CAL. CONST. art. IV, § 19. The specific subsections in section 19 either "authorize" certain types of gambling activities—as in the case of the state lottery, horse race wagering, bingo games for charitable purposes, casino-style games on tribal lands, and charitable gaming—or prohibit the legislature from authorizing certain gambling activities, such as private lotteries and "casinos of the type currently operating in Nevada and New Jersey." *See id.*

19 *See Ballot Initiatives*, STATE OF CAL. DEP'T OF JUST., http://oag.ca.gov/initiatives [http://perma.cc/K5BU-E7DH] (last visited May 31, 2021) ("The ballot initiative process gives California citizens a way to propose laws and constitutional amendments without the support of the Governor or the Legislature.").

stakeholders).[20] Second, it ensures the tribes a near-monopoly over sports betting in California.[21] Lastly, it eliminates the potential competitive threat—and legal uncertainties—posed by online sports wagering.[22]

For the state legislature, however, there are significant drawbacks to pursuing the legalization of sports betting through a proposed constitutional amendment. First, there is the issue of timing: in California, legislatively-initiated ballot measures to amend the state constitution can only appear on the ballot in primary or general elections, which are held

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20 The primary gaming stakeholders in California are the Native American tribal casinos, commercial card rooms, and state-regulated horse racetracks. *See* Steve Ruddock, *Sports Betting Is on the Menu in California but Major Hurdles Remain*, BETTINGUSA (Nov. 11, 2019), http://www.bettingusa.com/california-sports-betting-2020-hurdles/ [http://perma.cc/L4W2-NZM3] (referring to California's tribal casinos, card rooms, and horse racetracks as "[t]he [t]hree-[h]eaded [m]onster" that comprises the "trio of competing interests" in the state's gaming industry).

21 Under the tribal initiative, only tribal governments and "Approved Racetrack Operators" (defined as state-licensed, privately-owned horse racing venues located in the Counties of Alameda, Los Angeles, Orange, or San Diego) would be permitted to offer sports wagering. *See* Tribal Retail Initiative, *supra* note 15, at §§ 3(b)–(c), 4(f), 5.1. As of the date of this publication, there were seventy-six tribal casinos in California. *See California Casinos: Updates 2021*, 500NATIONS, http://www.500nations.com/California_Casinos.asp [http://perma.cc/8DB3-WZ2W] (last visited May 31, 2021). Each of these venues would be permitted to offer sports betting under the tribal initiative. By contrast, only four horse racing venues—Del Mar Racetrack (San Diego County), Los Alamitos Racecourse (Orange County), Santa Anita Park (Los Angeles County), and Alameda County Fairgrounds (Alameda County)—would be eligible to offer sports betting under that proposal. In other words, seventy-six out of eighty potential sportsbook venues—or roughly 95%—would be tribally-owned-and-operated. *See id.*

22 California's Native American tribes view sports betting as a vehicle to increase visitation to tribal casinos, many of which are located in rural areas, and there is concern that the widespread availability of mobile sports wagering throughout the state would reduce incentives to visit such facilities. *See* Ryan Butler, *California Sports Betting Begins to Take Shape During Wild December*, ACTION (Dec. 15, 2020, 4:57 PM), http://www.actionnetwork.com/legal-online-sports-betting/california-sports-betting-legalization-update-2020 [http://perma.cc/Z7EA-U9KW]. In addition, there is serious doubt as to whether the federal law which regulates the conduct of gaming on Indian lands—the Indian Gaming Regulatory Act ("IGRA")—would even permit tribal casinos to accept online bets from any person physically located outside of tribal lands when he or she initiates the wager. *See* California v. Iipay Nation of Santa Ysabel, 898 F.3d 960, 968 (9th Cir. 2018) (holding that a California tribe's operation of a server-based bingo game over the Internet "constitutes gaming activity that is not located on Indian lands," and, therefore, "violates the UIGEA, and is not protected by IGRA"); West Flagler Assocs. v. Haaland, No. 21-cv-2192 (DLF), No. 21-cv-2513 (DLF), 2021 WL 5492996, at *9 (D.D.C. Nov. 22, 2021) (holding that a tribal-state gaming compact that allows patrons to place online sports bets throughout Florida violates IGRA's "Indian lands" requirement, even though the compact expressly "deems" the bet to take place on tribal lands where the server processing the bet is located). For a more extensive treatment of this issue, see generally Daniel Wallach, *Florida's Gambling Compact Set Up To Fail? Federal Rejection of Mobile Sports Betting Likely To Trigger a Tribal Monopoly*, FORBES (May 10, 2021, 12:51 PM), http://www.forbes.com/sites/danielwallach/2021/05/10/floridas-gambling-compact-set-up-to-fail-federal-rejection-of-mobile-and-off-reservation-sports-betting-likely-to-trigger-a-tribal-monopoly/?sh=4cb1261a6682 [http://perma.cc/UPX6-SA2L].

exclusively in even-numbered years.[23] Second, before a legislatively-referred proposed constitutional amendment can even be placed on the statewide ballot, it must first be approved in both houses of the California Legislature by a two-thirds vote.[24] This is "a difficult, if not impossible, task on any hotly disputed matter."[25] Indeed, this numeric threshold—which is among the highest in the country—has proven thus far to be an insurmountable barrier to legislative efforts to propose a constitutional amendment that would include an authorization for online sports betting.[26]

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23 *See* CAL. ELEC. CODE §§ 1200–1201 (West 2021). By contrast, a citizen-initiated ballot initiative to amend the California Constitution can be presented to the electorate during either a general election or statewide special election. *See* CAL. CONST. art. II, § 8(c). Unlike a general election, statewide special elections are not confined to even-numbered years. *See, e.g.*, Kevin Shelley, *Statement of Vote*, CAL. SEC'Y OF STATE (2003), http://elections.cdn.sos.ca.gov/sov/2003-special/sov-complete.pdf [http://perma.cc/34SL-C6HX] (illustrating the recall election of Governor Gray Davis being conducted as a special election with an included citizen-initiated ballot initiative). *But see* Elections: Ballot Measures, S.B. 202, 2011–2012 Reg. Sess. (Cal. 2011), http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120SB202 [http://perma.cc/5M66-VM33] (requiring that any citizen-led ballot initiative after July 1, 2011, be limited to general elections only). Despite its enactment, S.B. 202 may be vulnerable to a legal challenge based on the notion that statutory legislation cannot "abrogate or deny a right granted by the Constitution." Rose v. State, 123 P.2d 505, 513 (Cal. 1942).

24 *See* CAL. CONST. art. XVIII, § 1.

25 PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 76 (Bernard Grofman ed., 4th vol. 1998) ("In California it is harder for the legislature to propose a constitutional amendment than for many initiative proponents to do so. The legislature must achieve a two-thirds vote, a difficult, if not impossible, task on any hotly disputed matter. Initiative sponsors, however, can propose constitutional amendments by obtaining signatures equal to 8 percent of the last gubernatorial vote, a task that sponsors who have enough money to pay signature gatherers generally have no trouble accomplishing."); *see also* Pepperman, *supra* note 12, at 644 n.238 ("It is relatively easy to qualify [an initiative] measure on the statewide ballot.") (citation omitted).

26 Due to tribal opposition, California State Senator Bill Dodd (D-Napa) withdrew SCA-6—the most recent legislative proposal to authorize sports wagering through a voter-approved ballot measure—when it became apparent that the measure lacked the requisite two-thirds support in the Senate. *See* Matthew Kredell, *California Sports Betting Bill Dead After Tribal Opposition Too Strong*, LEGAL SPORTS REP. (June 22, 2020), http://www.legalsportsreport.com/42104/california-sports-betting-bill-dead-as-tribal-opposition-too-strong/ [http://perma.cc/294C-EKFZ]. With a legislatively-referred proposed constitutional amendment seemingly a nonstarter, proponents of online sports betting have turned to the ballot initiative process as their preferred vehicle for legalization. Between August 2021 and December 2021, three different citizen groups filed proposed ballot initiatives to amend the California Constitution to allow online sports betting. *See* Letters from Helen Fisicaro, et al., Proponents, to Hon. Rob Bonta, Att'y Gen. of Cal. (Aug. 9, 2021) (proposing initiative 21-0009 to allow California Indian tribes, horse racetracks, card rooms, and professional sports venues to operate both in-person and online sports betting) (on file with author); Letter from John J. Moffatt, et al., Proponents, to Hon. Rob Bonta, Att'y Gen. of Cal., Allows Online and Mobile Sports Wagering, Initiative Constitutional Amendment and Statute, Att'y Gen. No. 21-0017A1 (Aug. 31, 2021; amended Oct. 5, 2021),

This begs the question: is a constitutional amendment even necessary for sports betting? Or put differently, does the state legislature have the power to authorize sports betting by statute without an amendment to the California Constitution? Both questions go to the heart of legislative authority and entail consideration of constitutional restrictions or limitations on the exercise of such powers. This is because "the California Constitution, unlike its federal counterpart, is a limitation or restriction on the powers of the Legislature, rather than a grant of power to it."[27] Thus, as the California Supreme Court has explained, it does "not look to the Constitution to determine whether the Legislature is *authorized* to do an act, but only to see if it is *prohibited*."[28] Notably, the California Constitution does not expressly prohibit the state legislature from authorizing sports betting.[29] However, it does prohibit the legislature from authorizing "casinos of the type currently operating in Nevada and New Jersey."[30] This language, contained in article IV, section 19(e), embodies California's constitutionally enshrined public policy against "casino-style" gambling.[31] But does this anti-casino provision—which targets a particular type of gambling associated with two specific geographic locations—encompass wagering on sporting events?

No California judicial decision has ever addressed the applicability of section 19(e) to sports betting. And, for good reason—until mid-2018, PASPA had forbidden states from authorizing that activity.[32] So, there has been no real opportunity to test the applicability of section 19(e) in that specific context. As a consequence, there has been a dearth of interpretative analysis examining whether sports betting is encompassed within section

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http://oag.ca.gov/system/files/initiatives/pdfs/21-0017%20%28Sports%20Gambling%29.pdf [http://perma.cc/N2KJ-9E2W] (proposing initiative 21-0017 to allow online sports betting to be operated by California Indian tribes and qualified online sports betting operators); Letter from Bo Mazzetti et al., Proponents, to Anabel Renteria, Initiative Coordinator, Atty. Gen. of Cal., Allows In-Person and Online Sports Wagering and Other New Types of Gambling. Initiative Constitutional Amendment and Statute, Att'y Gen. No. 21-0039A1 (Nov. 5, 2021; amended Dec. 13, 2021), http://oag.ca.gov/system/files/initiatives/pdfs/21-0039A1%20%28Sports%20Wagering%202%29_0.pdf [http://perma.cc/KR2F-Q9EP] (original letter on file with author) (proposing initiative 21-0039 to allow California Indian tribes to operate both in-person and statewide online sports betting).

27 Cal. Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 731 (Cal. 1978).

28 Methodist Hosp. of Sacramento v. Saylor, 488 P.2d 161, 165 (Cal. 1971) (emphasis added) (quoting Fitts v. Superior Court., 57 P.2d 510, 512 (Cal. 1936)).

29 *See* CAL. CONST. art. IV, § 19.

30 CAL. CONST. art. IV, § 19(e).

31 United Auburn Indian Cmty. of Auburn Rancheria v. Newsom, 472 P.3d 1064, 1071 (Cal. 2020).

32 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478–81 (2018).

19(e)'s scope. Further, there have been very few cases that have addressed the parameters of section 19(e)—even with respect to other types of gambling. In the nearly forty years that have elapsed since section 19(e) was enacted by the electorate, only one judicial decision—*Hotel Employees & Restaurant Employees International Union v. Davis* (hereinafter referred to as "*Hotel Employees*")[33]—has attempted to decipher the meaning of section 19(e)'s key language. That 1999 California Supreme Court decision therefore provides a critical roadmap for evaluating whether section 19(e) forbids the legislative authorization of sports betting and should be the starting point for any analysis of the issue.

In *Hotel Employees*, the California Supreme Court addressed the scope and meaning of "section 19(e)'s declaration that '[t]he Legislature has no power to authorize . . . casinos of the type currently operating in Nevada and New Jersey.'"[34] In particular, the court undertook to determine "[w]hat was meant by 'the type' of casino 'operating in Nevada and New Jersey,'" since those words are not defined in section 19(e).[35] Significantly, the court identified two possible ways to interpret that constitutional language. First, the court consulted the legislative history of section 19(e) and determined that what the drafters and voters intended to prohibit in 1984—when that constitutional amendment was enacted—was "a type of gambling house *unique to or particularly associated with* Nevada and New Jersey."[36] The court added that this is what "[t]he 1984 constitutional amenders *must have had in mind*" when they enacted section 19(e), "since they chose to define the prohibited institution by reference to those states."[37] Under this interpretation, sports betting is beyond the scope of section 19(e)'s coverage since it was a type of gambling that was not available—or even permitted—in New Jersey casinos at that time.

A second possibility suggested by the California Supreme Court was to analyze the meaning of section 19(e) through the lens of California statutory law—i.e., by equating "'the type' of casino 'operating in Nevada and New Jersey'" in 1984 with "a gambling facility that did *not* legally operate in California" at that time.[38] Employing equivocal language in contrast to the certainty expressed in the earlier definition, the court suggested

33 Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 1002 (Cal. 1999).
34 *Id.* at 994, 1002.
35 *Id.* at 1004.
36 *Id.* (emphasis added).
37 *Id.* (emphasis added).
38 *Id.* (alteration in original).

that "a casino of 'the type . . . operating in Nevada and New Jersey' *may be understood*, with reasonable specificity, as one or more buildings, rooms, or facilities, whether separate or connected, that offer gambling activities *including those statutorily prohibited in California*, especially banked table games and slot machines."[39] It is the language at the tail-end of that sentence—and, in particular, the words "including those statutorily prohibited in California"—that has fueled the belief in some quarters that the Legislature is prohibited from authorizing any gambling activities that were statutorily prohibited in 1984.[40]

This Article will examine these seemingly contradictory interpretations as part of a broader inquiry into whether section 19(e) applies to sports wagering. Employing well-established principles of constitutional interpretation enunciated by the California Supreme Court, this Article will explain why the existence of these alternative interpretations actually bolsters the conclusion that the California Legislature has the power to authorize sports wagering by statute. In particular, as detailed below, when a constitutional provision is capable of two or more interpretations, the state legislature's adoption of one of those alternatives is to be accorded substantial deference, if not controlling weight, under longstanding California Supreme Court precedent.[41]

Significantly, under this principle, the state legislature's choice will be respected so long as it represents "at least a *possible and not unreasonable* construction of the constitution."[42] Based on these interpretive principles, this Article asserts that the California Legislature can effectuate the statutory authorization of sports wagering outside of the constitutional amendment process by adopting the California Supreme Court's initial construction of section 19(e) in *Hotel Employees* as referring only to gambling activities "unique to or particularly associated with Nevada and New Jersey" casinos in 1984.[43] This

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39 *Id.* (emphasis added).

40 *See* Letter from Gen. Couns. & Att'ys Gen. of Nine Cal. Indian Tribes to the Cal. Sen. & Assemb. Comms. on Governmental Org. (Feb. 6, 2020) [hereinafter Feb. 6, 2020 Letter] (relying on the "*including those statutorily prohibited in California*" language from *Hotel Employees* in asserting that sports wagering—a form of gambling that was illegal in California in 1984—can only be authorized by a constitutional amendment) (emphasis added) (on file with author).

41 *See* discussion *infra* Section II.C.

42 Methodist Hosp. of Sacramento v. Saylor, 488 P.2d 161, 166 (Cal. 1971) (emphasis added).

43 *Hotel Emps.*, 981 P.2d at 1004.

court-approved interpretation easily satisfies the "possible and not unreasonable"[44] standard for obvious reasons, aligns with the intent of the voters (as acknowledged by the court in *Hotel Employees*), and would empower the state legislature to authorize sports betting by statute since sports betting was not available—or even permitted—in New Jersey's gambling casinos at that time.

But even under the California Supreme Court's alternative definitional approach, the legislative authorization of sports betting would still not run afoul of section 19(e). As analyzed below, the court's reference to "gambling activities including those statutorily prohibited in California, especially banked table games and slot machines"[45] must be read in the context of the facts of *Hotel Employees*, which focused exclusively on "casino-style" gambling—specifically, banked card games and slot machines—at tribal casinos. Consistent with that factual context, the court in *Hotel Employees* indicated that section 19(e) elevated to a constitutional level only those prohibitions against "casino gambling" codified in section 330 of the California Penal Code.[46] The California Supreme Court's recent decision in *United Auburn* reaffirms that section 19(e) applies only to casino-style gaming falling within the prohibitions of California Penal Code section 330.[47]

The next logical question then becomes whether sports betting constitutes casino-style gaming within the scope of section 19(e). Answering that question in the negative, this Article highlights several fundamental distinctions between "casino-style" gaming and sports betting. First, as outlined below, casino-style games are primarily games of chance where the outcomes are determined largely or wholly by chance (such as through the random distribution of cards, the roll of the dice, or the use of a random number generator), whereas wagering on sporting events is widely considered to be predominantly *skill-based*. Second, the *location* of the underlying contests further distinguishes casino-style gaming from sports wagering. Casino-style games (such as slot machines, banked card games, and dice games) are typically played—and their outcomes are usually determined—within the *four walls* of a casino. By contrast, in sports betting, the athletic competitions on which the

44 *Methodist Hosp.*, 488 P.2d at 161.

45 *Hotel Emps.*, 981 P.2d at 1004.

46 *See* discussion *infra* Section III.B.1–2.

47 *See* United Auburn Indian Cmty. of Auburn Rancheria v. Newsom, 472 P.3d 1064, 1068 (Cal. 2020); *see also* discussion *infra* Section III.B.3.

bets or wagers are placed usually occur and are decided at locations external to a casino's four walls—in many cases, hundreds or thousands of miles away from the casino floor.

For these reasons, among others, casino-style games and sports betting are treated as separate and distinct categories of gambling by the California Penal Code, federal law, gambling studies commissioned by both Congress and the State of California, and public opinion polls and surveys conducted by leading polling companies.[48] Therefore, this Article concludes that even under the California Supreme Court's alternative interpretation of section 19(e)—which looks to California's statutory prohibitions against casino-style gambling—the state legislature would have the power to authorize sports wagering through a statutory enactment without the need for an amendment to the California Constitution.

The structure of the remainder of this Article is as follows: Part I discusses the historical background and legislative history surrounding the enactment of section 19(e), and the legal disputes between California's Indian tribes and the State of California that gave rise to the *Hotel Employees* decision. Part II compares and contrasts the two distinctly different interpretations of section 19(e) that were suggested by the California Supreme Court in *Hotel Employees*, and discusses the constitutional consequences associated with the existence of multiple possible interpretations of section 19(e). Part III examines the legislative authorization of sports betting through the lens of each interpretive approach suggested by the court in *Hotel Employees* and concludes that sports wagering falls outside the scope of section 19(e)'s prohibitions regardless of the approach utilized. Part IV then examines the fundamental issue of whether sports wagering constitutes "casino-style" gambling for purposes of section 19(e) and concludes that they are separate and distinct categories of gambling.

Finally, this Article weighs the above considerations in light of the following well-established constitutional principles: (1) restrictions and limitations on legislative power are to be strictly and narrowly construed, and (2) any doubt as to the Legislature's power to act in a given case should be resolved in favor of the Legislature's action. When viewed through this lens, the suggestion that section 19(e) constitutionalized all of California's statutory prohibitions against gambling falls apart

48 *See* discussion *infra* Part IV.

rather quickly and convincingly. Therefore, this Article ultimately concludes that section 19(e) is not a barrier or obstacle to the legislative authorization of sports betting.

I. BACKGROUND

A. Legislative History of Section 19(e)

At the November 6, 1984 general election, the people of California approved Proposition 37, an initiative measure which amended the California Constitution to permit the establishment of the California State Lottery.[49] Proposition 37 added two new provisions to the California Constitution. The first new clause— Subdivision (d) to section 19 of article IV—authorized the state lottery as an exception to the general prohibition on lotteries and the sale of lottery tickets that appears at article IV, section 19, subdivision (a).[50] In the same measure, the voters also added a new subdivision (e), which provides that "[t]he Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey."[51]

Subdivision (e) does not define the term "casino" or provide any insights as to what constitutes "the type" of casino "currently operating in Nevada and New Jersey" for purposes of that provision. However, the available legislative history surrounding Proposition 37 is helpful in ascertaining the meaning of those words. For initiative measures adopted by the voters, the ballot pamphlet prepared by the Secretary of State is the equivalent of its legislative history and may be relied upon to determine the "probable meaning of uncertain language."[52] While primarily addressing the establishment of a state lottery, the ballot pamphlet for Proposition 37 includes several important references to the proposed casino ban in section 19(e). The first such reference is in the "Official Title and Summary Prepared by the Attorney General," which states that Proposition 37 "amends [the] Constitution to authorize [the] establishment of a state

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49 *See* W. Telecon, Inc. v. Cal. State Lottery*,* 917 P.2d 651, 653 (Cal. 1996).

50 *Id.*; CAL. CONST. art. IV, § 19(d).

51 Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 994 (Cal. 1999) (citing CAL. CONST. art. IV, § 19(e)).

52 Bd. of Supervisors v. Lonergan, 616 P.2d 802, 808 (Cal. 1980) ("We have previously acknowledged that ballot pamphlets may constitute the only legislative history of an initiative measure adopted by the voters. . . . As such, they may properly be resorted to as a construction aid to determine the 'probable meaning of uncertain language.'") (citing Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 585 P.2d 1281 (Cal. 1978)).

lottery and to prohibit casinos."[53] The next reference to the proposed casino ban—and by far the most substantive—is set forth in the "Analysis by the Legislative Analyst," which states in relevant part:

> This measure would amend the California Constitution to authorize the establishment of a statewide lottery in California. *In addition, the measure would amend the Constitution to prohibit in California gambling casinos of the type that exist in Nevada and New Jersey. (Casino gambling currently is prohibited within the state by a statute, but not by the Constitution).*[54]

The only other reference to the anti-casino language in the ballot pamphlet is in the "Argument in Favor of Proposition 37," which states, *inter alia*, that Proposition 37 "also adds a new CONSTITUTIONAL PROHIBITION AGAINST CASINO GAMBLING."[55]

Owing to the non-partisan nature of the Legislative Analyst's Office (the "LAO"), California courts place great weight on the "Analysis of the Legislative Analyst" as an important interpretive resource for determining the intent of the voters in a ballot initiative.[56] As Ronald M. George, the former Chief Justice of the California Supreme Court, once observed, the Legislative Analyst's analysis is "the item in the ballot pamphlet materials that voters are most likely to have viewed as objective and impartial and to have consulted as a reliable indicator of the proposition's meaning and effect."[57] Crucially, as highlighted in the previous paragraph, the Legislative Analyst interpreted section 19(e) consistent with its plain meaning and geographic reference points—that it only operates as a ban on a specific type of "gambling casino"—i.e., "the type that exist[s] in Nevada and New Jersey"[58]—rather than as a blanket prohibition on all forms of gambling that are prohibited by California statute. The parenthetical which follows that sentence—"(Casino gambling currently is prohibited within the state by a statute, but not by

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[53] *See* Ballot Pamp., Prop. 37, *State Lottery. Initiative Constitutional Amendment and Statute*, 46 (Nov. 6, 1984), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1926&context=ca_ballot_props [http://perma.cc/V3XM-E6LY] (last visited May 31, 2021).

[54] *Id.* (emphasis added).

[55] *Id.* at 48.

[56] *See* Hi-Voltage Wire Works v. City of San Jose, 12 P.3d 1068, 1096 (Cal. 2000) ("Past cases establish that a court properly may look to the analysis of the Legislative Analyst in determining the voters' intent.") (George, C.J., concurring in part); *see also* Garfinkle v. Superior Court, 578 P.2d 925, 934 n.19 (Cal. 1978) (relying solely on Legislative Analyst's evaluation to determine voters' intent).

[57] *Hi-Voltage Wire Works*, 578 P.2d at 1096 (George, C.J., concurring in part).

[58] *See supra* text accompanying note 54.

the Constitution)"—likewise infers that section 19(e)'s reach is limited to a specific species of gambling activity—i.e., "casino gambling"—and cuts against any notion that the initiative measure elevated *all* statutory prohibitions on gambling (even those which are not considered casino-style gambling) to a constitutional level.[59]

This constrained reading of section 19(e) is echoed by the 1984 legislative hearing testimony of John Vickerman, the long-time Chief Deputy of the Legislative Analyst's Office.[60] Far from suggesting an expansive interpretation of section 19(e), Mr. Vickerman's August 22, 1984 testimony before the Assembly Committee on Governmental Organization hints at a much narrower focus. First, he represented to the committee members that section 19(e) applies only to "casino-type" gambling that "exists in Nevada and New Jersey."[61] Second, and just as critically, Mr. Vickerman described section 19(e) as elevating a "statutory *provision*" regarding casino-type gambling to a constitutional level, while at the same time observing that Proposition 37's other principal objective—establishing the state-operated lottery—raised "statutory *provisions*" to a constitutional level.[62] His use of the singular tense when describing the reach of the anti-casino language in Proposition 37, when juxtaposed against his use of the plural tense when discussing the lottery component, indicates that Mr. Vickerman, who served for 18 years as the Chief Deputy of the Legislative Analyst's Office, did not view section 19(e) as elevating all statutory prohibitions against gambling to a constitutional level. Rather, his testimony suggests that he viewed section 19(e)'s reach more narrowly—as constitutionalizing the statutory *prohibition* against casino-style gambling.

