No. _____

In The
Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL, UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Even though there is no federal regulatory or deregulatory scheme directly governing sports wagering, the Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. 3701 *et seq.* (PASPA), makes it "unlawful" for 46 States to "license or authorize by law or compact" any wagering on amateur or professional sports contests. The Court of Appeals for the Third Circuit held that (1) PASPA is a valid "stand-alone" federal law that, "via the Supremacy Clause," preempts New Jersey's law authorizing sports wagering at casinos and racetracks; and (2) Because PASPA is an enactment under the Commerce Clause and not the Reconstruction Amendments, the fundamental equal sovereignty principle does not apply but, in any event, PASPA's discrimination is sufficiently related to the Federal Government's goal "to stop the *spread* of *state-sanctioned* sports gambling."

The questions presented are:

1. Does PASPA's prohibition on state licensing or authorization of sports wagering exceed the enumerated powers of Congress and violate both the Tenth Amendment and structural principles of federalism?

2. Does PASPA's discrimination in favor of Nevada and other exempted States violate the fundamental principle of equal sovereignty?

PARTIES TO THE PROCEEDING

Petitioner New Jersey Thoroughbred Horsemen's Association, Inc. (NJTHA) was an intervenor-defendant in the district court and an appellant below.

Respondents National Collegiate Athletic Association (NCAA), National Basketball Association (NBA), National Football League (NFL), National Hockey League (NHL) and Office of the Commissioner of Baseball (MLB) were plaintiffs and appellees below.

Respondent United States of America was an intervenor in the district court to defend the constitutionality of PASPA and an appellee below.

Christopher J. Christie, Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement; and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission, were defendants and appellants below, and are filing a separate petition for a writ of certiorari.

Stephen M. Sweeney, President of the New Jersey Senate, and Sheila Y. Oliver, then-Speaker of the New Jersey General Assembly, were intervenors-defendants in the district court and appellants below. Sweeney and Vincent Prieto, the current Speaker of the New Jersey General Assembly, are filing a separate petition for a writ of certiorari.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in New Jersey Thoroughbred Horsemen's Association, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner NJTHA respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

Defining "the conflicting powers of the government of the Union and of its members, as marked in that constitution," has always been acknowledged to be this Court's constitutional duty. *M'Culloch* v. *Maryland*, 17 U.S. 316, 400-401 (1819). This case squarely falls within two important areas in which state and federal power conflict: (1) the tension between permissible federal power to preempt under the Supremacy Clause and impermissible federal power to commandeer state sovereign functions that are protected under the Tenth Amendment as well as structural principles of federalism; and (2) the limited enumerated power of Congress to regulate under the Commerce Clause and the fundamental right of States under the equal sovereignty principle to have their sovereign functions treated in an equal non-discriminatory manner. In both areas, the court of appeals (divided regarding (1) above) resolved these conflicts in favor of an expansive view of national power that is both outdated and out of sync with this Court's modern precedents upholding state sovereignty in *New York* v. *United States*, 505 U.S. 144 (1992), *Printz* v. *United States*, 521 U.S. 898 (1997), *National Federation of Independent Business* v. *Sebelius*, 132

S. Ct. 2566 (2012), and *Shelby County, Alabama* v. *Holder*, 133 S. Ct. 2612 (2013).[1]

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 730 F.3d 208 and reproduced at Pet. App. 1-95. The first of the two opinions of the district court that were affirmed by the court of appeals is not published but is available at 2012 WL 6698684 and reproduced at Pet. App. 161-181, and the second is reported at 926 F. Supp.2d 551 and reproduced at Pet. App. 96-157.

JURISDICTION

The court of appeals entered its judgment on September 17, 2013, and denied a timely petition for rehearing and rehearing en banc on November 15, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The court of appeals majority wrote that the "forty-nine states that do not enjoy PASPA's solicitude may easily invoke Congress' authority should they so desire." Pet. App. 70. It cited no authority, but its reliance on the national political process to protect state sovereign functions echoes the long-repudiated reasoning of *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

U.S. Const. Art. I, § 8, Cl. 3.

The Supremacy Clause of the United States Constitution provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, Cl. 2.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend. X.

The most relevant provision of PASPA (28 U.S.C. 3702) provides in pertinent part:

> It shall be unlawful for –
>
> (1) a governmental entity to * * * license, or authorize by law or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate.

The full text of PASPA, 28 U.S.C. 3701 *et seq.*, is reproduced at Pet. App. 187-190.

Article IV, Section VII, Paragraph 2 of the New Jersey Constitution is reproduced at Pet. App. 191-195. New Jersey's law authorizing some sports wagering, N.J. Stat. Ann. §§5:12A-1 *et seq.*, is reproduced at Pet. App. 196-207.

STATEMENT OF THE CASE

A. Background: Sports Wagering And PASPA

"Wagering on sporting events is an activity almost as inscribed in our society as participating in or watching the sports themselves" and is now a $500 billion per year industry, most of which is illegal. Pet. App. 9. Most States, including New Jersey, maintain

broad prohibitions against wagering activity, including sports wagering. See, *e.g.*, N.J. Stat. Ann. §§2A:40-1 *et seq.*; see also N.J. Stat. Ann. §§2C:37-1 *et seq.*[2]

A few States have enacted measures authorizing sports wagering, Nevada being the most prolific and having a virtual monopoly on legal sports wagering. Nevada began permitting widespread betting on sporting events in 1949. Three other States (Delaware, Oregon, and Montana) permit limited types of sports wagering. Pet. App. 10.

Congress enacted PASPA in 1992 in response to growing efforts by States to allow sports wagering. Pet. App. 10. Before PASPA was enacted, the U.S. Department of Justice opposed its passage, explaining that, *inter alia*, "it raises federalism issues." *Id*. at 233.

Neither PASPA nor any other federal statute makes sports wagering unlawful as a matter of federal law. Instead, PASPA regulates through the States by making it unlawful for "a governmental entity to * * * license, or authorize by law or compact" sports wagering activities. 28 U.S.C. 3702(1). PASPA also makes it unlawful for "a person to sponsor, operate, advertise, or promote" sports wagering

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[2] See also, *e.g.*, 11 Del. C. §§1401 *et seq.*; 18 Pa. Cons. Stat. Ann. §§5513 *et seq.*; Conn. Gen. Stat. Ann. §§53-278a *et seq.*; Md. Code Ann., Crim. Law §§12-101 *et seq.*; Ohio Rev. Code Ann. §§2915.01 *et seq.*; N.Y. Penal Code Art. 225.

activities *if and only if* done "pursuant to the law or compact of a governmental entity." 28 U.S.C. 3702(2).

PASPA treats state sovereign functions unequally. PASPA completely "releases Nevada from PASPA's grip." Pet. App. 11; 28 U.S.C. 3704(a). It also permits Delaware, Oregon, and Montana to continue limited "sports lotteries" that they had previously conducted. Pet. App. 11; 28 U.S.C. 3704(a).

To enforce its mandate, PASPA provides for a right of action "to enjoin a violation [of the law] * * * by the Attorney General of the United States, or by a * * * sports organization * * * whose competitive game is alleged to be the basis of such violation." 28 U.S.C. 3703; Pet. App. 11.

B. New Jersey's Response To The Dramatic Growth Of Legal And Illegal Sports Wagering Since PASPA Was Enacted.

Since PASPA was enacted, sports wagering has grown dramatically. In Nevada, the volume of legal sports wagering has increased to at least $2.9 billion per year. Pet. App. 228 ¶8. The amount of illegal sports wagering has skyrocketed, from an estimated $50 billion in 1989 to recent estimates of $500 billion annually. *Id.* at 228-229 ¶15.

Against this backdrop, New Jersey moved to authorize legal sports wagering and staunch the sports wagering black market by allowing state-regulated casinos and racetracks to operate legal,

regulated, transparent, and taxable sports wagering venues. In 2010, the New Jersey Legislature, after holding public hearings, conducted a referendum. Pet. App. 13. This referendum passed. As a result, the New Jersey Constitution was amended to permit the Legislature to "authorize by law wagering * * * on the results of any professional, college, or amateur sport or athletic event." N.J. Const. Art. IV, § VII, ¶2(D), (F); Pet. App. 13. Pursuant to the Constitutional amendment, New Jersey enacted its "Sports Wagering Law." Pet. App. 13-14. This law permits state authorities to license sports wagering at casinos and racetracks. N.J. Stat. Ann. §§5:12A-1 *et seq.*; see also N.J.A.C. §§13:69N-1.1 *et seq.* (regulations implementing the law); Pet. App. 14.

C. The NJTHA

The NJTHA has more than 3,000 members, consisting of thoroughbred horse owners and horse trainers from around the world. Pet. App. 220 ¶23. The NJTHA is also the licensed operator and permit holder of Monmouth Park Racetrack, a thoroughbred racetrack located in Oceanport, New Jersey ("Monmouth Park"). *Id.* at ¶24.

As a racetrack operator and permit holder the NJTHA would have the right under the Sports Wagering Law (subject to the regulations of the New Jersey Division of Gaming Enforcement and the New Jersey Racing Commission) to engage in the business of accepting wagers on the results of certain

professional and amateur sports events. Pet. App. 220 ¶¶25-26.

Thoroughbred racing in New Jersey provides substantial economic and other benefits to the general public, creates employment opportunities for thousands of people, and generates substantial revenues for the State of New Jersey. Pet. App. 221 ¶29.

Monmouth Park is an integral part of all aspects of the equine industry in New Jersey. Pet. App. 221 ¶30. If Monmouth Park is forced to close it will mean the death of the thoroughbred racing industry in New Jersey. *Id.* at ¶31.

Wagering on New Jersey Thoroughbred and Standardbred horse races in New Jersey has waned in recent years resulting in the loss of jobs as well as causing economic distress to the equine industry in New Jersey, especially to Monmouth Park. Pet. App. 222 ¶32. The NJTHA believes that sports betting is an essential component of the NJTHA's overall plan to make Monmouth Park an economically self-sustaining Thoroughbred Racetrack, better able to compete with racetracks in surrounding States that are bolstered by casino revenues. *Id.* at ¶33.

The New Jersey equine industry is critical to New Jersey's economy and the preservation of open space in New Jersey. Pet. App. 222 ¶34. In a Report, prepared by Karyn Malinowski, Ph.D. of the Rutgers Equine Science Center, it was concluded that if racing-related and breeding farms in New Jersey were to cease operations it would have a $780 million

negative annual impact, put 7,000 jobs in danger, eliminate $110 million in tax revenues, and leave over 163,000 acres of open space vulnerable to future development. *Id.*

The competitive disadvantages created by PASPA's exemption, in favor of four States (especially Nevada and neighboring Delaware), from PASPA's prohibition against sports wagering has combined with other factors to put the New Jersey horse industry, and Monmouth Park in particular, at such a severe disadvantage that the economic viability of the New Jersey horse industry and Monmouth Park has been and continues to be seriously damaged. Pet. App. 222-223 ¶35.

D. Procedural History

The NCAA, NBA, NFL, NHL, and MLB (collectively, the "Leagues") sued New Jersey Governor Chris Christie, New Jersey's Racing Commissioner, and New Jersey's Director of Gaming Enforcement (the "State" or "New Jersey") in the United States District Court, District of New Jersey, under 28 U.S.C. 3703, asserting that the Sports Wagering Law is invalidated by PASPA. The basis for jurisdiction in the District Court was 28 U.S.C. 1331.

The NJTHA as well as New Jersey Senate President Stephen Sweeney and then-New Jersey General Assembly Speaker Sheila Oliver intervened as defendants. Pet. App. 14.

The State moved to dismiss for lack of standing. Pet. App. 14. After expedited discovery, the district court concluded that the Leagues have standing. *Id.* The United States intervened pursuant to 28 U.S.C. 2403.

The district court ultimately upheld PASPA's constitutionality, granted summary judgment to the Leagues and enjoined the Sports Wagering Law from going into effect. Pet. App. 15. After an expedited appeal, the Third Circuit affirmed.

E. The Court Of Appeals Opinions

1. A Divided Panel Holds PASPA Is Permissible Preemption, Not Impermissible Federal Commandeering Of State Sovereign Functions.

The court of appeals, in a 2-1 decision, held that PASPA permissibly preempts New Jersey's Sports Wagering Law and does not impermissibly commandeer the 46 States even though PASPA makes it "unlawful" for those States to "authorize" or "license" sports wagering.[3] The majority wrote that PASPA

[3] The NJTHA also argued below that because PASPA is written in sweeping terms – reaching all bets on all competitive games in which amateur or professional athletes compete, even purely local ones with utterly no connection to or effect on interstate commerce – it is, on its face, beyond the scope of Congressional power under the Commerce Clause. The court of appeals responded by interpreting PASPA narrowly, concluding that it does not reach all bets on all competitive games in which

(Continued on following page)

uses "classic preemption language that operates, via the Constitution's Supremacy Clause * * * to invalidate state laws that are contrary to the federal statute." Pet. App. 36-37. The majority noted that the anti-commandeering doctrine has never been successfully invoked in the Third Circuit. *Id.* at 8.

