

**Proposition 26:
California Sports Wagering Regulation and Unlawful Gambling
Enforcement Act**

Initiative Constitutional Amendment and Statute

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I. EXECUTIVE SUMMARY

Proposition 26, the *California Sports Wagering Regulation and Unlawful Gambling Enforcement Act*, would amend the California Constitution to allow for sports wagering, roulette, and games played with dice on federally recognized tribal lands where the tribe has entered into a gaming compact with the state.¹ Sports wagering would be allowed on any professional sport or athletic event, almost any college sport or athletic event, and any amateur sport or athletic event.² Wagering is still prohibited on high school sports or athletic events and is prohibited on any California College sports or athletic event.³ Sports wagering would also be allowed at four of the thirty-three horse racing facilities in the State of California.⁴ Additionally, Proposition 26 creates the California Sports Wagering Fund.⁵

The California Sports Wagering Fund would be deposited in three ways: 15 percent to the California Department of Health, 15 percent to the Bureau of Gambling Control, and 70 percent to the General Fund.⁶ The Sports Wagering Fund is filled by a 10 percent tax on sports wagering at the Approved Racetracks.⁷ Tribal gaming would continue to be taxed according to the compacts entered into between gaming Tribes and the State of California.⁸

Proposition 26 would also establish 21 as the minimum age for placing a sports wager and add Unlawful Gambling Enforcement provisions to permit private citizens to bring lawsuits in some situations where the Attorney General's Office has declined to sue.⁹

A **YES** vote supports this ballot initiative to (1) legalize sports wagering at Approved Racetracks and tax the racetracks on the sports wagering profits at 10%; (2) legalize sports wagering, roulette, and games with dice on federally recognized Indian lands where Tribal-State gaming compacts are in place; (3) permits private citizens to bring lawsuits, in some situations, where the Attorney General's Office has declined to sue.

A **NO** vote opposes this ballot initiative, continuing to prohibit sports wagering, roulette, and dice games in California.

¹ Cal. Proposition 26, OFFICE OF THE ATTORNEY GENERAL, <https://www.oag.ca.gov/system/files/initiatives/pdfs/19-0029A1%20%28Sports%20Wagering%20%26amp%3B%20Gambling%29.pdf> (last visited Oct. 13, 2022).

² *Id.*

³ *Id.*

⁴ *Id.*; Proposition 26, LEGISLATIVE ANALYST'S OFFICE.

<https://lao.ca.gov/BallotAnalysis/Proposition?number=26&year=2022> (last visited Oct. 13, 2022).

⁵ OFFICE OF THE ATTORNEY GENERAL, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

II. THE LAW

A. Gaming Background

In *California v. Cabazon*,¹⁰ the United States Supreme Court recognized the inherent right of Indian tribes to offer gaming on tribal land.¹¹ In 1988, Congress passed the Indian Gaming Regulatory Act (“IGRA”) which “created the statutory framework for tribal governments to engage in gaming as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”¹² There are 109 federally recognized tribal governments in California.¹³ Of those 109 recognized tribes, 75 have a tribal-state compact, and 64 of the tribes that have signed tribal-state gaming compacts are engaged in gaming.¹⁴ As part of the tribal-state compacts, Indian nations must negotiate with their states concerning the scope of games to be played and the level of regulation to ensure “that tribal governments are the sole owners and primary beneficiaries of Indian gaming.”¹⁵

Under the IGRA there are three classes of gambling that coincide with three different regulating bodies.¹⁶ Class I are traditional or social Indian games that are regulated by the tribes themselves.¹⁷ Class II are games in which players are competing against each other and not the “house” such as bingo and non-banking card games (like poker) that are regulated by the tribes and the National Indian Gaming Commission (“NIGC”).¹⁸ Class III are slot machines, electronic games of chance, and banked card games (like blackjack) that are regulated by the tribes and state agencies.¹⁹ Specifically, the California Gambling Control Commission sets the regulations and then the Bureau of Gambling Control, in the Department of Justice, enforces those regulations.²⁰ The NIGC does not have the authority to regulate Class III games.²¹ The California State Constitution prohibits craps, roulette, and dice games.²²

In 1998, Proposition 5, the Tribal-State Gaming Compacts Initiative, was passed which gave tribes the right to have gambling devices, such as slot machines, and lotteries at the tribal

¹⁰ *California v. Cabazon*, 480 U.S. 202, 220 (1987).

¹¹ *Id.*

¹² *Articles of Incorporation*, CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION, <https://cniga.com/about/cniga-information/> (last visited Oct. 13, 2022).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *California Tribal Casinos*, LEGISLATIVE ANALYST’S OFFICE, https://lao.ca.gov/2007/tribal_casinos/tribal_casinos_020207.aspx, (last visited Oct.13, 2022).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *About the Commission*, CALIFORNIA GAMBLING CONTROL COMMISSION, <http://www.cgcc.ca.gov/?pageID=aboutus&pageName=About%20Us> (last visited Oct. 13, 2022).

²¹ LEGISLATIVE ANALYST’S OFFICE, *supra* note 16.