Public statements by Proposition 37's drafter and leading proponent also indicate that the measure was not intended to incorporate all existing statutory prohibitions against

59 *See supra* text accompanying note 54.

60 Mr. Vickerman appeared as a witness before the Assembly Committee on Governmental Organization, which held an interim hearing on August 22, 1984 to review the potential economic impact of Proposition 37. *See Fadem Lottery Initiative Prop. 37: Hearing on Prop. 37 Before the Cal. Assembly Comm. on Governmental Org.*, Transcript of Proceedings 2 (Aug. 22, 1984), http://digitalcommons.law.ggu.edu/caldocs_assembly/144/ [http://perma.cc/UQK6-W2SH] (statement of John Vickerman, Chief Deputy, Legislative Analyst's office).

61 *Id.*

62 Referring to the anti-casino language in Proposition 37, Mr. Vickerman stated that "[w]e have a statutory *provision* in current law[,] so this elevates the statutory to a constitutional provision—most of the *provisions* that govern the lottery and the statutory *measure* that is also incorporated herein. On page 2 of our statement, we go into the general part of these statutory *provisions*." *Id.* (emphasis added).

gambling into the California Constitution. In an October 1984 interview with the Los Angeles Times, attorney Barry Fadem, who formed the organization which proposed Proposition 37 and drafted the initiative language,[63] explained the rationale behind including a casino ban in a ballot initiative focused principally on the establishment of a state lottery.[64] Mr. Fadem told the reporter that "[h]e put into the Constitution for the first time a prohibition against *casino gambling,* to allay the fears of individuals who think this is *the first step* down the *long road* to *other forms of gambling*."[65] Mr. Fadem's use of the words "the first step" and a "long road" in this context is revealing. It reasonably evinces his belief that there was a vast continuum (i.e., "a long road") between the establishment of a state lottery—which would be a first for California (i.e., the "first step")—and the legalization of *all* forms of gambling, with casino gambling being just one of several additional steps on the long road to full legalization. This contemporaneous statement—made by the drafter and leading proponent of Proposition 37 and expressed in one of California's most widely-read daily newspapers just one week prior to the general election—lends further credence to the notion that the constitutional prohibition contained in section 19(e) extended only to casino-style gambling and that "other forms of gambling" were beyond its purview.[66]

The limited scope of section 19(e) has been acknowledged by other relevant California legal authorities as well. For example, in *Sutter's Place v. Kennedy*, the Second District Court of Appeal acknowledged that section 19(e) did not incorporate all of the California Penal Code's gambling prohibitions into the state Constitution.[67] In declining to find that section 19(e) "constitutionalized" *all* statutory prohibitions against gambling in one fell swoop, the Second District Court drew upon the following canons of constitutional construction that have long been recognized in California:

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63 *See* John Hurst, *Lottery Ticket Supplier to Win Biggest Jackpot of All*, L.A. TIMES (May 16, 1985, 12:00 AM), http://www.latimes.com/archives/la-xpm-1985-05-16-mn-17394-story.html#:~:text=On%20Jan.,executive%20officer%20of%20the%20organization [http://perma.cc/W7E9-PQG5] (last visited May 31, 2021).

64 *See* Paul Jacobs, *Initiative to Set Up a State Lottery Sparks One of Hottest Battles: The Pro Argument (Barry Fadem)*, L.A. TIMES, Oct. 28, 1984, 3.

65 *Id.* (emphasis added).

66 *See generally* McMahan v. City & Cnty. of S.F., 26 Cal. Rptr. 3d 509, 516 n.6 (Cal. Ct. App. 2005) (citing Cal. Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 733 (Cal. 1978)) (noting that "our Supreme Court has relied on [newspaper] articles in the past" when attempting to ascertain voter intent on a ballot initiative).

67 84 Cal. Rptr. 2d 84, 94 (Cal. Ct. App. 1999).

> [T]he entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution . . . . [A]ll intendments favor the exercise of the Legislature's plenary authority: If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.[68]

Applying these well-established principles of constitutional interpretation, the Second District Court of Appeal recognized that "[t]he language of section 19(e) does not purport to incorporate [all of] the California Penal Code's gambling prohibitions into the California Constitution."[69] Rather, the appellate court observed that, "on its face, section 19(e) prohibits the Legislature from permitting *certain types* of casinos."[70]

B. Post-IGRA Compact Disputes over "Casino-Style" Gaming on Tribal Lands Put California's Indian Tribes on a Collision Course with Section 19(e)

Continuous legal battles between California's Indian tribes and the State of California over gambling activities on tribal lands would eventually necessitate a more in-depth judicial examination of section 19(e)'s contours. During the early 1980's, two California Indian tribes—the Cabazon and Morongo Band of Mission Indians—began offering high-stakes bingo and card games (including draw poker) at their reservations.[71] When the State threatened criminal action against the two tribes on the basis that their games violated California's anti-gambling laws, the tribes challenged its authority to do so.[72] This disagreement led to the landmark United States Supreme Court decision in *California v. Cabazon Band of Mission Indians*,[73] which concluded that because Congress had not provided for the regulation of tribal gaming, a state could prohibit gaming on tribal lands only if the state completely prohibited all gambling

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68 *Id.* at 94 (quoting Methodist Hosp. of Sacramento v. Saylor, 488 P.2d 161, 165 (Cal. 1971)).

69 *Id.*

70 *Id.* (emphasis added).

71 *See* Roger Dunstan, *Indian Casinos in California*, CRB 3 (Sept. 1998), http://www.library.ca.gov/wp-content/uploads/crb-reports/98015.pdf [http://perma.cc/CW8R-CF7U].

72 *See* United Auburn Indian Cmty. of Auburn Rancheria v. Newsom, 472 P.3d 1064, 1068 (Cal. 2020).

73 480 U.S. 202 (1987).

within its borders.[74] Because California did not prohibit all gambling outright, but instead allowed some forms of gambling (such as the state lottery and pari-mutuel horse-race betting) to occur,[75] the Court concluded that California's laws with respect to gambling were "regulatory" in nature, rather than "prohibitory," and thus could not be enforced on tribal lands.[76] As a result of the *Cabazon* decision, states could not "restrict or otherwise regulate Indian gaming operations unless they prohibited all gaming."[77]

Congress responded to *Cabazon*'s "disallowance of state regulation over Indian gaming"[78] by enacting the Indian Gaming Regulatory Act ("IGRA") in 1988.[79] IGRA created a comprehensive jurisdictional framework for the regulation of gaming activities on Indian lands.[80] One of IGRA's primary purposes was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,"[81] while at the same time establishing "[f]ederal standards for gaming on Indian lands"[82] and "granting [the] states some role in the regulation of Indian gaming."[83] As described by the Ninth Circuit, "IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme."[84]

To accomplish those objectives, Congress divided Indian gaming into three distinct categories, each of which is subject to a

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74 *See id.* at 209; *see also* Wyandotte Nation v. Sebelius, 337 F. Supp. 2d 1253, 1256 (D. Kan. 2004) ("The [*Cabazon*] Court held that because Congress had not provided for the regulation of tribal gaming, a state could only prohibit gaming on tribal lands if the state completely prohibited all gaming within its borders."), *aff'd in part and vacated in part on other grounds,* 443 F.3d 1247 (10th Cir. 2006).

75 *Cabazon*, 480 U.S. at 210.

76 *See id.* at 211.

77 *United Auburn*, 472 P.3d at 1068.

78 Joshua L. Sohn, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139, 142 (2006).

79 *See* Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 715 (9th Cir. 2003) ("As a response to the *Cabazon* decision, Congress enacted IGRA as a means of granting states some role in the regulation of Indian gaming."); Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 998 (Cal. 1999) ("In 1988, in the wake of *Cabazon*, Congress enacted IGRA."); *see also* Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721).

80 Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 785 (2014) (citing 25 U.S.C. § 2702(3) and "describing [its] purpose as establishing 'regulatory authority . . . [and] standards for gaming on Indian lands'").

81 25 U.S.C. § 2702(1).

82 25 U.S.C. § 2702(3).

83 *Artichoke Joe's*, 353 F.3d at 715.

84 *Id.* (quoting Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)).

different level of regulation. Class I gaming encompasses social games and traditional Indian games played solely for "prizes of minimal value," and is regulated exclusively by Indian tribes without any federal or state governmental oversight.[85] Class II gaming consists primarily of bingo and "non-banked" card games, and is regulated by the tribes subject to approval and oversight by the National Indian Gaming Commission ("NIGC"),[86] a federal regulatory agency within the United States Department of the Interior.[87] The most important category, class III, encompasses all other forms of gambling[88] and "includes the types of high-stakes games usually associated with casino-style gambling,"[89] such as "slot machines, craps, roulette, and banked card games like blackjack."[90] As "the most lucrative" of the three gaming categories,[91] "[c]lass III gaming is subject to a greater degree of federal-state regulation than either class I or class II gaming."[92] IGRA provides that class III gaming activities on Indian lands are permissible "only if" they are: (1) duly authorized by a tribal ordinance; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity"; and (3) "conducted in conformance with a Tribal-State compact" that has been approved by the United States Secretary of the Interior.[93]

Class III "[t]ribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes."[94] "IGRA's compacting requirement allows states to negotiate with tribes . . . regarding

85 25 U.S.C. §§ 2703(6), 2710(a)(1).

86 *See* 25 U.S.C. §§ 2703(7), 2704(a)–(b), 2710(a)(2)–(b); *see also* Texas v. United States, 497 F.3d 491, 494 (5th Cir. 2007) ("Class II gaming—bingo and related activities—is subject to oversight by the National Indian Gaming Commission.").

87 *See* 25 U.S.C. § 2704(a).

88 25 U.S.C. § 2703(8) ("The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming.").

89 *Artichoke Joe's*, 353 F.3d at 715; *see also In re* Indian Gaming Related Cases, 331 F.3d 1094, 1097 (9th Cir. 2003) ("Class III gaming . . . includes the types of high-stakes games usually associated with Nevada-style gambling.").

90 Wisconsin v. Ho-Chunk Nation, 784 F.3d 1076, 1079–80 (7th Cir. 2015); *see also* Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal. v. California, 163 F. Supp. 3d 769, 773 (E.D. Cal. 2016) ("Class III gaming includes casino-style gaming such as card games played against the house and slot machines."); City of Vancouver v. Hogen, No. C08-5192BHS, 2008 WL 4443806, at *1 (W.D. Wash. Sept. 24, 2008), *aff'd*, 393 F. App'x 528 (9th Cir. 2010) ("Class III gaming . . . includes more traditional 'casino' games, including slot machines, roulette, poker, blackjack, etc.").

91 Hotel Emps. & Rest. Emps. Int'l. Union v. Davis, 981 P.2d 990, 999 (Cal. 1999) (quoting United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1299 (9th Cir. 1998)).

92 *In re Indian Gaming Related Cases*, 331 F.3d at 1097.

93 *Id.* (citing 25 U.S.C. §§ 2710(d)(1), 2710(d)(3)(B)); *see also* Amador Cnty. v. Salazar, 640 F.3d 373, 376 (D.C. Cir. 2011).

94 Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 546 (8th Cir. 1996).

aspects of class III Indian gaming that might affect legitimate state interests."[95] Through this mechanism, "[t]he compacting process gives to states civil regulatory authority that they otherwise would lack under *Cabazon*, while granting to tribes the ability to offer legal class III gaming."[96] In exchange for a seat at the negotiating table, however, IGRA requires states to negotiate class III gaming compacts with tribes "in good faith"[97] and sets forth a detailed remedial process to enforce that obligation.[98] An Indian tribe may enforce the good faith bargaining provisions of IGRA by filing a lawsuit against the state in federal court,[99] but only if there has been a waiver of sovereign immunity by the state.[100] California has waived its sovereign immunity with respect to suits brought under IGRA.[101]

The passage of IGRA did not end the battle over Indian gaming in California. After the statute's enactment, several Indian tribes in California "sought to negotiate compacts with the State to permit the operation of class III games on their respective reservations."[102] "Among the class III games over

95 Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 716 (9th Cir. 2003).

96 *Id.* (citing Keweenaw Bay Indian Cmty. v. United States*,* 136 F.3d 469, 472 (6th Cir. 1998)).

97 *Id.* at 716 (citing 25 U.S.C. § 2710(d)(3)(A)); *In re Indian Gaming Related Cases*, 331 F.3d at 1097 (citing 25 U.S.C. § 2710(d)(3)(A)); *see also* Rincon Band of Luiseno Mission Indians of Rincon Rsrv. v. Schwarzenegger, 602 F.3d 1019, 1027 (9th Cir. 2010) ("Because the compact requirement skews the balance of power over gaming rights in favor of states by making tribes dependent on state cooperation, IGRA imposes on states the concomitant obligation to participate in the negotiations in good faith.") (citing 25 U.S.C. § 2710(d)(3)(A)).

98 *See* 25 U.S.C. § 2710(d)(7); *see also* Stand Up for Cal.! v. U.S. Dep't of the Interior, 959 F.3d 1154, 1160–61 (9th Cir. 2020) (citing S. REP. NO. 100-446 at 13 (1988) as "noting that the remedial scheme fills the 'need to provide some incentive for States to negotiate with tribes in good faith'"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 73–74 (1996) (explaining that the state's duty to negotiate is enforceable through "the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7)").

99 *See* 25 U.S.C. § 2710(d)(7)(A).

100 In *Seminole Tribe of Florida*, the United States Supreme Court invalidated portions of IGRA's enforcement mechanism in 25 U.S.C. § 2710(d)(7), holding that the Eleventh Amendment bars Indian tribes from suing states in federal district court for failing to negotiate compacts in good faith. 517 U.S. at 76. As a result of this decision, a state must waive its sovereign immunity before a tribe can file suit against the state in federal court to enforce IGRA's good faith negotiation requirement. *See* Hein v. Capitan Grande Band of Diegueno Mission Indians, 201 F.3d 1256, 1260 n.7 (9th Cir. 2000) (noting "[t]he practical effect of this holding is to take away from tribes the ability to force states to comply with IGRA's compacting scheme.").

101 *See Artichoke Joe's*, 353 F.3d at 716 n.7 (citing CAL. GOV'T CODE § 98005 (Deering 1998)); Pauma Band of Luiseno Mission Indians. v. California, 813 F.3d 1155, 1171 n.12 (9th Cir. 2015) ("California—unlike many states—has chosen to legislatively enact a broad statutory waiver of sovereign immunity for claims arising out of violations of IGRA.") (citing CAL. GOV'T CODE § 98005).

102 *In re Indian Gaming Related Cases*, 331 F.3d at 1098; *see also Artichoke Joe's*, 353 F.3d at 716.

which these tribes sought to negotiate were live banked or percentage card games and stand-alone electronic gaming machines (similar to slot machines)."[103] The State refused to negotiate, pointing to language in IGRA stating that "class III gaming shall be lawful on Indian lands *only if* such activities are . . . located in a State that *permits such gaming* for any purpose by any person, organization, or entity."[104] California's argument was pretty straightforward: it asserted that the games and devices in question were illegal under its Penal Code.[105] In California's view, because state law did not permit live banked or percentage card games or slot machine-like devices, California had no duty to negotiate a gaming compact with respect to them.[106] The tribes, on the other hand, maintained that the phrase "*permits such gaming*" (as used in 25 U.S.C. § 2710(d)(1)(B)) should be construed broadly as referring to class III gaming in general, rather than any specific class III games in particular.[107] In the tribes' view, because California permitted other types of class III games (such as pari-mutuel horse race betting, nonelectronic keno, and lotto), it could not refuse to negotiate over a particular subset of class III gaming.[108]

In *Rumsey*, the Ninth Circuit rejected the tribes' expansive view of IGRA, holding that:

> IGRA does not require a state to negotiate over one form of [c]lass III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity "for any purpose by any person, organization, or entity," then it also must allow Indian tribes to engage in *that same activity*.[109]

The Ninth Circuit explained, "[i]n other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have."[110] Because California law prohibited all persons from engaging in banked or percentage card games,[111] and likewise prohibited

103 *In re Indian Gaming Related Cases*, 331 F.3d at 1098; *see also* Hotel Emps. & Rest. Emps. Int'l. Union v. Davis, 981 P.2d 990, 999 (Cal. 1999) (citing Rumsey Indian Rancheria v. Wilson, 64 F.3d 1250, 1255 (9th Cir. 1994)).

104 *In re Indian Gaming Related Cases*, 331 F.3d at 1098 (quoting 25 U.S.C. § 2710(d)(1)(B)) (alteration in original) (internal quotations omitted).

105 *See Rumsey*, 64 F.3d at 1256 (citing Cal. Penal Code §§ 330, 330a, and 330b).

106 *In re Indian Gaming Related Cases*, 331 F.3d at 1099 (citing *Rumsey*, 64 F.3d at 1255 n.1).

107 *Id.* at 1098.

108 Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 716 (9th Cir. 2003) (citing *Rumsey*, 64 F.3d at 1255 n.1).

109 *Rumsey*, 64 F.3d at 1258 (emphasis added) (citing 25 U.S.C. § 2710(d)(1)(B)).

110 *Id.* (emphasis added).

111 *See id.* at 1256 (citing CAL. PENAL CODE § 330).

anyone from possessing or operating a slot machine,[112] the court concluded that the State had no obligation to negotiate a compact with respect to those types of class III games.[113]

C. California's Indian Tribes Turn to Proposition 5, a Purely Statutory Measure, to Force the State of California's Hand on "Casino-Style" Gaming

The Ninth Circuit's decision in *Rumsey* "meant that the State of California had no obligation under federal law to negotiate with the tribes" over "the most lucrative forms of class III gaming."[114] While the *Rumsey* appeal was pending, a number of California Indian tribes began offering class III gaming activities without a compact.[115] Among the "uncompacted" class III games being offered by the tribes were electronic gaming machines which resembled slot machines.[116] In response, then-California Governor Pete Wilson refused to negotiate with the tribes until they ceased such unauthorized gaming activities.[117] He also "refused to negotiate compacts covering class III games that the State *did permit*, unless and until the tribes requesting such negotiations ceased engaging in unlawful class III gaming."[118] Rather than acquiesce to Governor Wilson's demand, a coalition of California tribes "resorted to California's initiative process [in an effort] to impose a state-law obligation on California to negotiate class III gaming compacts."[119]

In particular, the California tribes drafted and circulated a statutory initiative for the November 1998 California statewide ballot entitled "The Tribal Government Gaming and Economic Self–Sufficiency Act of 1998," otherwise known as Proposition 5.[120] This initiative, which amended the Government Code (a state statute)[121] but not the California

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112 *See id.* (citing CAL. PENAL CODE § 330(a)–(b)).

113 *See id.* at 1260.

114 Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 717 (9th Cir. 2003); *In re* Indian Gaming Related Cases, 331 F.3d 1094, 1099 (9th Cir. 2003).

115 Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 999 (Cal. 1999).

116 *See* Guy Levy, *Western Telecon v. California State Lottery; Will Native Americans Lose Again?*, 19 T. JEFFERSON L. REV. 361, 374–76 (1997).

117 *See id.* at 376; *see also Hotel Emps.*, 981 P.2d at 999.

118 *In re Indian Gaming Related Cases*, 331 F.3d at 1099 (second emphasis added).

119 *Artichoke Joe's*, 353 F.3d at 717; *see also In re Indian Gaming Related Cases*, 331 F.3d at 1099–1100.

120 *See Artichoke Joe's*, 353 F.3d at 717; *see also* Flynt v. Cal. Gambling Control Comm'n, 104 Cal. App. 4th 1125, 1136 (Cal. Ct. App. 2002); *see also Hotel Emps.*, 981 P.2d at 994.

121 Proposition 5 added a single title to the Government Code, title 16, and a single chapter within that title, chapter 1, entitled "The Tribal Government Gaming and

Constitution,[122] purported to authorize various forms of gambling at tribal casinos.[123] Specifically, Proposition 5 required the State to enter into a standardized Tribal-State Gaming Compact (the "model compact")[124] with California Indian tribes to allow certain class III gambling activities, such as slot machines (referred to in the model compact as "Tribal gaming terminals"),[125] banked card games, lottery games, and off-track pari-mutuel horse race wagering,[126] to be conducted at tribal gaming facilities in California.[127] Proposition 5 obligated the Governor to execute the model compact on behalf of the State "as a ministerial act, without preconditions" within thirty days after receiving a request from a federally-recognized Indian tribe "to enter into such a compact."[128] Under the measure, the compacts were deemed approved if the Governor took no action within thirty days.[129]

Anticipating that the model compact's authorization of certain casino-style games (such as the Tribal gaming terminals and banked card games) might be seen as skirting section 19(e)'s ban on Nevada-and-New Jersey-style casinos, the proponents of Proposition 5 included two specific factual findings in the initiative statute designed to counter any such suggestion. section 98001 of the Government Code, which sets forth the initiative's findings, states, in relevant part, that "'[c]asinos of the type currently operating in Nevada and New Jersey are materially different from the tribal gaming facilities authorized under' Proposition 5 . . . in that the casinos in those states," (1) offer "house-banked" games, in which players wager against the casino rather than against each other, as well as various other games such as roulette and craps, "none of which" are authorized under Proposition 5; and (2) are privately owned and not restricted in how their profits may be

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Economic Self-Sufficiency Act of 1998," comprised of sections 98000 through 98012. *Hotel Emps.*, 981 P.2d at 1000.

122 *Id.* at 994 (referring to Proposition 5 as "a purely statutory measure"); *Flynt*, 104 Cal. App. 4th at 1136 (noting that Proposition 5 "amended state law but not the State Constitution").

123 *Hotel Emps.*, 981 P.2d at 994.

124 The model compact is set forth in its entirety at section 98004 of the Government Code. *See* CAL. GOV'T CODE § 98004.

125 *Hotel Emps.*, 981 P.2d at 1001 ("'Tribal gaming terminal' is defined [in the model compact] as a 'gaming device' . . . 'that does not dispense coins or currency and is not activated by a handle.'") (quoting CAL. GOV'T CODE § 98004(2.21)).

126 *See id.* (citing CAL. GOV'T CODE § 98004(4.1)(b)–(d)).

127 *See id.* (citing CAL. GOV'T CODE § 98004(4.2)).

128 *Id.* (quoting CAL. GOV'T CODE § 98002(a)).

129 *See id.* (citing CAL. GOV'T CODE § 98005).

expended, whereas tribal governments must be the "primary beneficiaries" of the tribal gaming facilities and "are limited to using their gaming revenues for various tribal purposes" such as tribal government services and programs "that address reservation housing, elderly care, education, economic development, health care, and other tribal programs and needs[] in conformity with federal law."[130]

These factual findings would soon become a central issue in the ensuing state court litigation arising out of Proposition 5. On November 3, 1998, California voters approved Proposition 5.[131] Within a month of Proposition 5's passage and prior to its implementation, two groups of petitioners filed separate, but similar lawsuits challenging the constitutionality of Proposition 5. On November 20, 1998, the Hotel Employees and Restaurant Employees International Union (the "Union")—representing the interests of over 2,000 employees of licensed card clubs and horse racetracks located off Indian land in California, and over 20,000 hotel employees[132]—filed a petition for writ of mandate in the California Supreme Court seeking to bar Governor Wilson and then-Secretary of State Bill Jones from implementing Proposition 5 on the ground that it authorizes "casino-type" gambling prohibited by section 19(e).[133] The Union also requested an immediate stay of the implementation of Proposition 5 pending a final determination of the merits of its petition.[134] On that same date, Eric Cortez and four other petitioners ("Cortez")—each of whom owned real property located near a tribal gaming facility[135]—filed a similar petition for writ of mandate with the California Supreme Court, also with a request for a stay, seeking to compel Governor Wilson not to implement Proposition 5 on the ground that it purports to authorize by statute "casinos of the type currently operating in Nevada and New Jersey," in contravention of section 19(e).[136] Both petitions named Frank Lawrence, a tribal gaming attorney who was the proponent of

130 *Id.* at 1000 (quoting CAL. GOV'T CODE § 98001(c)).

131 *Id.* at 994; *see* Flynt v. Cal. Gambling Control Comm'n, 104 Cal. App. 4th 1125, 1136 (Cal. Ct. App. 2002).

132 *See* Petition for Writ of Mandate; Application for Stay; Memorandum in Support Thereof, at *3, Hotel Emps. & Rest. Emps. Int'l Union v. Wilson, 981 P.2d 990 (Cal. 1999) (No. S074850), 1998 WL 34188080 (Cal. Super. Ct. Nov. 20, 1998) (hereinafter *Union Petition*).

133 *Id.* at *21–23; *see also Hotel Emps.*, 981 P.2d at 995, 1002.

134 *See Hotel Emps.*, 981 P.2d at 995.

135 *See* Petition for Writ of Mandate and Supporting Memorandum of Points and Authorities of Stay Requested, at *5–7, Hotel Emps. & Rest. Emps. Int'l Union v. Wilson, 981 P.2d 990 (Cal. 1999) (No. S074851), 1998 WL 34188081 (Cal. Super. Ct. Nov. 20, 1998) [hereinafter *Cortez Petition*].

136 *Id.* at *2–3, *23–31; *Hotel Emps.*, 981 P.2d at 995, 1002.