In holding that PASPA is permissible preemption, not impermissible commandeering, the court of appeals majority dramatically expanded federal power and significantly narrowed state sovereignty. The holding that a "stand-alone" federal law (PASPA), "via the Supremacy Clause" (Pet. App. 37 & n.9), preempted a contrary state law (New Jersey's Sports Wagering Law), *notwithstanding the absence of any federal scheme directly governing sports wagering*, is unprecedented. That PASPA establishes no federal rule directly regulating the people, according to the majority, is irrelevant to the federal power "via the Supremacy Clause" to preempt.[4] In the view of the majority, Congress has the raw power to tell the

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amateur or professional athletes compete, because, in its view, friendly bets do not count as "schemes" and are not carried out "pursuant to law or compact," even when permitted by state law. Pet. App. 34. New Jersey law expressly permits casual bets. See, *e.g.*, N.J. Stat. Ann. §2C:37-2(c) (exempting "player"); N.J. Stat. Ann. §2C:37-1(c) (defining "player" to mean a person who gambles without receiving any profit other than personal gambling winnings).

[4] The United States argued before the District Court that "there is a Supremacy Clause issue here. Congress has said, you can't do this, and all the states must follow that command." Pet. App. 212.

States that they cannot authorize or otherwise regulate activity, even though there is no federal regulatory or deregulatory scheme directly regulating that activity.

Judge Vanaskie dissented, striking a markedly different balance of federal-state power that, unlike the majority, is consistent with *New York* v. *United States*, 505 U.S. 144 (1992), and its progeny. He concluded that the federal power to preempt via the Supremacy Clause requires, as a predicate, that there be a federal regulatory or deregulatory scheme that displaces state law. He reasoned that PASPA violates the principles of federalism that form the basis of the Tenth Amendment because it is a congressional command that conscripts "the states as foot soldiers to implement a congressional policy choice." Pet. App. 80 n.3.

The dissent pointed out the unprecedented nature of the majority's holding, noting that "the majority opinion does not cite any case that sustained a federal statute that purported to regulate the states under the Commerce Clause where there was no underlying federal scheme of regulation or deregulation." Pet. App. 84 n.4. He explained:

> As a result, the federal prohibition of state-authorized sports gambling does not emanate from a federal regulatory scheme that expressly or implicitly preempts state regulation that could conflict with federal policy. Instead, PASPA attempts to implement federal policy by telling the states that they

> may not regulate an otherwise unregulated activity. The Constitution affords Congress no such power.

Id. at 86-87.

The dissent (Pet. App. 71-79) meticulously analyzed the fundamental flaws in the majority's reliance on *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *F.E.R.C.* v. *Mississippi*, 456 U.S. 742 (1982), as well as the majority's conflict with this Court's admonitions in *New York, Printz* v. *United States*, 521 U.S. 898 (1997), *Reno* v. *Condon*, 528 U.S. 141 (2000), and *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012), that state sovereignty must be respected notwithstanding the Supremacy Clause.

The majority reasoned that PASPA's "stand-alone" command is not coercive. In reaching this conclusion, the majority interpreted PASPA to allow New Jersey to repeal its laws prohibiting sports wagering. Pet. App. 49-51. Under the majority's interpretation of PASPA, the 46 non-exempt States are given the option to repeal existing laws prohibiting sports wagering and leave sports wagering completely unregulated. *Id.*

The dissent thought the majority's interpretation of PASPA gave the States no choice at all because unregulated sports wagering might cause grave harm to the States and would wrongly make state officials accountable to the people, even though it is federal

law that prohibits the States from regulating such activity. Pet. App. 88 n.8.

2. The Court Of Appeals Holds That PASPA Does Not Violate The Equal Sovereignty Principle.

The court of appeals sided with an expansive view of federal power at the expense of state sovereignty when it held that PASPA does not violate the principle of equal state sovereignty even though it exempts four States from its mandate and singles out Nevada for unique protection that gives it a virtual monopoly to maintain broad state-sponsored sports wagering. In addressing the equal sovereignty principle, the court of appeals limited application of that principle to federal statutes enacted under the Reconstruction Amendments that regulate voting. Pet. App. 64-65. Thus, the court of appeals concluded that the equal sovereignty principle is inapplicable to statutes enacted pursuant to the Commerce Clause. In that regard, the court of appeals wrote that "there is nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of 'sensitive areas of state and local policymaking[ ]' [(]*Shelby County*, 133 S. Ct. at 2624[)]" and that it "had best respect what the [Court's] majority says rather than read between the lines. * * * If the Justices are pulling our leg, let them say so." Pet. App. 65 (quoting *Sherman* v. *Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 448 (7th Cir. 1992)).

The court of appeals opined that even if the equal sovereignty principle were applicable, PASPA is constitutional because its sovereignty discrimination among the States is justifiable. The court of appeals explained that inasmuch as the goal of PASPA is merely "to stop the *spread* of *state-sanctioned* sports gambling," it would have been "irrational" to "regulat[e] states [such as Nevada] in which sports-wagering already existed." Pet. App. 66 (emphasis in original).

REASONS FOR GRANTING THE WRIT

I. It Is Necessary For This Court To Preserve The Constitutional Balance Between Federal And State Power By Clarifying The Distinction Between Permissible Preemption Under The Supremacy Clause And Impermissible Commandeering Of State Sovereign Functions Protected By The Tenth Amendment And Broader Principles Of Structural Federalism.

A. The Court Of Appeals Majority Stands Alone In Taking The Most Radically Nationalistic Approach Possible On The Distinction Between Permissible Preemption And Impermissible Commandeering.

Both the supremacy of federal law, reflected in the preemption doctrine, and the sovereignty of the States, reflected in the Tenth Amendment's anti-commandeering doctrine, are fundamental to our

Union. They are sometimes in tension. A boundary must be drawn between them. In its 2-1 decision, the court of appeals drew the boundary in the most radically nationalistic place possible.

In the view of the court of appeals majority, a naked federal command that makes it unlawful for a State to authorize or license private activity is permissible preemption and not impermissible commandeering even where Congress has established no federal regulatory or deregulatory scheme directly governing that private activity. This unprecedented notion – that Congress has the raw power to enact a stand-alone statute preempting state law without any direct federal regulation of the people – wholly misunderstands the nature of preemption and thereby provides a pathway for evasion of the core constitutional principle that while the federal government may regulate the people directly it may not dictate how the States regulate the people.

Even where there *is* a direct federal regulation barring certain private conduct, courts have struggled with ascertaining the proper boundary between permissible preemption and unconstitutional commandeering when States attempt to license or authorize that conduct as a matter of state law. As Judge Kozinski has explained: "If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to

criminalize behavior it has chosen to make legal." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring).[5]

In this case the court of appeals majority made new constitutional law by concluding that valid preemption exists even when there is no federal statute that directly prohibits or otherwise directly regulates private behavior. According to the majority, Congress has a stand-alone raw power to make it unlawful for States to authorize certain private behavior, such as sports wagering, even in the absence of a federal regulatory or deregulatory scheme directly regulating that private behavior.

If state sovereignty means anything, this cannot be the law.

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[5] Some courts, following Judge Kozinski, find no preemption because of the anti-commandeering principle. See, *e.g.*, *State* v. *Nelson*, 195 P.3d 826 (Mont. 2008). Others find preemption notwithstanding the anti-commandeering principle. See, *e.g.*, *Emerald Steel Fabricators* v. *Bureau of Labor and Indus.*, 230 P.3d 518, 526-529 (Or. 2010). See also *People* v. *Crouse*, 2013 WL 6673708, No. 12CA2290, at *8 (Colo. Ct. App. Dec. 19, 2013) (noting the question "has divided courts").

B. The Holding By The Court Of Appeals Majority Is Contrary To The Framers' Decision To Reject Both A National Power To Issue Commands To The States And A National Power To Negative State Laws.

1. The Framers Rejected A Federal Power To Issue Commands To The States (The Confederation Model).

A central flaw in the Articles of Confederation was the reliance on a national power of issuing commands to the States. Articles of Confederation VIII, IX. The Framers summarily rejected the Confederation model. As James Madison put it at the Convention, "The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands." 2 The Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911). Madison and Hamilton made the same point during the ratification debates, explaining that "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity." The Federalist No. 20, p. 138 (C. Rossiter ed. 1961).

The Constitution repudiated the Articles of Confederation by empowering the National Government to directly regulate the people, but not the States. The Framers did not intend the Constitution to empower the National Government to regulate the

States in order to indirectly regulate the people. As this Court noted nearly two centuries ago, "The government of the Union * * * is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them." *M'Culloch* v. *Maryland*, 17 U.S. 316, 404-405 (1819). And as this Court explained more than two decades ago, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. * * * The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York* v. *United States*, 505 U.S. 144, 166 (1992).

This Court has long recognized that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992) (citing *Coyle* v. *Smith*, 211 U.S. 559 (1911)). Instead, the Constitution "gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.* at 178. Any attempt by Congress to "circumvent" this limitation should be guarded against and rejected. *Printz* v. *United States*, 521 U.S. 898, 935 (1997).

2. The Framers Rejected A Federal Power To Negative State Laws (The Negative Model).

While the Framers were quick to reject the Confederation model of a national government issuing commands to the States, a "second proposal received more favorable consideration," before being rejected. *F.E.R.C.* v. *Mississippi*, 456 U.S. 742, 794 (1982) (O'Connor, J., dissenting). That proposal was to give Congress the power "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." 1 The Records of the Federal Convention of 1787, p. 21 (M. Farrand ed. 1911). On May 31, 1787, the Committee of the Whole approved this proposal without debate. *Id.* at 61. But when faced with a proposal to expand the congressional negative to encompass all state laws Congress found to be "improper," the Framers recoiled. *Id.* at 164. They rejected not only the expansion of Congressional negative, but also reversed their earlier decision and rejected *any* congressional veto of state legislation because the negative would be "terrible to the States," "unnecessary," and "improper." 2 *id.*, at 27. See *F.E.R.C.* v. *Mississippi*, 456 U.S. 742, 794 (1982) (O'Connor, J., dissenting) (tracing this history).

As a result, "[t]he Federal Government does not * * * have a general right to review and veto state enactments before they go into effect." *Shelby County, Alabama* v. *Holder,* 133 S. Ct. 2612, 2623 (2013). The court of appeals majority, however, gives Congress

what might be termed a preemptive veto: Congress need not await the passage of an individual state law, and then gear up the cumbersome process of Article I, Section 7, to consider vetoing that individual state law. Instead, it can simply decree in advance that state laws are vetoed without awaiting their passage and presentation, with state officials that dare to implement such laws held in contempt. And it can do this as an *alternative* to directly regulating the people.

3. The Framers Adopted The Supremacy Clause As The Constitution's Mechanism For Enforcing Federal Law Directly On The People While Respecting The Sovereignty Of The States.

Having rejected federal power, reflected in both the Confederation and Negative models, to dictate to the States how they must regulate the people, the Framers adopted the Supremacy Clause. The Supremacy Clause became the Constitution's mechanism to empower the Federal Government to impose national standards directly on the people without compromising the integrity of the States and their sovereign functions. *F.E.R.C.* v. *Mississippi*, 456 U.S. 742, 794-795 (1982) (O'Connor, J., dissenting); see also, *e.g.,* Jack N. Rakove, *Original Meanings*, 81-82, 171-177 (1996).

The Supremacy Clause does not allow the Federal Government to tell the States how the States are to

govern the people. That's what the Framers twice decided not to do. "The true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect *even though its laws are supreme*." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (second emphasis added).

Contrary to the decision by the court of appeals majority, the Framers never intended the Supremacy Clause to empower Congress to enact "stand-alone" laws (that is, laws like PASPA with no direct regulation of private conduct) that "preempt" state laws by issuing commands that tell the States what laws they may not enact. The Supremacy Clause is "not a source of any federal rights"; rather, it "secure[s] federal rights by according them priority whenever they come in conflict with state law." *Dennis* v. *Higgins*, 498 U.S. 439, 450 (1991) (internal quotations and citations omitted). See also Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2088 (2000) (It is "critically important to note the Supremacy Clause itself does not authorize Congress to preempt state laws [because] it only prescribed a constitutional choice of law rule * * * . If the Clause were meant to be an affirmative grant of Congressional power, it would likely reside in the metropolis of Congressional powers, Article I, section 8, rather than in the suburbs of Article VI.").