²² CALIFORNIA STATE CONSTITUTION Article IV § 19.

casinos and mandated the Governor to sign compacts upon request by tribes.²³ However, in *Hotel Employees and Restaurant Employees International Union v. Davis*²⁴, the California Supreme Court held that the gaming authorized in Proposition 5 was unconstitutional.²⁵ In 2000, Proposition 1A was passed which amended the California Constitution to expressly allow slot machines and other previously prohibited forms of gaming in tribal casinos.²⁶ Sports wagering, roulette, and games with dice were still prohibited.²⁷

There are currently 67 tribal casinos in California operated by 64 of the 75 tribes with Tribal-State compacts.²⁸ There are an additional four tribes that have a direct federal process known as Secretarial Procedures, and one tribe waiting for their Tribal-State compact to be ratified.²⁹

B. Sports Wagering Background

In 1992, the Professional and Amateur Sports Protection Act (“PASPA”) was passed by Congress which prohibited any state-sanctioned sports wagering scheme on amateur or professional teams.³⁰ PASPA had an exception made for any state that had already had a sports betting scheme between 1972-1990; including Nevada’s sportsbooks, Oregon’s limited sports lottery, Delaware’s sports lottery, and Montana’s limited sports pool betting.³¹ There was also a one-year window given to the state of New Jersey to enact a sports wagering law.³² New Jersey did not pass a law within that window, but passed the Sports Wagering Act of 2012, and therefore was found to be in conflict with federal law.³³

In 2014, the National Collegiate Athletic Association sued New Jersey claiming a violation of PASPA.³⁴ On appeal to the Supreme Court, *Christie v. NCAA* (later also known as

²³ *Voter Information Guide for 1998, General Election*, UC HASTINGS SCHOLARSHIP REPOSITORY, https://repository.uhastings.edu/cgi/viewcontent.cgi?article=2163&context=ca_ballot_props (last visited Oct. 13, 2022).

²⁴ *Hotel Employees and Restaurant Employees International Union v Davis*, 981 P.2d 990 (Cal. 1999).

²⁵ *Id.*

²⁶ K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 S.F. L. Rev. 1033, 1037,

<https://repository.usfca.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1061&context=usflawreview> (last visited Oct. 13, 2022).

²⁷ CALIFORNIA STATE CONSTITUTION Article IV §19.

²⁸ *FAQ*, CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION, <https://cniga.com/industry-resources/faq/> (last visited Oct. 13, 2022).

²⁹ Email correspondence from James R. May, Industry Relations Specialist, California Nations Indian Gaming Association. (September 30, 2022) (interview notes on file with the *California Initiative Review*).

³⁰ *Proposition 26*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_26_Legalize_Sports_Betting_on_American_Indian_Lands_Initiative_\(2022\)](https://ballotpedia.org/California_Proposition_26_Legalize_Sports_Betting_on_American_Indian_Lands_Initiative_(2022)) (last visited Oct. 13, 2022).

³¹ Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet For the States*, UNLV Gaming Law Journal, Vol. 2:281, at 287 (January 10, 2012).

³² *Id.*

³³ *Id.*

³⁴ *Murphy v. National Collegiate Athletic Assn.*, 138 S.Ct. 1461, 1471(2018). This case began as *Christie v. National Collegiate Athletic Assn.* but was changed to *Murphy v. NCAA* when the New Jersey Governor Murphy took office after Governor Chris Christie.

Murphy v. NCAA)³⁵ alleged that PASPA was unconstitutionally commandeering New Jersey.³⁶ The Court held that PASPA did violate federal anti-commandeering doctrine and therefore was unconstitutional.³⁷ The Court overturned the federal ban on sports wagering and allowed states to legalize sports betting.³⁸ Thirty-one states, and the District of Columbia, have since enacted sports wagering laws, five of those by initiative.³⁹ Five additional states have approved the legalization of sports betting but their laws have not yet become operational.⁴⁰

C. Existing Law

Section 19 of Article IV of the California Constitution provides for horse wagering and also provides for the operation of slot machines, lottery games, and banking and percentage card games by federally recognized Indian tribes with tribal-state compacts.⁴¹ Penal Code Chapter 10 of Title 9 Part 1 sections 336 and 337 lay out the crimes and punishments of illegal gaming.⁴² Section 336 establishes that 18 is the legal age for gambling, and section 337(b) establishes current crimes around bribes and pressures/manipulations to throw sporting events.⁴³ Tribal-State Compacts have established regulations on operations and the appropriation of gaming funds.⁴⁴

D. Path to the Ballot

The initiative was filed on November 4, 2019, by Mark Macarro, Edwin “Thorpe” Romero, Anthony Roberts, and Jeff L. Grubbe.⁴⁵ The signature gathering was suspended in response to COVID. On June 9, 2020, the campaign filed suit against the state, in *Macarro v. Padilla*,⁴⁶ to extend the deadline to file signatures beyond the July 20, 2020, deadline.⁴⁷ The Superior Court extended the deadline for all initiatives to October 12, 2020.⁴⁸

On December 21, 2021, Hollywood Park Casino filed suit, in *Hollywood Park Casino v. Weber*,⁴⁹ claiming that the initiative violated the state’s single-subject rule because it covers sports betting, roulette, and dice games, as well as includes the Private Attorney General Act, which would allow private citizens to sue establishments found to be engaged in unlawful

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Murphy v. NCAA*, *supra* note 34.