Proposition 5, as a real party in interest,[137] and Cortez's petition also named Californians for Indian Self-Reliance, a California corporation which presented ballot arguments in favor of Proposition 5, as the other real party in interest.[138]

Cortez was represented in the case by famed appellate lawyer Theodore Olson, whose legal efforts nearly two decades later on behalf of New Jersey Governor Phil Murphy led to the demise of PASPA and opened the door to state-authorized sports betting.[139] Mr. Olson's court filing in the Cortez case took aim at the statutory "finding" that the "tribal gaming facilities" authorized by Proposition 5 are "materially different" than Nevada and New Jersey casinos, calling it nothing more than an "imaginative" "earth-is-flat" declaration that is completely at odds with reality. As Mr. Olson powerfully wrote in Part II.B of the Cortez petition:

> Proposition 5 . . . attempts to avoid the clear constitutional ban by including a "finding" that up is down and black is white, *i.e.*, that "casinos of the type currently operating in Nevada and New Jersey are materially different from the tribal gaming facilities authorized under this chapter," Cal. Gov't Code § 98001(c). But neither legislative bodies nor the electorate can opt out of the Constitution merely by conveniently "finding" that it does not apply to the activities they propose to reach through legislation. "Findings," imaginative declarations, and earth-is-flat declarations grafted on an initiative measure cannot repeal reality, are not controlling, and certainly cannot so easily rewrite a constitutional proscription. The Court is required to inquire into the purpose of a statute to determine its scope and effect.[140]

Addressing the same issue, the Union's petition asserted that "[s]tatutory 'findings' cannot override the Constitutional ban on casinos,"[141] adding that "the [California] Supreme Court is not bound by them in interpreting the Constitution."[142] Along the same lines, California's Legislative Counsel, Bion M. Gregory, issued an advisory opinion prior to the vote on Proposition 5, concluding, *inter alia*, that the measure violated section 19(e)'s prohibition against "casinos of the type currently operating in Nevada and New Jersey."[143] In so concluding, the Legislative Counsel stressed that the "[f]indings and declarations . . . set forth in a statutory enactment . . . are not controlling; [rather], the [California Supreme

137 Union Petition, *supra* note 132, at *4; Cortez Petition, *supra* note 135, at *8.
138 Cortez Petition, *supra* note 135, at *8.
139 *See Murphy*, 138 S. Ct. at 1478–81; *see also supra* text accompanying note 6.
140 Cortez Petition, *supra* note 135, at *26–27.
141 Union Petition, *supra* note 132, at *23.
142 *Id.*
143 *Hotel Emps.*, 981 P.2d at 1000.

Court] is required to inquire into the real, rather than the ostensible, purpose of a statute to determine its scope and effect."[144]

D. The California Supreme Court Rejects Proposition 5's Statutory "Findings" and Invalidates the Measure as Contravening Section 19(e)'s Ban on Casinos

The Union and Cortez petitions were ultimately consolidated for purposes of oral argument and decision.[145] On August 23, 1999, the California Supreme Court issued its opinion in *Hotel Employees*, striking down nearly all of Proposition 5.[146] The court found that the provisions of the model compact authorizing slot machine-style gambling devices (euphemistically referred to as "tribal gaming terminals")[147] and banked card games within tribal gaming facilities were "inconsistent with" the anticasino provision of section 19(e) "insofar as [they] authorize[] what would amount to proscribed casinos."[148] The "entry into such a compact," the court declared, "is beyond the legislative power under the law of California, conflicting as it would with [section 19(e)'s declaration that '[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey']."[149] The court concluded as follows: "Because Proposition 5, a purely statutory measure, did not amend section 19(e) or any other part of the [California] Constitution, and because in a conflict between statutory and constitutional law the Constitution must prevail[,] . . . Proposition 5's authorization of casino gambling is invalid and inoperative."[150]

Importantly, the California Supreme Court declined to defer to the statutory "finding" in Section 98001(c) of the Government Code that "casinos of the type currently operating in Nevada and New Jersey" are "materially different" from the tribal gaming authorized by Proposition 5.[151] The court did not apply the "general rule of deference" ordinarily accorded to statutory factual findings because it determined that the

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144 Legal Opinion Letter from Bion M. Gregory, Cal. Leg. Couns., to Assemb. Bernie Richter (Oct. 8, 1998) (on file with author) [hereinafter Op. Cal. Leg. Counsel, No. 21947].

145 *Hotel Employees*, 981 P.2d at 995.

146 *Id.* at 1000–11. The only part of Proposition 5 which was not invalidated by the Supreme Court was a sentence waiving the State's immunity from suit in disputes arising out of negotiations for a new or amended tribal-state compact other than the measure's model compact. The Court determined that such provision was severable from the invalid portions. *Id.* at 1010–11.

147 *Id.* at 1006–07.

148 *Id.* at 1009–11.

149 *Id.* at 1009.

150 *Id.* at 994.

151 *Id.* at 990 (quoting CAL. CONST. art. IV, § 19(e)).

findings—which focused on the private ownership of Nevada and New Jersey casinos and the absence of any house-banked games at the tribal casinos—did not "meaningfully distinguish" the casinos authorized by Proposition 5 from those prohibited by section 19(e).[152] Additionally, the court determined that the distinctions highlighted in Government Code section 98001(c) were not even "findings" of "legislative fact," or indeed any other kind of "fact," but, rather, were an attempt to interpret the constitutional language in section 19(e).[153] Writing for the majority, Justice Kathryn Werdegar wrote, "[a]s such, it commands no deference on our part, because we construe the provisions of the California Constitution independently."[154]

Thus, in order to determine whether Proposition 5 was "inconsistent with section 19(e)," the California Supreme Court independently examined and interpreted "each part of section 19(e)," without according any deference to the statutory findings.[155] The court's resulting interpretation of the phrase "casinos of the type currently operating in Nevada and New Jersey"—in the context of a case involving the statutory authorization of banked card games (including blackjack) and slot machines at tribal casinos—provides an analytical framework for assessing section 19(e)'s potential applicability to sports betting. The remainder of this Article examines the issue of sports betting through the lens of the Court's construction of section 19(e) in *Hotel Employees*.

II. THE CALIFORNIA SUPREME COURT'S ALTERNATIVE INTERPRETATIONS OF "THE TYPE" OF "CASINO" "OPERATING IN NEVADA AND NEW JERSEY"

In *Hotel Employees*, the California Supreme Court analyzed the scope and meaning of section 19(e)'s declaration that "[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey."[156] As

152 *Id.* at 1007–08.

153 *Id.* at 1008.

> [T]he general statement that 'casinos of the type currently operating in Nevada and New Jersey are materially different from the tribal gaming facilities authorized under this chapter' (Gov. Code, § 98001, subd. (c)) is not a 'finding' of 'legislative fact' or indeed of any other kind of 'fact.' Rather, it is a construction of the anticasino provision of section 19(e).

Id.

154 *Id.*

155 *Id.* at 1002.

156 *Id.* at 1002–05.

a preliminary matter, the Court began its analysis by construing the phrase "[t]he Legislature has no power" to encompass both legislatively-enacted statutes and "the people acting through initiative statute[s]."[157] The Court next determined the meaning of the word "casinos" for purposes of section 19(e).[158] Since the term "casinos" was not defined by section 19(e) or by any other provision of state law, the Court interpreted that word in accordance with its "common usage" in 1984 (when section 19(e) was added to the California Constitution).[159] Relying on both a dictionary definition and a leading gambling law treatise that were in circulation at that time, the Court construed the word "casino" to simply mean "a building or room for gambling,"[160] and stated that its use in section 19(e) "does not appear to demand any different signification."[161]

The California Supreme Court next addressed the meaning of the word "currently" (as used in section 19(e)) and observed that it is "potentially ambiguous" because it is susceptible to two interpretations.[162] "Currently" could refer to 1984, the year that section 19(e) was added to the California Constitution, or it could refer to a later time when prohibited casinos are purportedly authorized.[163] The court adopted the former view and determined that the word "currently" necessarily refers to 1984, reasoning that section 19(e) "addresses an evil that was knowable and, in fact, known at the time the anticasino provision was added, that is, the kind of casino then existing in [Nevada and New Jersey in 1984]."[164] The court added that any suggestion the anticasino language in section 19(e) could encompass gambling activities that may be legalized "from time to time" in the future (i.e., after 1984) "addresses an evil, if evil it be, that is altogether unknown and unknowable."[165] The court concluded that it was "unlikely" that the amendment drafters or voters intended only such an "attenuated" effect.[166]

157 *Id.* at 1002–03.
158 *Id.* at 1004.
159 *Id.*
160 *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 347 (3d ed. 1961)).
161 *Id.*
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.*
166 *Id.*

A. "Unique to or particularly associated with Nevada and New Jersey"[167] in 1984

The California Supreme Court then turned to the more difficult interpretive question of "[w]hat was meant by 'the type' of casino 'operating in Nevada and New Jersey' in 1984."[168] Acknowledging that section 19(e) "contains no definition of this phrase," the court observed that both "[l]ogic and reference to legislative history" allowed the court "to see with reasonable clarity" that the framers and voters, in enacting section 19(e), intended to prohibit "a type of gambling house unique to or particularly associated with Nevada and New Jersey."[169] As the court explained:

> The 1984 constitutional amenders must have had in mind a type of gambling house *unique to or particularly associated with Nevada and New Jersey,* since they chose to define the prohibited institution by reference to those states. On this logic, the "type" of casino referred to must be an establishment that offers gaming activities including banked table games and gaming devices, i.e., slot machines, for in 1984 that "type" of casino was legal only in Nevada and New Jersey and, hence, *was particularly associated with those states*."[170]

This interpretative approach—which looks to the "gaming operations" of Nevada and New Jersey casinos in 1984 to determine the precise meaning and scope of section 19(e)—is in lockstep with the California Supreme Court's earlier construction of the word "currently" as referring to the kind of casino "*then existing*" in Nevada and New Jersey,[171] and echoes the Legislative Analyst's statement in the ballot pamphlet that Proposition 37 "would amend the Constitution to prohibit in California gambling casinos of the type *that exist* in Nevada and New Jersey."[172] It also ties directly back to the opening paragraph of the *Hotel Employees* opinion, wherein Justice Kathryn Werdegar, writing for the Court's majority, stated that the anticasino language in section 19(e) addressed casino gambling activities "of the sort *then associated* with Las Vegas and Atlantic City."[173]

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167 *Id.*

168 *Id.* (quoting CAL. CONST. art. IV, § 19(e)).

169 *Id.*

170 *Id.* (emphasis added) (noting that Nevada and New Jersey were the only states that allowed casinos with the full range of gambling games).

171 *Id.* (emphasis added).

172 *Id.* at 1003 (emphasis added) (quoting Ballot Pamp., Prop. 37, *supra* note 53, at 46).

173 *Id.* at 994 (emphasis added) ("In 1984, the people of California amended our Constitution to state a fundamental public policy against the legalization in California of casino gambling of the sort *then associated* with Las Vegas and Atlantic City.").

The common thread among these statements is an unwavering focus on the gambling activities that were *actually in existence* and *lawfully conducted* in Nevada and New Jersey casinos in 1984.[174] Under this functional definition, which looks to the laws and practices in both Nevada and New Jersey at the time that Proposition 37 was approved by voters, sports wagering would unquestionably be beyond the scope of section 19(e)'s anticasino ban for one simple (yet insurmountable) reason: it was not a form of gambling that was "*associated with*" New Jersey casinos in 1984.[175] At that time, the only gambling games that were available or even permitted in New Jersey casinos were slot machines, blackjack, craps, roulette, baccarat, and Big 6.[176] Sports betting was not even legal in New Jersey in 1984, and was certainly not a permitted form of gambling in any of Atlantic City's gambling casinos at that time.[177] In 1984, Nevada was the only state where casino patrons could legally wager on sporting events.[178] In fact, it took another thirty-four years for New Jersey casinos to even be afforded the opportunity to offer sports wagering as an amenity to their patrons.[179]

This interpretive approach also implicitly recognizes that the phrase "casinos of the type currently operating in Nevada and New Jersey" is expressed in the conjunctive. A basic rule of construction is that where the conjunctive word "and" is inserted between two conditions in a statutory or constitutional provision, it means that *both of those* conditions must be given effect.[180]

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174 *Id.*

175 *See Atlantic City, New Jersey 1984 Casino Data*, UNLV CENTER FOR GAMING RSCH., http://gaming.unlv.edu/abstract/ac_1984.html [http://perma.cc/P8V6-P4DA] (last updated Apr. 8, 2022) (summarizing statistical information from New Jersey Casino Control Commission's 1984 Annual Report).

176 *Id.*

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

178 *Id.*

179 *See* Joseph Albright, *Full-Service Gas Stations, Illegal Gambling, and Other Tidbits of N.J. History*, NJ.COM (Oct. 1, 2019, 12:11 PM), http://www.nj.com/hudson/2019/10/full-service-gas-stations-illegal-gambling-and-other-tidbits-of-nj-history-albright.html [http://perma.cc/N65K-R9SH] ("Sports betting became legal in New Jersey in 2018 when the U.S. Supreme Court threw out a federal ban that stood for more than a quarter century.").

180 *See* Conservatorship of Boyes, No. A139165, 2014 WL 1378247, at *2 (Cal. Ct. App. Apr. 8, 2014) ("The two requirements are conjunctive, not disjunctive. Both must be addressed and satisfied."); *In re* Carr, 77 Cal. Rptr. 2d 500, 506 (Cal. Ct. App. 1998) ("The Legislature . . . used the conjunctive 'and' which must be given effect under traditional statutory interpretation rules."); McComb v. Superior Court, 137 Cal. Rptr. 233, 237 (Cal. Ct. App. 1977) ("The section is in the conjunctive; both of the conditions must be satisfied before the act will constitute a crime."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives.").

Applying this basic canon of statutory construction under the California Supreme Court's initial interpretive approach guided by the intent of the 1984 constitutional amenders, section 19(e)'s ban on "the type" of casinos "currently operating in Nevada and New Jersey" would extend only to those gambling activities which were particularly associated with *both* Nevada and New Jersey casinos in 1984—and not just to those occurring in only *one* of those states.[181]

B. "Gambling activities including those statutorily prohibited in California, especially banked table games and slot machines"[182]

The second interpretive approach suggested by the California Supreme Court in *Hotel Employees* shifts the focus away from the gambling activities offered in Nevada and New Jersey casinos in 1984, and, instead, looks entirely to California statutory law for guidance.[183] Under this alternative formulation, the court examined the meaning of the phrase "the type of casino currently operating in Nevada and New Jersey" through the lens of California's statutory prohibitions against gambling that were in effect in 1984 (when Proposition 37 was approved by voters).[184] Following its discussion of what the framers and voters "must have had in mind" when they enacted section 19(e)—i.e., "a type of gambling house unique to or particularly associated with Nevada and New Jersey"—the court began the next paragraph by stating that: "Similarly, 'the type' of casino 'operating in Nevada and New Jersey' presumably refers to a gambling facility that did *not* legally operate in California; something other, that is, than 'the type' of casino 'operating' in California."[185]

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181 Consistent with this basic rule of construction, the Legislative Counsel has likewise interpreted the phrase "casinos of the type currently operating in Nevada and New Jersey" to be coextensive with the lawful gambling activities that were conducted in *both* of those states in 1984. *See* Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 9 (construing section 19(e) by reference to "the sorts of gambling activities that were conducted in Nevada *and* New Jersey in 1984" and discussing "authorized forms [of] gambling *in those states* at that time") (emphasis added); *see also id.* (quoting CAL. CONST. art. IV, § 19(e) ("In addition, it is possible to derive a functional definition of the phrase 'casinos of the type currently operating in Nevada and New Jersey' from the laws and practices *of those states* in effect at the time [section 19(e)] was approved.") (emphasis added)); *id.* at 10–11 ("incorporating the common and essential attributes of casino gambling permitted in Nevada *and* New Jersey at the time [section 19(e)] was adopted" and adopting a definition that "is supported by the laws of Nevada *and* New Jersey extant in 1984") (emphasis added).

182 Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 1004 (Cal. 1999).

183 *Id.*

184 *Id.*

185 *Id.*

Turning section 19(e)'s language inside out, the court stated that "the type" of "casino" legally operating in California "has commonly been called a 'card room' or 'card club.'"[186] In contrast to the above-described Nevada and New Jersey-centric interpretive approach, which looks to the gaming activities that were *allowed* in both those states in 1984, the Court's alternative formulation defines the scope of section 19(e) by reference to the gaming activities which California card rooms were *forbidden* from offering at that time.[187] Specifically, the court stated that a "California card room or card club was *not* permitted to offer gaming activities in the form of: (1) lotteries; (2) banking games . . . ; (3) percentage games . . . ; (4) slot machines; or (5) games proscribed by name, including twenty-one" because those activities were prohibited by statute.[188]

Viewing section 19(e) through the alternative lens of what a California card room was statutorily prohibited from offering in 1984, the California Supreme Court suggested an interpretation of section 19(e) that would elevate *all* statutory prohibitions against gambling in California to a constitutional level.[189] The court stated: "Thus, a casino of 'the type . . . operating in Nevada and New Jersey' may be understood, with reasonable specificity, as one or more buildings, rooms, or facilities, whether separate or connected, that offer gambling activities including those statutorily prohibited in California, especially banked table games and slot machines."[190]

The language at the tail-end of the previous sentence—i.e., "*gambling activities including those statutorily prohibited in California*, *especially banked table games and slot machines*"—has been interpreted by some stakeholders as constituting a blanket prohibition against the legislative authorization of any form of gambling that was barred by California statute in 1984.[191] For example, several of California's Indian tribes have asserted that sports betting—a form of gambling which was not "particularly associated with" New Jersey casinos in 1984—is nonetheless encompassed within section 19(e)'s anticasino language because pool-selling and bookmaking (which are synonymous with sports gambling) are prohibited by section 337a of the California Penal

186 *Id.* (citations omitted).
187 *Id.*
188 *Id.*
189 *Id.* at 1004–05.
190 *Id.*
191 *Id.*

Code.[192] The California tribes contend that section 19(e) "raised" the statutory prohibition against pool-selling and bookmaking (codified in Penal Code section 337a)—and *all* other Penal Code gambling prohibitions—"*to a constitutional level*."[193]

If that were the only interpretation suggested by the California Supreme Court in *Hotel Employees*, then the California tribes might have had a point. But the court also supplied *another* interpretation of section 19(e) and expressed it with far more certainty than the construction urged by the tribes.[194] As discussed in Part II, Section A above, in the same section of the *Hotel Employees* opinion—and just prior to the paragraph featuring the words "including those statutorily prohibited in California"—the court construed the phrase "casinos of the type currently operating in Nevada and New Jersey" to mean something much narrower—namely, "a type of gambling house *unique to or particularly associated with Nevada and New Jersey*" in 1984.[195] The court declared that this is what the framers and voters "*must have had in mind*" when they enacted section 19(e) "since they chose to define the prohibited institution by reference to those states."[196] This is a significant point of departure between the two suggested interpretative approaches, given that it produces seemingly different outcomes on the issue of sports betting. However, the California Supreme Court has consistently recognized that the intent of the voters is the "paramount consideration" when construing a constitutional provision enacted by initiative.[197] This principle would appear to strongly favor the Supreme Court's initial interpretation of section 19(e) as the more legally sound one.

But this is not about which of the two interpretative approaches is the more compelling or correct one. What is relevant here—and ultimately dispositive—is the *fact* that the California Supreme Court supplied *two* different possible interpretations of what was meant by the "the type" of casino

192 *See* Feb. 6, 2020 Letter, *supra* note 40, at 1 ("[S]ports betting is well within the reach of section 19(e)'s prohibition" against Nevada and New Jersey-style casinos because "[s]ports betting has been prohibited in California since 1909 when Penal Code section 337a was enacted.").

193 *Id.* at 2 (emphasis added).

194 *Hotel Emps.,* 981 P.2d at 1004 (emphasis added).

195 *Id.*

196 *Id.* (emphasis added).

197 Davis v. City of Berkeley, 794 P.2d 897, 900 (Cal. 1990) ("When construing a constitutional provision enacted by initiative, the intent of the voters is the paramount consideration."); *see also In re* Lance W., 694 P.2d 744, 754 (Cal. 1985) ("In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration.").

"operating in Nevada and New Jersey" in 1984. Even the California tribes have acknowledged that the Court initially sought to define "the type" of casino "operating in Nevada and New Jersey" by reference to the gambling activities that were endemic to Nevada and New Jersey casinos in 1984, conceding that "[i]t is true that in *defining* 'the type' of casino 'operating in Nevada and New Jersey,' the California Supreme Court analyzed the gambling activities *occurring* in those states in 1984."[198] With that concession, the tribes recognized—as they must—that the court viewed section 19(e) as being reasonably susceptible to two or more interpretations: one focusing solely on those gambling activities that were "unique to or particularly associated with" Nevada and New Jersey casinos in 1984 and the other looking strictly at the inverse or "flip-side" of the issue by reference to what was statutorily prohibited in California at the time.[199]

The California Supreme Court's recognition that there are at least two plausible interpretations of section 19(e)'s anticasino language is further evidenced by the court's multiple references to the official ballot pamphlet for Proposition 37 as an essential part of its inquiry into the meaning and scope of section 19(e).[200] In particular, the court cited the Proposition 37 ballot pamphlet in support of its statement that "the available legislative history suggests section 19(e) was designed, precisely, to elevate statutory prohibitions on a set of gambling activities to a constitutional level."[201] Quoting directly from the "Analysis by the Legislative Analyst" and the "Argument in Favor of Proposition 37," the Court reasoned that "[v]oters on the 1984 initiative would thus have understood the constitutional provision they added, section 19(e), as focusing on a set of statutorily prohibited activities, i.e., 'casino gambling,' and as endowing the existing statutory bars on that set of activities with a new, constitutional status."[202] The use of the official ballot pamphlet as an interpretive tool is an implicit acknowledgment by California's highest court that the language in section 19(e) is ambiguous and, therefore, capable of more than one interpretation.[203]

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198 Feb. 6, 2020 Letter, *supra* note 40, at 2 (emphasis added).

199 *Id.*

200 *See Hotel Emps.*, 981 P.2d at 1003, 1005.

201 *Id.* at 1005.

202 *Id.*

203 *See* City & Cnty. of S.F. v. Cnty. of San Mateo, 896 P.2d 181, 186 (Cal. 1995) (citing Bd. of Supervisors v. Lonergan, 616 P.2d 802, 808 (Cal. 1980)) ("If the [constitutional] provision's words are ambiguous and open to more than one meaning, we consult the legislative history, which in the case of article XIII A is the ballot pamphlet."); *see also* People v. Birkett, 980 P.2d 912, 923 (Cal. 1999) (citing Hill v. Nat'l Collegiate

C. Where Constitutional Language Is Capable of Several Interpretations, the Legislature's Adoption of One of Those Alternatives Is Entitled to Substantial Deference

As the California Supreme Court's alternative definitional approaches plainly demonstrate, the anti-casino language in section 19(e) is reasonably susceptible to at least two possible interpretations: one tied to the specific gambling activities that were endemic to Nevada and New Jersey casinos in 1984 (i.e., "a type of gambling house unique to or particularly associated with Nevada and New Jersey"),[204] and the other more broadly referring to *all* categories of gambling that were banned in California at that time (i.e., "including those statutorily prohibited in California, especially banked table games and slot machines").[205]

Additionally, the Legislative Counsel of California has acknowledged that there are at least three possible interpretations of the phrase "casinos of the type currently operating in Nevada and New Jersey."[206] In a 1998 opinion letter that was issued one month prior to the vote on Proposition 5, the Legislative Counsel explained that "it is possible to derive a functional definition of the phrase 'casinos of the type currently operating in Nevada and New Jersey' from the laws and practices of those states *in effect* at the time [that section 19(e)] was approved."[207] As part of its detailed analysis of the issue, the Legislative Counsel examined the characteristics of Nevada and New Jersey casinos in 1984.[208] For example, the Legislative Counsel observed that both states defined casino gaming as consisting of "any banking or percentage game played with cards, dice or mechanical, electromechanical, or electronic devices or machines, for money, property, checks, credit, or any representative of value."[209] The Legislative Counsel also noted that "[u]nder New Jersey law in force at the time [section 19(e)]

Athletic Ass'n, 865 P.2d 633, 642 (Cal. 1994)) ("When an initiative measure's language is ambiguous, we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet."); People v. Arroyo, 364 P.3d 168, 170 (Cal. 2016) (quoting Robert L. v. Superior Ct., 69 P.3d 951, 955 (Cal. 2003)) ("When the language is ambiguous, 'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.").

204 *Hotel Emps.*, 981 P.2d at 1004.

205 *Id.*

206 Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 9–11.

207 *Id.* at 9 (emphasis added).