As a choice of law rule, the Supremacy Clause and its "doctrinal descendent preemption" have "no

substantive component," and are not a power or means of exercising congressional power. Allison H. Eid, *Preemption and the Federalism Five*, 37 Rutgers L.J. 1, 6-8 (2005).

> Congress may govern directly the people * * * [b]ut it may not govern the *states* for the purpose of indirectly exacting its will on the people. Preemption involves the *direct* federal governance of the people in a way that supersedes concurrent state governance of the same people, not a federal usurpation of state government * * * for federal ends.

Petersburg Cellular Partnership v. *Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000) (opinion of Niemeyer, J.).

Preemption can occur only when Congress establishes a valid federal rule governing the people, pursuant to some other constitutionally enumerated power. The federal rule preempts because it displaces state law and replaces the state law with a valid federal rule. Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 250-252 (2000). Unless there is a federal rule governing the people's conduct, there is no predicate for preemption.

To hold, as the court of appeals majority did, that preemption can occur without Congress establishing any federal rule governing private conduct is to unconstitutionally expand federal power, undermine state autonomy, authorize federal commandeering of

state sovereign functions, and contradict the Framers' intent.

C. The Court Of Appeals Majority Failed To Recognize The Unprecedented Nature Of Expanding Congressional Power To Include A Power To Enact A "Stand-Alone" Law Preempting State Law.

The decision of the court of appeals majority, in doing what the Framers twice repudiated, confers on the National Government a plenary power to negative any state law it does not like by commanding the States to not make particular laws. The court of appeals majority saw this case as nothing more than a "straightforward operation of the Supremacy Clause, which operates on states [sic] laws that are foreclosed by a stand-alone federal provision." Pet. App. 37 n.9; see also *id.* at 58-59 (finding the Sports Wagering Law "conflicts with PASPA and is preempted"); *id.* at 62 (describing PASPA as "a law of pre-emption"); *id.* at 8 (rejecting the argument that PASPA violates the anti-commandeering doctrine because application of that principle here would "suspend commonplace operations of the Supremacy Clause over state activity contrary to federal law"). The majority thought that failure to recognize a plenary Congressional power to preempt would mean that "everyday operation of the Supremacy Clause" would raise "anti-commandeering concerns." *Id.* at 46 n.11. The majority was concerned that the

anti-commandeering doctrine would swallow Congress's power to preempt. But the majority's solution to their concern has the effect of preemption swallowing anti-commandeering in ways that misread this Court's precedents in the area.

The majority thought PASPA fit within a category of this Court's precedents that it denominated as "[p]ermissible regulation in a pre-emptible field." Pet. App. 38. The majority wrote that PASPA's constitutionality was governed by this Court's decisions in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *F.E.R.C.* v. *Mississippi*, 456 U.S. 742 (1982).

PASPA, as the dissent pointed out, is much different than the federal statutes upheld in *Hodel* and *F.E.R.C.* In *Hodel*, the federal statutory provision at issue required that state utility commissions merely "consider" whether to enact certain energy efficiency standards; it did not command how the States ultimately chose to regulate the people. This case would surely not have been brought if PASPA merely required the States to "consider" not licensing or authorizing sports gambling. Indeed, one might view the entire process of the New Jersey Legislature proposing and the people of the State adopting a constitutional amendment, followed by the adoption of implementing legislation and regulations, as New Jersey thoroughly "considering" and then deciding to approve sports gambling.

The statute involved in *F.E.R.C.* made clear that if the States declined to regulate as Congress wished, the Federal Government would step in and enforce its own regulations of the people. 452 U.S. at 271. And that is precisely what PASPA fails to do: it contains no direct regulation of the people and does not establish any national standard, federal rule, or federal regulatory scheme to directly govern sports wagering. PASPA simply commands the States that they cannot authorize or license sports wagering.

There is nothing routine, straightforward, or commonplace about a federal law like PASPA. Indeed, no court, litigant, or anyone else has identified a single federal statute enacted under the Commerce Clause that tells the States that they may not authorize or license certain conduct without also establishing some federal rule governing the activity of private actors.

It has been suggested that federal deregulatory statutes are examples of enactments that preempt without establishing a federal rule. But a moment's analysis reveals this to be in error. When Congress chooses to deregulate an area, such as the routes and prices of airlines and trucks, it *does* establish a federal rule governing private commerce: the federal rule is that the people have a right to engage in that activity (as delimited by federal law) with "maximum reliance on competitive market forces." See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (quoting 49 U.S.C. App. 1302(a)(4) (1988 ed.)); *Rowe*

v. *New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 367 (2008).

In the end, the court of appeals majority does make a gesture towards recognizing the need for a federal rule governing the people. The weakness of the gesture, however, only underscores the problem.

PASPA makes private conduct illegal only if done "pursuant to the law or compact of a governmental entity." That is, nothing a private person can do constitutes a violation of PASPA unless that private person acts "pursuant to" state law. A private person's violation of PASPA is, therefore, entirely derivative of a State's violation. The court of appeals nevertheless concluded that PASPA "does impose a federal standard directly on private individuals." Pet. App. 61. How? By "telling them, essentially, thou shall not engage in sports wagering under the auspices of a state-issued license." *Id.* The inability to articulate any federal rule governing private behavior that is independent from state authorization makes clear that there is no direct regulation of private activity, but only an attempt to regulate private conduct *through* the States.

Within the limits of its enumerated powers, Congress may establish a federal policy for sports gambling, but nothing in the Constitution empowers it to enact a "stand-alone" federal law that dictates to the States what the content of state law must be.

D. The Unprecedented Recognition Of A Congressional Power To Enact A "Stand-Alone" Law Preempting State Law, If Left Unreviewed, Threatens To Emasculate The Anti-Commandeering Doctrine.

If Congress has the raw power that the court of appeals majority says it has, via the Supremacy Clause, to enact a "stand-alone" statute prohibiting the States from authorizing or licensing private activity without establishing any federal rule directly governing that activity, it sounds the death knell for the anti-commandeering principle. Congress would have the power to veto state laws before they go into effect (indeed, before they are even passed) and to coerce the States to govern according to a Congressional command. And Congress would be able to exercise this plenary power while declining to establish a federal rule directly governing the people, thereby avoiding the risk of triggering popular reaction against Congress that such a federal rule could produce.

A few examples illustrate the dangers of the holding of the court of appeals majority:

Consider *Printz*: Rather than establishing a federal rule governing gun possession, Congress could simply order the States by fiat, via the Supremacy Clause, not to authorize or license any person with a criminal record or a mental illness to possess a gun. The States would have to regulate gun possession as Congress dictated.

Consider *New York*: Rather than establishing a federal rule governing low-level nuclear waste, Congress could simply order the States by fiat, via the Supremacy Clause, not to authorize or license any person, other than the States themselves, to own or possess low-level nuclear waste. The States would have to take title to the nuclear waste as Congress dictated.

Consider the minimum wage: Rather than raising the federal minimum wage, Congress could simply order the States by fiat, via the Supremacy Clause, not to authorize anyone to employ another unless the employee is paid a minimum of $15 per hour. The States would have to raise the State minimum wage to $15 per hour.

The possibilities for Congressional fiats and vetoes, via the Supremacy Clause, without establishing any federal rule directly governing the people, are endless. For example, States frequently license (among many other occupations) athletic trainers, barbers, cosmetologists, dieticians, escort drivers, funeral directors, hearing aid dispensers, interior designers, jockeys, lawyers, milk receivers, nursing home administrators, optometrists, public school teachers, real estate appraisers, security guards, truck drivers, ultrasonic testing technicians, veterinarians, and weighmasters.

Suppose Congress wants there to be certain licensing standards for certain occupations but lacks the political courage to establish a federal rule. By

prohibiting the States from licensing anyone who does not meet those standards, Congress could dictate to the States who, what, and how to license or authorize and who, what, and how not to license or authorize.

The court of appeals majority wrote that the anti-commandeering principle is not violated because PASPA allows the States to decline to regulate sports wagering. Pet. App. 49-51. What Judge Vanaskie said in dissent is applicable not only in the context of sports wagering but also with respect to guns, nuclear waste, and the licensing of most occupations: "The resulting unregulated market, however, portends grave consequences for which state officials would be held accountable, even though it would be federal policy that prohibits the states from taking effective measures to regulate and police this activity." *Id.* at 88 n.8. A federal law giving States that kind of "choice" is "indeed coercive." *Id.*

The Constitution "'simply does not give Congress the authority to require the States to regulate.' That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *Sebelius*, 132 S. Ct. at 2602 (Roberts, C.J., joined by Breyer and Kagan, JJ.) (quoting *New York*, 505 U.S. at 178). As *Sebelius* makes clear, unconstitutional coercion exists if the States have "no real option but to acquiesce," despite a formal right to refuse, because the right to refuse must exist "not merely in theory but in fact."

Id. at 2604-2605 (quoting *South Dakota* v. *Dole*, 483 U.S. 203, 211-212 (1987)).

II. It Is Necessary For This Court To Make Clear That The Principle Of Equal Sovereignty Is A Fundamental Principle Of The Constitution, Not A Recent Invention Whose Scope Is Narrowly Confined To Voting Rights Legislation Enacted Pursuant To The Reconstruction Amendments.

A. The Principle Of Equal Sovereignty Is Fundamental To The Union.

Over one hundred years ago, this Court emphasized that "the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." *Coyle* v. *Smith*, 221 U.S. 559, 580 (1911). But the court of appeals treated the equal sovereignty principle as some sort of recent invention that is exceedingly narrow in scope and applicable only to federal voting laws enacted under the Reconstruction Amendments.

It held that the equal sovereignty principle did not apply at all (or at least with less force) to federal laws enacted under the claimed authority of the Commerce Clause, Pet. App. 64-65, failing to distinguish between ordinary Commerce Clause legislation directly regulating the people (which does not

implicate the equal sovereignty of the States "in power, dignity, and authority," *Coyle*, 221 U.S. at 567) and laws such as PASPA that regulate the State's exercise of sovereign regulatory authority. In attempting to regulate the State's exercise of sovereign regulatory authority, PASPA not only exceeds the scope of Congressional power under the Commerce Clause, but plainly does implicate the "power, dignity, and authority of the States."

By confining the domain of the equal sovereignty principle, the court of appeals decision conflicts with the decisions of this Court in *Northwest Austin Municipal Utility District Number One* v. *Holder*, 557 U.S. 193 (2009), and *Shelby County, Alabama* v. *Holder*, 133 S. Ct. 2612 (2013). The decisions in *Northwest Austin* and *Shelby County* explained that the "fundamental principle of equal sovereignty" has been a part of the Court's jurisprudence since at least 1845. See *Shelby County*, 133 S. Ct. at 2623 (citing a line of cases dating back to *Lessee of Pollard* v. *Hagan*, 3 U.S. 212, 223 (1845)). The equal sovereignty principle is not a new principle and its applicability does not ebb and flow depending on the strength of the State's interest in a particular area.

The court of appeals treated the equal sovereignty principle as, at most, a second class constitutional right. It suggested that the principle "may yield" not merely where "local evils appear," but also in many other "types of cases." Pet. App. 65. In short, the court of appeals seems not to have believed that this Court was serious when it said the "principle of equal

sovereignty" is "fundamental." *Shelby County*, 133 S. Ct. at 2623; *Northwest Austin*, 557 U.S. at 203.

B. Discriminatory Regulation Of The States' Exercise Of Sovereign Regulatory Authority Over Their Own Citizens Is At Least As Constitutionally Problematic As Discriminatory Regulation Under The Reconstruction Amendments That Protect Voting Rights.

The only cases in which this Court has upheld any departure at all from the fundamental principle of equal sovereignty have involved federal laws that enforce rights guaranteed by the Reconstruction Amendments. See, *e.g.*, *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). This is hardly surprising as a matter of history and constitutional doctrine.

Historically, the Reconstruction Amendments were a response to blatant efforts by certain States – the States of the former Confederacy – to deny the rights of the freedman. Doctrinally, just as state sovereign immunity can be abrogated when Congress acts under the Reconstruction Amendments, see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), so too, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments [because those] Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome* v.

United States, 446 U.S. 156, 179 (1980) (stating that "*Fitzpatrick* stands for" this proposition).

In narrowly limiting the scope of the equal sovereignty principle, the court of appeals used anomalous reasoning. It concluded that Congress has *greater* power to discriminate against state sovereign functions and depart from the principle of equal sovereignty when regulating the States' regulation of their own citizens than it has when enforcing the Reconstruction Amendments. We respectfully suggest that this conclusion has it backwards and cannot be the law.