³⁸ *Id.*

³⁹ BALLOTPEDIA *supra* note 30.

⁴⁰ *Id.*

⁴¹ CALIFORNIA STATE CONSTITUTION Article IV §19.

⁴² CAL. PENAL CODE § 336 and § 337.

⁴³ *Id.*

⁴⁴ CALIFORNIA NATIONS INDIAN GAMING ASSOCIATION, *supra* note 28; LEGISLATIVE ANALYST’S OFFICE *supra* note 16.

⁴⁵ BALLOTPEDIA *supra* note 30.

⁴⁶ *Macarro v. Padilla*, 2020 WL 6689521, at*1 (Cal. Super. July 17, 2020)

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Hollywood Park Casino v. Weber*, S272366, CALIFORNIA COURTS, https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2370542&doc_no=S272366&request_token=NiIwLSEmPkg%2FWyBBSCMtTEtIMFQ0UDxTJCI%2BSzxSUCAgCg%3D%3D (last visited Oct. 13, 2022).

gambling.⁵⁰ The court found that all the subjects were related to gambling and therefore the initiative was not in violation of the state’s single-subject rule.⁵¹

On May 26, 2021, the state verified that there were over one million valid signatures and the initiative qualified for the ballot.⁵² Because this initiative is a constitutional amendment there were 997,139 valid signatures required.⁵³ The sponsors of the initiative hired signature gatherers and paid a cost per required signature of \$10.86.⁵⁴

III. PROPOSED LAW

A. Amends California State Constitution

Proposition 26 would amend the California Constitution to permit sports wagering, roulette, and games played with dice on federally recognized Indian lands that have tribal-state compacts.⁵⁵ “Sports Wagering” is defined as any wagering on the results of any professional, amateur, or college sports or athletic event.⁵⁶ This section also prohibits sports wagering on high school sports or athletic events, as well as prohibits any wagering on sports or athletic events in which a California college is a participant.⁵⁷ Approved Racetrack Operators would also be permitted to offer sports wagering at their facilities.⁵⁸ The Amendment requires sports wagering to be done within a designated building and the person wagering must be physically present and at least 21 years old.⁵⁹ Wagering at kiosks, or self-service gaming terminals, is prohibited.⁶⁰ The Amendment also requires that live horse races be conducted in the immediately preceding eighteen months at any of the four approved race tracks designated in the proposition.⁶¹

B. Adds Article 12: Sports Wagering at Licensed Horse Racing Facilities to Chapter 4 of Division 8 of The Business and Professions Code.

Article 12 section 19670 defines “Approved Racetrack Operators” as operated by private entities, licensed by the California Horse Racing Board during the 2019 calendar year, and located in one of the four approved counties: Alameda, Los Angeles, Orange, or San Diego.⁶²

Section 19671 details the sports wagering tax as a 10 percent tax that only the Approved Racetracks pay.⁶³ The Approved Racetracks would pay a 10 percent tax on the daily total of

⁵⁰ Hollywood Park Casino, *supra* note 49.

⁵¹ *Id.*

⁵² BALLOTPEdia, *supra* note 30.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Cal. Proposition 26, § 4 (2022), *amending* CAL. STATE CONSTITUTION Article IV §19(f) (2022).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Cal. Proposition 26, § 4 (2022), *amending* CAL. STATE CONSTITUTION Article IV §19(h) (2022).

⁵⁹ *Id.*, and Cal. Proposition 26, § 5.1 (2022) *adding* CAL. BUS. & PROF. 19674 (2022).

⁶⁰ Cal. Proposition 26, § 4 (2022), *amending* CAL. STATE CONSTITUTION Article IV §19(h) (2022).

⁶¹ Cal. Proposition 26, § 4 (2022), *amending* CAL. STATE CONSTITUTION Article IV §19(i) (2022).

⁶² Cal. Proposition 26, § 5.1 (2022), *adding* CAL. BUS. & PROF. 19670 (2022).

⁶³ Cal. Proposition 26, § 5.1 (2022), *adding* CAL. BUS. & PROF. 19671 (2022).

sports wagers less the daily total of winnings by patrons.⁶⁴ All the revenues resulting from the tax will be deposited into the California Sports Wagering Fund (“Fund”).⁶⁵ The Fund is established in section 19672.⁶⁶ Section 19673 details the distribution of the monies from the fund as follows:

1. 15 percent to the California Department of Health for research, development, and implementation of programs and grants for problem gambling prevention and mental health.⁶⁷
2. 15 percent to the Bureau of Gambling Control within the Department of Justice for the actual and reasonable cost of enforcement and implementation of sports wagering and other forms of gaming.⁶⁸
3. 70 percent to the State General Fund.⁶⁹ Funds are to be used to expand programs for the purposes of the Act and not supplant existing state or local funds utilized for these purposes.⁷⁰ General Funds are used for K-12 and community college funding among other purposes.