208 *Id.*

209 *Id.* (citing NEV. REV. STAT. § 463.0152 (West 2021) and N.J. STAT. ANN. § 5:12-21 (West 2021)).

was approved, the term 'casino' referred to a 'single room of at least 15,000 square feet in which casino gaming is conducted.'"[210]

After identifying and analyzing several possible interpretative approaches—each measured by the gambling activities associated with Nevada and New Jersey casinos in 1984—the Legislative Counsel ultimately approved of a definition that "incorporat[ed] the common and essential attributes of casino gambling permitted in Nevada and New Jersey at the time [section 19(e)] was adopted."[211] Incorporating the laws and practices in effect in both states in 1984, the Legislative Counsel concluded that "the phrase 'casinos of the type currently operat[ing] in Nevada and New Jersey' should be construed to mean premises at which banking or percentage games involving cards, dice, or gambling devices are played for money, property, or any representative value."[212] The Legislative Counsel reasoned that this interpretation is: (i) "supported by the laws of Nevada and New Jersey extant in 1984"; (ii) "consistent with the phrase 'casino-style' gaming, used as a legal term of art to refer to games commonly offered in casinos such as slot machines, black-jack, baccarat, roulette, and craps"; and (iii) "consistent with the common usage of the term 'casino,' which is defined as a 'building or room for gambling.'"[213]

The mere existence of these alternative interpretations—each receiving the imprimatur of the state's highest court and/or the Legislative Counsel—plainly shows that the meaning of section 19(e) is not free from doubt and is reasonably susceptible to two or more interpretations. When, as here, a constitutional provision "has a doubtful or obscure meaning or is capable of various interpretations," the California Legislature's adoption of one of those alternatives is accorded substantial deference, if not controlling weight, by the courts under longstanding California Supreme Court precedent.[214] In *City and County of San Francisco v. Industrial Accident Commission*, the California Supreme Court enunciated the now well-established principle that "where a constitutional provision may well have *either of two meanings*, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is *well-nigh, if not completely, controlling*."[215]

210 *Id.* (quoting N.J. STAT. ANN. § 5:12-6 (West 2021)).
211 *Id.* at 10.
212 *Id.* at 11.
213 *Id.* at 10–11.
214 Delaney v. Lowry, 154 P.2d 674, 678 (Cal. 1944).
215 City & Cnty. of S.F. v. Indus. Acc. Comm'n, 191 P. 26, 28 (Cal. 1920) (emphasis added); *see also* Pac. Indem. Co. v. Indus. Acc. Comm'n, 11 P.2d 1, 2 (Cal. 1932) ("Where

This principle has been recognized by the California Supreme Court for more than one hundred years, beginning with *City and County of San Francisco v. Industrial Accident Commission*[216] and continuing with the Court's decision in *Methodist Hospital of Sacramento v. Saylor*.[217] In *Methodist Hospital of Sacramento*, the California Supreme Court summarized this "fundamental rule of constitutional construction" as follows:

> [There is a] strong presumption in favor of the Legislature's interpretation of a provision of the Constitution. That presumption has been phrased differently over the years, but its import remains clear. Thus in *San Francisco v. Industrial Acc. Com.*, the court held that "where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely, controlling. When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another and co-ordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the Constitution."[218]

Quoting from its earlier decision in *Pacific Indemnity*, the *Methodist Hospital* Court explained that "[f]or the purpose of determining constitutionality, we cannot construe a section of the Constitution as if it were a statute, and adopt our own interpretation without regard to the legislative construction."[219]

more than one reasonable meaning [of a constitutional provision] exists, it is [the Court's] duty to accept that chosen by the Legislature.").

216 *See City & Cnty. of S.F.*, 191 P. at 28. The principle of deference enunciated in *City & County of San Francisco* is not confined to legislatively-referred constitutional amendments; it is also applicable to constitutional provisions enacted by citizen-proposed initiatives. *See, e.g.*, Armstrong v. Cnty. of San Mateo, 194 Cal. Rptr. 294, 297, 306–10 (Cal. Ct. App. 1983) (finding the California Legislature's interpretation of Proposition 13 tax reform initiative controlling where ballot materials did not shed light on ambiguous language). Further, as the Legislative Counsel has acknowledged, "[t]his rule applies even when the Legislature interprets constitutional limitations on its own powers." *See* The Legislature of the State of California's Opening Brief on the Merits in Californians for an Open Primary v. Shelley, No. S126780, 2004 WL 2863090, at *13–14 (Cal. Sup. Ct. Oct. 8, 2004).

217 Methodist Hosp. of Sacramento v. Saylor, 488 P.2d 161 (Cal. 1971).

218 *Id.* at 166 (citation omitted).

219 *Id.* (quoting *Pac. Indem. Co.,* 11 P.2d at 2).

Thus, "[w]here more than one reasonable meaning exists, it is [the judiciary's] *duty* to accept that chosen by the Legislature."[220]

And, finally, from its decision in *Delaney v. Lowery*,[221] the *Methodist Hospital* Court reiterated the longstanding principle that when a constitutional provision "has a doubtful or obscure meaning or is capable of various interpretations, the construction placed thereon by the Legislature is of very persuasive significance,"[222] stating that this rule "remains viable today."[223]

Significantly, under this principle, the California Legislature's interpretation does not even have to be the most reasonable reading of the constitutional language at issue, "[n]or need it be shown that the construction placed upon the constitutional provision by the Legislature is '*more probably than not*' the meaning intended by those who framed or adopted the proposal."[224] Rather, it suffices that the Legislature has "adopt[ed] what is at least a *possible and not unreasonable* construction of the Constitution."[225] Under this standard, the courts may not invalidate a statute incorporating the Legislature's construction "unless there is a *plain and unmistakable conflict* between the statute and the Constitution."[226]

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220 *Pac. Indem. Co.*, 11 P.2d at 2 (emphasis added); *see also* Lundberg v. County of Alameda, 298 P.2d 1, 6 (Cal. 1956) ("We cannot adopt our own interpretation of a provision of the Constitution without regard to the legislative construction, and, where more than one reasonable meaning exists, it is our duty to accept that chosen by the Legislature."); Brown v. Cmty. Redev. Agency, 214 Cal. Rptr. 626, 629 (Cal. Ct. App. 1985) ("As a general rule, legislative enactments are presumed to be constitutional; if 'more than one reasonable meaning exists, it is our duty to accept that chosen by the Legislature.'") (quoting *Lundberg*, 298 P.2d at 6).

221 154 P.2d 674 (Cal. 1944).

222 *Methodist Hosp.*, 488 P.2d at 166 (quoting *Delaney*, 154 P.2d at 678); *accord* Mt. San Jacinto Cmty. Coll. Dist. v. Superior Court, 151 P.3d 1166, 1170 (Cal. 2007); Gomez v. Superior Court, 278 P.3d 1168, 1176 (Cal. 2012).

223 *Methodist Hosp.*, 488 P.2d at 166 (quoting *Delaney*, 154 P.2d at 678). Further, the application of this rule is not limited to contemporaneous legislative interpretations of a constitutional provision. It is equally applicable to post-enactment interpretations of constitutional language, even in cases where the Legislature is construing a constitutional provision many years after its enactment. *See, e.g.*, Cal. Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 731–33 (Cal. 1978) (deferring to 1976 legislative enactment of statutory provision defining the term "low rent housing project" as used in Cal. Const., art. XXXIV, § 1, enacted by initiative in 1950) (citing *Methodist Hosp.*, 488 P.2d. at 166).

224 488 P.2d. at 166 (emphasis added).

225 *Id.* (emphasis added); *see also* City & Cnty. of S.F. v. Indus. Acc. Comm'n, 191 P. 26, 29 (Cal. 1920) (approving a legislative interpretation that adopted "what is at least a possible and not unreasonable construction of the Constitution"); People v. Giordano, 170 P.3d 623, 630 (Cal. 2007) ("When the Legislature has 'adopted a plausible interpretation of the constitutional provision,' we defer to its determination.") (quoting People v. Birkett, 980 P.2d 912, 924 (Cal. 1999)).

226 *Methodist Hosp.*, 488 P.2d. at 166 (emphasis added) (quoting *Indus.* Acc. *Comm'n*, 191 P. at 29); Armstrong v. Cnty. of San Mateo, 194 Cal. Rptr. 294, 311 (Cal. Ct. App. 1983) (quoting *Methodist Hosp.*, 488 P.2d. at 166).

III. Sports Betting Can Be Legislatively Authorized Without a Constitutional Amendment under Either Interpretive Approach Identified by the Supreme Court in *Hotel Employees*

It is beyond question that the phrase "casinos of the type currently operating in Nevada and New Jersey" is capable of several interpretations. As discussed above, the Legislative Counsel's 1998 advisory opinion identified three possible interpretations of what was meant by "the type" of casino "operating in Nevada and New Jersey" in 1984 and ultimately selected a definition which "incorporat[ed] the common and essential attributes of casino gambling permitted in Nevada and New Jersey at the time [section 19(e)] was adopted."[227] In *Hotel Employees*, the California Supreme Court likewise suggested several possible interpretations of section 19(e), including one that, similar to the Legislative Counsel's definitional approach and consistent with the intent of the 1984 constitutional amenders, is confined to the gambling activities that were "unique to or particularly associated with" Nevada and New Jersey casinos in 1984.[228]

A. Sports Betting was not "particularly associated with" New Jersey Casinos in 1984

A legislative construction of section 19(e) that is coextensive with the gambling activities "unique to or particularly associated with" Nevada and New Jersey casinos in 1984 would enable the California Legislature to authorize sports wagering through a statutory enactment without the need for a separate constitutional amendment. Sports wagering was not a form of gambling that was available—or even permitted—in New Jersey casinos in 1984. At that time, the only gambling activities that were available in New Jersey casinos were slot machines, blackjack, craps, roulette, baccarat, and Big 6.[229] As the Legislative Counsel acknowledged, New Jersey law in effect at that time restricted the gambling that could be legally offered in Atlantic City's gambling casinos to those games which take place "exclusively" within the casino and are played with "cards, dice or any electronic, electrical, or mechanical device or machine":

227 Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 9–11.

228 Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 1004 (Cal. 1999).

229 *See Atlantic City, New Jersey 1984 Casino Data*, *supra* note 175.

> Under New Jersey law in force at the time the Act [meaning section 19(e)] was approved, the term "casino" referred to "a single room of at least 15,000 square feet in which casino gaming is conducted" and "gaming" was in turn defined as the "dealing, operating, carrying on, conducting, maintaining or exposing for pay of any game." New Jersey law defined a "game" as "[a]ny banking or percentage game located exclusively within the casino played with cards, dice, or any electronic, electrical, or mechanical device or machine for money, property, or any representative value."[230]

Sports betting does not fall within the ambit of this definition since it is not a "game" located "exclusively" within a casino (inasmuch as the underlying contests take place and are decided at locations beyond a casino's four walls). Moreover, sports betting is not played with cards, dice, or any electronic gambling device.

This view on sports betting is also confirmed by a 1993 New Jersey court decision which upheld a state gaming regulator's refusal to allow Atlantic City's gambling casinos to operate sports betting as a form of "casino gambling."[231] In the case of *In re Casino Licensees for Approval of a New Game, Rulemaking and Authorization of a Test* ("*In re Casino Licensees*"), a New Jersey appellate court reviewed the legislative history surrounding New Jersey's authorization of casino gambling by constitutional amendment in 1976 and concluded that it only authorized gambling games "which take place *completely* within the confines of a casino."[232] The appellate court also noted that the New Jersey Casino Control Act—which implemented the constitutional amendment—defined the term "game" or "gambling game[s]" to mean "[a]ny banking or percentage game *located within the casino* . . . played with cards, dice, tiles, dominos, or any electronic, electrical, or mechanical device or machine for money, property, or any representative of value."[233]

Pointing to these constitutional and statutory constraints, the appellate court upheld the New Jersey Casino Control Commission's determination that it lacked constitutional and statutory authority to allow sports betting in New Jersey's gambling casinos.[234] The New Jersey court also concluded that New Jersey's casinos "may operate only those games conducted *solely* in-house" and "may not offer betting on events which take

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230 Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 9 (citations omitted).

231 *In re* Casino Licensees for Approval of a New Game, Rulemaking & Authorization of a Test, 633 A.2d 1050, 1051 (N.J. Super. Ct. 1993), *aff'd per curium*, 647 A.2d 454 (N.J. 1993).

232 *Id.* at 1054 (emphasis added).

233 *Id.* (emphasis added) (quoting N.J. STAT. ANN. § 5:12-21 (West 2021)).

234 *Id.* at 1051.

place or where the result is determined at a location *outside* a casino's four walls."[235] Thus, the appellate court viewed sports wagering as a species of gambling that was separate and distinct from the type of casino gambling that had been authorized by New Jersey law at the time.[236] As a result of this 1993 decision, New Jersey's gambling casinos were prohibited from offering sports wagering to patrons until May 14, 2018 when PASPA was declared unconstitutional by the United States Supreme Court,[237] and New Jersey casinos and racetracks were *thereafter* authorized under state law to operate sports wagering.[238]

Since section 19(e)'s casino gambling ban is tethered—at least in part—to "the type" of casinos being operated in New Jersey in 1984 (when Proposition 37 was approved by voters),[239] it is highly relevant, if not dispositive, that a New Jersey court found that the "casino gambling" authorized by that state's constitution and enabling statute did not encompass sports betting. If sports betting was not considered casino gambling under New Jersey law in 1984—and it is also uncontroverted that New Jersey casinos were not even offering sports betting at that time—then the condition precedent to the application of section 19(e) under the California Supreme Court's initial interpretative approach (i.e., that it involve the type of gambling activity that was "particularly associated with" Nevada *and New Jersey* in 1984) is plainly not satisfied in the case of sports betting.

The legal status of sports betting in New Jersey in 1984 is a matter of public record and would not require the type of subjective fact-finding that proved problematic in *Hotel Employees*, where the California Supreme Court, instead of deferring to the findings set forth in the initiative statute, exercised its own "independent judgment [of] the facts."[240] In contrast to *Hotel Employees*, where the proponents of Proposition 5 could only point to subtle, nonmaterial differences between their gambling games and those offered at Nevada and New Jersey casinos, there would be no need for the California Legislature to articulate *any* differences between sports wagering and the gambling activities that typified Nevada and New Jersey

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235 *Id.* at 1051, 1055 (emphasis added).

236 *Id.* at 1055.

237 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1484–85 (2018).

238 *See* N.J. STAT. ANN. § 5:12A-10–19 (West 2021).

239 *See* Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 1005 (Cal. 1999).

240 Coral Constr., Inc. v. City & Cnty. of S.F., 235 P.3d 947, 964 n.20 (Cal. 2010) ("[T]he deference afforded to legislative findings does 'not foreclose [a court's] independent judgment on the facts bearing on an issue of constitutional law.'") (quoting Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 825 (Cal. 1997)).

casinos in 1984. It is beyond dispute that sports wagering was not available—or even allowed—in New Jersey casinos at that time. It is an objective, easily verifiable fact about which a California state court could take judicial notice.[241]

Further, in authorizing sports betting through a statutory enactment, the state legislature would not be usurping the judiciary's role in interpreting the provisions of the California Constitution independently. To the contrary, the legislature would be adopting an interpretation that has already been endorsed by the California Supreme Court. In *Hotel Employees*, the court determined that section 19(e) was susceptible to at least two possible interpretations, including one that is measured by the gambling activities "unique to or particularly associated with" Nevada and New Jersey casinos in 1984, consistent with the intent of the voters.[242] It is the legislature's adoption of *that* judicial interpretation that would be given deference today under a *different* well-established constitutional principle that was not at issue in *Hotel Employees*—the one that applies where a constitutional provision "has a doubtful or obscure meaning or is capable of various interpretations" and commands that the legislature's adoption of one of those alternatives is of "very persuasive significance," if not "completely controlling."[243]

Importantly, a statutory finding that sports wagering is beyond the scope of section 19(e) because it was not "unique to or particularly associated with" New Jersey casinos in 1984 would align with the intent of the voters.[244] In *Hotel Employees*, the court declared that "a type of gambling house unique to or particularly associated with Nevada and New Jersey" is what "the drafters and voters intended to prohibit in 1984 . . . since they chose to define the prohibited institution by reference to those states."[245] The California Supreme Court has recognized time and again that the intent of the voters is the "paramount consideration" when construing a constitutional provision enacted by initiative.[246] Consistent with this well-established

241 *See* CAL. EVID. CODE § 452(h) (West 2021) (stating that a court may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy").

242 *See Hotel Emps.*, 981 P.2d at 1004.

243 Methodist Hosp. of Sacramento v. Saylor, 488 P.2d 161, 166 (Cal. 1971); City & Cnty. of S.F. v. Indus. Acc. Comm'n., 191 P. 26, 28 (Cal. 1920).

244 *See Hotel Emps.*, 981 P.2d at 1004.

245 *Id.*

246 Davis v. City of Berkeley, 794 P.2d 897, 900 (Cal. 1990) ("'When construing a constitutional provision . . . the intent of the voters is the paramount consideration."); *In*

principle, the court in *Hotel Employees* repeatedly invoked the intent of the "drafters" and "voters"—sometimes referred to as the "1984 constitutional amenders"—as the polestar for interpreting section 19(e), mentioning it no fewer than eight times in the majority opinion, including:

- "That the amendment drafters or the voters *intended* only such an attenuated effect is unlikely."[247]
- "Logic and reference to legislative history, however, allow us to see with reasonable clarity what the drafters and voters *intended* to prohibit in 1984."[248]
- "The 1984 constitutional amenders *must have had in mind* a type of gambling house unique to or particularly associated with Nevada and New Jersey, since they chose to define the prohibited institution by reference to those states."[249]
- "Voters on the 1984 initiative *would thus have understood* the constitutional provision they added, section 19(e), as focusing on a set of statutorily prohibited activities, i.e., 'casino gambling,' and as endowing the existing statutory bars on that set of activities with a new, constitutional status."[250]
- "Nor would the voters on the 1984 constitutional amendment *likely have understood* section 19(e) to permit casinos so long as the slot machines therein were activated by buttons rather than levers, and dispensed chips or electronic credits rather than coins."[251]
- "We think it highly unlikely that the 1984 constitutional amenders, who were told the measure before them would constitutionalize California's statutory prohibitions on 'casino gambling,' *were concerned with* such secondary nongambling features of casinos as their mutual proximity or service of free alcohol."[252]
- "Finally, because private ownership and for-profit operation were not unique to Nevada and New Jersey gambling facilities in 1984, and, indeed, characterized permitted California facilities such as card clubs and

re Lance W., 694 P.2d 744, 754 (Cal. 1985) ("In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration.").

247 *Hotel Emps.*, 981 P.2d at 1004 (emphasis added).

248 *Id.* (emphasis added).

249 *Id.* (emphasis added).

250 *Id.* at 1005 (emphasis added).

251 *Id.* at 1007 (emphasis added).

252 *Id.* (emphasis added).

horse racing tracks, private ownership and for-profit operation could not logically have been the characteristics to which the constitutional amenders *intended to refer* in prohibiting 'casinos of the type currently operating in Nevada and New Jersey.'"[253]

- "As just discussed, however, private ownership and for-profit operation did not distinguish Nevada and New Jersey casinos from California card clubs in 1984 and, therefore, these were almost certainly not the characteristics to which the drafters and voters *intended to refer* when barring authorization of casinos 'of the type currently operated in Nevada and New Jersey.'" [254]

As demonstrated by the foregoing passages, the California Supreme Court expressed a decidedly strong preference for resolving interpretative issues under section 19(e) through the lens of voter intent. Thus, a reasonable way to interpret section 19(e)—and one which fulfills the intent of the voters (as prioritized in *Hotel Employees*) while comporting with basic principles of statutory construction by giving effect to the conjunctive "and"—is that it extends only to those gambling activities which were associated with *both* Nevada and New Jersey casinos in 1984, and not just to those occurring in only *one* of those states.[255] Since sports wagering was not a category of gambling "particularly associated with" *both* Nevada and New Jersey casinos in 1984—it was legal only in Nevada at that time—it would be entirely reasonable for the state legislature to construe section 19(e) as not encompassing the activity of sports wagering.

A legislative construction of section 19(e) which adopts the California Supreme Court's initial interpretation of "the type" of casino "operating in Nevada and New Jersey" as coextensive with the gambling activities "unique to or particularly associated with Nevada and New Jersey" in 1984 easily satisfies the "possible and not unreasonable" standard enunciated in *Methodist Hospital* and earlier precedent.[256] Quite obviously, an interpretation of the state constitution that is suggested or approved by California's highest

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253 *Id.* (emphasis added).

254 *Id.* at 1008 (emphasis added).

255 *See supra* notes 180–181 and accompanying text; *see also* Whitman v. Transtate Title Co., 211 Cal. Rptr. 582, 587 (Cal. Ct. App. 1985) ("It is a cardinal principle of statutory construction that every word, phrase and provision of the statute is to be given meaning and that a statute will not be interpreted in such a way as to render a portion of the statutory language meaningless.") (citing J. R. Norton Co. v. Agric. Lab. Rels. Bd., 603 P.2d 1306, 1326–27 (Cal. 1979)).

256 *See* Methodist Hosp. of Sacramento v. Saylor, 488 P.2d 161, 166 (Cal. 1971) (quoting City & Cnty. of S.F. v. Indus. Acc. Com., 191 P. 26, 29 (Cal. 1920)).

court is inherently reasonable, especially where, as here, (1) it is expressed with certainty—with the court going so far as to state that this is the interpretation that the 1984 constitutional amenders "must have had in mind" when they enacted section 19(e); and (2) it incorporates the specific geographic parameters (i.e., Nevada and New Jersey) chosen by the 1984 constitutional amenders, thereby aligning with the intent of the voters.[257] It also adheres to the well-established principle that constitutional limitations on legislative power are to be strictly construed against the limitation.[258] Indeed, a construction of section 19(e) that is coextensive with the gambling activities "unique to or particularly associated with Nevada and New Jersey" in 1984—inasmuch these are the only states explicitly mentioned in section 19(e)—would constitute a strict construction of the constitutional language in accordance with well-established precedent from the California Supreme Court.

B. The California Supreme Court's Alternative Interpretation Tethered to California's Statutory Prohibitions against Gambling Did Not Create a Wide-Sweeping Rule of General Applicability, but, Rather, Must Be Read in the Context of the Particular Facts of *Hotel Employees*, which Focused Exclusively on Banked Card Games and Slot Machines

The other interpretive approach suggested by the California Supreme Court—which looks to California's statutory gambling prohibitions as an alternative way of analyzing section 19(e)'s scope—is riddled with equivocal and uncertain language.[259] This is evident in the very first paragraph of the court's discussion of that alternative approach, with the court suggesting that the phrase "'the type' of casino 'operating in Nevada and New Jersey' *presumably* refers to a gambling facility that did *not* legally operate in California; something other, that is, than 'the type' of casino 'operating' in California."[260] Likewise, in the subsequent

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257 *Hotel Emps.*, 981 P.2d at 1004.

258 *See* Cal. Hous. Fin. Agency v. Patitucci, 583 P.2d 729, 731 (Cal. 1978) ("Any constitutional limitations on legislative power are to be narrowly construed . . . ."); *Methodist Hosp.*, 488 P.2d at 165 (quoting Collins v. Riley, 152 P.2d 169, 171 (Cal. 1944)) ("Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.").

259 *Hotel Emps.*, 981 P.2d at 1004.

260 *Id.* (first emphasis added). The word "presumably" connotes something that is considered likely—i.e., probable—but is not known for certain. *See Presumably*, CAMBRIDGE DICTIONARY, http://dictionary.cambridge.org/us/dictionary/english/presumably [http://perma.cc/CJA6-UHNX] (last visited May 31, 2021) (defining "presumably" as being "used to say what you think is the likely situation").

paragraph, the court stated that the phrase "a casino of 'the type . . . operating in Nevada and New Jersey' [in 1984] *may be understood*, with reasonable specificity, as one or more buildings, rooms, or facilities, whether separate or connected, that offer gambling activities including those statutorily prohibited in California**,** especially banked table games and slot machines."[261]

The California Supreme Court's use of equivocal language highlights a critical difference between the two alternative definitional approaches. While the Court uses compulsory language (i.e., "the 1984 constitutional amenders *must* have had in mind") in construing section 19(e) as referring to the type of gambling house "unique to or particularly associated with Nevada and New Jersey" in 1984,[262] it later switches to the permissive "*may*" in suggesting an alternative definition that is tied to California's statutory gambling prohibitions in effect at that time.[263] That is far from an authoritative or ringing endorsement of the latter interpretive approach.[264] If California's highest court believed that the *only* way to interpret section 19(e) was to look to California's statutory gambling prohibitions for guidance, it would have stated so explicitly and unambiguously, instead of suggesting two alternative definitions and then using uncertain language in describing the latter.

1. The California Supreme Court Invoked Penal Code Section 330's Prohibition against "Casino-Style" Games to Counter the Statutory Finding that the Player-Banked Games and Tribal Gambling Terminals Authorized by Proposition 5 Were "Materially Different" than the House-Banked Games and Slot Machines Offered in Nevada and New Jersey in 1984.

When viewed out of context and disassociated from the actual facts of the case, it might be tempting to view the phrase "*including those statutorily prohibited in California*" as an indication that the

261 *Hotel Emps.*, 981 P.2d at 1004 (emphasis added). The word "may" is "used to indicate [a] possibility or probability." People v. Maradiaga, No. B271506, 2016 WL 7031545, at *2 (Cal. Ct. App. Dec. 2, 2016) (quoting *May*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/may [http://perma.cc/FMS5-7YAL] (last visited May 31, 2021)).

262 *Hotel Emps.*, 981 P.2d at 1004 (emphasis added).

263 *Id.* (emphasis added).

264 *See* Boca Ctr. at Military, LLC v. City of Boca Raton, 312 So. 3d 920, 923 (Fla. Dist. Ct. App. 2021) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 112 (2012)) ("Per the 'Mandatory/Permissive Canon,' the word 'may' is commonly treated as a permissive word granting discretion."); *see also* Janssen v. Denver Career Serv. Bd., 998 P.2d 9, 16 (Colo. App. 1999) ("[W]here the term 'may' is used as opposed to 'must,' the term refers to authority which is permissive and not mandatory.").