Surely Congress cannot have greater authority to discriminate between the States when enacting laws that regulate the States' regulation of their own citizens – laws that themselves exceed Congressional power under the Commerce Clause – than when enforcing the fundamental rights protected by the Reconstruction Amendments against hostile State action.

And even if PASPA can somehow survive the objection that it is an invalid regulation of the States' regulation of the people rather than the permissible direct federal regulation of the people authorized by the Commerce Clause, the equal sovereignty problem remains. For the Commerce Clause, unlike the Reconstruction Amendments, was not created in response to some States denying some of their own citizens the fundamental rights of citizenship; it was designed instead to unify the nation commercially.

See, *e.g.*, *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 807 (1976) (stating that the Commerce Clause "was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution"). If any logical distinction can properly be drawn between federal laws enacted under the Reconstruction Amendments and the Commerce Clause with regard to a departure from the equal sovereignty principle, it would be to view Congress as possessing some limited power to depart from the equal sovereignty principle when enforcing the Reconstruction Amendments but a more narrow or nonexistent power to depart from the equal sovereignty principle when regulating under the Commerce Clause.

Discriminatory regulation of the States' exercise of sovereign regulatory authority over their own citizens is, at the very least, as constitutionally problematic as discriminatory regulation under the Reconstruction Amendments that protect voting rights.

C. If Left Unreviewed And Commerce Clause Enactments Are Not Subject To The Fundamental Principle Of Equal Sovereignty, Then The Equal Sovereignty Principle Is Reduced To A Fiction.

If the equal sovereignty principle does not apply to Commerce Clause enactments then the equal sovereignty principle is a fiction and the Commerce

Clause is an unchecked plenary Congressional power to balkanize the nation and create the equivalent of internal colonies. Congress could, for example, prohibit all States except Michigan from licensing car manufacturing; prohibit all States except West Virginia from licensing fossil fuel extraction; prohibit all States except Pennsylvania from licensing all coal mining; prohibit all States except Kansas from licensing wheat production; prohibit all States except New Jersey from licensing tomato growing; prohibit all States except Washington from licensing apple production; and prohibit all States except Florida from licensing orange production – just as PASPA prohibits all States except Nevada from broadly licensing most sports wagering. *Cf.* Suzanne Collins, *The Hunger Games* (2008) (post-apocalyptic novel, set in North America, in which each separate district is responsible for a particular industry dictated by the wealthy central capital). A principle of equal sovereignty that would permit such disparate treatment of state sovereign functions by the National Government can hardly be considered "fundamental."

Carving out the Commerce Clause as an area where sovereignty discrimination is particularly permissible turns the Commerce Clause on its head. For as this Court has noted, it is "beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984).

Of course, as the court of appeals noted, Congressional action under the commerce clause will affect states differently. Pet. App. 64. A federal minimum wage has different effects in New York and Mississippi; a federal gun control requirement has different effects in Rhode Island and Texas. But laws with different effects on different States no more violate the fundamental principle against sovereignty discrimination than laws with different effects on different racial groups violate the fundamental principle against race discrimination. See *Washington* v. *Davis*, 426 U.S. 229 (1976); *McCleskey* v. *Kemp*, 481 U.S. 279 (1987). It is purposeful discrimination, not mere disparate impact, that is of constitutional concern.

D. The Appropriate Standard Of Review Governing Sovereignty Discrimination Is An Important Issue.

This Court has twice considered the appropriate standard of review governing sovereignty discrimination by Congress. As the Court explained in *Northwest Austin*, the "parties do not agree on the standard to apply," and the "question has been extensively briefed in this case, but we need not resolve it," because of "serious constitutional questions" under both of the competing standards of review suggested by the parties. *Northwest Austin*, 557 U.S. at 204. In *Shelby County,* this Court repeated what it had previously said in *Northwest Austin* that "any 'disparate geographic coverage' must be 'sufficiently related' to the problem it targets." *Shelby County,* 133

S. Ct. at 2627 (quoting *Northwest Austin*, 557 U.S. at 203).

To the extent that *Shelby County* has settled that "sufficiently related" is the standard of review, but see *Shelby County,* 133 S. Ct. at 2644 (Ginsburg, J., dissenting) (contending that the Court did not "identify[ ] a standard of review"), this Court should make clear this standard reaches beyond the context of the Voting Rights Act and is not equivalent to the highly deferential rational basis test.[6] If the only judicial check on Congressional departures from equal state sovereignty is the rational basis test, then Congress can discriminate between the sovereign functions of States as readily as it can discriminate between optometrists and opticians, see *Williamson* v. *Lee Optical*, 348 U.S. 483 (1955), or advertising vehicles and business delivery vehicles, see *Railway Express Agency* v. *New York*, 336 U.S. 106 (1949).

Because all distinctions are subject to rational basis review, if sovereignty discrimination is subject merely to that same standard, then the principle of equal sovereignty would add precisely *nothing* by way of judicial scrutiny – hardly appropriate for a fundamental constitutional principle of equality or consistent with this Court's precedents. Fundamental

[6] The District Court specifically applied low-level rational basis review (Pet. App. 146-148 and n.23) and the court of appeals implied that nothing more than rational basis review was applicable here (*id*. at 65-66).

rights of equality are always protected by some form of heightened scrutiny. See, *e.g.*, *Fisher* v. *University of Texas*, 133 S. Ct. 2411 (2013) (race discrimination); *United States* v. *Virginia*, 518 U.S. 515 (1996) (sex discrimination). Indeed, the individual liberty rights of the NJTHA and its members are as much at issue here as New Jersey's sovereign rights because "federalism protects the liberty of the individual from arbitrary power." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011).

In addition, it is important to make clear that the standard of review does not allow discrimination among the States to become a part of the Congressional ends. Yet that is exactly what the court of appeals did in this case: By treating the purpose of PASPA as stopping the spread of state-sanctioned sports wagering to additional States, it was able to conclude that it would have been irrational to "regulat[e] states in which sports-wagering already existed," and that "[t]argeting only states where the practice did not exist" was "*precisely tailored* to address the problem." Pet. App. 65-66 (emphasis in original). This kind of tautological reasoning should never be accepted, and certainly not where a fundamental constitutional requirement of equality is involved. See *United States* v. *Virginia,* 518 U.S. 515, 545 (1996) (describing as "notably circular" the argument that treats single-sex education as the purpose and exclusion of women as the means to further that

purpose).[7] Similarly flawed would be a defense of a hypothetical voting rights act that insisted on preclearance of voting changes in States *without* a history of race-based vote suppression, but not States *with* such a history, on the theory that the purpose of the law was to stop the spread of race-based vote suppression to additional States.

The willingness of the court of appeals to accept such reasoning in this context underscores that it simply failed to take seriously the fundamental principle of equal sovereignty. It is important for this Court to make clear that the principle of equal sovereignty is not only a broad constitutional right but also a right that is judicially protected by an

[7] The court of appeals also held that PASPA does not violate the principle of equal sovereignty because "far from singling out a handful of states for disfavored treatment, PASPA treats *more favorably* a *single* state." Pet. App. 66 (emphasis in original). The idea seems to be that there is no need for judicial enforcement because a majority of States can protect their own interests in Congress. While arguments relying on the so-called "political safeguards of federalism" did succeed in the years before PASPA was drafted, see *Garcia* v. *San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985), the entire line of federalism decisions from *New York* v. *United States,* 505 U.S. 144 (1992) through *National Federation of Independent Business* v. *Sebelius,* 132 S. Ct. 2566 (2012) makes clear that the political process cannot be trusted to protect constitutional federalism. See also *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995) (rejecting a similar idea that racial majorities can protect themselves in the political process). Indeed, *Sebelius* itself – where a majority of States challenged an Act of Congress on federalism grounds – illustrates that even a majority of States sometimes need to resort to the judiciary to protect their sovereign interests from Congress.

appropriately searching standard of review. States are entitled to the dignity of sovereignty, and to the equal dignity of equal sovereignty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 12, 2014

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1713

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

UNITED STATES OF AMERICA
(Intervenor in the District Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER (Intervenors in District Court)

Stephen M. Sweeney and Sheila Y. Oliver,
Appellants.

No. 13-1714

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

UNITED STATES OF AMERICA
(Intervenor in the District Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER (Intervenors in District Court)

New Jersey Thoroughbred Horsemen's Association, Inc.,
Appellant.

No. 13-1715

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

UNITED STATES OF AMERICA
(Intervenor in the District Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER (Intervenors in District Court)

Governor of the State of New Jersey; David L. Rebuck and Frank Zanzuccki,
Appellants.

On Appeal from the United States District Court
for the District of New Jersey
(Civil Action No. 3-12-cv-04947)
District Judge: Hon. Michael A. Shipp

Argued: June 26, 2013

Before: FUENTES, FISHER,
and VANASKIE, *Circuit Judges.*

(Opinion Filed: September 17, 2013)

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OPINION OF THE COURT

FUENTES, *Circuit Judge*:

Betting on sports is an activity that has unarguably increased in popularity over the last several decades. Seeking to address instances of illegal sports wagering within its borders and to improve its economy, the State of New Jersey has sought to license gambling on certain professional and amateur sporting events. A conglomerate of sports leagues, displeased at the prospect of State-licensed gambling on their athletic contests, has sued to halt these efforts. They contend, alongside the United States as intervening plaintiff, that New Jersey's proposed law violates a federal law that prohibits most states from licensing sports gambling, the Professional and Amateur Sports Protection Act of 1992 (PASPA), 28 U.S.C. § 3701 *et seq*.

In defense of its own sports wagering law, New Jersey counters that the leagues lack standing to bring this case because they suffer no injury from the State's legalization of wagering on the outcomes of their games. In addition, alongside certain intervening defendants, New Jersey argues that PASPA is beyond Congress' Commerce Clause powers to enact and that it violates two important principles that underlie our system of dual state and federal sovereignty: one known as the "anti-commandeering" doctrine, on

the ground that PASPA impermissibly prohibits the states from enacting legislation to license sports gambling; the other known as the "equal sovereignty" principle, in that PASPA permits Nevada to license widespread sports gambling while banning other states from doing so. The District Court disagreed with each of these contentions, granted summary judgment to the leagues, and enjoined New Jersey from licensing sports betting.

On appeal, we conclude that the leagues have Article III standing to enforce PASPA and that PASPA is constitutional. As will be made clear, accepting New Jersey's arguments on the merits would require us to take several extraordinary steps, including: invalidating for the first time in our Circuit's jurisprudence a law under the anti-commandeering principle, a move even the United States Supreme Court has only twice made; expanding that principle to suspend commonplace operations of the Supremacy Clause over state activity contrary to federal laws; and making it harder for Congress to enact laws pursuant to the Commerce Clause if such laws affect some states differently than others.

We are cognizant that certain questions related to this case – whether gambling on sporting events is harmful to the games' integrity and whether states should be permitted to license and profit from the activity – engender strong views. But we are not asked to judge the wisdom of PASPA or of New Jersey's law, or of the desirability of the activities they seek to regulate. We speak only to the legality of

these measures as a matter of constitutional law. Although this "case is made difficult by [Appellants'] strong arguments" in support of New Jersey's law as a policy matter, *see Gonzales v. Raich,* 545 U.S. 1, 9 (2005), our duty is to "say what the law is," *Marbury v. Madison,* 1 Cranch 137, 177 (1803). "If two laws conflict with each other, the courts must decide on the operation of each." *Id.* New Jersey's sports wagering law conflicts with PASPA and, under our Constitution, must yield. We will affirm the District Court's judgment.

I. LEGAL FRAMEWORK

Wagering on sporting events is an activity almost as inscribed in our society as participating in or watching the sports themselves. New Jersey tells us that sports betting in the United States – most of it illegal – is a $500 billion dollar per year industry. And scandals involving the rigging of sporting contests in the interest of winning a wager are as old as the games themselves: the infamous Black Sox scandal of the 1919 World Series, or Major League Baseball's ("MLB") lifetime ban on all-time hits leader Pete Rose for allegedly wagering on games he played in come to mind. And the recent prosecution of Tim Donaghy, a National Basketball Association ("NBA") referee who bet on games that he officiated, reminds us of problems that may stem from gambling.

However, despite its pervasiveness, few states have ever licensed gambling on sporting events.