Section 19674 establishes the age as 21 for sports wagering and a violation of the age limit would result in a misdemeanor crime.⁷¹

C. Adds Article 18: Unlawful Gambling Enforcement, to Chapter 5 of Division 8 of the Business and Professions Code.

Section 19990(a) adds a penalty of \$10,000 per violation of gambling activities made unlawful under Penal Code Chapter 10.⁷² Some examples of unlawful gambling activities are any Class III category gaming outside of legal tribal casinos, online gambling, banking games or games where the house occupies the player-dealer position.⁷³

Section 19990(b) allows for any person or entity to file a civil action against illegal gambling if the Attorney General does not file a suit within 90 days of notice of the violation or the action brought by the Attorney General is dismissed without prejudice.⁷⁴ All civil penalties are deposited in the Fund.⁷⁵

⁶⁴ Cal. Proposition 26, § 5.1 (2022), *adding* CAL. BUS. & PROF. 19671 (2022).

⁶⁵ *Id.*

⁶⁶ Cal. Proposition 26, § 5.1 (2022), *adding* CAL. BUS. & PROF. 19672 (2022).

⁶⁷ Cal. Proposition 26, § 5.1 (2022), *adding* CAL. BUS. & PROF. 19673 (2022).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Cal. Proposition 26, § 5.1 (2022), *adding* CAL. BUS. & PROF. 19674 (2022).

⁷² Cal. Proposition 26, § 5.2 (2022), *adding* CAL. BUS. & PROF. 19990 (2022). There is an exemption of the new fine carved out for two sections: first, § 335, which stipulates penalties when district attorneys, sheriff, or police officers do not diligently prosecute illegal gambling offenders; and second, § 337, which stipulates penalties for public officials who are caught involved in illegal gambling.

⁷³ Cal. Penal Code §§ 330a, 330.11.

⁷⁴ Cal. Proposition 26, § 5.2 (2022), *adding* CAL. BUS. & PROF. 19990 (2022).

⁷⁵ *Id.*

Section 19991 prohibits the marketing and advertising of sports wagering directed at minors.⁷⁶

D. Amends Government Code 12012.12

All amendments to tribal-state gaming compacts will include provisions for compensation for actual regulatory costs incurred by the State related to sports wagering.⁷⁷

E. Tribal Compact revisions

Tribal-state compacts will be amended to allow for sports wagering, roulette, and dice games and will include provisions for compensation incurred for regulation costs.⁷⁸ All compacts will have to be amended and signed by the Governor before operations for the new games can begin.⁷⁹

F. What the law would impose on the Legislature

Section 19(i)(2) states that the Legislature will authorize “by law, statutes necessary to implement this subdivision, which shall also provide for consumer protections and anti-corruption measures to ensure the integrity of sports or athletic events.”⁸⁰

IV. **POTENTIAL DRAFTING ISSUES**

A. Constitutional and Sovereignty Issues

A possible conflict and question arise: do the people of California have the power to interfere with tribal-state compacts and tribal sovereignty?

In *Hotel Employees and Restaurant Employees International Union v. Davis*⁸¹, the California Supreme Court established that the initiative process could not grant rights to tribes that are expressly prohibited by the state constitution,⁸² but the remainder of Proposition 5 continued to be good law, including a mandate to the Governor to negotiate and sign tribal-state compacts within a timeframe.⁸³ The initiative process was then used to amend the California Constitution which afforded the tribes the ability to negotiate certain constitutionally prohibited games into their compacts.⁸⁴ Based on this history, it would seem that the provisions of Proposition 26 are an acceptable exercise of voter power.

⁷⁶ Cal. Proposition 26, § 5.2 (2022), *adding* CAL. BUS. & PROF. 19991 (2022).

⁷⁷ Cal. Proposition 26, § 5.3 (2022), *adding* CAL. GOV. 12012.101 (2022).

⁷⁸ *Id.*

⁷⁹ Cal. Proposition 26.

⁸⁰ Cal. Proposition 26, § 4 (2002), *amending* CAL. STATE CONSTITUTION Article IV §19(i)(2) (2022).

⁸¹ *Hotel Employees and Restaurant Employees International Union v Davis*, *supra* note 24.

⁸² *Id.*

⁸³ UC HASTINGS SCHOLARSHIP REPOSITORY, *supra* note 23.

⁸⁴ K. Alexa Koenig, *supra* note 26.

B. Ambiguous Terms

In Proposition 26, section 19(i) prohibits wagering on high school sports and athletic events⁸⁵ but what about high school aged players on competitive travel teams, or who are Olympians playing in athletic events, or elite youth sports, are these not prohibited? They are not high school sports or athletic events. This omission would leave many youth participating in sports unprotected from the provisions of Proposition 26.

The same section also prohibits wagering on sports and athletic events in which California colleges are playing.⁸⁶ This causes two concerns. First, the initiative says it is to protect the athletes but does not mention what they are being protected from, or why only California college athletes are in need of such protection. If it is to protect from the pressures of throwing games, this seems unnecessary since there are already laws against coercing, manipulating, or pressuring athletes, referees, coaches, or the like, to fix the outcome of an event.⁸⁷

The second concern is that the initiative says wagering on California college teams is prohibited yet wagering on tournaments that California college teams are in is okay (specifically the proposition mentions the NCAA basketball tournament, March Madness) as long as there is no wagering on the specific game played by a California college team.⁸⁸ How can a person wager on a bracket without also wagering on a California college team, should a California college team be in the tournament? These questions are unanswered by the measure and are likely to be argued over if the measure passes.