California Supreme Court construed section 19(e) as having elevated *all* of California's statutory prohibitions against gambling to a constitutional level. That isolated judicial statement, however, must be read in the context of the particular facts of *Hotel Employees*—a case focusing exclusively on banked card games and slot machines, which are classic "casino-style" games[265]—and should not be understood as establishing a hard and fast rule to be applied in every case.[266] As the California Supreme Court observed more than 100 years ago in *Pearce v. Boggs*:

> There is no rule better settled than that the opinion of a court is always to be read in connection with the facts of the case in which it is given, and it may often occur that in its opinion it will use expressions, either by way of argument or illustration, which are correct in their application to the case before it, but would be inapplicable in many other cases.[267]

Indeed, California's appellate courts have long recognized the hazards of taking broad or isolated judicial statements out of context and treating them as rules of general applicability.[268] In *Bay Summit Community Association. v. Shell Oil Company*, the Fourth District Court of Appeal cautioned that "trial courts should use great care in lifting statements from opinions since such statements taken out of context may be inappropriate as a general rule of law, particularly if the facts underlying the opinion are distinguishable."[269] Likewise, in *Carrillo v. Helms Bakeries, Ltd.*, the Second District Court of Appeal recognized the "danger of error" in a trial court's "extraction of

265 *See infra* note 379 and accompanying text.

266 *See* Coffey v. Shiomoto, 345 P.3d 896, 908 (Cal. 2015) (cautioning that statements by an appellate court "must be read in the context of the case"); People v. Mincey, 827 P.2d 388, 402 (Cal. 1992) (declaring that statement by the California Supreme Court "must be read in the context of the case in which it was made"); Armour & Co. v. Wantock, 323 U.S. 126, 132–33 (1944) (recognizing that broad and general statements of law in judicial opinions must be read in the context of the facts before the court, and cannot be uncritically transposed to different factual circumstances).

267 Pearce v. Boggs, 33 P. 906, 907 (Cal. 1893); *see also* Bristol-Myers Squibb Co. v. Teva Pharms. USA, Inc., 769 F.3d 1339, 1353 (Fed. Cir. 2014) (Taranto, J., dissenting) ("It is a well-recognized principle, and one essential to our system of precedent, that statements in opinions must be read in context, considering their role in the decision and the facts of the case."); Mitchell Partners, L.P. v. Irex Corp., 53 A.3d 39, 46 (Pa. 2012) ("We have emphasized many times, however, that a decision is to be read against its facts and will not be applied uncritically to subjects which were not directly before the Court.").

268 Bay Summit Cmty. Assn. v. Shell Oil Co., 59 Cal. Rptr. 2d 322, 332 n.9 (Cal. Ct. App. 1996).

269 *Id.*; *see also* Francis v. City & Cnty. of S.F., 282 P.2d 496, 500 (Cal. 1955) ("The admonition has been frequently stated that it is dangerous to frame [a jury] instruction upon isolated extracts from the opinions of the court."); Ernest W. Hahn, Inc. v. Sunshield Insulation Co., 68 Cal. App. 3d 1018, 1023 (Cal. Ct. App. 1977) ("The practice of taking excerpts from the opinions of courts of last resort and indiscriminately changing them into instructions to juries has frequently been condemned.").

a statement of an appellate court from its context in an opinion and giving it as a statement of abstract law."[270] Finally, in *Tait v. City and County of San Francisco*, the First District Court of Appeal recognized that "[e]ven if a statement in an opinion is made as a general rule, such rule is drafted with the special case in mind and *may in a different case prove to be inapplicable*."[271]

These admonitions are particularly appropriate here. The California Supreme Court's reference to "gambling activities *including those statutorily prohibited in California, especially banked table games and slot machines*" was made in the context of a case focusing on a specific type of gambling—namely, "casino-style" games offered within a traditional casino environment.[272] *Hotel Employees* involved a challenge to Proposition 5, a statutory initiative measure which authorized various types of gambling at tribal casinos.[273] The main focus of the court's opinion was on two specific types of "casino-style" games authorized under Proposition 5's model compact: (1) "Tribal gaming terminals" (also referred to in the model compact as "gaming or gambling device[s]"); and (2) Class III card games, including blackjack or twenty-one.[274]

California's statutory gambling prohibitions became relevant in *Hotel Employees* because Proposition 5's proponents—who were affiliated with California's Indian tribes[275]—argued that the gambling activities authorized in the model compact "differed" from those offered at Nevada and New Jersey-style casinos in 1984.[276] Pointing to language in the initiative statute,[277] the proponents of Proposition 5 asserted that the class III card games and "tribal gaming terminals" contemplated by Proposition 5 were not like the "house-banked" games offered in Nevada and New Jersey casinos, as they would pay prizes solely

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270 Carrillo v. Helms Bakeries, Ltd., 44 P.2d 604, 606–07 (Cal. Dist. Ct. App. 1935).

271 Tait v. City & Cnty. of S.F., 300 P.2d 74, 77 (Cal. Dist. Ct. App. 1956) (emphasis added).

272 Hotel Emps. & Rest. Emps. Int'l Union v. Davis 981 P.2d 990, 1004 (Cal. 1999).

273 *Id.* at 994, 1000–01.

274 *Id.* at 1002, 1005–07, 1019 n.1 ("The record does not contain an exhaustive list of the card games played at tribal casinos on or before January 1, 1998, but there is no dispute they included one or more forms of blackjack or twenty-one.").

275 *Id.* at 994–95 (describing that the real parties in interest were Californians for Indian Self-Reliance, a California corporation which presented ballot arguments in favor of Proposition 5, and Frank Lawrence, a tribal gaming attorney who was the proponent of the ballot initiative).

276 *Id.* at 1005–08 (discussing and rejecting the claimed differences between the tribal casinos authorized by Proposition 5 and "the archetypical 1984 Nevada or New Jersey casino").

277 CAL. GOV'T CODE § 98001(c) (West 2021); CAL. GOV'T CODE § 98006(a)–(b) (West 2021).

in accordance with a "players' pool prize system" in which the house would not have any interest in the outcome of the wager.[278] Under the proposed "players' prize pool system," all player wagers would be pooled and dedicated solely to the payment of prizes, and, while the house could not have any interest in those funds, it would be permitted to collect a fee from players on a "per play, per amount wagered, or time-period basis," and could "seed" the pools in the form of loans.[279]

The California Supreme Court was unpersuaded by this asserted distinction, pointing to California's broad statutory ban on all "banking" games involving "cards, dice, or any device"[280] regardless of whether they are house-banked.[281] Drawing heavily on judicial decisions interpreting section 330 of the California Penal Code, the court determined that the gambling activities authorized by Proposition 5 were "banking" games because the tribal casino "through the prize pool . . . 'pays off all winning wagers and keeps all losing wagers,' which are variable 'because the amount of money' the tribal casino 'will have to pay out,' or be able to take in, 'depends upon whether each of the individual bets is won or lost.'"[282] As the court explained, "[t]he *pool* itself functions as a bank, collecting from all losers and paying all winners."[283] The California Supreme Court reasoned that the player prize pool "is a bank in nature if not in name" because it is a "'fund against which everybody has a right to bet, the bank . . . taking . . . all that is won, and paying out all that is lost.'"[284] It was therefore "immaterial" that the players' prize pool, rather than the tribal casino operator directly, "pays all the winnings

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278 *Hotel Emps.*, 981 P.2d at 1000, 1002.

279 *Id.* at 1002. Section 98006 of the California Government Code defined a "players' pool prize system" as

> one or more segregated pools of funds that have been collected from player wagers are irrevocably dedicated to the prospective award of prizes in [authorized gaming activities] and in which the house has neither acquired nor can acquire any interest. The tribe may set and collect a fee from players on a per play, per amount wagered, or time-period basis, and may seed the pools in the form of loans or promotional expenses, provided that the seeding is not used to pay prizes previously won.

CAL. GOV'T CODE § 98006(a) (West 2021).

280 *Hotel Emps.*, 981 P.2d at 1005–06; *see also* W. Telcon, Inc. v. Cal. State Lottery, 917 P.2d 651, 653–54 (Cal. 1996) ("Section 330 . . . forbids 'any banking or percentage game played with cards, dice, or any device . . . .'"); United States v. Roselli, 432 F.2d 879, 887 n.9 (9th Cir. 1970) ("California Penal Code section 330 prohibits the playing for money of certain listed card games, 'or any banking or percentage game played with cards, dice, or any device.'").

281 *Hotel Emps.*, 981 P.2d at 996 (citing CAL. PENAL CODE § 330 (West 2021)).

282 *Id.* at 1005 (quoting W. Telcon, Inc. v. Cal. State Lottery, 917 P.2d 651, 657 (Cal. 1996)).

283 *Id.* at 1019 n.4.

284 *Id.* at 1006 (quoting *W. Telecon, Inc.*, 917 P.2d at 657).

and suffers all the losses,"[285] since, as the court acknowledged, "a banking game, within the meaning of Penal Code section 330's prohibition, may be banked by someone other than the owner of the gambling facility."[286]

The California Supreme Court again turned to the California Penal Code for guidance in rejecting the argument that the "Tribal gaming terminals" were "materially different" from Nevada and New Jersey-style slot machines on the asserted basis that they "do not dispense coins or currency and are not activated by handles."[287] Citing the broad definition of slot machines in Penal Code section 330b, the court explained that "[a] slot machine is no less a slot machine under California law because it dispenses a 'credit, allowance or thing of value,' rather than money . . . or because it is 'caused to operate' by one 'means' rather than another."[288] Acknowledging the paramount importance of voter intent—an overarching theme running throughout the majority opinion—the California Supreme Court reasoned that "voters on the 1984 constitutional amendment likely [would not] have understood section 19(e) to permit casinos so long as the slot machines therein were activated by buttons rather than levers, and dispensed chips or electronic credits rather than coins."[289] Thus, the court concluded that the Tribal gaming terminals "are within the prohibition of Penal Code section 330."[290]

As the foregoing reveals, the California Supreme Court invoked California's statutory gambling prohibitions for a very specific (and limited) purpose: to explain why the gambling activities at issue (i.e., "Class III card games" and "Tribal gaming terminals") were not, as the tribal representatives had claimed, "materially different" from the banked card games and slot machines operated by Nevada and New Jersey casinos in 1984.[291]

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285 *W. Telecon, Inc.*, 917 P.2d at 657 (quoting People v. Ambrose, 265 P.2d 191, 194 (Cal. Super. Ct. 1953)).

286 *Hotel Emps.,* 981 P.2d at 1006 (citing Oliver v. County of Los Angeles, 78 Cal. Rptr. 2d 641, 647–48 (Ct. App. 1998)).

287 *Id.* (citing CAL. GOV'T CODE § 98006(b) (West 2021)).

288 *Id.* at 1007 (citation omitted).

289 *Id.*

290 *Id.* at 1007 n.5. The proponents of Proposition 5 also argued that the Tribal gaming terminals "differ from slot machines found in Nevada and New Jersey casinos" because "they are not house-banked, but rather operate as lotteries" in that they "must be conducted according to the players' prize pool system." *Id.* at 1006–07. Referencing its earlier discussion of the players' prize pool system and its finding that the "pool" itself is "the bank" for purposes of Penal Code section 330, the Court reiterated that the players' prize pool system "does not convert a game or device into a lottery," reasoning that "tribal gaming devices are not a lottery terminals, rather than slot machines, merely because a player's winnings must come from, and his or her losses, go into, a particular fund." *Id.*

291 *See id.*

Far from creating a wide-sweeping rule of general applicability, the court turned to California law (and, in particular, Penal Code sections 330 and 330b) simply to assess whether, in substance, the gambling games authorized by Proposition 5 were materially similar to those being offered in Nevada and New Jersey at the time—and *not* to expand the reach of section 19(e) to cover gambling activities that were not "typical" of Nevada and New Jersey casinos in 1984.[292] Had the proponents of Proposition 5 *not* sought to differentiate their games from those offered at Nevada and New Jersey casinos by pointing to the "player-banked" nature of their games and the absence of pull-handles and coin dispensers from the Tribal gaming terminals, there would have been no reason for the court to even consider California's statutory gambling prohibitions, inasmuch as banked card games and slot machines were the quintessential form of Nevada-and-New Jersey-style casino gambling in 1984, independent of any analysis under California law.[293]

This provides crucial context for understanding the California Supreme Court's use of the words "including those statutorily prohibited in California, *especially banked table games and slot machines*." The court's inclusion of the adverb "especially" in that sentence denotes the specific gambling games at issue in *Hotel Employees* (i.e., banked table games and slot machines) and singles them out "over all others" as the gambling activities that are most closely associated with a "casino of 'the type' operating in Nevada and New Jersey" in 1984.[294] So, while the words "including those statutorily prohibited in California" were included in that sentence as well, it bears emphasizing again that the only "statutorily prohibited" gambling activities that were actually involved and actually addressed by the court in *Hotel Employees* were banked card games (such as blackjack) and slot machines—both of which were endemic to Nevada and New Jersey casinos in 1984 and are specifically prohibited by Penal Code section 330.

Notably, the statutory offenses of pool-selling and bookmaking, which are codified at Penal Code section 337a and generally

292 *Id.* at 996.

293 *Id.* at 1000–01.

294 *Id.* at 1006; *see also Especially*, LEXICO, http://www.lexico.com/en/definition/especially [http://perma.cc/BZ3B-YHRX] (last visited May 31, 2021) (defining "especially" as an adverb that is "[u]sed to single out one person, thing, or situation over all others.").

encompass the activity of sports gambling,[295] were not at issue before the California Supreme Court.[296] There is no reference to section 337a or sports betting anywhere in the *Hotel Employees* opinion.[297] Proposition 5 would not have even permitted tribal casinos to operate sportsbooks.[298] Nor *could* it have done so in view of the federal ban on state-authorized sports betting that was still in effect in 1998.[299] Given the specific factual context of *Hotel Employees*—a case focused solely on banked card games and slot machines (the archetypical form of "casino-style" gambling)—the court's statement "*including those statutorily prohibited in California, especially banked table games and slot machines*" is, at best, non-binding obiter dictum to the extent that it implies that other forms of gambling (such as sports betting) not before the court are also within the scope of section 19(e).[300]

A careful reading of the facts of *Hotel Employees* should therefore dispel any suggestion that the California Supreme Court's statement "including those statutorily prohibited in California, especially banked table games and slot machines"—made in the context of a case focusing solely on banked card games and slot machines—was meant to create a wide-sweeping rule of general applicability that would reach all other forms of gambling (such as sports betting) not at issue before the court,[301] when within the immediately preceding paragraph, the California Supreme Court provided an alternative interpretation of section 19(e) (i.e., gambling activities "particularly associated with Nevada and New Jersey" in 1984) that would necessarily *exclude* sports betting.[302] That interpretation—aligning with the intent of the constitutional amenders (as acknowledged by the court)—precludes any such sweeping generalizations from being drawn.

295 CAL. PENAL CODE § 337a; *see* People v. Epperson, 176 P. 702, 703 (Cal. Ct. App. 1918) ("The ultimate design of [section 337a] was to penalize and thus put a stop to pool selling on horse races and other sports usually played for money or on wagers.").

296 *Hotel Emps.*, 981 P.2d at 990.

297 *Id.*

298 *See* CAL. GOV'T CODE § 98006 (West 2021) (listing the gambling games that were authorized under Proposition 5 with no mention of sports betting or bookmaking).

299 *See* 28 U.S.C. § 3702 (1992), *invalidated by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

300 *See* People v. Vang, 262 P.3d 581, 592 n.3 (Cal. 2011) (defining "obiter dictum," commonly referred to as either "dicta" or "dictum," as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)") (quoting BLACK'S LAW DICTIONARY 1177 (9th ed. 2009)).

301 *Hotel Emps.*, 981 P.2d at 1004.

302 *Id.*

2. The California Supreme Court Indicated that Section 19(e) Elevated to a Constitutional Level Only Those Prohibitions against Casino-Style Gaming Codified in Penal Code Section 330.

But even apart from the highly specific factual context of the case, a closer examination of the California Supreme Court's detailed analysis of the constitutional language in *Hotel Employees* belies any suggestion that section 19(e) "constitutionalized" *all* of California's statutory prohibitions against gambling (encompassing the entirety of sections 330 through 337z of Chapter 10, Title 9, Part 1 of the Penal Code).[303] For example, in the paragraph immediately following the one containing the phrase "*including those statutorily prohibited in California, especially banked table games and slot machines*," the Court clarified that only a "set" of gambling activities was elevated to a constitutional level by virtue of section 19(e).[304]

In attempting to pinpoint the "set" of gambling activities that was encompassed by section 19(e), the California Supreme Court examined the ballot pamphlet associated with Proposition 37, highlighting the following language: "[I]n addition to establishing [a] state lottery, Proposition 37 'would amend the Constitution to prohibit in California gambling casinos of the type that exist in Nevada and New Jersey. (*Casino gambling is currently prohibited within the state by a statute*, but not by the Constitution).'"[305] Proposition 37 would also "ADD[] A NEW CONSTITUTIONAL PROHIBITION AGAINST CASINO GAMBLING."[306]

Relying on this straightforward ballot pamphlet language, the California Supreme Court explained that "[v]oters on the 1984 initiative would thus have understood the constitutional provision they added, section 19(e), as focusing on a set of statutorily prohibited activities, i.e., '*casino gambling*', and as endowing the *existing statutory bars* on *that set* of activities with a new, constitutional status."[307] The court similarly observed that "the 1984 constitutional amenders . . . were told the measure before them would constitutionalize California's statutory

303 *Id.* at 996.

304 *Id.* (emphasis added) ("[T]he available legislative history suggests section 19(e) was designed, precisely, to elevate statutory prohibitions on a set of gambling activities to a constitutional level.").

305 *Id.* (emphasis added) (quoting Ballot Pamp., Prop. 37, *State Lottery. Initiative Constitutional Amendment and Statute*, UC HASTING SCHOLARSHIP REPOSITORY 46 (Nov. 6, 1984), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1926&context=ca_ballot_props [http://perma.cc/V3XM-E6LY] (last visited May 31, 2021)).

306 *Id.* at 1005 (alteration in original).

307 *Id.* (emphasis added).

prohibitions on '*casino gambling*.'"[308] With these clear and unequivocal statements—and there are several others as well[309]—the court left little doubt that it viewed section 19(e) as elevating to a constitutional level only those statutory prohibitions against casino gambling.

The "existing statutory bars" and "statutory prohibitions" on casino-style gambling in California are set forth in Penal Code sections 330, 330a, and 330b.[310] Section 330 prohibits eleven gambling games by name, including roulette and twenty-one (often referred to as blackjack), as well as "any banking or percentage game played with cards, dice, or any device . . . ."[311] Sections 330a and 330b, in turn, separately prohibit slot machines, the other predominant form of "casino-style" gaming in California.[312] The California Supreme Court has referred to

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308 *Id.* at 1007 (emphasis added).

309 *See id.* at 994 ("In 1984, the people of California amended our Constitution to state a fundamental public policy against the legalization in California of casino gambling of the sort then associated with Las Vegas and Atlantic City."); *id.* at 1018 n.2 (Kennard, J., dissenting) (referring to "the casino gambling prohibition of section 19(e) of article IV of the California Constitution.").

310 *See, e.g.*, Reiter v. Mut. Credit Corp., No. SACV 09-0811 AG, 2011 WL 13175458, at *7 (C.D. Cal. Aug. 31, 2011) ("Section 330 applies to casino games . . . ."); Oliver v. Cnty. of Los Angeles, 78 Cal. Rptr. 2d. 641, 644 ("According to expert testimony in *Tibbetts v. Van de Kamp*, . . . 'the common thread among the games specifically listed in section 330 at the time of its enactment was that they were casino games . . . .'") (citation omitted); Flynt v. Shimazu, 940 F.3d 457, 459 (9th Cir. 2019) ("California Penal Code § 330 prohibits cardrooms from engaging in casino-like activities . . . ."); 71 Ops. Cal. Att'y Gen. 139 (1988), No. 87-906, 1988 WL 385199, at *1, *5–6 (opining that a charitable organization's "casino night" in which attendees "would be given chips . . . to play roulette, twenty-one and *similar casino games*" would violate California Penal Code section 330) (emphasis added).

311 CAL. PENAL CODE § 330 (West 2021)

> Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment.

Id.

312 *See Hotel Emps.*, 981 P.2d at 997 ("Since 1911, section 330a of the Penal Code has prohibited all slot machines; section 330(b) of the same code, enacted in 1950, has redoubled the prohibition."); United Auburn Indian Cmty. of Auburn Rancheria v. Newsom, 472 P.3d 1064, 1068 (Cal. 2020) (referring to slot machines, roulette, and blackjack as "casino-style games"); People *ex rel.* v. Green, 352 P.3d 275, 276 (Cal. 2015) (referring to slot machines as "casino-style" games).

these provisions as comprising California's statutory prohibitions against "casino-style" gaming.[313]

Consistent with the above, and further evidencing that section 19(e) did not constitutionalize the *entirety* of California's statutory prohibitions against gambling, the *Hotel Employees* Court identified only *one* Penal Code section as having been elevated to a constitutional level by section 19(e).[314] In a footnote near the end of the majority opinion, the California Supreme Court stated that "section 19(e) was intended, in part, to constitutionalize . . . [Penal Code] section 330."[315] The court mentioned section 330 (along with the related slot machine statutory prohibitions in sections 330a, 330b, and 330.1) a grand total of fifteen times.[316] By contrast, none of the other Penal Code gambling prohibitions encompassing the entirety of sections 330 through 337z—including crimes related to sports betting (codified at section 337a)—are even mentioned at all.[317]

This should not come as a surprise since the only gambling games at issue in *Hotel Employees* were those falling squarely within section 330's strictures, namely, banked card games and slot machines.[318] Viewed through that lens, the California Supreme Court concluded that "the card games and devices in question are within the prohibition of Penal Code section 330" because the tribal casino, through the player prize pool system, "pays off all winning wagers and keeps all losing wagers," rendering them "banking games" within the scope of section 330.[319]

Further, to the extent that tribal casino operators would be able to "collect fees from players on a per-amount-wagered basis,"

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313 *See United Auburn*, 472 P.3d at 1079 ("Recall that the California Constitution and other state law once prohibited *casino-style gaming*. (See Cal. Const. art. IV, § 19, subd. (e); *Pen. Code, §§ 330, 330a*.)" (emphasis added)).

314 *Hotel Emps.*, 981 P.2d at 1007 n.5.

315 *Id.*

316 *Id.* at 996–97, 1006–08, 1007 n.5.

317 The only other Penal Code sections that are referenced in the Court's opinion are section 319 (defining "lottery") and section 326.5 (authorizing bingo games for charity). *Id.* at 996–98. Both sections are part of Chapter 9, which addresses "lotteries." *See* W. Telcon, Inc. v. Cal. State Lottery, 917 P.2d 651, 653 (Cal. 1996) ("[T]he definition of a lottery and the prohibitions on operation of lotteries have been contained in part 1, title 9, chapter 9 of the Penal Code (chapter 9), now consisting of sections 319 through 329."). The gambling prohibition at issue in *Hotel Employees*—Penal Code section 330—is part of Chapter 10, entitled "Gaming." *See* McVeigh v. Burger King Corp., No. B220964, 2010 WL 4056857, at *19 (Cal. Ct. App. Oct. 18, 2010) ("Chapter 10 of title 9, part 1 of the Penal Code, which includes sections 330 through 337z, addresses gaming.").

318 *See Hotel Emps.*, 981 P.2d at 996–97, 1005–07, 1007 n.5 (analyzing the gambling activities authorized by Proposition 5 through the lens of Penal Code section 330 and the interpretive caselaw).

319 *Id.* at 1004–06, 1007 n.5 (citations omitted).

such gambling games, the Court concluded, would also be considered a "percentage game played with cards, dice, or any device" within the ambit of Penal Code section 330.[320] Finally, the Court noted that the banked card games in question "are also within [Penal Code] section 330 to the extent that they include twenty-one, or blackjack: to that extent, they are prescribed by name [in section 330]."[321]

As the majority opinion makes quite clear, *Hotel Employees* was focused squarely on a very specific type of gambling activity—namely, banked card games and slot machines—which are the archetypical forms of "casino-style" gaming.[322] As such, it was on "all fours" with the language and intent underlying section 19(e), which is to prohibit the legislative authorization of "casino-style" gaming in California.[323] Aside from the failed attempt to factually distinguish the tribal casinos authorized by Proposition 5 from Nevada and New Jersey-style casinos—which led to the California Supreme Court analyzing the issue through the lens of Penal Code section 330's prohibition against casino-style gaming—*Hotel Employees* was a relatively straightforward application of section 19(e).[324] It involved a comparison of banked card games and slot machines that were to be offered at one type of casino facility (i.e., tribal casinos in California) and substantially the same or similar gambling games being offered at another type of casino facility (i.e., "casinos of the type currently operating in Nevada and New Jersey").[325] You cannot get much closer to a perfect one-to-one match than that.

While the California Supreme Court's alternative interpretation of section 19(e) might be logical in a case involving banked card games and slot machines offered at Las Vegas-style casinos, it begins to make less sense the further and further one moves away from that paradigm. Applied outside of that specific context, the court's statement "*including those statutorily prohibited in California, especially banked table games and slot machines*" can sweep too broadly and lead to absurd results.[326] For

320 *Id.* at 1007 n.5; *see also* CAL. PENAL CODE § 330 (West 2021).

321 *Id.*

322 *Id.* at 1005.

323 *See* United Auburn Indian Cmty. of Auburn Rancheria v. Newsom, 472 P.3d 1064, 1075, 1077–79, 1081–82 (Cal. 2020).

324 *See Hotel Emps.*, 981 P.2d at 1007.

325 *See id.* at 996–97, 1005–07, 1007 n.5.