Nevada alone began permitting widespread betting on sporting events in 1949 and just three other states – Delaware, Oregon, and Montana – have on occasion permitted limited types of lotteries tied to the outcome of sporting events, but never single-game betting. Sports wagering in all forms, particularly State-licensed wagering, is and has been illegal elsewhere. *See, e.g.,* 18 Pa. Cons. Stat. Ann. § 5513; Del. Code Ann. tit. 11, § 1401, *et seq*. Congress took up and eventually enacted PASPA in 1992 in response to increased efforts by states to begin licensing the practice.

A. The Professional and Amateur Sports Protection Act of 1992

PASPA's key provision applies for the most part identically to "States" and "persons," providing that neither may

> sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. The prohibition on private persons is limited to any such activity conducted "pursuant to the law or compact of a governmental entity," *id.* § 3702(2), while the states are subject to an additional

restriction: they may not "license[ ] or authorize by law or compact" any such gambling activities, *id.* §§ 3702(1), 3701.

PASPA contains three relevant exceptions – a "grandfathering" clause that releases Nevada from PASPA's grip, *see id.* § 3704(a)(2), a clause that permitted New Jersey to license sports wagering in Atlantic City had it chosen to do so within one year of PASPA's enactment, *see id.* § 3704(a)(3), and a grandfathering provision permitting states like Delaware and Oregon to continue the limited "sports lotteries" that they had previously conducted, *see id.* § 3704(a)(1). PASPA provides for a private right of action "to enjoin a violation [of the law] . . . by the Attorney General or by a . . . sports organization . . . whose competitive game is alleged to be the basis of such violation." *Id.* § 3703.

Only one Court of Appeals has decided a case under PASPA – ours. In *Office of the Commissioner of Baseball v. Markell* we held that PASPA did not permit Delaware to license single-game betting because the relevant grandfathering provision for Delaware permitted only lotteries consisting of multi-game parlays on NFL teams. 579 F.3d 293, 304 (3d Cir. 2009). This is the first case addressing PASPA's constitutionality.

The Act's legislative history is sparse but mostly consistent with the foregoing. The Report of the Senate Judiciary Committee makes clear that PASPA's purpose is to "prohibit sports gambling conducted by,

or authorized under the law of, any State or governmental entity" and to "stop the spread of State-sponsored sports gambling." Sen. Rep. 102-248, at 4, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555 ("Senate Report"). The Senate Report specifically notes legislators' concern with "State-sponsored" and "State-sanctioned" sports gambling. *Id.* at 3555.

The Senate Report catalogues what the Committee believed were some of the problems arising from sports gambling. Importantly, the Committee noted its concern for "the integrity of, and public confidence in, amateur and professional sports" and its concern that "[w]idespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think 'the fix was in' whenever their team failed to beat the point-spread." *Id.* at 3556. The Senate Report also stated its concurrence with the then-director of New Jersey's Division of Gaming Enforcement's statement that "most law enforcement professionals agree that legalization has a negligible impact on, and in some ways enhances, illegal markets." *Id.* at 3558. This is so because "many new gamblers will . . . inevitably . . . seek to move beyond lotteries to wagers with higher stakes and more serious consequences." *Id.*

The Senate Report also explains the Committee's conclusion that "[s]ports gambling is a national problem" because "[t]he moral erosion it produces cannot be limited geographically" given the thousands who earn a livelihood from professional sports and the millions who are fans of them, and because "[o]nce a

State legalizes sports gambling, it will be extremely difficult for other States to resist the lure." *Id.* at 3556. Finally, it notes that PASPA exempts Nevada because the Committee did not wish to "threaten [Nevada's] economy," or of the three other states that had chosen in the past to enact limited forms of sports gambling. *Id.* at 3559.

B. Sports Gambling in New Jersey Since PASPA Was Enacted

Although New Jersey in its discretion chose not to avail itself of PASPA's exemption within the one-year window, "[o]ver the course of the next two decades . . . the views of the New Jersey voters regarding sports wagering evolved." Br. of Appellants Sweeney, *et al.* 4. In 2010, the New Jersey Legislature held public hearings during which it heard testimony that regulated sports gambling would generate much-needed revenues for the State's casinos and racetracks, and during which legislators expressed a desire to "to stanch the sports-wagering black market flourishing within [New Jersey's] borders." Br. of Appellants Christie, *et al.* 13 ("N.J. Br."). The Legislature ultimately decided to hold a referendum which would result in an amendment to the State's Constitution permitting the Legislature to "authorize by law wagering . . . on the results of any professional, college, or amateur sport or athletic event." N.J. Const. Art. IV, § VII, ¶ 2(D), (F). The measure was approved by the voters, and the Legislature later enacted the law that is now asserted to be in violation

of PASPA – the "Sports Wagering Law," which permits State authorities to license sports gambling in casinos and racetracks and casinos to operate "sports pools." N.J.S.A. 5:12A-1 *et seq.*; *see also* N.J.A.C. § 13:69N-1.1 *et seq.* (regulations implementing the law).

II. PROCEDURAL HISTORY

The NBA, MLB, the National Collegiate Athletic Association ("NCAA"), the National Football League ("NFL"), and the National Hockey League ("NHL") (collectively, the "Leagues"), sued New Jersey Governor Chris Christie, New Jersey's Racing Commissioner, and New Jersey's Director of Gaming Enforcement (the "State" or "New Jersey"), under 28 U.S.C. § 3703, asserting that the Sports Wagering Law is invalidated by PASPA. The New Jersey Senate Majority Leader Stephen Sweeney and House Speaker Sheila Oliver intervened as defendants, alongside the New Jersey Thoroughbred Horsemen's Association, the owner of the Monmouth Park Racetrack, a business where sports gambling would occur under the Sports Wagering Law (the "NJTHA") (collectively, "Appellants").

The State moved to dismiss for lack of standing and the District Court ordered expedited discovery on that question. After the completion of discovery and oral arguments, the District Court concluded that the Leagues have standing. *Nat'l Collegiate Athletic Ass'n*

v. Christie, No. 12-4947, 2012 WL 6698684 (D.N.J. Dec. 21, 2012) ("*NCAA I*").

With the constitutionality of PASPA then squarely at issue, the District Court invited the United States to intervene pursuant to 28 U.S.C. § 2403. The District Court ultimately upheld PASPA's constitutionality, granted summary judgment to the Leagues, and enjoined the Sports Wagering Law from going into effect. *Nat'l Collegiate Athletic Ass'n v. Christie,* ___ F. Supp. 2d ___, 2013 WL 772679 (D.N.J. Feb. 28, 2013) ("*NCAA II*"). This expedited appeal followed.

III. JURISDICTION: WHETHER THE LEAGUES HAVE STANDING

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331, and we have appellate jurisdiction over its final judgment under § 1291. Our jurisdiction, however, is limited by the Constitution's "cases" and "controversies" requirement. U.S. CONST., art. III, § 2. To satisfy this jurisdictional limitation, the party invoking federal court authority must demonstrate that he or she has standing to bring the case.[1]

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[1] The United States notes there may be questions as to whether the District Court's injunction is an appealable final order because it does not specify what steps the State must undertake to comply with the injunction, but we conclude that the injunction is an appealable final order because the merits opinion describes what the State must do – refrain from licensing sports gambling. *See NCAA II,* 2013 WL 772679, at *25.

The Leagues argue they have standing because their own games are the subject of the Sports Wagering Law. They also contend that the law will increase the total amount of gambling on sports available, thereby souring the public's perception of the Leagues as people suspect that games are affected by individuals with a perhaps competing hidden monetary stake in their outcome. Appellants counter that the Leagues cannot show a concrete, non-speculative injury from any potential increase in *legal* gambling.

The District Court granted summary judgment to the Leagues, reasoning that *Markell* supports a holding that the Leagues have standing, and that reputational injury is a legally cognizable harm that may confer standing. It also found sufficient facts in the record to conclude that the Sports Wagering Law will result in an increase in fans' negative perceptions of the Leagues. We review *de novo* the legal conclusion that the Leagues have standing, and we review for clear error any factual findings underlying the District Court's determination. *Marion v. TDI Inc.,* 591 F.3d 137, 146 (3d Cir. 2010).

A. The Effect of *Markell*

Markell, like this case, was a lawsuit by the Leagues to stop a state from licensing single-game betting on the outcome of sporting events. In *Markell* we "beg[a]n [our analysis], as always, by considering whether we ha[d] jurisdiction to hear [the] appeal," and later concluded that we did have jurisdiction. 579

F.3d at 297, 300. But, contrary to the Leagues' suggestion, our analysis was limited to whether we had appellate jurisdiction under 28 U.S.C. § 1292(a). *See id.* We did not explicitly consider Article III standing, and a "drive-by jurisdictional ruling, in which jurisdiction has been assumed by the parties . . . does not create binding precedent." *United States v. Stoerr,* 695 F.3d 271, 277 n.5 (3d Cir. 2012) (internal quotation marks and alterations omitted). Therefore, we will not rely on *Markell* for our standing analysis.

B. Standing Law Generally

Under the familiar three-part test, to establish standing, a plaintiff must show (1) an "injury in fact," *i.e.,* an actual or imminently threatened injury that is "concrete and particularized" to the plaintiff; (2) causation, *i.e.,* traceability of the injury to the actions of the defendant; and (3) redressability of the injury by a favorable decision by the Court. *Summers v. Earth Island Inst.,* 555 U.S. 488, 493 (2009).

Causation and redressability may be met when "a party . . . challenge[s] government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action." *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.,* 366 F.3d 930, 940-41 (D.C. Cir. 2004). Here, the Leagues do not purport to enjoin third parties from attempting to fix games. The Leagues have sued to block the Sports Wagering Law, which they assert will result in a taint upon their games, and is a law

that by definition constitutes state action to license conduct that would not otherwise occur. Under the reasoning of *National Wrestling Coaches,* causation and redressability are thus satisfied, and all arguments implicitly aimed at those two prongs are suspect.

Accordingly, we focus on the injury-in-fact requirement, the "contours of [which], while not precisely defined, are very generous." *Bowman v. Wilson,* 672 F.2d 1145, 1151 (3d Cir. 1982). Indeed, all that Article III requires is an identifiable trifle of injury, *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 690 n.14 (1973), which may exist if the plaintiff "has . . . a personal stake in the outcome of [the] litigation." *The Pitt News v. Fisher,* 215 F.3d 354, 360 (3d Cir. 2000); *see also Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 n.1 (1992) (noting that to satisfy the injury-in-fact requirement the "injury must affect the plaintiff in a personal and individual way"). To meet this burden, the Leagues must present evidence "in the same way as [for] any other matter on which [they] bear[ ] the burden of proof." *Lujan,* 504 U.S. at 561.

C. Whether the Sports Wagering Law Causes the Leagues An Injury In Fact

As noted, the Leagues offer two independent bases for standing: that the Sports Wagering Law makes the Leagues' games the object of state-licensed

gambling and that they will suffer reputational harm if such activity expands. We address each in turn.

1. The Leagues are essentially the object of the Sports Wagering Law

Injury in fact may be established when the plaintiff himself is the object of the action at issue. *Id.* Thus, the Leagues are correct that if the Sports Wagering Law is directed at them, the injury-in-fact requirement is satisfied.

Fairly read, however, the Sports Wagering Law does not directly regulate the Leagues, but instead regulates the activities that may occur at the State's casinos and racetracks. We thus hesitate to conclude that the Leagues may rely solely on the existence of the Sports Wagering Law to show injury. But that is not to say that we are glib with respect to one of the main purposes of the law: to use the Leagues' games for profit. *Cf. NFL v. Governor of Del.,* 435 F. Supp. 1372, 1378 (D. Del. 1972) (Stapleton, J.) (explaining that Delaware's sports lottery sought to use the NFL's "schedules, scores and public popularity" to "mak[e] profits [Delaware] [c]ould not make but for the existence of the NFL"). The Sports Wagering Law is thus, in a sense, as much directed at the Leagues' events as it is aimed at the casinos. This is not a generalized grievance like those asserted by environmental groups over regulation of wildlife in cases where the Supreme Court has found no standing, such as in *Lujan* or *Summers.* The law here aims to license

private individuals to cultivate the fruits of the Leagues' labor.

Appellants counter that the Leagues' interest in not seeing their games subject to wagering is a non-cognizable "claim for the loss of psychic satisfaction." N.J. Br. at 31 (citing *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 107 (1998)). But the holding in *Steel Company* was that a claim for psychic satisfaction did not present a *redressable* injury. In that case, a private plaintiff sought a payment into the U.S. Treasury by a private company that had violated federal law, and asserted that such was a redressable injury because the plaintiff would feel "psychic satisfaction" in seeing the payment made. *See Steel Co.,* 523 U.S. at 107. The case is thus inapposite here, where redressability is established because the Leagues assert harm from the very government action they seek to enjoin – the enforcement of the Sports Wagering Law. Moreover, the Leagues do not assert merely psychic, but reputational harm, a very real and very redressable injury.