Section 19(h) requires that Approved Racetrack Operators conduct live horse races in the immediately preceding eighteen months to be eligible to offer sports wagering.⁸⁹ The plurality of the term “race” would indicate more than one, but it does not indicate how many are enough. The other issue that arises is whether there must be a live horse race within eighteen months of the onset of the initial sports betting operations or if it is a recurring requirement that every eighteen months there must be live horse races held to continue sports betting. This may be a cause for future litigation or clarification by the Legislature through the amendment clause.

C. Amendment Clause

This initiative has an amendment clause that states “this Act shall be broadly construed to accomplish its purposes. The provisions may be amended so long as such amendments are consistent with and further the intent of this act by a statute that is passed by a two-thirds vote of the members of each house of the Legislature.”⁹⁰

⁸⁵ Cal. Proposition 26, § 4 (2002), *amending* CAL. STATE CONSTITUTION Article IV §19(i) (2022).

⁸⁶ Cal. Proposition 26, § 4 (2002), *amending* CAL. STATE CONSTITUTION Article IV §19(i) (2022).

⁸⁷ CAL. PEN. § 337a - § 337e (2022).

⁸⁸ Cal. Proposition 26, § 3(e)(6); Cal. Proposition 26, § 4 (2002), *amending* CAL. STATE CONSTITUTION Article IV §19(i) (2022).

⁸⁹ Cal. Proposition 26, § 4 (2002), *amending* CAL. STATE CONSTITUTION Article IV §19(h) (2022).

⁹⁰ Cal. Proposition 26 § 6 (2022).

D. Severability

Section 7 of this Act establishes that each provision of this Act is severable.⁹¹ The severability clause in this Act includes provisions that allow for the valid provisions to remain if any provisions of the text are found invalid.⁹²

V. PUBLIC POLICY CONSIDERATIONS

A. Racetrack Limitations

Proposition 26 defines “Approved Racetrack Operators” as licensed by the California Horse Racing Board during the 2019 calendar year and located in one of four counties and must be privately owned.⁹³ There are only 4 of the 33 California racetracks that would qualify.⁹⁴ This is a policy consideration because of the small number of tracks allowed to offer sports wagering and Proposition 26 also does not seem to allow for future racetracks to become Approved Racetrack Operators.

Proposition 26 also amends the constitution to require Approved Racetrack Operators to conduct “live horse races in the immediately preceding eighteen (18) months” of offering sports wagering.⁹⁵ As discussed above, there are potential drafting issues with the language as to whether it is a continuing requirement in order to offer sports wagering, or if it is the requirement in order to begin a sports wagering operation.

B. Proponents Main Arguments

Proposition 26 is supported by several Indian tribes, the California Nations Indian Gaming Association, state businesses, the California African American Chamber of Commerce, social justice organizations, area chapters of the NAACP, local governments, political groups, elected officials, public safety, and hundreds of other entities.⁹⁶

1. *Promotes Indian Self Reliance*

Proponents argue that the increase of gaming options and opportunities at the Tribal casinos will promote and bolster Indian self-reliance.⁹⁷ The primary revenue source for California tribes is casino gaming.⁹⁸ Increased gaming leads to increased casino revenues which would expand tribal communities’ access to vital services like healthcare, housing, infrastructure, and education.⁹⁹ Through the Revenue Sharing Trust Fund, already established between the

⁹¹ Cal. Proposition 26 § 7 (2022).

⁹² *Id.*

⁹³ *YES on 26*, <https://yeson26.com/our-coalition/> (last visited on Oct. 13, 2022).

⁹⁴ Proposition 26, LEGISLATIVE ANALYST OFFICE, <https://lao.ca.gov/BallotAnalysis/Proposition?number=26&year=2022> (last visited Oct. 13, 2022).

⁹⁵ Cal. Proposition 26, § 4 (2002), *amending* CAL. STATE CONSTITUTION Article IV §19(h) (2022).

⁹⁶ *YES on 26*, *supra* note 93.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

gaming and non-gaming tribes, limited/non-gaming tribes might also see the benefits of the increased gaming revenues.¹⁰⁰

There are two different funds incorporated into Tribal-State gaming compacts for the benefit of nongaming and limited gaming tribes: the Revenue Sharing Trust Fund¹⁰¹ and the Indian Gaming Special Distribution Fund.¹⁰² Both are laid out in the California Government Code, filled pursuant to the terms of tribal-state gaming compacts, and are managed through the California Gambling Control Commission.¹⁰³ The Revenue Sharing Trust Fund gives qualifying nongaming, and limited-gaming, tribes up to \$1.1 million each fiscal year.¹⁰⁴ The Indian Gaming Special Distribution Fund provides compensation for regulatory costs at all levels of bureaucracy and is used to offer grants for programs and local tribal governments.¹⁰⁵ Neither of these funds would be necessarily increased by the passage of Proposition 26, but the renegotiation of compacts might result in some adjustments.