326 *See* Richmond v. Shasta Cmty. Servs. Dist., 83 P.3d 518, 523 (Cal. 2004) (quoting Carman v. Alvord, 644 P.2d 192, 197 (Cal. 1982)) ("Courts construe constitutional phrases liberally and practically; where possible they avoid a literalism that effects absurd, arbitrary, or unintended results."); *In re* Anthony R., 201 Cal. Rptr. 299, 302 (Cal. Ct.

example, if a court interpreted that phrase to its outer limits, a gas station or convenience store offering electronic keno games could be deemed a "casino[] of the type currently operating in Nevada and New Jersey" within the scope of section 19(e) simply because keno (when operated as a "banking game") is prohibited by Penal Code section 330[327] and Webster's New International Dictionary defined "casino" in 1984 as "a building or room for gambling."[328] The absurdity of equating a gas station or neighborhood bodega with a Nevada and New Jersey-style casino illustrates the danger of applying a broad or isolated judicial statement completely out of context.[329] This incongruous outcome—and recall that a New Jersey casino in 1984 had to be "at least 15,000 square feet"[330] and did not offer keno games[331]—is not what the constitutional amenders could have intended when they enacted section 19(e).[332]

App. 1984) (quoting Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1300 (Cal. 1978)) ("The primary goal in construing constitutional amendments is to 'avoid absurd results and to fulfill the apparent intent of the framers.'").

327 *See* W. Telcon, Inc. v. Cal. State Lottery, 917 P.2d 651, 653, 658–62 (Cal. 1996) (concluding that a keno game operated by the California State Lottery, in which each player placed a wager on the outcome of a "draw" of random numbers generated by computer and where the California State Lottery paid winning players a preset amount based only on the amount of wager, number of numbers selected and number of numbers matched, was a "banking game" proscribed by Penal Code section 330, and not an authorized "lottery" or "lottery game").

328 *See Casino*, WEBSTER'S NEW INTERNATIONAL DICTIONARY 347 (3d ed. 1961).

329 If considered in isolation and out of context, the word "casino" could embrace a wide range of structures under a purely dictionary-based definition. *Hotel Emps.*, 981 P.2d at 1004. But as the United States Supreme Court has cautioned, "[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction." Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) (noting that "[a] word in a statute may or may not extend to the outer limits of its definitional possibilities"). Rather, as the Supreme Court explained in *Dolan*, the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Id.*

330 *See* Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 9 (citation omitted) ("Under New Jersey law in force at the time [section 19(e)] was approved, the term 'casino' referred to 'a single room of at least 15,000 square feet in which casino gaming is conducted.'").

331 *See* I. NELSON ROSE, GAMBLING AND THE LAW 4 (Gambling Times Inc. ed., 1986) (noting that "Atlantic City does not allow poker or keno"); Report of I. Nelson Rose at 8, Hemenway v. Albion Pub. Schs., No. 05CV00007, 2006 WL 4725543 (W.D. Mich. Apr. 23, 2006) ("New Jersey, by statute, allowed only six games in Atlantic City casinos at the relevant time [referring to 1984]: blackjack, craps, roulette, big six, baccarat and slot machines. *No keno. No poker*.") (emphasis added).

332 *See Hotel Emps.*, 981 P.2d at 1004. Employing the same reasoning, one could also argue that *online* sports betting—which did not exist in 1984—is beyond the scope of section 19(e) because it is not the type of gaming activity that is conducted in "a *building or room* for gambling." *See id.* (emphasis added). Under each of the suggested interpretations of section 19(e) proffered in *Hotel Employees*, the Court equated "the type" of "casino operating in Nevada and New Jersey" in 1984 with a *brick-and-mortar* facility, using words such as "gambling house," "institution," "establishment," "gambling facility," and "one or more buildings, rooms, or facilities" in describing what was meant by a Nevada-and-New Jersey-style casino. *See id.* After all, that was the only "type" of casino which existed at that time in both states. *See id.* Indeed, that is precisely the assessment

It also serves as an important reminder that constitutional limitations and restrictions on legislative power are to be "construed strictly" and "[i]f there is any doubt as to the legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action."[333]

3. *United Auburn* Reaffirms that Section 19(e) Applies Only to "Casino-Style" Games Falling within the Prohibitions of Penal Code Section 330.

The *United Auburn* decision should put to rest once and for all any lingering questions about the scope of section 19(e). In *United Auburn*, the California Supreme Court repeatedly characterized section 19(e) as a restriction on "casino-style gaming," employing that phrase a staggering twenty-seven times.[334] Equally important, the court identified Penal Code sections 330 and 330a as the only statutory provisions which, along with section 19(e), prohibited "casino-style" gaming in California.[335] This observation follows the court's statement—made some twenty-one years earlier in *Hotel Employees*—that "section 19(e) was intended, in part, to constitutionalize" Penal Code section 330.[336] Since *United Auburn* and *Hotel Employees* are the principal California Supreme Court decisions addressing or commenting on the scope of section 19(e), it is extremely telling that both decisions characterize section 19(e) as a ban on "casino-style" gambling and link section 19(e) with Penal Code section 330 (and the related slot machine prohibitions in sections 330a and 330b) without including so much

made in a 2013 legislative staff analysis, which concluded that section 19(e)'s ban on a certain type of casinos applies only to "brick and mortar" facilities. *See* S. Comm. on Governmental Org., Staff Analysis of SB 1390, 2011–2012 Reg. Sess. at J (Cal. 2012) http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1351-1400/sb_1390_cfa_20120426_101317_sen_comm.html [http://perma.cc/936E-6DWJ] (last visited May 31, 2021) ("It therefore appears that what the Legislature cannot do is authorize so-called brick-and-mortar facilities or buildings that provide roulette tables, crap tables, blackjack tables, and especially slot machines and banked card games.").

333 Methodist Hosp. of Sacramento v. Saylor, 488 P.2d 161, 165 (Cal. 1971).

334 *See, e.g.*, United Auburn Indian Cmty. of Auburn Rancheria v. Newsom, 472 P.3d 1064, 1071 (Cal. 2020) ("Notwithstanding the Constitution's general restriction on casino-style gaming" (citing CAL. CONST. art. IV, § 19(f))); *id.* ("given the preexisting, constitutionally enshrined policy against casino-style gaming in California" (citing section 19(e))); *id.* at 1074 (referring to "[section 19(e)'s] general ban on casino-style gaming"); *id.* at 1077 ("Proposition 1A was significant because it amended the Constitution to signal a policy of greater openness toward casino-style gaming—which California had previously prohibited." (citing CAL. CONST. art. IV, § 19(e))); *id.* at 1081 ("For decades, California imposed on itself a categorical prohibition on casino-style gaming that surely restricted not only legislative authority, but gubernatorial power.").

335 *Id.* at 1079 ("Recall that the California Constitution and other state law once prohibited casino-style gaming." (citing CAL. CONST. art. IV, § 19(e); CAL. PENAL CODE §§ 330, 330a)).

336 Hotel Emps., 981 P.2d at 1007 n.5.

as a single reference to any of the other Penal Code prohibitions against gambling.[337] It reinforces the view that section 19(e) applies only to "casino-style" gambling games falling within the prohibitions of Penal Code sections 330, 330a, and 330b, and casts further doubt on the assertion that sports betting—addressed in Penal Code section 337a (and not at issue in *Hotel Employees*)—is encompassed within section 19(e).[338]

This is also consistent with the Legislative Counsel's 1998 advisory opinion, which specifically addressed whether the gaming authorized by Proposition 5 would be prohibited by section 19(e). Echoing nearly verbatim the statutory language of Penal Code section 330—which prohibits "any banking or percentage game involving dice, cards or any device"—the Legislative Counsel interpreted the phrase "casinos of the type currently operating in Nevada and New Jersey" (as used in section 19(e)) to mean "*premises at which banking or percentage games involving cards, dice, or gambling devices* are played for money, property, or any representative value."[339] This construction further supports the conclusion that the nearly-identically worded section 330 is the only Penal Code prohibition against gambling that was elevated to a constitutional level by section 19(e).

Several California Indian tribes have likewise interpreted section 19(e)'s ban against Nevada and New Jersey-style casinos as constitutionalizing Penal Code section 330's ban against casino-style gaming. In a federal lawsuit filed in January 2019 against then-Governor of California Edmund G. Brown over the state's alleged failure to enforce its gambling

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337 *See generally id.*; *see also United Auburn*, 472 P.3d at 1064.

338 Several other California judicial opinions likewise treat section 19(e) as the constitutional equivalent of Penal Code section 330. *See, e.g.*, Stanley v. Cal. State Lottery Comm'n, No. C041034, 2003 LEXIS 8296, at *67 (Cal. Ct. App. Aug. 29, 2003).

> The California Constitution still forbids "casinos of the type currently operating in Nevada and New Jersey" (CAL. CONST, art. IV, § 19, subd. (e)) – which are epitomized by their banking games – and the California Penal Code prohibits "any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value. . . ." (Penal Code, § 330.).

Id. Rumsey Indian Rancheria of Wintun Indians, Table Mountain Rancheria v. Wilson, No. CIV-S-92-812 GEB, 1993 U.S. Dist. LEXIS 9877, 34 (E.D. Cal. July 20, 1993) (stating that section 19(e) and Penal Code section 330, along with California Government Code section 8880.28(a), "reveal a California public policy prohibiting traditional casino gambling").

339 Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at p. 11 (emphasis added). The Legislative Counsel's analysis of section 19(e) was expressly adopted by the Union petitioners in *Hotel Employees*. *See* Union Petition, *supra* note 132, at *2 ("The Legislative Counsel's October 8, 1998 analysis of Proposition 5 concluded that the gaming authorized by the Initiative was just like that allowed in Nevada and New Jersey in 1984 . . . . We adopt the Legislative Counsel's analysis of this issue.").

laws against California's card room industry, three California tribes—the Sycuan Band of the Kumeyaay Nation, Viejas Band of Kumeyaay Indians, and Yocha Dehe Wintun Nation—made the following statement regarding section 19(e)'s relationship with Penal Code section 330:

> In 1984, California voters amended the State's Constitution *to give Section 330 constitutional effect*, providing that "[t]he Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey." Cal. Const. art. IV, § 19(e); *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal.4th 585, 605-06 (1999) (1984 amendment to the California Constitution "was designed, precisely, to elevate statutory prohibitions on a set of gambling activities to a constitutional level.").
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> . . . As mentioned before, Section 330 specifically prohibits the game of "twenty-one," as well as any banked game, *and that prohibition has been raised to a constitutional level*.[340]

California lawmakers have also recognized the limited scope of section 19(e), as previous sports betting bills (i.e., those introduced in 2012 and 2013 before the fall of PASPA) sought to accomplish legalization solely through a legislative enactment, rather than by constitutional amendment.[341] As justification for proceeding legislatively, the staff analyses prepared for the Senate Committee on Governmental Organization quoted directly from the portion of the *Hotel Employees* opinion which interpreted section 19(e) through the lens of voter intent (i.e., the statement that "[t]he 1984 constitutional amenders must have had in mind a gambling house unique to or particularly associated with Nevada and New Jersey) since they chose to define the prohibited institution by reference to those states."[342] Relying on that interpretation and recognizing, of course, that "New Jersey ha[d] never authorized sports betting [prior to 2018],"[343] the legislative

340 Complaint at 4, 32, Yocha Dehe Wintum Nation, et al. v. Edmund G. Brown, No. 2:19-cv-00025-JAM-AC, 2019 WL 2513788 (E.D. Cal. Jan. 3, 2019) (emphasis added). Notably, these are the same tribes that are signatories to the letter sent to the California Senate and Assembly Committees on Governmental Organization on February 6, 2020—barely more than one year later—asserting that section 19(e) elevated *all* statutory prohibitions against gambling (and not just Penal Code section 330) to a constitutional level. *See* Feb. 6, 2020 Letter, *supra* note 40.

341 *See* S.B. 190, 2013–2014 Cal. Leg., Reg. Sess. (Cal. 2013); S.B. 1390, 2011–2012 Cal. Leg., Reg. Sess. (Cal. 2012).

342 Staff Analysis of S.B. 1390, S. Comm. on Govt. Org., 2011–2012 Cal. Leg., Reg. Sess. at I (Cal. 2012); Staff Analysis of S.B. 190, S. Comm. on Gov't Org., 2013–2014 Cal. Leg., Reg. Sess. at F (Cal. 2013).

343 Staff Analysis of S.B. 190, S. Comm. on Gov't Org., 2013–2014 Cal. Leg., Reg. Sess. at G (Cal. 2013).

staff analyses stated that "[i]t is therefore logical to conclude that wagering on sports events never 'was particularly associated with' New Jersey."[344] The staff analyses interpreted section 19(e)'s ban on "the type" of casino "operating in Nevada and New Jersey" in 1984 as only restricting the Legislature from authorizing "so-called brick-and-mortar facilities or buildings that provide roulette tables, crap tables, blackjack tables, and especially slot machines and banked card games"[345]—all of which fall within the prohibitions of Penal Code section 330.[346]

Finally, the enactment of Proposition 1A less than seven months after *Hotel Employees* was decided further bolsters the conclusion that section 19(e) applies only to "casino-style" gaming. Proposition 1A, approved by the voters on March 7, 2000,[347] amended article IV, section 19(f) of the California Constitution to give the Governor the authority to "negotiate and conclude" compacts, subject to ratification by the legislature, that would allow California's Indian tribes to operate "slot machines, lottery games . . . banking and percentage card games" on tribal lands in accordance with federal law.[348] In *United Auburn*, the Supreme Court repeatedly characterized Proposition 1A as having authorized "casino-style" gaming on tribal lands in accordance with federal law.[349] Since Proposition 1A authorized "casino-style"

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344 Staff Analysis of S.B. 1390, S. Comm. on Govt. Org., 2011–2012 Cal. Leg., Reg. Sess. at I (Cal. 2012).

345 Staff Analysis of S.B. 1390, S. Comm. on Govt. Org., 2011–2012 Cal. Leg., Reg. Sess. at J (Cal. 2012); Staff Analysis of S.B. 190, S. Comm. on Gov't Org., 2013–2014 Cal. Leg., Reg. Sess. at G (Cal. 2013).

346 *See* CAL. PENAL CODE § 330. SB 1390 was approved by the California Senate on May 29, 2012 with thirty-three votes in favor and only two against. *See* Bill Votes on S.B. 1390, 2011–2012 Cal. Leg., Reg. Sess. 1 (Cal. 2012). SB 1390 was then referred to the Assembly Committee on Governmental Organization, but was relegated to the suspense file with no further action taken. *See* Bill History of S.B. 1390, 2011–2012 Cal. Leg., Reg. Sess. (Cal. 2012). A similar bill, SB 190, introduced the following year, passed the Senate Committee on Governmental Organization with eleven "ayes" and zero "noes," but was held in the Senate Committee on Appropriations and relegated to the suspense file, with no further action being taken on the bill. *See* Bill History on S.B. 190, 2013–14 Cal. Leg., Reg. Sess. (Cal. 2013).

347 *See* Coyote Valley Band of Pomo Indians v. California (*In re* Indian Gaming Related Cases Chemehuevi Indian Tribe), 331 F.3d 1094, 1107 (9th Cir. 2003).

348 CAL. CONST. art. IV, § 19(f).

349 *See, e.g.*, 472 P.3d 1064, 1071 (Cal. 2020) ("Notwithstanding the Constitution's general restriction on casino-style gaming, Proposition 1A allowed that type of gaming 'to be conducted and operated on tribal lands subject to [tribal-state] compacts.'"); *id.* ("Proposition 1A allows casino-style gaming 'in accordance with federal law'"); *id.* at 1072 ("Proposition 1A . . . amended the California Constitution to allow casino-style gaming 'by federally recognized Indian tribes on Indian lands' and 'on tribal lands' in California, 'in accordance with federal law.'"); *id.* at 1073 ("[T]he most reasonable understanding of voters' purpose in enacting Proposition 1A is that they sought to permit casino-style gaming on all Indian land in accordance with federal law . . . ."); *id.* at 1075 ("[T]he most defensible account of Proposition 1A's purpose was to allow casino-style gaming *only* on lands associated with those compacts.").

gaming and was enacted in direct response to *Hotel Employees*,[350] it reinforces that *Hotel Employees* was a case addressing only "casino-style" gaming, which, as explained in Part III, Section B, provides important context for understanding the reasons underlying the Court's alternative construction of section 19(e).

IV. SPORTS BETTING IS NOT "CASINO-STYLE" GAMBLING

Even under the California Supreme Court's alternative definitional approach—which looks to California's statutory prohibitions against casino-style gaming as a guidepost—the legislative authorization of sports betting would still not run afoul of section 19(e). Under California law, statutory prohibitions against "casino-style" games are addressed in Penal Code sections 330, 330a, and 330b.[351] By contrast, criminal offenses relating to sports gambling are prosecuted under California Penal Code section 337a, the statutory prohibition against pool-selling and bookmaking.[352] Sports betting does not fit within the section 330 paradigm because it is not a banking or percentage game played with "cards, dice, *or any device*."[353] Although the term "device" is not defined in Penal Code section 330, other statutes covering the same or similar subject matter[354] define the analogous term "gambling device"[355] as referring to

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350 1 WITKIN, SUM. OF CAL. LAW CONTRACTS, § 649 (11th ed. 2017) (stating that Proposition 1A was proposed "[i]n response to [the *Hotel Employees*] decision . . . .").

351 *See* Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 1007 n.5 (Cal. 1999) (noting that "section 19(e) was intended, in part, to constitutionalize" Penal Code section 330"); *United Auburn*, 472 P.3d at 1079 (identifying Penal Code section 330 and 330a as the statutory prohibitions against "casino-style" gaming); Reiter v. Mut. Credit Corp., No. 09-0811 AG, 2011 WL 13175458, at *7 (C.D. Cal. Aug. 21, 2011) ("Section 330 applies to casino games . . . .").

352 *See* 80 Op. Cal. Att'y Gen. 98 (1997), 1997 WL 206243, at *2 ("It is evident that section 337a prohibits the placing of bets by anyone in California on any of the enumerated contests or events."). Additionally, betting on a boxing match is prohibited by Penal Code section 412, which is part of title 11. Section 412 states, in pertinent part, that "[a]ny person who . . . lays, makes, offers or accepts, a bet or bets, or wager or wagers, upon the result or any feature of any pugilistic contest, or fight, or ring or prize fight, or sparring or boxing exhibition, or acts as a stakeholder of any such bet or bets, or wager or wagers, shall be guilty of a misdemeanor . . . ." CAL. PENAL CODE § 412 (Deering 1914).

353 *See* Western Telecon, Inc. v. Cal. State Lottery, 917 P.2d 651, 654 ("Section 330 . . . forbids 'any banking or percentage game played with cards, dice, or any device . . .'") (emphasis added).

354 As stated in *Quarterman v. Kefauver*, when an undefined term appears in a statutory provision, "[courts] may attempt to gain insight into the intended meaning of [the] phrase or expression by examining use of the same or similar language in other statutes." 64 Cal. Rptr. 2d 741, 745 (Dist. Ct. App. 1997).

355 The Legislative Counsel's 1998 advisory opinion uses the phrase "gambling devices" in its definition of section 19(e), tracking nearly verbatim the "banking or percentage game" language contained in Penal Code section 330. *See* Op. Cal. Leg. Counsel, No. 21947, *supra* note 144, at 11 (concluding that "in our view, the phrase 'casinos of the type currently operated in Nevada and New Jersey' should be construed to

any instrument, contrivance, component, or machine that is intended for the purpose of gambling and "affects the result of the wager by determining win or loss," such as in the case of cards, dice, a roulette wheel, or slot machine.[356]

Reading the statutory term "device" as being synonymous with "gambling device" for purposes of Penal Code section 330 is also guided by the principle of statutory interpretation known as *noscitur a sociis* (commonly referred to as the associated-words canon).[357] Under this canon of construction, "the meaning of a word may be ascertained by reference to the meaning of other terms which the Legislature has associated with it in the statute . . . ."[358] Here, the term "device" appears directly alongside the words "cards" and "dice" in a California penal statute exclusively addressing the topic of gambling.[359] Cards and dice naturally affect the result of a wager, as the roll of the dice or the random distribution of cards will determine win or loss.

In light of the context in which it is used and the associated words appearing next to it, the term "device" (as used in Penal Code section 330) must necessarily be referring to a "gambling device" that affects the result of a wager and "determin[es] win or loss,"[360] such as in the case of a slot machine.[361] This definition logically excludes devices that are used to communicate and process wagers, but have "nothing to do in determining who should win or lose."[362] By way of illustration, one could communicate or record a sports wager in person without using any "device" or "thing" other than a paper and pencil. The fact

mean premises at which banking or percentage games involving cards, dice, or gambling devices are played for money, property, or any representative value.").

356 *See e.g.*, CAL. PENAL CODE § 337t(f) (West 2003) ("'Gambling game device' means any equipment or mechanical, electromechanical, or electronic contrivance, component or machine used remotely or directly in connection with gaming or any game *which affects the result of a wager by determining win or loss*. The term includes . . . [a] slot machine.") (emphasis added); NEV. REV. STAT. ANN. § 463.0155 (West 2021) ("'Gaming device' means any object used remotely or directly in connection with gaming or any game which affects the result of the wager by determining win or loss and which does not otherwise constitute associated equipment. The term includes, without limitation . . . [a] slot machine.").

357 *See id.*; *see also Noscitur a sociis,* BLACK'S LAW DICTIONARY (11th ed. 2019).

358 Grafton Partners v. Superior Ct., 116 P.3d 479, 487 (Cal. 2005).

359 *See* CAL. PENAL CODE § 330.

360 CAL. PENAL CODE § 337t(f).

361 *See* Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 1004 (Cal. 1999) (referring to "slot machines" as an example of a "gaming device"); Cates v. Cal. Gambling Control Comm'n, 65 Cal. Rptr. 3d 513, 516 (Ct. App. 2007) (equating "gaming device" to slot machines); Davies v. Mills Novelty Co., 70 F.2d 424, 426 (8th Cir. 1934) ("The term 'gambling device,' or 'gambling machine,' will include ordinarily only such instruments or contrivances as are intended for the purpose of gambling, and as such are used to determine the result of the contest on which the wager is laid.").

362 Engle v. State, 90 P.2d 988, 992 (Ariz. 1939).

that a wager may be communicated by a paper and pencil (or even by smartphone) does not transform such items into "gambling devices," as they obviously play no role in determining or affecting the outcome of the wager.[363]

Given the narrow contours of the statutory language—with sports betting not included among the eleven gambling games specifically enumerated in Penal Code section 330 or otherwise constituting a "banking or percentage game played with cards, dice or *any device*"[364]—it should come as no surprise that there do not appear to be any reported California judicial decisions in which Penal Code section 330 was invoked to prosecute a criminal offense related to sports betting. Every reported decision that this author has examined—following extensive legal research[365]— identifies section 337a as the specific Penal Code provision that applies to sports wagering.[366]

A. Location of the Underlying Contests

But even apart from its statutory categorization under California law, sports betting is not considered to be "casino-style" gambling as a basic definitional matter. There are several fundamental—and dispositive—distinctions between casino-style gaming and sports betting. One of the most obvious differences between the two species of gambling is the "location" where the underlying activities take place and the outcomes are

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363 *See, e.g.*, Commonwealth v. Certain Gaming Implements, 57 N.E.2d 542, 543 (Mass. 1944) (concluding that a typewriter used to record bets was not a "gaming apparatus or implement[] used or kept and provided to be used in unlawful gaming"; the Massachusetts Supreme Court reasoned that a typewriter "serves to disclose whether a bettor *has* won or lost, but not to determine whether he *shall* win or lose"); Plotnick v. Pa. Pub. Util. Comm'n, 18 A.2d 542, 552 (Pa. Super. Ct. 1941) (stating "that a telephone or telegraph appliance used to receive and furnish information, even in connection with a pool-selling or book-making establishment," does not constitute a "gambling machine or device").

364 CAL. PENAL CODE § 330.

365 *See, e.g.*, People v. Rooney, 221 Cal. Rptr. 49, 51 (Ct. App. 1985) (charging defendant with bookmaking under Penal Code section 337a for accepting wagers on professional football games over the telephone); People v. Silvers, 16 Cal. Rptr. 489, 490 (Ct. App. 1961) (convicting defendant of violating Penal Code section 337a for recording and registering bets upon the result of a football game).

366 *See* CAL. PENAL CODE § 337a (West 2010). The Legislative Analyst also views sports betting as being outside the scope of Penal Code section 330's prohibitions. Letter from Gabriel Petek, Legis. Analyst, Legis. Analyst Off., to Hon. Xavier Becerra, Att'y Gen. of Cal. (Jan. 3, 2020), http://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report%2819-0029A1%29.pdf [http://perma.cc/D2BQ-LE7R] ("State law limits the type of gaming that can occur in California. For example, state law prohibits wagering on the outcomes of contests between animals and/or people (including sporting events). It also prohibits banking and percentage games played with cards, dice, or other devices . . . .").

determined.[367] In sports wagering, the athletic competitions or sporting events on which the bets or wagers are placed by patrons usually occur and are decided at locations beyond the casino's four walls.[368] Most major sporting events—with the exception of the occasional high-profile professional boxing match or mixed martial arts competition—are held at locations external to a casino environment.[369] By contrast, "casino-style" games (such as banked card games, roulette, craps, and slot machines) are played—and their outcomes are primarily determined—within the "four walls" of a casino.[370]

This proved to be a critical distinction under New Jersey law in effect at the time that section 19(e) was enacted. In *In re Casino Licensees*, a New Jersey court held that sports betting was not a permitted form of "casino gambling" under New Jersey law because it did not take place "completely within the confines of a casino," as required by that state's constitution and gambling statutes.[371] As the court explained:

> The Commission's conclusion that sports betting is not a permitted form of gambling in Atlantic City's casinos is consistent with the constitutional and statutory scheme which, with one exception, permits only those games which take place completely within the confines of a casino. . . . Except for constitutionally-authorized simulcast horse race betting, gambling casinos may operate only those games conducted solely in-house. They may not offer betting on events which take place or where the result is determined at a location outside a casino's four walls.[372]

The external location of the underlying sporting events also highlights key regulatory differences between sports betting and casino-style gaming. As Professors Miller and Cabot point out, "[r]egulatory structures in place to protect the integrity of casino gambling have limited application to sports wagering."[373] State regulators can "tightly control" the regulation of in-house

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367 *See* Jennifer Roberts & Greg Gemignani, *Who Wore It Better? Federal v. State Governmental Regulation of Sports Betting*, 9 UNIV. NEV. L.V. GAMING L.J. 77, 90 (2019).