Appellants also argue that because the Leagues do not have a proprietary interest in the outcomes of their games they may not seek to prevent others from profiting from them. This contention relies on the holding in *NFL v. Governor of Delaware,* that a Delaware lottery based on the outcome of NFL games did not constitute a misappropriation of the NFL's property. 435 F. Supp. at 1378-79. But here the Leagues do not complain of an invasion of any proprietary interest, but only refer to the fact of

appropriation of their labor to show that the Sports Wagering Law is directed at them.

2. Reputational Harm as Injury In Fact

The Leagues may also meet their burden of establishing injury from a law aimed at their games by proving that the activity sanctioned by that law threatens to cause them reputational harm amongst their fans and the public.

(a) Reputation Harm Is a Legally Cognizable Injury

As a matter of law, reputational harm is a cognizable injury in fact. The Supreme Court so held in *Meese v. Keene,* where it concluded that a senator who wished to screen films produced by a foreign company had standing to challenge a law requiring the identification of such films as foreign "political propaganda" because the label could harm his reputation with the public and hurt his chances at reelection. 481 U.S. 465, 473-74 (1987). Essentially, the senator challenged his unwanted association with an undesirable label. Our cases have also recognized that reputational harm is an injury sufficient to confer standing. *See, e.g., Bowers v. Nat'l Collegiate Athletic Ass'n,* 475 F.3d 524, 542-43 (3d Cir. 2007) (concluding that an attorney has standing to challenge a public reprimand because the sanction "affect[s] [his] reputation"); *Doe v. Nat'l Bd. of Med. Exam'rs,* 199 F.3d 146, 153 (3d Cir. 1999) (holding that a student had standing to

challenge a rule requiring that he be identified as disabled because such label could sour the perception of him by "people who can affect his future and his livelihood").

The Leagues' claim of injury is identical to that of the plaintiffs in *Keene* and *Doe:* they are harmed by their unwanted association with an activity they (and large portions of the public) disapprove of – gambling. Appellants do not dispute this legal premise, but attack the strength of the evidence that the Leagues have proffered to tie the Sports Wagering Law to the reputational harm they assert. These arguments overstate what the Leagues must show to demonstrate reputational harm in this context and, in any case, ignore the strength of the proffered evidence.

(b) The Evidence In the Record Supports the District Court's Conclusion that Reputational Harm Will Occur

To be sure, at the summary judgment stage, mere allegations of harm are insufficient and specific facts are required. *See Lujan,* 504 U.S. at 561. And a plaintiff's claim of fear of reputational harm must always be "based in reality." *Doe,* 199 F.3d at 153. But the "nature and extent of facts that must be averred" depends on the nature of the asserted injury. *Lujan,* 504 U.S. at 561-62. No one would doubt, for example, that an individual forced to wear a scarlet "A" on her clothing has standing to challenge that action based

on reputational harm. Indeed, that was the import of our holding in *Doe* where, after discounting all of the evidence presented to prove that others' perception of the plaintiff as disabled could harm him, we concluded that his fear of reputational harm based on an unwanted and stigmatizing label was nevertheless based "in reality." 199 F.3d at 153. In *Keene,* by contrast, where the reputational harm from being associated with "foreign political propaganda" was not as intuitive, the Supreme Court held that an undisputed expert opinion that such labels may stigmatize individuals was sufficient to make the required injury-in-fact showing. 481 U.S. at 490. This suggests a spectrum wherein the sufficiency of the showing that must be made to establish reputational harm depends on the circumstances of each case. Here, the reputational harm that results from increasingly associating the Leagues' games with gambling is fairly intuitive.

For one, the conclusion that there is a link between legalizing sports gambling and harm to the integrity of the Leagues' games has been reached by several Congresses that have passed laws addressing gambling and sports, *see, e.g.,* H.R. Rep. No. 88-1053 (1963) (noting that when gambling interests are involved, the "temptation to fix games has become very great," which in turn harms the honesty of the games); Senate Report at 3555 (noting that PASPA was necessary to "maintain the integrity of our national pastime"). It is, indeed, the specific conclusion reached by the Congress that enacted PASPA, as reflected by the statutory cause of action conferred to

the Leagues to enforce the law when their individual games are the target of state-licensed sports wagering. *See* 28 U.S.C. § 3703. And, presumably, it has also been at least part of the conclusions of the various state legislatures that have blocked the practice throughout our history.

But even if polls like in *Keene* were always required in reputational harm cases, the Leagues have met that burden. The record is replete with evidence showing that being associated with gambling is stigmatizing, regardless of whether the gambling is legal or illegal. Before the District Court were studies showing that: (1) some fans from each League viewed gambling as a problem area for the Leagues, and some fans expressed their belief that game fixing most threatened the Leagues' integrity **[App. 1605-06]**; (2) some fans did not want a professional sports franchise to open in Las Vegas, and some fans would be less likely to spend money on the Leagues if that occurred; and (3) a large number of fans oppose the expansion of legalized sports betting. **[2293-98.]** This more than suffices to meet the Leagues' evidentiary burden under *Keene* and *Doe* – being associated with gambling is undesirable and harmful to one's reputation.

Although the Leagues could end their injury in fact proffer there, they also set forth evidence establishing a clear link between the Sports Wagering Law and increased incentives for game-rigging. First, the State's own expert noted that state-licensing of sports gambling will result in an increase in the total

amount of (legal plus illegal) gambling on sports. **[App. 325]**. Second, a report by the National Gambling Impact Study Commission, prepared at the behest of Congress in 1999, explains that athletes are "often tempted to bet on contests in which they participate, undermining the integrity of sporting contests." App. 743. Third, there has been at least one instance of match-fixing for NCAA games as a result of wagers placed through legitimate channels, and several as a result of wagers placed in illegal markets for most of the Leagues, and NCAA players have affected or have been asked to affect the outcome of games "because of gambling debt." App. 2245. Thus, more legal gambling leads to more total gambling, which in turn leads to an increased incentive to fix or attempt to fix the Leagues' matches.

This evidence, together, permits the factual conclusion that being associated with gambling is a stigmatizing label and that, to the extent that the Sports Wagering Law will increase the total amount of gambling as New Jersey's expert expects, it will increase some fans' "negative perceptions [of the Leagues] attributed to game fixing and gambling." *NCAA I,* 2012 WL 6698684, at *6. We discern no clear error in the District Court's factual conclusions as derived from these surveys and reports.[2]

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[2] More fundamentally, it is clear to us that gambling and match-fixing scandals tend to tarnish the Leagues' reputations. Media reports to that effect abound. To take but one, after the Tim Donaghy NBA gambling and game-fixing scandal, commentators

(Continued on following page)

3. Appellants' Counterarguments

Appellants posit that the Leagues cannot establish injury based on any stigma that may attach to wagering, because fans would not think negatively of the Leagues given that it is the State that is licensing the activity against the Leagues' wishes. But as then-Circuit Judge Scalia explained, an argument that the "public reaction [to] the alleged harm . . . is an irrational one . . . is irrelevant to the question of core, constitutional injury-in-fact, which requires no more than *de facto* causality." *Block v. Meese,* 793 F.2d 1303, 1309 (D.C. Cir. 1986).

We also find unpersuasive the contention that the increase in incentives to rig the outcome of the Leagues' games cannot give rise to standing because they depend on unknown actions of third parties. The Leagues do not seek to enjoin individuals from rigging games; they seek to enjoin New Jersey's law. That a third party's action may be necessary to complete the complained-of harm does not negate the existence of an injury in fact from the Sports Wagering Law or negate causation and redressability. "It is impossible to maintain . . . that there is no standing to sue regarding action of a defendant which harms

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noted that "the integrity of the [NBA's] games just took a major hit." J.A. Adande, *Ref investigation only adds to bad perception of NBA,* ESPN.com, July 19, 2007, http://sports.espn.go.com/nba/columns/story?id=2943704. It is simply untenable to hold that the Leagues have not identified a trifle of reputational harm from an increase in even legal or licensed sports gambling.

the plaintiff only through the reaction of third persons. If that principle were true, it is difficult to see how libel actions or suits for inducing breach of contract could be brought in federal court. . . ." *Id.* Thus, "the traceability requirement [may be] met even where the conduct in question might not have been a proximate cause of the harm." *Edmonson v. Lincoln Nat'l Life Ins. Co.,* ___ F.3d ___, No. 12-1581, 2013 WL 4007553, *7 (3d Cir. Aug. 7, 2013) (citing *The Pitt News,* 215 F.3d at 360-61).[3]

Appellants also assert that granting summary judgment to the Leagues was improper because the effect of the studies and opinion polls was disputed by Appellants' own evidence. In particular, they point to

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[3] Appellants rely almost exclusively on *Simon v. East Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976), for the proposition that the reputational injury at issue here is insufficient because it "result[s] 'from the independent action of some third party not before the court.' " N.J. Br. at 23 (quoting *Simon,* 426 U.S. at 41-42). This argument greatly overstates the effect of *Simon.* There, a group of indigent individuals brought suit against the IRS, asserting that the IRS's tax designation of certain hospitals harmed them by making it less likely that the hospitals would provide them free services. The Supreme Court concluded that the plaintiffs lacked standing because it was "purely speculative whether the denials of services . . . fairly can be traced to [the IRS' actions] or instead result from decisions made by the hospitals without regard to the tax implications." *Simon,* 426 U.S. at 42-43. But here we are dealing with a law that licenses conduct that casinos could not otherwise undertake under the State's auspices, and thus the third party's actions are not truly independent of the State's conduct. *See Nat'l Wrestling Coaches Ass'n,* 366 F.3d at 941.

evidence that (1) the Leagues have been economically prospering despite pervasive unregulated sports gambling and state-licensed sports gambling in Nevada; and (2) some individuals would have no interest in the Leagues' product unless they had a monetary interest in the outcome of games. But these arguments, which sound more like an appeal to commonsense with which, no doubt, many will agree as a policy matter, do not legally deprive the Leagues of standing and are insufficient to raise a genuine issue of material fact.

A plaintiff does not lose standing to challenge an otherwise injurious action simply because he may also derive some benefit from it. Our standing analysis is not an accounting exercise and it does not require a decision on the merits. *See, e.g., Denney v. Deutsche Bank AG,* 443 F.3d 253, 265 (2d Cir. 2006) (noting that "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing"); *see also* 13A CHARLES A. WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. JURIS. 3d § 3531.4, 147 (3d ed. 2008). Nor must the Leagues construct counterfactuals analyzing whether they would have done better if PASPA had instituted a complete ban of state-licensed sports gambling or, conversely, worse if PASPA had not existed. And that fans may still buy tickets is not inconsistent with the notion that the Leagues' esteem suffers in the eyes of fans, which requires the Leagues to take efforts to rehabilitate their image. That alone establishes injury in fact;

that the Leagues may have been successful at rehabilitating their images does not deprive them of standing. *See, e.g., Keene,* 481 U.S. at 475 ("[T]he need to take . . . affirmative steps to avoid the risk of harm to [one's] reputation constitutes a cognizable injury.").

As a last resort, Appellants question the Leagues' commitment to their own argument that state-licensed sports wagering harms them, noting that the Leagues hold events in jurisdictions, such as Canada and England, where gambling on sports is licensed, and that they promote and profit from products that are akin to gambling on sports, such as pay-to-play fantasy leagues. But standing is not defeated by a plaintiff's alleged unclean hands and does not require balancing the equities. That the Leagues may believe that holding events in Canada and England is not injurious to them does not negate that harm may arise from an expansion of sports wagering to the entire country. The same can be said of the Leagues' promotion of fantasy sports, even if we accept that these activities are akin to head-to-head gambling.[4]

[4] We note, however, the legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the Sports Wagering Law. *See Humphrey v. Viacom, Inc.,* No. 06-2768 (DMC), 2007 WL 1797648, at *9 (D.N.J. June 20, 2007) (holding that fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws); *Las Vegas Hacienda, Inc. v. Gibson,* 359 P.2d 85, 86-87 (Nev. 1961) (holding that a "hole-in-one" contest that required an entry fee was a prize contest, not a wager).

And, as even Appellants recognize, it is not the Leagues' subjective beliefs that control. *See Lujan,* 504 U.S. at 564.