2. Creates Jobs and Revenues for the Local Communities and the State.

Proponents argue that tribal casinos currently provide Californians with over 150,000 jobs and \$12.4 billion in wages.¹⁰⁶ Tribal casinos generate \$26.9 billion for the state economy and contribute nearly \$1.2 billion in state taxes and revenues, and \$489 million to local governments annually.¹⁰⁷ The increased gaming will increase the foot traffic to casinos and the surrounding communities creating new jobs and also increasing local spending from the influx of visitors creating additional revenues for the local communities.¹⁰⁸

Professor Kenneth Hansen, of California State University, Fresno, and an expert on American Indian Law and tribal self-governance,¹⁰⁹ stated that Proposition 26 will generate more revenue for the state General Fund in comparison to Proposition 27.¹¹⁰

3. Generates Tens of Millions to Support

Proponents point out that the Legislative Analyst's Office has stated that Proposition 26 will result in "increased state revenues, potentially reaching tens of millions of dollars annually."¹¹¹ Thirty of the states that have legalized sports wagering have had tax revenue

¹⁰⁰ *YES on 26, supra* note 93.

¹⁰¹ CALIFORNIA GOVERNMENT CODE § 12012.75.

¹⁰² CALIFORNIA GOVERNMENT CODE § 12012.85.

¹⁰³ *Id.*; CALIFORNIA GOVERNMENT CODE § 12012.75.

¹⁰⁴ CALIFORNIA GOVERNMENT CODE § 12012.90.

¹⁰⁵ CALIFORNIA GOVERNMENT CODE § 12012.85.

¹⁰⁶ *YES on 26, supra* note 93.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Hansen, Kenneth. Interview conducted by Elizabeth Rocha Zuñiga, (October 8, 2022) (notes on file with the *California Initiative Review*).

¹¹⁰ *Id.*

¹¹¹ *Id.* See also LEGISLATIVE ANALYST'S OFFICE, <https://lao.ca.gov/BallotAnalysis/Proposition?number=26&year=2022> (last visited Oct. 13, 2022).

increases, twenty-two of the states have revenues in the millions of dollars, with the highest being New York at \$274.4 million, as of 2022.¹¹²

4. *Shuts Down Illegal Gaming*

Proponents argue that Proposition 26 will “establish safeguards to ensure safe, responsible sports wagering by: Limiting participation to adults, prohibiting advertising to minors, and protecting against underage gambling by requiring individuals to be physically present to place bets with ID and age verification checks.”¹¹³ They also argue that Proposition 26 strengthens enforcement against illegal gambling activities.¹¹⁴ According to the Attorney General's office, in December 2019, Hawaiian Gardens Casino had to pay \$3.1 million in a settlement for misleading gambling regulators and violating state and federal regulations.¹¹⁵ There have been several other large sum violations paid by card rooms in recent years.¹¹⁶

The Tribal casinos and Racetracks have decades of experience regulating gambling and will continue to utilize new and existing regulations to safeguard the industry.¹¹⁷

C. Opponent's Argument

Proposition 26 is opposed by California Licensed Card Clubs, California Commerce Club, small business organizations, animal welfare organizations, National Animal Care and Control Association, taxpayer organizations, social justice groups, Black American Political Association of California, labor organizations, and hundreds more.¹¹⁸ On the *Vote No on Prop 26* website, there are no Indian tribes mentioned in the list of coalition members.¹¹⁹

1. *Expansion of Gambling in California*

Opponents of Proposition 26 are concerned that it will increase gambling addictions and put a strain on local resources. This concern arises from claims that several states, allowing new sports betting, have seen an increase in gambling addiction and have seen a spike in the demand for services.¹²⁰

¹¹² BALLOTPEDIA *supra* note 30.

¹¹³ YES on 26, *supra* note 93.

¹¹⁴ YES on 26, *supra* note 93.

¹¹⁵ Attorney General Becerra Secures \$3.1 Million Settlement from Hawaiian Gardens Casino, OFFICE OF ATTORNEY GENERAL, <https://oag.ca.gov/news/press-releases/attorney-general-becerra-secures-31-million-settlement-hawaiian-gardens-casino> (last visited Oct. 13, 2022).

¹¹⁶ Facts about card rooms, FACTS ABOUT CARD ROOM CASINOS, https://factsaboutcardrooms.com/wp-content/uploads/2022/09/Cardrooms_FactSheet_20220929.pdf (last visited October 13, 2022).

¹¹⁷ Cal. Proposition 26 § 3 (2022).

¹¹⁸ *Vote No on Prop26*, the <https://votenoonprop26.org/coalition-members/> (last visited on Oct. 13, 2022).

¹¹⁹ *Id.*

¹²⁰ *Endorsement: No on Propositions 26 and 27. Legalizing sports betting stacks the odds against Californians.* LA TIMES. <https://www.latimes.com/opinion/story/2022-09-11/sports-betting-problems-solutions-vote-no-prop-26-prop-27-endorsement> (last visited Oct. 13, 2022).