368 *See id.*

369 *See id.*

370 *See* Boardwalk Bros., Inc. v. Satz, 949 F. Supp. 2d 1221, 1230 (S.D. Fla. 2013) ("'Casino-style games' refers to the types of games that are commonly played in a casino."); *see also* Roberts & Gemignani, *supra* note 367, at 90 ("[S]ports wagering is different than casino gambling because the sport event upon which wagers are made occurs outside of the four walls of the casino, unlike slot machines or table games.").

371 *In re* Casino Licensees, 633 A.2d, 1050, 1054–55 (N.J. Super. Ct. App. Div. 1993).

372 *Id.*

373 Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNIV. NEV. L.V. GAMING L.J. 153, 166 (2018).

casino games played exclusively within the casino.[374] By contrast, since sporting events "do not occur in the casino nor typically the jurisdiction where the casino is located . . . the integrity of the sporting event is largely outside the control of the state regulators."[375]

B. Skill vs. Chance Distinction

A second fundamental distinction between "casino-style" gaming and sports betting centers on the essential character of the underlying activity. Casino-style games are classified as "games of chance" under most states' laws (including California law)[376] because the element of chance (or luck) predominates over skill.[377] This proposition is so well-ingrained in the law that one California appellate court even took judicial notice of the fact that casino-style games offered at Lake Tahoe, Nevada gambling casinos "consist[] primarily of 'games of chance' insofar as the law is concerned, i.e., games which by definition are contests in which chance predominates over skill."[378] Courts and legislatures around the country have likewise recognized that "casino-style" gaming necessarily refers to games of chance played entirely within a casino, with blackjack, craps, roulette, baccarat and slot machines frequently cited as the paradigmatic examples of casino-style gaming.[379]

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374 *Id.* at 166–67.

375 *Id.* at 167.

376 California courts apply the "dominant factor" test for assessing whether a particular contest is a "game of chance" or a "contest of skill." Bell Gardens Bicycle Club v. Dep't of Just.*,* 42 Cal. Rptr. 2d 730, 749 (Cal. Ct. App. 1995) ("[T]he test in California is whether the game is dominated by chance, not whether the winner of the game is determined solely by chance.") (emphasis omitted).

377 Nez Pierce Tribe v. Cenarrusa, 867 P.2d 911, 916 (Idaho 1993) (referring to blackjack, craps, roulette, poker, baccarat, keno and slot machines as games involving "pure chance"); State v. Eisen, 192 S.E.2d 613, 616 (N.C. Ct. App. 1972) ("In the game of blackjack . . . we think the element of chance clearly dominates the element of skill . . . ."); *In re* Advisory Opinion to the Governor, 856 A.2d 320, 328–29 (R.I. 2004) (recognizing that "chance is the dominant factor" in casino games such as roulette, blackjack, craps, poker and slot machines).

378 *In re* Marriage of Shelton, 173 Cal. Rptr. 629, 632, n.3 (Cal. Ct. App. 1981) ("Although perhaps involving some slight element of skill, successful gambling of the type afforded at the Lake Tahoe casinos depends mainly upon good luck . . . . We take judicial notice that the gambling offered at the casinos at Lake Tahoe consists primarily of 'games of chance' insofar as the law is concerned, i.e., games which by definition are contests in which chance predominates over skill."); Score Family Fun Ctr. v. Cnty. of San Diego, 275 Cal. Rptr. 358, 361 (Cal. Ct. App. 1990) ("[W]e note that there are a number of cases holding poker and other casino games are predominantly games of chance particularly when played against a machine.").

379 *See, e.g.*, United Auburn Indian Cmty. of Auburn Rancheria v. Newsom, 472 P.3d 1064, 1068 (Cal. 2020) (referring to "casino-style games such as slot machines, roulette and blackjack"); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 278 (8th Cir. 1993) (including craps and blackjack as "casino-type games"); Lac du Flambeau Band of Lake

By contrast, wagering on sporting events is widely considered to be a contest of skill. As New York's Attorney General put it, sports betting involves "*substantial (not 'slight') skill*" including "the exercise of a bettor's judgment in trying to select the winners or losers of such contests, and to figure [out] the point spreads."[380] In *United States v. DiCristina*,[381] the United States Attorney for the Eastern District of New York acknowledged that "[s]ports betting . . . is widely considered to require a significant amount of skill to be conducted successfully," observing that "[s]ports bettors have every opportunity to employ superior knowledge of the games, teams and players involved in order to exploit odds that do not reflect the true likelihoods of the possible outcomes."[382] The United States Attorney explained that "[w]hile a sports bettor cannot (legally) influence the outcome of a game, sports bettors can and do influence the 'betting line' or 'point spread' in order to improve their odds of making a successful bet."[383]

The question of whether sports betting is a game of chance or a contest of skill has been the subject of a number of state attorney

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Superior Chippewa Indians v. Wisconsin, 770 F. Supp. 480, 482 n.1, 483 (W.D. Wis. 1991) (including blackjack and slot machines as "casino games"); Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1025–1026 (2d Cir. 1990) ("[C]asino-type games of chance" that are permitted under Connecticut law for a nonprofit organization's "Las Vegas nights" fundraiser include "blackjack, poker, dice, money-wheels, roulette, baccarat"); Dalton v. Pataki, 780 N.Y.S.2d 47, 62 (App. Div. 2005) (listing types of "Las Vegas night casino-type gambling, such as roulette, blackjack and dice games"), *aff'd and modified*, 835 N.E.2d 1180 (N.Y. 2005); State *ex rel.* Chwirka v. Audino, 260 N.W.2d 279, 284 (Iowa 1977) (finding that "casino type games" are games such as blackjack, craps, and roulette); Green v. Commissioner, 66 T.C. 538, 540, 547 (U.S. T.C. 1976) (noting that "[t]he instant case does not involve bookmaking but casino style gambling," such as "dice tables," a "roulette wheel," "blackjack tables," and "slot machines"); OHIO REV. CODE ANN. § 3772.01 (West 2018) ("'Casino gaming' means any type of slot machine or table game wagering, using money, casino credit, or any representative of value, authorized in any of the states of Indiana, Michigan, Pennsylvania, and West Virginia as of January 1, 2009 . . . .").

380 N.Y. Op. Att'y Gen. 11, No. 84-F1, 1984, at *10 (1984) (noting further that "[i]n the sports betting context there is no such thing as a random chance event") (emphasis added); *see also* Garrett Downing, *Career Sports Bettors Battle the Betting Line*, LAS VEGAS SUN (Mar. 30, 2009), http://lasvegassun.com/news/2009/mar/30/career-sports-bettors-battle-betting-line/ [http://perma.cc/8NKE-5C9A] (describing research and analysis conducted by professional sports bettors).

381 United States v. DiCristina, 886 F. Supp. 2d 164 (E.D.N.Y. 2012), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013).

382 Government's Memorandum of Law in Opposition to Defendant's Rule 29 Motion at 30, United States v. DiCristina, 886 F. Supp. 2d 164 (E.D.N.Y. 2012) (No. 1:11-CR-00414-JBW).

383 Brief & Special Appendix of the United States at 32, United States v. DiCristina, 886 F. Supp. 2d 164 (E.D.N.Y. 2012) (No. 12-3720) ("Specifically, a gambler intending to make a large bet on one team may first place one or more smaller, strategic bets on the other team to move the betting line and make it more favorable for the ultimate intended bet.") (citing Downing, *supra* note 380 ("noting that professional sports bettors 'try to move the betting lines' to improve their odds")).

general opinions, all of which have recognized the important role that skill plays in sports betting. For example, in a 1991 advisory opinion, West Virginia's Attorney General concluded that "the amount of skill involved in sports betting places this form of gambling outside the parameters of a lottery" (which is a game of chance).[384] As the West Virginia Attorney General observed, "betting on sports activities is usually performed by those who either have or think they have a degree of knowledge about the game in question . . . . Those who bet on sports . . . usually take into consideration past records, who has the home field advantage, and a myriad of other factors that may influence the outcome of the event."[385] Furthermore, the Attorney General added, "statistics and other materials pertinent to sporting events are readily available for those who wish to study them and then place an informed bet using reason and judgment."[386] Drawing upon this array of information, "[t]he person making the bet is utilizing his knowledge about the sporting activity in order to enhance his chances of winning."[387] The use of such knowledge, the attorney general declared, "is the employment of skill."[388]

Colorado's Attorney General reached a similar conclusion, opining that sports betting is not a prohibited lottery under the Colorado Constitution "because participants are able to exercise sufficient skill in selecting their wagers such that chance is not the 'controlling factor' in an award."[389] As the Attorney General explained:

> [S]ports bettors can use skill to choose who they believe will win a sporting event or whether some sub-event will occur (such as a point spread or the outcome of a particular portion of an event). In selecting their bets, today's sports bettors have . . . team records; players' past performance data (amateur and professional); past head-to-head data; injury reports; facility conditions; weather conditions; and more.[390]

The Colorado Attorney General ultimately concluded that "because a bettor can exercise skill in reviewing this information and selecting a wager, the element of chance is not the controlling factor in commercial sports betting."[391]

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384 Legality of Sports Betting, 64 W. Va. Op. Att'y Gen. 8 (Jan. 8, 1991), 1991 WL 628003, at *4.

385 *Id.*

386 *Id.*

387 *Id.*

388 *Id.*

389 Legality of Commercial Sports Betting, Colo. Op. Att'y Gen. 18-02 (Aug. 2, 2018), 2018 WL 3873198, at *4.

390 *Id.* at *5.

391 *Id.*

Tennessee's Attorney General likewise opined that some sports bets, such as "a contest that involves entrants placing bets on the outcome of an individual professional baseball game . . . would appear to fall outside the parameters of Tennessee's lottery prohibition" due to the predominance of skill involved in sports wagering.[392] Acknowledging the similarities between pari-mutuel betting on horse racing and betting on sporting events, the Tennessee Attorney General examined the decisional law in the horse racing context and made the following observation:

> Courts have generally reasoned that chance does not control the outcome of horse races because the skill of the jockey and the condition, speed, and endurance of the jockey's horse are all factors that affect the result of the race. Moreover, bettors on horse races have sources of information that they may review before placing their bets. This information includes not only data on the actual race, but also previous records on the past performance of the jockeys and the horses. These sources allow the bettor to exercise his judgment and discretion in determining the horse on which to bet. Thus, courts generally reason that chance does not predominate.[393]

Drawing a straight line from horse race wagering to sports betting, the Tennessee Attorney General reasoned that "[i]n a like manner, the winner of a professional baseball game is primarily determined on the participants' skill. And persons who bet on such a game have a multitude of available sources of information to aid them in placing informed bets."[394] Addressing the ultimate question of whether a constitutional amendment was required for the legalization of sports betting in Tennessee, the Attorney General advised Senator Brian Kelsey, the state lawmaker who requested the advisory opinion, that "[i]f skill is the dominant factor in determining the outcome of the contest, the [legislature] may legalize the contest solely through legislative action without a constitutional amendment."[395] Less than seven months later, the Tennessee Legislature enacted the Tennessee Sports Gaming Act,[396] necessarily reaching the conclusion that skill (rather than chance) is the "dominant factor" in determining the outcome of a sports betting contest.[397]

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392 Legality of Sports Betting in Tennessee, Tenn. Op. Att'y Gen. 18-48 (Dec. 14, 2018), 2018 WL 6982306, at *3.

393 *Id.* at *3, *3 n.4 (citing sixteen out-of-state authorities).

394 *Id.* at *3.

395 *Id.*

396 *See generally* TENN. CODE ANN. § 4-51-301–330 (West 2019).

397 *See* Legality of Sports Betting in Tennessee, Tenn. Op. Att'y Gen. 18-48 (Dec. 14, 2018), 2018 WL 6982306, at *3.

C. Federal Law Distinctions

The conclusion that sports wagering does not fall within the definition of "casino-style" gaming is buttressed by federal law. For example, the federal regulations governing the conduct of gaming on Indian lands—promulgated pursuant to IGRA[398]—treat sports betting as a separate and distinct form of class III gaming, mentioning it in a different subparagraph than house banked card games (such as blackjack), casino games (such as roulette, craps, and keno) and slot machines.[399] The legislative history of IGRA likewise supports this segregation. As stated in the August 13, 1988 Senate Report on IGRA, "[c]asino gaming in the United States typically consists of card games like blackjack and poker, craps, roulette and slot machines."[400]

The clear distinction between sports betting and casino-style gaming is also reflected in the Federal Wire Act, which prohibits anyone "engaged in the business of betting or wagering" from knowingly utilizing a "wire communication facility" to transmit "bets or wagers" or "information assisting in the placing of bets or wagers on any sporting event or contest" through the channels of interstate or foreign commerce (i.e., across state lines).[401] Every federal circuit court to have considered the issue has concluded that the Wire Act applies only to wagering on sporting events, and does not reach other forms of gambling, such as casino gambling.[402]

Federal tax law also distinguishes between sports betting and casino-style gaming. The Federal Wagering Tax Act imposes an excise tax on all "wagers,"[403] with the applicable tax rate depending on whether or not the wager is "authorized" (i.e., legal)

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398 *See generally* Indian Gaming Regulations Act, 25 U.S.C. § 2701–21.

399 *See* 25 C.F.R. § 502.4 (2012) (defining class III gaming under IGRA as, *inter alia*, "(a) [a]ny house banking game including but not limited to—(1) [c]ard games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games); (2) [c]asino games such as roulette, craps, and keno; (b) [a]ny slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance; (c) [a]ny sports betting and parimutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai").

400 S. REP. NO. 100-446, at 24 (1988), http://www.nigc.gov/images/uploads/Senate%20Rept%20100-466.pdf [http://perma.cc/QL5E-FSD7] (setting forth the United States Department of Justice's position on S.555, the Senate bill which became IGRA).

401 18 U.S.C. § 1084(a).

402 *See* United States v. Lyons, 740 F.3d 702, 718 (1st Cir. 2014) ("The Wire Act applies only to 'wagers on any sporting event or contest,' that is, sports betting.") (citing *In re* MasterCard Int'l Inc., 313 F.3d 257, 263 (5th Cir. 2002)); N.H. Lottery Comm'n v. Rosen, 986 F.3d 38, 61–62 (1st Cir. 2021) ("Like the Fifth Circuit, and the district court in this case, we therefore hold that the prohibitions of section 1084(a) apply only to the interstate transmission of wire communications related to any 'sporting event or contest.'").

403 *See* 26 U.S.C.A. § 4401(a) (West).

in the state in which it is made.[404] This tax is imposed on each person "who is engaged in the business of accepting wagers" or "who conducts any wagering pool or lottery."[405] The federal statute and regulations define a "wager" as any bet or wager: (i) made on a *sporting event or contest* with a person engaged in the business of accepting wagers; (ii) placed in a wagering pool on a *sporting event or contest*, if such pool is conducted for profit; or (iii) placed in a lottery conducted for profit.[406] While sports wagering unquestionably falls within the scope of this definition (as the italicized language indicates),[407] "casino-style" games (including slot machines,[408] banked card games, dice games, and roulette) are specifically exempted from the federal excise tax on wagers.[409]

Likewise, in the Interstate Transportation of Wagering Paraphernalia Act—which prohibits the distribution of wagering paraphernalia or other devices in interstate or foreign commerce for use in "bookmaking," "wagering pools with respect to a sporting event," or "numbers, policy, bolita, or similar

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404 *Id.* § 4401 (a)(1)–(2) (stating that for wagers "authorized" under the law of the state in which it is accepted, the excise tax is equal to 0.25 percent of the amount wagered and for wagers that are not authorized by state law, the federal excise tax is equal to 2 percent of the amount wagered).

405 26 U.S.C. § 4401(c).

406 26 U.S.C. § 4421(1); 26 C.F.R. § 44.4421-1(a) (2020).

407 *See* Internal Revenue Service, *Sports Wagering*, SMALL BUSINESS & SELF-EMPLOYED, http://www.irs.gov/businesses/small-businesses-self-employed/sports-wagering [http://perma.cc/AJW4-UN4Z] (last visited Aug. 16, 2021) ("Sports wagering, like wagering in general, is subject to federal excise taxes, regardless of whether the activity is allowed by the state.").

408 *See* 26 U.S.C. § 4402(2) ("No tax shall be imposed . . . [o]n any wager placed in a coin-operated device . . . ."); 26 C.F.R. § 44.4402-1(b)(1) (2020) (noting that coin-operated devices include "'slot' machines"); Miscellaneous Revenue Act of 1982, H.R. REP. NO. 97-929, at 42 (1982) (noting that the federal excise tax on wagering is not imposed on "wagers placed in coin-operated gaming devices, such as slot machines").

409 Under the Internal Revenue Code, the term "lottery" does not include any game in which the wagers are placed, the winners are determined, and the prizes are distributed "*in the presence of all persons placing wagers in the game* . . . ." 26 U.S.C. § 4421(2)(A) (emphasis added). This statutory provision is interpreted as meaning that "no tax would be payable with respect to wagers made in a bingo or keno game since such a game is usually conducted under circumstances in which the wagers are placed, the winners are determined, and the distribution of prizes is made in the presence of all persons participating in the game." 26 C.F.R. § 44.4421-1(b)(2)(i) (2020). "For the same reason, no tax would apply in the case of card games, dice games, or games involving wheels of chance, such as roulette wheels . . . ." *Id.*; Eugene R. Thrash v. O'Donnell Etc., 1970 WL 22622, at *1 (I.R.S. Jan. 15, 1970) action on dec., 4306-66 (Oct. 29, 1969) ("The games contemplated within such exclusion were identified as card games such as draw poker, stud poker, and blackjack; roulette games; [and] dice games such as craps . . . .") (citations omitted); *see also* COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING, GAMBLING IN AMERICA, at 17 (1976), http://archive.org/details/gamblinginameric00unit/page/viii/mode/2up?view=theater [http://perma.cc/Z6VV-QX9P] ("The wagering taxes do not apply to . . . casino games; they apply only to sports and horse bookmaking and numbers games.").

game"[410]— Congress created an exemption for state-operated lotteries conducted under state law and expressly excluded sports wagering from the meaning of the term "lottery."[411] There is no similar exemption for casino-style games of chance.[412]

D. Governmental Studies

Consistent with the above, every significant gambling study commissioned by either the federal government or the State of California has explicitly recognized that sports wagering is a different species of gambling than "casino-style" gambling. For example, the National Gambling Impact Study Commission ("NGISC"), which was established by Congress in 1996 to "conduct a comprehensive legal and factual study of the social and economic impacts of gambling in the United States,"[413] made the following observations in its Final Report published in 1999:

- "[T]he gambling 'industry' is far from monolithic. Instead, it is composed of *relatively discrete segments*: *Casinos* (commercial and tribal), state-run lotteries, pari-mutuel wagering, *sports wagering*, charitable gambling, Internet gambling, stand-alone electronic gambling devices . . . and so forth."[414]
- "*Unlike casinos* or other destination resorts, *sports wagering* does not create other economic sectors."[415]
- "Most Internet gambling sites offer *casino-style gambling*, such as blackjack, poker, slot machines, and roulette. . . . *Another form of gambling* available on the Internet is *sports gambling* . . . .").[416]

The NGISC Final Report, which was addressed to the President, Congress, State Governors, and Native American Tribal Leaders, has been described by scholars as "the most comprehensive gambling study ever conducted in the United States."[417]

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410 18 U.S.C. § 1953(a).

411 18 U.S.C. § 1953(d)(4)(B) ("[T]he term 'lottery' . . . does not include the placing or accepting of bets or wagers on sporting events or contests.").

412 *See generally id.* § 1953.

413 National Gambling Impact Study Commission Act, Pub. L. No. 104-169, § 4(a)(1), 110 Stat. 1482, 1484 (Aug. 3, 1996).

414 NAT'L. GAMBLING IMPACT STUDY COMM'N., NATIONAL GAMBLING IMPACT STUDY COMMISSION REPORT, 1-2 (1999) [hereinafter NGISC FINAL REPORT] (emphasis added), http://govinfo.library.unt.edu/ngisc [http://perma.cc/DRE8-25LM].

415 *Id.* at 2-14, 3-10 (emphasis added).

416 *Id.* at 5-3 (emphasis added).

417 R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 MISS. L.J. 565, 566 (2002).

An earlier federal gambling study, published in 1976 by the Commission on the Review of the National Policy Toward Gambling,[418] similarly viewed sports wagering and casino gambling as separate and distinct categories of gambling. The Final Report of the Commission—entitled *Gambling in America*—referred to "casino gambling" and "sports bookmaking" as among the "various forms of gambling" that have been sanctioned by state governments,[419] and treated them as separate gambling categories throughout the report.[420] The *Gambling in America* study was cited by the California Supreme Court in *Hotel Employees* to support the court's factual finding that "banked table games and gaming devices, i.e., slot machines" were "unique to or particularly associated" with Nevada casinos in 1984.[421]

Gambling studies published by California state agencies likewise recognize sports wagering and casino gambling as separate categories of gambling. In 1997, Roger Dunstan of the California Research Bureau authored a report that examined gambling policy in California and nationally. In his report, Mr. Dunstan characterized "sports betting" as "the largest category of gambling *after casino games*."[422] In another report published the following year, Mr. Dunstan explained that "casino gaming is a term used in the industry and generally means a variety of banked games including slot machines, blackjack, baccarat, roulette, and craps."[423]

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418 The Commission on the Review of the National Policy Toward Gambling was established by Congress as part of the Organized Crime Control Act of 1970 (P.L. 91-452, 84 Stat. 922, which added section 1955 to Title 18). Its mission was "to study gambling as it exists in America and to develop recommendations for the States to follow in formulating their own gambling policies." COMM'N. ON THE REVIEW OF THE NAT'L. POLICY TOWARD GAMBLING, GAMBLING IN AMERICA, at x, 12 (1976) http://archive.org/details/gamblinginameric00unit?view=theater [http://perma.cc/Z6VV-QX9P].

419 *Id.* at 5.

420 *See id.* at 58 ("The games covered in detail were horse betting, lotteries, casinos, bingo, sports betting, and numbers."); *id.* at 62 (including a chart denoting gambling participation by "type of game," with "[l]egal casinos" and "[s]ports books" listed as separate gambling categories); *id.* at 71 ("Casino gambling is viewed as potentially the most dangerous form of gambling—the only one where a majority of bettors . . . think that legalization would attract racketeers . . . . They also see casinos as creating more jobs than numbers, lotteries, or sports betting . . . ."); *id.* at 62–63 (providing chart comparing different forms of gambling, with "casinos" and "sports" once again listed separately) (emphasis added); *id.* at 108 (noting "the growth of other forms of gambling such as lotteries and off-track betting, and movements to legalize forms of gambling such as sports betting and casinos.").

421 Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 1003 (Cal. 1999).

422 ROGER DUNSTAN, GAMBLING IN CALIFORNIA I-1 (Cal. Rsch. Bureau, Cal. State Library, CRB-97-003, 1997) (emphasis added).

423 DUNSTAN, *supra* note 71, at 20 (interpreting the term "casino" in the specific context of section 19(e)'s ban against Nevada and New Jersey-style casinos).

Nearly one decade later, Charlene Wear Simmons, the Assistant Director of the California Research Bureau at the time, published a similar report at the request of the Attorney General.[424] Page 7 of Ms. Simmons' report includes a chart listing the "21 Different Forms of Gambling" that were permitted by state governments as of 2003.[425] Among the separately-listed gambling categories are "*Casinos and Gaming*" (denoted as permitted by fourteen states) and "*Sports Betting*" (permitted by four states).[426] Her report also includes another chart detailing national gambling consumption habits by category for each of 1989, 1996, and 2003, with casino gambling and sports wagering again designated as separate and distinct categories of gambling.[427]

E. Public Opinion Polls and Surveys

Along the same lines, public opinion polls conducted at or near the time of Proposition 37 differentiated between casino gambling and sports betting.[428] A 1983 survey of California residents conducted by The Field Institute (led by Mervin Field, described by one federal judge as "an eminent California political polling expert"[429]) asked respondents to indicate whether they supported the legalization of various forms of gambling, such as "casino gambling, betting on jai alai, sports betting," and "off-track horse race betting."[430] The Field Institute's 1983 survey—the only known public opinion poll conducted in California around the time of the Proposition 37 vote—reported that public opinion was "evenly split when it comes to whether casino gambling, betting on jai-alai, sports betting and card-parlor poker gambling should be legalized on a statewide basis."[431]

Other public opinion polls conducted during the late 1970's and early 1980's likewise treated casino gambling and sports betting as separate and distinct categories of gambling. For

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424 CHARLENE WEAR SIMMONS, GAMBLING IN THE GOLDEN STATE 1998 FORWARD (Cal. State Library, Cal. Rsch. Bureau, CRB-06-004, 2006), http://oag.ca.gov/sites/all/files/agweb/pdfs/gambling/GS98.pdf [http://perma.cc/UV44-EY3H].

425 *Id.* at 7.

426 *Id.* (emphasis added).

427 *Id.* at 10.