* * *

That the Leagues have standing to enforce a prohibition on state-licensed gambling on their athletic contests seems to us a straightforward conclusion, particularly given the proven stigmatizing effect of having sporting contests associated with gambling, a link that is confirmed by commonsense and Congress' own conclusions.[5]

IV. THE MERITS

We turn now to the merits. The centerpiece of Appellants and amici's attack on PASPA is that it impermissibly commandeers the states. But at least one party raises the spectre that PASPA is also beyond Congress' authority under the Commerce Clause of the U.S. Constitution. We thus examine first whether Congress may even regulate the activities that PASPA governs. Only after concluding that Congress may do

[5] We also note that, although the United States' intervention does not always give us jurisdiction, a court may treat intervention as a separate suit over which it has jurisdiction, if the intervenor has standing, particularly when the intervenor enters the proceedings at an early stage. *See, e.g., Disability Advocates, Inc. v. New York Coal. For Assisted Living, Inc.,* 675 F.3d 149, 161 (2d Cir. 2012); *Fuller v. Volk,* 351 F.2d 323, 328 (3d Cir. 1965). Thus, the United States' intervention independently supports our jurisdiction.

so can we consider whether, in exercising its affirmative powers, Congress exceed a limitation imposed in the Constitution, such as by the anti-commandeering and equal sovereignty principles. *See, e.g., Reno v. Condon,* 528 U.S. 141, 148-49 (2000) (asking, first, whether a law was within Commerce Clause powers and, second, whether the law violated the Tenth Amendment).[6]

A. Whether PASPA is Within Congress' Commerce Clause Power

1. Modern Commerce Clause Law

Among Congress' enumerated powers in Article I is the ability to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., Art. I., § 8, cl. 3. As is well-known, since *NLRB v. Jones & Laughlin Steel Corporation,* 301 U.S. 1 (1937), the Commerce Clause has been construed to give Congress "considerabl[e] . . . latitude in regulating conduct and transactions." *United States v. Morrison,* 529 U.S. 598, 608 (2000). For one, Congress may regulate an activity that "substantially affects interstate commerce" if it "arise[s]

[6] We review *de novo* a determination regarding PASPA's constitutionality, *Gov't of V.I. v. Steven,* 134 F.3d 526, 527 (3d Cir. 1998), and begin with the "time-honored presumption that [an act of Congress] is a constitutional exercise of legislative power." *Reno,* 528 U.S. at 148 (internal quotation marks omitted) (quoting *Close v. Glenwood Cemetery,* 107 U.S. 446, 475 (1883)).

out of or [is] connected with a commercial transaction." *United States v. Lopez,* 514 U.S. 549, 559 (1995). By contrast, regulations of non-economic activity are disfavored. *Id.* at 567 (striking down a law regulating possession of weapons near schools); *see also Morrison,* 529 U.S. at 613 (invalidating a law regulating gender-motivated violence).

2. Gambling and the Leagues' Contests, Considered Separately or Together, Substantially Affect Interstate Commerce

Guided by these principles, it is self-evident that the activity PASPA targets, state-licensed wagering on sports, may be regulated consistent with the Commerce Clause.

First, both wagering and national sports are economic activities. A wager is simply a contingent contract involving "two or more . . . parties, having mutual rights in respect to the money or other thing wagered." *Gibson,* 359 P.2d at 86; *see also* N.J. Stat. Ann. §§ 5:12-21 (defining gambling as engaging in a game "for money, property, checks, or any representative of value"). There can also be no doubt that the operations of the Leagues are economic activities, as they preside essentially over for-profit entertainment. *See, e.g.,* App. 1444 (NFL self-describing its "complex business model that includes a diverse range of revenue streams, which contribute . . . to company profitability").

Second, there can be no serious dispute that the professional and amateur sporting events at the heart of the Leagues' operations "substantially affect" interstate commerce. The Leagues are associations comprised of thousands of clubs and members, **[App. 105]**, which in turn govern the operations of thousands of sports teams organized across the United States, competing for fans and revenue across the country. "Thousands of Americans earn a . . . livelihood in professional sports. Tens of thousands of others participate in college sports." Senate Report at 3557. Indeed, some of the Leagues hold sporting events abroad, affecting commerce with Foreign Nations.

Third, it immediately follows that placing wagers on sporting events also substantially affects interstate commerce. As New Jersey indicates, Americans gamble up to $500 billion on sports each year. **[App. 330-31]**. And whatever effects gambling on sports may have on the games themselves, those effects will plainly transcend state boundaries and affect a fundamentally national industry. Accordingly, we have deferred to Congressional determinations that "gambling involves the use and has an effect upon interstate commerce." *United States v. Riehl,* 460 F.2d 454, 458 (3d Cir. 1972).

At bottom, it is clear that PASPA is aimed at an activity that is "quintessentially economic" and that has substantial effects on interstate commerce. *See Raich,* 545 U.S. at 19-20. Prohibiting the state licensing of this activity is thus a "rational . . . means of

regulating commerce" in this area and within Congress' power under the Commerce Clause. *Id.* at 26.[7]

3. PASPA Does Not Unconstitutionally Regulate Purely Local Activities

Appellants nevertheless assert that PASPA is unconstitutional because it "reaches unlimited betting activity . . . that cannot possibly affect interstate commerce . . . [such as] a casual bet on a Giants-Jets football game between family members." Br. of NJTHA at 34. Parsing words from the statute, they insist PASPA reaches these activities because it prohibits betting in "competitive games" involving "amateur or professional athletes." 28 U.S.C. § 3702. This argument is meritless.

For one, PASPA on its face does not reach the intrastate activities that Appellants contend it does. PASPA prohibits only gambling "schemes" and only those carried out "pursuant to law or compact." 28 U.S.C. § 3702. The activities described in Appellants' examples are nor [sic] carried out pursuant to state law, or pursuant to "a systemic plan; a connected or orderly arrangement . . . [or] [a]n artful plot or plan." Black's Law Dictionary (9th Ed. 2009) (defining "scheme").

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[7] *But see Federal Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs,* 259 U.S. 200, 208-09 (1922) (describing MLB's business as "giving exhibitions of base ball, which are purely state affairs," and concluding that baseball is not in interstate commerce for purposes of the Sherman Antitrust Act).

Moreover, even entertaining that PASPA somehow reaches these activities, Congressional action over them is permissible if Congress has a "rational basis" for concluding that the activity in the aggregate has a substantial effect on interstate commerce. *Raich,* 545 U.S. at 22. The rule of an unbroken line from *Wickard v. Filburn,* 317 U.S. 111 (1942), to *Raich* – respectively upholding limitations on growing wheat at home and personal marijuana consumption – is that when it comes to legislating economic activity, Congress can regulate "even activity that is purely intrastate in character . . . where the activity, combined with like conduct by other similarly situated, affects commerce among the States or with foreign nations." *Nat'l League of Cities v. Usery,* 426 U.S. 833, 840 (1976), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985) (alterations omitted). And there can be no doubt that Congress had a rational basis to conclude that the intrastate activities at issue substantially affect interstate commerce, given the reach of gambling, sports, and sports wagering into the far corners of the economies of the states, documented above.[8]

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[8] Moreover, if PASPA reaching activities that are purely intrastate in nature were constitutionally problematic, we would construe its language as not reaching such acts. After all, "[t]he cardinal principle of statutory construction is to save and not to destroy. . . . [A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *Jones & Laughlin Steel,* 301 U.S. at 30. Appellants' reading

(Continued on following page)

Appellants finally seek support in the Supreme Court's holding that the "individual mandate" of the Affordable Care Act is beyond Congress' power under the Commerce Clause. *See Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566 (2012). But the problem in *Sebelius* was that the *method* chosen to regulate (forcing into economic activity individuals previously not in the market for health insurance) was beyond Congress' power. Here, the method of regulation, banning an activity altogether (in this case the expansion of State-sponsored sports betting), is neither novel nor problematic. *See, e.g., Raich,* 545 U.S. at 27.

B. Whether PASPA Impermissibly Commandeers the States

Having concluded that Congress may regulate sports wagering consistent with the Commerce Clause, we turn to PASPA's operation in the case before us.

As noted, PASPA makes it "unlawful for a governmental entity to . . . authorize by law or compact" gambling on sports. 28 U.S.C. § 3702. This is classic preemption language that operates, via the Constitution's Supremacy Clause, *see* U.S. CONST., art. VI,

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of PASPA to reach casual bets between friends steamrolls that principle. At the very worst, we would leave for another day the question of whether PASPA may constitutionally be applied to such a local wager. Appellants today have not shown that "no set of circumstances exists under which the [challenged] Act would be valid." *CMR D.N. Corp. v. City of Phila.,* 703 F.3d 612, 623 (3d Cir. 2013) (alteration in original).

cl. 2, to invalidate state laws that are contrary to the federal statute. *See, e.g., Am. Trucking Ass'ns v. City of Los Angeles,* 133 S. Ct. 2096, 2100-01, 2102 (2013) explaining that the provision of the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") that states a "'State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property' . . . preempts State laws related to a price, route, or service of any motor carrier with respect to the transportation of property" (quoting 49 U.S.C. § 14501(c)(1)). The Sports Wagering Law is precisely what PASPA says the states may not do – a purported authorization by law of sports wagering. It is therefore invalidated by PASPA.[9]

Appellants do not contest any of the foregoing, but argue instead that PASPA's operation over the Sports Wagering Law violates the "anti-commandeering" principle, which bars Congress from conscripting the states into doing the work of federal officials. The import of this argument, then, is that impermissible anti-commandeering may occur even when all a federal law does is supersede state law via the Supremacy Clause. But the Supreme Court's anti-commandeering jurisprudence has never entertained this position, let alone accepted it.

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[9] This straightforward operation of the Supremacy Clause, which operates on states [sic] laws that are foreclosed by a stand-alone federal provision, is not to be confused with *field preemption* of sports wagering, a topic we discuss at part IV.B.2.d below.

1. The Anti-Commandeering Principle

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991). And it is well-known that all powers not explicitly conferred to the federal government are reserved to the states, a maxim reflected in the text of the Tenth Amendment. U.S. CONST., amdt. X; *see also United States v. Darby,* 312 U.S. 100, 123-24 (1941) (describing this as a "truism" embodied by the Tenth Amendment).

Among the important corollaries that flow from the foregoing is that any law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" is beyond the inherent limitations on federal power within our dual system. *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 283 (1981). Stated differently, Congress "lacks the power directly to compel the States to require or prohibit" acts which Congress itself may require or prohibit. *New York v. United States,* 505 U.S. 144, 166, 180 (1992). The Supreme Court has struck down laws based on these principles on only two occasions, both distinguishable from PASPA.

(a) Permissible regulation in a preemptible field: *Hodel* and *FERC*

The first modern, relevant incarnation of the anti-commandeering principle appeared in *Hodel v.*

Virginia Surface Mining & Reclamation Ass'n. The law at issue there imposed federal standards for coal mining on certain surfaces and required any state that wished to "assume permanent regulatory authority over . . . surface coal mining operations" to "submit a proposed permanent program" to the Federal Government, which, among other things, required the "state legislature [to] enact[ ] laws implementing the environmental protection standards established by the [a]ct." *Hodel,* 452 U.S. at 271. If a particular state did *not* wish to implement the federal standards, the federal government would step in to do so. *Id.* at 272. The Supreme Court upheld the provisions, noting that they neither compelled the states to adopt the federal standards, nor required them "to expend any state funds," nor coerced them into "participat[ing] in the federal regulatory program in any manner whatsoever." *Id.* at 288. The Court further concluded that Congress could have chosen to completely preempt the field by simply assuming oversight of the regulations itself. *Id.* It thus held that the Tenth Amendment posed no obstacle to a system by which Congress "chose to allow the States a regulatory role." *Id.* at 290. As the Court later characterized *Hodel,* the scheme there did not violate the anti-commandeering principle because it "merely made compliance with federal standards a precondition to continued state regulation in an otherwise preempted field." *Printz v. United States,* 521 U.S. 898, 926 (1997).

The next year, in *F.E.R.C. v. Mississippi,* the Court upheld a provision *requiring* state utility regulatory

commissions to "consider" whether to enact certain standards for energy efficiency but leaving to the states the ultimate choice of whether to adopt those standards or not. 456 U.S. 742, 746, 769-70 (1982). The Court upheld the law despite its outright commandeering of the state resources needed to consider and study the federal standards, because the law did not definitely require the enactment or implementation of federal standards. *Id.* at 764. The Court, noting that Congress had simply regulated where it could have "pre-empted the States entirely" but instead chose to leave some room for the states to maneuver, saw the case as "only one step beyond *Hodel.*" *Id.*

(b) Permissible Prohibitions on State Action: *Baker* and *Reno*

In a different pair of anti-commandeering cases, the Court upheld affirmative prohibitions on state action that effectively invalidated contrary state laws and even required the states to enact new measures. First, in *South Carolina v. Baker,* the Supreme Court upheld the validity of laws that "directly regulated the States by prohibiting outright the issuance of bearer bonds." 485 U.S. 505, 511 (1988). These rules, which also applied to private debt issuers, required the states to "amend a substantial number of statutes in order to [comply]." *Id.* at 514. The Court concluded this result did not run afoul the Tenth Amendment because it did not "seek to control or influence the manner in which States regulate private parties" but

was simply "an inevitable consequence of regulating a state activity," *id.* In subsequent cases, the Court explained that the regulation in *Baker* was permissible because it simply "subjected a State to the same legislation applicable to private parties." *New York,* 505 U.S. at 160.