2. Increase of Frivolous Lawsuits against Card Clubs

Opponents of Proposition 26 argue that it will increase frivolous lawsuits forcing card club competitors to close.¹²¹ They argue that Proposition 26 allows for people and entities to exploit the Private Attorney General Act by allowing people or entities to file suits against unlawful gambling if the Attorney General decides not to file a claim.¹²²

Systems are already in place to deter the filing of frivolous lawsuits and lawsuits that harass or maliciously injure any person.¹²³ California Rules of Professional Conduct, Rule 3.1(a)(1), states that a lawyer cannot bring an action, a defense, or assert a position in litigation without probable cause.¹²⁴ Proposition 26 would give private citizens and entities the ability to file civil lawsuits against illegal gaming operations only after 90 days of the Attorney General not filing a suit, or if a case has been dismissed without prejudice^{125, 126}.

3. Disproportionately Hurts Communities of Color.

Opponents of Proposition 26 argue that card rooms will be flooded with lawsuits and forced to close resulting in the loss of \$500 million in local tax revenue statewide and 32,000 good-paying jobs.¹²⁷ Opponents anticipate the revenue lost from the card rooms closing will disproportionately hurt communities of color causing funding cuts for social programs such as public health, senior centers, homelessness services, and after-school programs.¹²⁸

Professor Hansen also makes the point that unrecognized tribes, and those without gaming compacts will not have the opportunity to collect the revenue that Proposition 26 promises to tribal communities.¹²⁹ Correspondingly, the communities in which these non-gaming tribes sit will also not recognize the increased revenue that the proponents focus on.¹³⁰

4. Revitalizing the Dying Industry of Horse Racing

As horse racing has been declining in popularity over the past years several animal rights advocacy groups fear that allowing sports wagering at the four racetracks is an attempt to revitalize the dying industry.¹³¹ Opponents also claim that this initiative will constitutionally

¹²¹ CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION, TUESDAY NOVEMBER 8, 2022, at 20.

¹²² BALLOTPEDIA *supra* note 29.

¹²³ California Rules of Professional Conduct, Rule 3.1(a)(1).

¹²⁴ California Rules of Professional Conduct, Rule 3.1(a)(1).

¹²⁵ Being dismissed without prejudice means that a losing case may again be brought before a judge. If a case is dismissed with prejudice it means that that losing case may not be brought before a judge again.

¹²⁶ Cal. Proposition 26, § 5.2 (2022), *adding* CAL. BUS. & PROF. 19990(b) (2022).

¹²⁷ *Vote No on Prop 26*, *supra* note 119.

¹²⁸ *Id.*; BALLOTPEDIA *supra* note 30.

¹²⁹ Hansen, Kenneth Interview, *supra* note 109.

¹³⁰ *Id.*

¹³¹ *NO on Prop 26*, Animalwelfare.tasimcoalition.com, https://animalwelfare.tasimcoalition.org/?gclid=Cj0KCQjwnP-ZBhDiARIsAH3FSRf-zGyP9GjfXrADAvBGMjN63MN0oJK0WdHjI6drcG4X-TZCXG0ApCMaAkvHEALw_wcB (last visited Oct. 13, 2022).

couple horse racing with sports wagering, requiring that races be run to maintain the ability to offer non-horse race-related sports betting.¹³² The initiative does amend the state Constitution to require a live horse race to have been conducted within the preceding 18 months in order for an Approved Racetrack Operator to offer sports wagering.¹³³

D. Predictions Amongst Likely Voters

A recent poll by the Berkeley Institute of Governmental Studies shows that amongst likely voters, both Proposition 26 and Proposition 27 lack support.¹³⁴

Specifically for Proposition 26, the opposition is at 42%, support is at 31%, and 27% of those polled are undecided.¹³⁵ Voters under the age of 40 seem to support the proposition, while those 65 or older are opposed. Although there may be several explanations for this disparity, it is essential to note that exposure to political advertisements on social media may be a factor. Within the analysis, there is a brief statement about how individuals who have seen various advertisements for Proposition 26 are voting no.¹³⁶ While those who have not seen many advertisements are divided on their vote.¹³⁷

The survey shows that more women are opposed to Proposition 26, while men are divided.¹³⁸ This also does not have a clear explanation. However, it is something that future drafters on this topic should keep in mind. If the initiative fails, there is already another statewide ballot initiative that is pending signature verification by the Secretary of State's office as of this writing. The new initiative is being led by the San Manuel Band of Mission Indians and would allow both in-person and online sports wagering.¹³⁹ If the requisite number of signatures are verified, this will be on the ballot for the 2024 election.

¹³² *NO on Prop 26*, Animalwelfare.tasimcoalition.com, *supra* note 131.

¹³³ Cal. Proposition 26, § 4 (2002), *amending* CAL. STATE CONSTITUTION Article IV §19(h) (2022).

¹³⁴ *Both Sports Waging Initiatives Trail*, BERKELEY INSTITUTE OF GOVERNMENTAL STUDIES POLL, October 4, 2022, <https://mailchi.mp/berkeley.edu/berkeley-igs-poll-2022-16-state-ballot-props-and-gubernatorial-election>.