428 *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 120–21 (1995) (noting that courts will consult, among other sources of information, "exit polls or other opinion surveys" in determining voter intent).

429 Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1291 (E.D. Cal. 1997).

430 *State Lottery, Off-Track Horse Race Bets Gain Support in Poll*, L.A. TIMES, May 28, 1983, at 3.

431 *Id.* (noting that "[p]roportions ranging from 42% to 52% favor legalizing and taxing these forms of gambling.").

example, a 1982 Gallup Organization survey commissioned by the trade journal Gaming Business showed that fifty-one percent of the public was in favor of legalizing "casino gambling at resort areas," while only forty-eight percent favored "legal betting on sports events."[432] A 1980 poll conducted by University of Connecticut Institute for Social Inquiry reported that fifty-five percent of respondents said that "casino gambling should be illegal," and "sports betting is opposed by [fifty] percent of the respondents."[433] Finally, a statewide poll in Gannett News Service in the late 1970's showed that New York State residents "narrowly oppose[d] legalizing casino gambling" by a forty-eight percent to forty-seven percent margin, but "support[ed] state-run betting on such sports as hockey, basketball and football, [fifty-nine] percent to [thirty-six] percent."[434]

The separate categorization of casino gambling and sports betting in public opinion surveys is likely indicative of the fact that the consumer behaviors and perceptions around the two activities are markedly different. Millions of people attend or watch sporting events every year without placing a bet or wager on the outcomes. Professional and collegiate sporting events have intrinsic entertainment value independent of any gambling activity. By contrast, "casino-style" games (such as slot machines and banked table games) exist solely to facilitate gambling.[435]

F. Sports Betting Is Not Endemic to a Casino Environment

Despite the vast differences between sports wagering and casino gambling—both in terms of their essential characteristics

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432 Gayle Cook, *A Hard Look/Trends Towards Legal Gambling*, S.F. EXAMINER, Sept. 4, 1983, at A1, A22; *see also Most Americans Favor Some Legalized Gambling*, SANTA MARIA TIMES, Oct. 6, 1982, at 24 (noting that "[l]otteries were favored by 72 percent, followed by off track betting at 54 percent and casino gambling at 51 percent. Professional sports betting was favored by 48 percent of those surveyed and jai alai by 47 percent.").

433 Jack Shea, *Survey Shows 82% of Residents Back High School Skills Exam*, HARTFORD COURANT, Mar. 4, 1980, at 8.

434 *Casino Gambling a Loser; Sports Betting Big Favorite*, JOURNAL-NEWS, Feb. 10, 1977, at 20 (stating that "New Yorkers apparently draw a fine line between gambling on a roulette wheel and placing a bet on a football game.").

435 Joey Parsons, *Better Bettors: Regulatory Proposals to Reduce Societal Costs Associated with Gambling Disorder in States That Permit Legal Sports Betting*, 44 LAW & PSYCH. REV. 267, 283–84 (2020).

> Sports betting is distinct from many other forms of gambling because millions of people enjoy watching sports without involving any type of betting. For instance, 98.2 million people watched Super Bowl LIII in 2019, but there is no demonstrable market for live feeds of slot machines. While slot machines and other casino games exist solely for gambling, sports betting is different because the bets enhance a form of entertainment that is already occurring.

Id.

and treatment under the law—there are some who might argue that sports wagering should still be categorized as "casino-style" gambling because an increasing number of states (such as Nevada, New Jersey, Indiana, Iowa, Michigan, Mississippi, and Pennsylvania, to name just a few) permit sportsbooks to be located within a casino environment. However, the mere fact that one can go to a casino to place a wager on professional or collegiate sporting event taking place at sports venues located beyond the "four walls" of a casino—in some cases, hundreds or thousands of miles away—does not render that activity "casino gambling" any more than having a race book inside a casino[436] would transform pari-mutuel wagering on horse races into "casino-style" gaming simply because the bet is made at a race book located within a casino. No one who visits a race book at a casino to bet on the Kentucky Derby would seriously consider that activity to be "casino-style" gaming. Under the same logic, a sportsbook customer at the same casino venue is not engaging in "casino-style" gaming when he or she places a bet on the Super Bowl.

While sports betting can certainly take place inside a casino, it is not endemic to a casino environment. As the legislative history of PASPA made abundantly clear nearly thirty years ago, sports betting can be offered in a variety of different settings, not just at casinos.[437] The 1991 Report of the Senate Judiciary Committee, which is the primary source of PASPA's legislative history,[438] observed that federal legislation prohibiting state-sponsored sports betting was warranted because many states at that time were considering or reviewing the possibility of offering sports wagering as a lottery game, on river boats, and as an amenity at horse racetracks and off-track betting parlors—even mentioning the prospect of Florida lawmakers including sports betting in that state's pari-mutuel betting law in the early 1990's.[439]

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436 Several states, such as Mississippi and Nevada, allow licensed casinos to operate a race book on the premises of the licensed gaming establishment. *See* MISS. CODE ANN. § 75-76-89(2) (2021); NEV. REV. STAT. ANN. § 463.160 465.186 (West 2021). As distinguished from a sportsbook, a "race book" generally refers to "the business of accepting wagers upon the outcome of any event held at a [race]track which uses the pari-mutuel system of wagering." MISS. CODE ANN. § 75-76-5(cc) (2021); NEV. REV. STAT. ANN. § 463.01855 (West 2021).

437 S. REP. NO. 102-248, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556 [hereinafter "SENATE REPORT 102-248].

438 *See* Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 216 (3d Cir. 2013) (noting that PASPA's legislative history "is sparse" and referring to Sen. Rep. 102-248 as the relevant legislative history), *abrogated on other grounds by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

439 S. REP. NO. 102-248, at 3556.

That observation proved to be quite prescient. In the little over three years that have elapsed since PASPA was declared unconstitutional, an increasing number of states have enacted statutes allowing sports wagering to be legally offered in a wide spectrum of "non-casino" settings, such as through the state-operated lottery[440] and as an amenity at horse racetracks, professional sports venues, bars and restaurants, as well as over the Internet. For example, New Hampshire and the District of Columbia, which do not even have casinos, will allow sports betting to take place in commercial retail establishments and over the Internet.[441] Illinois, Arizona, Maryland, and the District of Columbia have enacted legislation allowing sportsbooks at professional sports stadia and arenas.[442] In 2019, Tennessee authorized sports wagering to take place exclusively over the Internet, with no casino affiliation or partnership required.[443] In fact, there are more states that allow sports wagering to take place outside of a casino environment than there are states which confine it to those establishments (or through casino-affiliated websites).[444]

Along the same lines, the fact that several states have legalized sports betting as a constitutionally *authorized* form of

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> States are considering a wide variety of State-sponsored gambling schemes. Some would allow sports gambling on river boats, others would take bets on sports at off-track betting parlors, still others propose casino-style sports books. Florida's statute authorizing parimutuel animal racing is expiring and legislators there are considering including some form of sports betting in the reauthorizing bill.

Id.

440 Delaware, New Hampshire, Montana, and Oregon are among the growing number of states—in addition to the District of Columbia—that offer sports wagering as a lottery game. *See* Jill R. Dorson, *Look at Sports Betting Lottery States: Do Monopolies Leave Money on the Table?*, SPORTSHANDLE (Sept. 24, 2020), http://sportshandle.com/lottery-states-revenue-outlook/[http://perma.cc/2M2C-FGQZ].

441 *See* N.H. REV. STAT. §§ 287-I:1, I:5. (2021); D.C. CODE § 36-621.06 (2021).

442 *See* Andrew J. Silver, *Following Trend, Arizona Pro Teams Get In On Sports Wagering Action*, FORBES (Apr. 16, 2021, 10:51 AM EDT), http://www.forbes.com/sites/andrewjsilver/2021/04/16/following-trend-arizona-pro-teams-get-in-on-sports-wagering-action/?sh=756317d72d21 [http://perma.cc/K6J4-K7ZA].

443 *See* Natalie Allison, *Tennessee Governor to Allow Sports Betting to Become Law Without Signature*, TENNESSEAN (Apr. 30, 2019 11:49 AM CT) http://www.tennessean.com/story/news/politics/2019/04/30/tennessee-sports-betting-gambling-bill-governor/3626390002/ [http://perma.cc/JMJ8-W45K] ("After a vote of approval last week in the House of Representatives, the Senate on Tuesday passed legislation that would permit online sports gambling beginning July 1, while continuing to prohibit the practice at brick-and-mortar locations.").

444 Of the thirty-two states that have legalized sports wagering since the demise of PASPA, only five states—Mississippi, New Mexico, North Carolina, South Dakota, and Washington—confine that activity to brick-and-mortar casinos. The remaining twenty-seven states—plus the District of Columbia—allow sports betting to be offered at other types of venues or over the internet. *See* Rovell, *supra* note 7.

casino gambling under their respective state constitutions does not, *a fortiori*, mean that sports betting is a constitutionally *prohibited* form of casino gambling in California. To the contrary, this underscores the difference between a constitutional *authorization* and a constitutional *prohibition*. For example, under the New York Constitution, "casino gambling" is an authorized activity—it is permitted at "no more than seven facilities as authorized and prescribed by the legislature."[445] This provision affords the New York Legislature the discretionary authority—and affirmative obligation—to define the scope of gaming activities that may be conducted at state-licensed casinos, including specifying the types of gambling games that such casinos are allowed to operate.[446] Acting pursuant to this direction, New York lawmakers have specified that sports betting is a constitutionally-*authorized* form of casino gambling in New York.[447] Likewise, in Arkansas and Rhode Island, sports wagering was approved as part of a constitutional *authorization* of casino gambling by a statewide voter referendum.[448]

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445 N.Y. CONST. art. I, § 9, cl. 1.

446 Daniel Wallach & Robert Rosborough, *Let New Yorkers Bet On Games Online: Restricting Sports Betting to Upstate Casinos Would Forfeit Millions in Tax Revenue*, DAILY NEWS (Feb. 22, 2019, 12:00 PM), http://www.nydailynews.com/opinion/ny-oped-let-new-yorkers-bet-on-games-online-20190219-story.html [http://perma.cc/3NVB-8XYE].

> Once a form of gambling is authorized, the Constitution gives the Legislature power to regulate the details of wagering. That's why the constitutional provisions authorizing the state lottery, pari-mutuel betting on horse races and casino gambling include the phrase "as may be authorized and prescribed by the legislature," meaning that it's up to lawmakers to "authorize and prescribe" how wagering on those constitutionally-permitted forms of gambling will work.

Id.

447 *See* N.Y. RAC., PARI-MUT. WAG. & BREED. LAW, § 1367 (McKinney 2020) (legalizing sports wagering at casinos in New York by statute); *see also* Letter from Gibson Dunn & Crutcher LLP to their clients and friends entitled New York State Legalizes Online Sports Wagering, at p. 1 (Apr. 13, 2021) http://www.gibsondunn.com/wp-content/uploads/2021/04/new-york-state-legalizes-online-sports-wagering.pdf [http://perma.cc/XV6R-SKBV] ("In 2013, New York State voters approved a constitutional amendment to allow the Legislature to authorize 'casino gambling' 'at' up to seven casinos in the State. . . . Pursuant to this constitutional authority . . . the Legislature legalized 'sports wagering' in New York State.").

448 *See* Jennifer McDermott, *GOP Activist Sues Rhode Island Over Launch of Sports Betting*, ASSOC. PRESS (May 2, 2019, 9:21 AM), http://abcnews.go.com/Sports/wireStory/gop-activist-sues-rhode-island-launch-sports-betting-62781306 [http://perma.cc/95ZV-FPR8]; David Fucillo, *Arkansas Voters Pass Issue 4, Issuing Licenses to Four Casinos That Includes Potential Sports Gambling*, SBNATION, (Nov. 7, 2018 7:03 AM EST), http://www.sbnation.com/nfl/2018/11/7/18070884/arkansas-midterm-election-results-2018-issue-4-casino-licenses-sports-gambling [http://perma.cc/BUY8-79HX]. But there are other states that have opted *not* to include sports betting within their state constitution's definition of casino gambling. *See, e.g.*, OHIO CONST. art. XV, § 6 ("'Casino gaming' means any type of slot machine or table game wagering, using money, casino credit, or any

By contrast in California, casino gambling is expressed constitutionally as a *restriction* or *limitation* on the state legislature's authority to act.[449] As such, in contrast to New York, where state lawmakers have the discretion to *include* sports wagering as a constitutionally *authorized* form of casino gambling, the California constitutional *prohibition* against the legislative authorization of casino-style gambling is to be strictly and narrowly construed *against* the application of the prohibition, with any and all doubts resolved in favor of legislature's authority to act.[450] Moreover, the strictly-and-narrowly construed California constitutional prohibition against casino gambling—as recognized by the California Supreme Court in *Hotel Employees*—is to be measured by the gaming activities that were operational in both Nevada and New Jersey casinos in 1984.[451] As such, the constitutional authorization of casino-based sportsbooks in New York, Arkansas, and Rhode Island does not bear on the distinctly different situation in California, which utilizes a different baseline for comparison and requires a strict and narrow construction.

CONCLUSION

The California Legislature's power to statutorily authorize sports betting flows from well-settled principles of constitutional interpretation that have been enshrined in California legal jurisprudence for well over a century. The application of these principles to the text of section 19(e), coupled with prior judicial interpretations of the pertinent constitutional language and a review of the available legislative history, yields a singular conclusion: that section 19(e)'s prohibition against the legislative authorization of "casinos" of "the type" that existed in Nevada and New Jersey in 1984 does not extend to sports wagering, which was not available nor even permitted in New Jersey casinos at that time. Notably, the outcome would be the same under either of the interpretive approaches suggested by the California Supreme Court in *Hotel Employees*: (1) when viewed through the lens of voter intent, sports betting is beyond the scope of section 19(e) because it is not gambling activity that was "unique to or particularly associated with" New Jersey casinos in 1984; and (2) if viewed through the lens of California statutory law, sports

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representative of value, authorized in any of the states of Indiana, Michigan, Pennsylvania and West Virginia as of January 1, 2009 . . . .").

449 *See* CAL. CONST. art. IV, § 19(e).

450 *See* Methodist Hosp. of Sacramento v. Saylor, 488 P.2d 161, 164–65 (Cal. 1971).

451 *See* Hotel Emps. & Rest. Emps. Int'l Union v. Davis, 981 P.2d 990, 1003–04 (Cal. 1999).

betting is not considered "casino-style" gaming within the parameters of Penal Code section 330. The Supreme Court's recent decision in *United Auburn*—repeatedly equating section 19(e) with a restriction on "casino-style" gaming and citing only Penal Code sections 330 and 330a as the statutory equivalent—confirms the limited scope of section 19(e).

Those who urge a contrary result either misread *Hotel Employees*, overlook *United Auburn*, or ignore several foundational principles of constitutional interpretation that clearly apply here. There is simply no getting around the fact that the supreme court found that there were two possible ways to interpret the phrase "casinos of the type currently operating in Nevada and New Jersey,"[452] and, as such, the legislature's action in adopting either of the Court's alternative constructions would be entitled to controlling weight under well-established supreme court precedent (as it should be, especially considering the source). The Legislature's adoption of a "court-approved" interpretation would also belie any assertion that the ensuing statutory enactment is "positively and certainly" opposed to, or in "plain and unmistakable conflict" with, the California Constitution.[453] To the contrary, a statutory construction that sports wagering is beyond the scope of section 19(e)—either because it is not "casino-style" gaming or does not constitute gaming activity which was "unique to or particularly associated with"[454] New Jersey casinos in 1984—would constitute "at least *a possible and not unreasonable construction* of the constitution"—which is all that is required under longstanding California Supreme Court precedent.[455]

The above constitutional principles amply support the Legislature's power to authorize sports wagering by statutory enactment. But when you also factor in two other well-settled principles of constitutional interpretation, that (1) restrictions and limitations on legislative power are to be strictly and

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452 *See* CAL. CONST. art. IV, § 19(3).

453 *Methodist Hosp.*, 488 P.2d 161, 166 (Cal. 1971).

> [C]ourts should not and must not annul, as contrary to the constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the constitution.

Id. (quoting City and Cnty. of S.F. v. Indus. Acc. Comm'n., 191 P. 26, 28 (Cal. 1920)) (emphasis added); Armstrong v. Cnty. of San Mateo, 194 Cal. Rptr. 294, 311 (Ct. App. 1983) ("The Legislature's interpretation cannot be declared void 'unless there is a *plain and unmistakable* conflict between the statute and the constitution.") (emphasis in original) (quoting *Methodist Hosp.*, 488 P.2d at 166).

454 Hotel Emps. Int'l Union v. Davis, 981 P.2d 990, 1003 (Cal. 1999).

455 488 P.2d at 166 (quoting *Indus. Acc. Comm'n.*, 191 P. at 29) (emphasis added).

narrowly construed, and (2) any doubt as to the legislature's power to act in a given case should be resolved in favor of the Legislature's action,[456] the suggestion that section 19(e) forbids the California Legislature from authorizing *any* form of gambling that was illegal in California in 1984 becomes even less credible.

Applying a strict and narrow construction of section 19(e) and resolving all doubts in favor of the Legislature's power to act, one would be hard-pressed to interpret section 19(e) as incorporating the *entirety* of the California Penal Code's prohibitions against gambling (encompassing 44 separately numbered sections), and, in particular, sports betting, especially when:

- The text of section 19(e) does not even refer to the California Penal Code, much less purport to silently incorporate *all* of its statutory prohibitions into the California Constitution;[457]
- The ballot pamphlet associated with Proposition 37—the approved ballot measure which added section 19(e) to the California Constitution—described the proposed constitutional amendment as prohibiting "gambling casinos" of "the type" that "exist" in "Nevada and New Jersey;"[458]
- Consistent with the ballot pamphlet analysis, the Chief Deputy of the Legislative Analyst's Office testified in a legislative hearing held just prior to the vote on Proposition

456 *Id.* at 165.

457 If the 1984 constitutional amenders had intended to incorporate within section 19(e) *all* forms of gambling that were prohibited by the California Penal Code, they could have stated so explicitly. For example, they could have drafted section 19(e) to read: "[t]he Legislature has no power to authorize, and shall prohibit, *gambling of any type* currently *prohibited under any California statute*." (emphasis added). Such anti-gambling language is not uncommon, as at least six states expressly prohibit "gambling" under their state constitutions subject to certain specified exceptions. *See* DEL. CONST. art. II, § 17 ("All forms of gambling are prohibited in this State except the following . . . ."); LA. CONST. art. XII, § 6(C)(1)(a) ("No law authorizing a new form of gaming, gambling, or wagering not specifically authorized by law prior to the effective date of this Paragraph shall be effective . . . ."); IDAHO CONST. art. III, § 20(1) ("Gambling is contrary to public policy and is strictly prohibited except for the following . . . ."); N.J. CONST. art. IV, § 7(2) ("No gambling of any kind shall be authorized by the Legislature . . . except that . . . ."); N.Y. CONST. art. I, § 9 ("except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling . . . shall hereafter be authorized or allowed within this state"); R.I. CONST. art. 6, § 22 ("No act expanding the types or locations of gambling which are permitted within the state or within any city or town therein or expanding municipalities in which a particular form of gambling is authorized shall take effect . . . ."). Instead, as the California Supreme Court readily acknowledged in *Hotel Employees*, the 1984 constitutional amenders "chose to define the prohibited institution"—i.e., casinos of the type currently operating in Nevada and New Jersey—"by reference to those states" i.e., Nevada and New Jersey. 981 P.2d at 1004.

458 *See supra* notes 53–59 and accompanying text.

37 that the proposed amendment applies only to "casino-type" gambling that "exists in Nevada and New Jersey;"[459]

- The Legislative Counsel's 1998 advisory opinion likewise interpreted section 19(e) as "incorporating the common and essential attributes of casino gambling permitted in Nevada and New Jersey" in 1984;[460]
- The intent of the 1984 constitutional amenders in enacting section 19(e), as acknowledged by the Supreme Court in *Hotel Employees*, was to prohibit a type of gambling house "unique to or particularly associated with Nevada and New Jersey" in 1984;[461]
- *Hotel Employees* identified *only one* Penal Code provision—section 330's prohibition against "casino-style" games—as having been elevated to a constitutional level by virtue of the enactment of section 19(e); and[462]
- A more recent California Supreme Court decision—*United Auburn*—repeatedly characterized section 19(e) as a restriction on "casino-style" gaming, and identified only Penal Code sections 330 and 330a (but not any other statutory provision) as the state law statutory prohibition against "casino-style" gaming.[463]

These interpretations—coming from a variety of different sources of California law yet *all* pointing to the same limited reach of section 19(e)—provide a much fuller picture than does an isolated judicial statement (i.e., "gambling activities including those statutorily prohibited in California, especially banked table games and slot machines")[464] taken completely out of context from *Hotel Employees* and uncritically applied to a species of gambling that was not even at issue in that case. A careful review of the above diverse sources of law, applying well-settled principles of constitutional interpretation, leads to the inescapable conclusion that sports wagering—a form of gambling that was not available in New Jersey casinos in 1984 and, in any event, is not "casino-style" gaming due to its "skill-predominant" character and the external location of the underlying contests—falls outside the limited scope of section 19(e). Therefore, the California Legislature has the power to authorize

459 *See supra* notes 60–62 and accompanying text.
460 *See supra* notes 206–213 and accompanying text.
461 *See* discussion *supra* Section II.A.
462 *See* discussion *supra* Section III.B.2.
463 *See* discussion *supra* Section III.B.3.
464 Hotel Emps. Int'l Union v. Davis, 981 P.2d 990, 1004 (Cal. 1999).

sports wagering exclusively through a statutory enactment without the need for an amendment to the California Constitution.

The California Legislature's inaction on the policymaking front would be rare among states that have legalized sports betting. With one notable exception,[465] every state that has legalized sports betting as of the date of this publication has adopted a legislatively-authorized statutory scheme.[466] By contrast, in California, the legalization of sports betting is currently being pursued exclusively through the ballot initiative process, with as many as four sports betting initiatives potentially appearing on the November 2022 statewide ballot.[467] As a result, important public policy considerations (i.e., establishing eligibility criteria for determining which entities are entitled to operate sports betting, whether to allow online sports betting, the taxation structure or other methodology for determining the allocation of revenues to the state, problem gambling safeguards, integrity protections, advertising restrictions, and myriad

465 In November 2018, Arkansas voters approved Issue 4, a citizen-led ballot initiative to amend the Arkansas Constitution to authorize casino-based sports betting at four locations. *See* Fucillo, *supra* note 448.

466 This is true even in states such as Colorado, Louisiana, Maryland, New Jersey, and South Dakota, where voters approved an amendment to the state constitution to expressly allow for sports betting. In each of those states, the legislation setting forth the details of how constitutionally authorized sports wagering would work was enacted solely by the state legislature. *See* Pat Evans, *Maryland Sports Betting Bill Passes Months After Voters Back Wagering*, LEGAL SPORTS REP. (Apr. 12, 2021), http://www.legalsportsreport.com/50300/house-senate-pass-maryland-sports-betting/ [http://perma.cc/KG8G-YSBC]; Matthew Waters, *South Dakota Just a Signature Away from Legal Sports Betting*, LEGAL SPORTS REP. (Mar. 5, 2021), http://www.legalsportsreport.com/48936/south-dakotal-sports-betting-bill-passes-2021/ [http://perma.cc/YZU5-ABHJ]; Melinda Deslatte, *Louisiana Lawmakers OK Sports Betting Rules, Send to Edwards*, AP NEWS (June 11, 2021), http://apnews.com/article/louisiana-technology-sports-betting-personal-taxes-business-5907a676d738191548bd0599e93aef81 [http://perma.cc/3NXZ-7C9W]; Adam Candee, *Rocky Mountain Aye: Colorado Sports Betting Bill Approved by Senate*, LEGAL SPORTS REP. (May 3, 2019), http://www.legalsportsreport.com/31901/colorado-sports-betting-passes-senate/, [http://perma.cc/2ZLD-WNEX]; Jill R. Dorsen, *Murphy Makes Sports Betting Legal in New Jersey*, SPORTSHANDLE (June 11, 2018), http://sportshandle.com/murphy-makes-sports-betting-legal-in-new-jersey/ [http://perma.cc/W2AD-E5XD].

467 *See supra* notes 15, 17, 21 and 26. The tribal-sponsored ballot initiative for sports betting—which would allow only in-person wagering at tribal casinos and privately owned, state-licensed horse racetracks—has already secured the requisite number of signatures and is eligible for the November 2022 general election. *See* Shirley N. Weber, *November 2022 Eligible Statewide Initiative Measures*, CAL. SEC'Y OF STATE (May 27, 2021), http://www.sos.ca.gov/elections/ballot-measures/initiative-and-referendum-status/eligible-statewide-initiative-measures [http://perma.cc/63Z3-J2RW]. The other three sports betting ballot initiatives that have been proposed for the November 2022 statewide election—each of which would permit some form of online sports betting—were still going through the signature-gathering phase as of the date of the publication of this Article.

other consumer protections) are left entirely to the discretion of the various initiative proponents. It is incumbent on the California Legislature to address these important policy issues through statutory legislation—following public hearings aided by input from all affected stakeholders—rather than rely on any single stakeholder group to chart the future public policy of this state. Through the statutory lawmaking process, the legislature can also help craft a compromise solution that avoids both a costly initiative campaign and the possibility that all four proposed ballot initiatives could fail. The recognition that there is no constitutional barrier to the legislative authorization of sports betting is, hopefully, the first step in the evolution towards the establishment of a more balanced public policy for California—one that incorporates modern technological advancements and includes robust consumer protections—and enables California to join the growing number of states that permit legal sports betting.