¹³⁵ BERKELEY INSTITUTE OF GOVERNMENTAL STUDIES POLL, *supra* note 134.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Initiative Coordinator Attorney General's Office, Initiative No. 21-0039 - Amendment No.1, https://oag.ca.gov/system/files/initiatives/pdfs/21-0039A1%20%28Sports%20Wagering%20%29_0.pdf.

Below is a breakdown of the poll’s findings:

Table 2
Voter preferences about Propositions 26 and 27, the two sports wagering initiatives, among major subgroups of the likely voter population

	Proposition 26 <i>(in-person sports wagering on tribal lands)</i>			Proposition 27 <i>(online sports wagering)</i>		
	Yes %	No %	Undecided %	Yes %	No %	Undecided %
Total likely voters	31	42	27	27	53	20
<u>Party registration</u>						
Democrats	32	38	30	26	54	20
Republicans	28	50	22	25	58	17
No party preference/others	35	39	36	30	46	24
<u>Political ideology</u>						
Strongly conservative	26	54	20	24	59	17
Somewhat conservative	29	49	22	25	55	16
Moderate	31	42	27	28	51	21
Somewhat liberal	37	34	29	25	55	20
Strongly liberal	32	33	35	26	49	25
<u>Region</u>						
Los Angeles County	33	40	27	28	49	23
San Diego County	31	44	25	24	57	19
Orange County	31	41	28	28	56	16
Inland Empire	36	36	28	27	51	22
Central Coast	30	42	28	22	59	19
Central Valley	30	44	26	26	56	18
San Francisco Bay Area	28	45	27	26	53	21
North Coast/Sierras	35	38	27	31	46	22
<u>Gender</u>						
Male	40	39	21	35	49	16
Female	24	44	32	19	57	24
<u>Age</u>						
18-29	43	24	33	44	33	23
30-39	46	29	25	41	37	22
40-49	34	35	31	29	51	30
50-64	29	43	28	23	55	22
65 or older	21	56	23	15	68	17
<u>Race/ethnicity</u>						
White	30	44	26	23	57	20
Latino	32	38	30	33	44	23
Asian/Pacific Islander	35	37	28	31	47	22
Black	30	38	32	30	53	17
<u>Interest in pro sports</u>						
A lot	42	41	17	38	49	13
Some	29	43	28	27	54	19
Little/none	28	42	30	22	55	23
<u>Exposure to campaign ads</u>						
A lot	28	51	21	23	63	14
Some	29	38	33	23	53	24
None/no opinion	38	29	33	37	36	27

VI. CAMPAIGN FINANCES

A. Proponents

The coalition of tribes who led this campaign spent more than \$30 million to qualify the proposition for the election.¹⁴⁰

The campaign raised \$123.4 million and is led by the Coalition for Safe, Responsible Gaming.¹⁴¹ The campaign is supported by several American Indian tribes, including the top donors, who are: the Pechanga Band of Luiseno Indians, Yocha Dehe Wintun Nation, Agua

¹⁴⁰ Politico, California Ballot Tracker, <https://www.politico.com/interactives/2022/california-ballot-measures-propositions-guide-2022/> (last visited, October 8, 2022).

¹⁴¹ BALLOTPEDIA *supra* note 30.

Caliente Band of Cahuilla Indians, Federated Indians of Graton Rancheria, and the Barona Band of Mission Indians.¹⁴²

B. Opponents

The opponents' campaign raised \$44 million.¹⁴³ The top donors to the opposition are gambling-related companies and card rooms: California Commerce Club, Hawaiian Gardens Casino, Knighted Ventures LLC, Park West Casinos, The Bicycle Hotel & Casino, and PT Gaming LLC.¹⁴⁴

VII. CONCLUSION

In conclusion, Proposition 26 grants tribes with Tribal-State compacts more options on gambling offerings at their casinos. It also legalizes in-person sports wagering at tribal casinos and four horse racetracks. The Sports Wagering Fund will be set up and filled by the taxes from sports wagering at Approved Racetracks, 70 percent of which will be to the State's General fund, and 30 percent to be used for research and development on Gambling addiction and mental health, and to be used to pay for increased law enforcement. Proposition 26 utilizes the safeguards and regulations already established by the State to diminish unlawful gambling and adds an additional \$10,000 penalty per violation. In addition, it allows for private citizens and entities to file civil lawsuits against illegal gambling establishments. Proposition 26's biggest opponents are the Licensed Card Clubs, who believe the increased ability to sue will put them out of business, and the communities around the card rooms that are concerned with the potential of lost jobs and lost revenues should the card clubs close.

A **YES** vote supports this ballot initiative to (1) legalize sports wagering at Approved Racetracks and tax the racetracks on the sports wagering profits at 10%; (2) legalize sports wagering, roulette, and games with dice on federally recognized Indian lands; (3) permits private citizens to bring lawsuits, in some situations, where the Attorney General's Office has declined to sue.

A **NO** vote opposes this ballot initiative, continuing to prohibit sports wagering, roulette, and dice games in California.

¹⁴² *BALLOTPEDIA supra* note 30.

¹⁴³ *POLITICO, supra* note 138; *BALLOTPEDIA supra* note 30.

¹⁴⁴ *Id.*