Then, in *Reno v. Condon,* the Court unanimously rejected an anti-commandeering challenge to a law prohibiting states from disseminating personal information obtained by state departments of motor vehicles. South Carolina complained that the act required its employees to learn its provisions and expend resources to comply and, indeed, the federal law effectively blocked the operation of state laws governing the disclosure of that information. 528 U.S. at 150. The Court agreed "that the [act] will require time and effort on the part of state employees" but otherwise rejected the anti-commandeering challenge because, like the law in *Baker,* the law "d[id] not require the States in their sovereign capacity to regulate their own citizens[,] . . . d[id] not require the [State] Legislature[s] to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* at 151. Moreover, the law did not "seek to control[ ] or influence the manner in which States regulate private parties." *Id.* (citing *Baker,* 485 U.S. at 514-15).

(c) Impermissible Anti-Commandeering: *New York* and *Printz*

In contrast to the foregoing, the Court has twice struck down portions of a federal law on anti-commandeering grounds. The first was in *New York v. United States,* which dealt with a law meant to regulate and encourage the orderly disposal of low-level radioactive waste by the states. 505 U.S. at 149-54. The "most severe" aspect of the complex system of measures established by the law, referred to as the "take-title" provision, provided that if a particular state had not been able to arrange for the disposal of the radioactive waste by a specified date, then that state would have to take title to the waste at the request of the waste's generator. *Id.* at 153-54 (citing 42 U.S.C. § 2021e(d)(2)(C)). The Court, based on the notion that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,'" *id.* at 161 (quoting *Hodel,* 452 U.S. at 288) (alterations omitted), struck down the take-title provision because it did just that: compel the states to either enact a regulatory program, or expend resources in taking title to the waste. *Id.* at 176. The Court noted that Congress may enact measures to encourage the states to act and may "hav[e] state law pre-empted by federal regulation" but concluded that the take-title provision "crossed the line distinguishing encouragement from coercion." *Id.* at 167, 175. The Court also emphasized that the anti-commandeering principle was designed, in part, to

stop Congress from blurring the line of accountability between federal and state officials and from skirting responsibility for its choices by foisting them on the states. *Id.* at 168.

The Court then applied these principles, in *Printz,* to invalidate the provisions of the Brady Act that required local authorities of certain states to run background checks on persons seeking to purchase guns. The Court held that Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program." 521 U.S. at 935. The Court was also troubled that these provisions required states to "absorb the financial burden of implementing a federal regulatory program" and "tak[e] the blame for its . . . defects." *Id.* at 930.

To date, the schemes at issue in *New York* and *Printz* remain the only two that the Supreme Court has struck down under the anti-commandeering doctrine. Our Court has not yet had occasion to consider an anti-commandeering challenge.[10]

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[10] Three other cases complete the constellation of the Supreme Court's modern anti-commandeering jurisprudence but deal with the applicability of federal labor laws to certain State employees. *See Nat'l League of Cities,* 426 U.S. at 883; *Garcia,* 469 U.S. at 528; *Gregory,* 501 U.S. at 452. These cases are of marginal relevance, so we do not elaborate on them at length. *See also Markell,* 579 F.3d at 303 (rejecting an argument that PASPA violates the sovereignty principles set forth in *Gregory*).

2. Whether PASPA Violates the Anti-Commandeering Principle

(a) Anti-Commandeering and the Supremacy Clause

Appellants' arguments that PASPA violates anti-commandeering principles run into an immediate problem: not a single case that we have reviewed involved a federal law that, like PASPA, simply operated to invalidate contrary state laws. It has thus never been the case that applying the Supremacy Clause to invalidate a state law contrary to federal proscriptions is tantamount to direct regulation over the states, to an invasion of their sovereignty, or to commandeering. Most of the foregoing cases involved Congress attempting to directly impose a federal scheme on state officials. If anything, the federal laws in *Reno* and *Baker* had the effect of invalidating certain contrary state laws by prohibiting state action, and both survived. Indeed, the Justices in both *New York* and *Printz* disclaimed any notion that the anti-commandeering principle somehow suspends the operation of the Supremacy Clause on otherwise valid laws. For example, in *Printz* the Court explained that our Constitutional structure requires "*all* state officials . . . to enact, enforce, and interpret state law in such a fashion as not to obstruct the operation of federal law, and the attendant reality [is] that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid." 521 U.S. at 913; *see also New York,* 505 U.S. at 162 (noting that the Commerce

Clause permits Congress to "hav[e] state law preempted by federal [law]").

In light of the fact that the Supremacy Clause is the Constitution's answer to the problem that had made life difficult under the Articles of Confederation – the lack of a mechanism to enforce uniform national policies – accepting Appellants' position that a state's sovereignty is violated when it is precluded from following a policy different than that set forth by federal law (as New Jersey seeks to do with its Sports Wagering Law), would be revolutionary. *See* The Federalist No. 44, at 323 (James Madison) (B. Fletcher ed. 1996) (explaining that without the Supremacy Clause "all the authorities contained in the proposed Constitution . . . would have been annulled, and the new Congress would have been reduced to the same impotent condition with [the Articles of Confederation]").

And it is not hard to see why invalidating contrary state law does not implicate a state's sovereignty or otherwise commandeer the states. When Congress passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do, it is barring them from doing something they want to do. Anti-commandeering challenges to statutes worded like PASPA have thus consistently failed. *See, e.g., Kelley v. United States,* 69 F.3d 1503, 1510 (10th Cir. 1995) (upholding constitutionality of intrastate motor carrier statute, noting that it preempted state law and in doing so did not "compel[ ] the states to voluntarily act by enacting or administering a

federal regulatory program"); *California Dump Truck Owners Ass'n v. Davis,* 172 F. Supp. 2d 1298, 1304 (E.D. Cal. 2001) (upholding constitutionality of FAAAA provision against an anti-commandeering challenge, noting that, unlike the laws in *New York* and *Printz,* the FAAAA provision, insofar as it merely preempts state law, "tell[s] states *what not to do*").[11]

To be sure, the Supremacy Clause elevates only laws that are otherwise within Congress' power to enact. *See, e.g., New York,* 504 U.S. at 166 (noting that Congress may not, consistent with the Commerce Clause, "regulate state governments' regulation of interstate commerce"). But we have held that Congress may prohibit state-licensed gambling consistent with the Commerce Clause. The argument that PASPA is beyond Congress' authority thus hinges on the notion that the invalidation of a state law pursuant to the Commerce Clause has the same "commandeering"

[11] As the Leagues note, numerous federal laws are framed to prohibit States from enacting or enforcing laws contrary to federal standards, and these regulations all enjoy different preemptive qualities. *See, e.g., Farina v. Nokia,* 625 F.3d 97, 130 (3d Cir. 2010) (noting that statute which provides that "no State . . . shall have any authority to regulate the entry of or the rates charged by any commercial mobile service" is an express preemption provision); *MacDonald v. Monsanto,* 27 F.3d 1021, 1024 (5th Cir. 1994) (noting that law stating that a "State shall not impose or continue in effect any requirement for labeling or packing" pesticides is a preemption provision). The operation of these and other provisions is called into question by Appellants' view that the everyday operation of the Supremacy Clause raises anti-commandeering concerns.

effect as the federal laws struck down in *New York* and *Printz*. We turn now to this contention.

(b) PASPA is Unlike the Laws Struck Down in *New York* and *Printz*

Appellants' efforts to analogize PASPA to the provisions struck down in *New York* and *Printz* are unavailing. Unlike the problematic "take title" provision and the background check requirements, PASPA does not *require* or coerce the states to lift a finger – they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law. They are not even required, like the states were in *F.E.R.C.,* to expend resources considering federal regulatory regimes, let alone to adopt them. Simply put, we discern in PASPA no "directives requiring the States to address particular problems" and no "command[s] to the States' officers . . . to administer or enforce a federal regulatory program." *Printz,* 521 U.S. at 935.

As the District Court correctly reasoned, the fact that PASPA sets forth a prohibition, while the *New York*/*Printz* regulations required affirmative action(s) on the part of the states, is of significance. Again, it is hard to see how Congress can "commandeer" a state, or how it can be found to regulate how a state regulates, if it does not require it to do anything at all. The distinction is palpable from the Supreme Court's anti-commandeering cases themselves. State laws requiring affirmative acts may or may not be

constitutional, *compare F.E.R.C.,* 456 U.S. at 761-63 (upholding statute because requirement that states expend resources considering federal standards was not commandeering) *with Printz,* 521 U.S. at 904-05 (finding requirement that states perform background checks unconstitutional). On the other hand, statutes prohibiting the states from taking certain actions have never been struck down even if they require the expenditure of some time and effort or the modification or invalidation of contrary state laws, *see Baker,* 485 U.S. at 515; *Reno,* 528 U.S. at 150. As the District Court carefully demonstrated, in all its anti-commandeering cases, the Supreme Court has been concerned with conscripting the states into affirmative action. *See NCAA II,* 2013 WL 772679, at *17.[12]

Recognizing the importance of the affirmative/negative command distinction, Appellants assert that PASPA does impose an affirmative requirement that the states act, by prohibiting them from repealing

[12] The circuits that have considered anti-commandeering challenges, although addressing laws that are fundamentally different from PASPA, have similarly found this distinction significant. *See, e.g., Connecticut v. Physicians Health Servs. of Conn.,* 287 F.3d 110, 122 (2d Cir. 2002) (holding that a provision "limit[ing] states' power to sue as *parens patriae* . . . does not commandeer any branch of state government because it imposes no affirmative duty of any kind on them"); *Fraternal Order of Police v. United States,* 173 F.3d 898, 906 (D.C. Cir. 1999) (rejecting a commandeering challenge to a statute that did "not force state officials to do anything affirmative to implement" the statutory provision).

anti-sports wagering provisions.[13] We agree with Appellants that the affirmative act requirement, if not properly applied, may permit Congress to "accomplish exactly what the commandeering doctrine prohibits" by stopping the states from "repealing an existing law." *Conant v. Walters,* 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). But we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.

Under PASPA, "[i]t shall be unlawful for . . . a governmental entity to sponsor, operate, advertise, promote, *license, or authorize by law or compact*" a sports wagering scheme. 28 U.S.C. § 3702(1) (emphasis added). Nothing in these words *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling "license[s]" or the affirmative "authoriz[ation] *by law*" of gambling schemes.

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[13] Appellants also rely on *Coyle v. Smith,* where the Supreme Court struck down a law requiring Oklahoma to not change the location of its capital within seven years of its admission into the Union, 221 U.S. 559, 567 (1911), to lessen the significance of the "affirmative act" requirement we distill from the anti-commandeering cases. N.J. Br. 42, 44. But, despite the Supreme Court's citation to *Coyle* in *New York, see* 505 U.S. at 162, *Coyle* did not turn on impermissible commandeering. Instead, the Court struck down the statute as being traceable to no power granted by Congress in the Constitution, pertaining "purely to the internal polic[ies] of the state," and in violation of the principle that all states are admitted on equal footing into the Union. *Coyle,* 221 U.S. at 565, 579. PASPA does not raise any of these concerns, and neither do the modern anti-commandeering cases.

Appellants contend that to the extent a state may choose to repeal an affirmative prohibition of sports gambling, that is the same as "authorizing" that activity, and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it. This argument is problematic in numerous respects. Most basically, it ignores that PASPA speaks only of "authorizing *by law*" a sports gambling scheme. We do not see how having *no law* in place governing sports wagering is the same as authorizing it by law. Second, the argument ignores that, in reality, the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people. Indeed, that the Legislature needed to enact the Sports Wagering Law itself belies any contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to "authorize [it] by law." The amendment to New Jersey's Constitution itself did not purport to affirmatively authorize sports wagering but indeed only gave the Legislature the power to "authorize by law" such activities. N.J. Const. Art. IV, § VII, ¶ 2(D), (F). Thus, the New Jersey Legislature itself saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering – the Sports Wagering Law was required. *Cf. Hernandez v. Robles,* 855 N.E.2d 1, 5-6 (N.Y. 2006) (rejecting as "untenable" a construction of a domestic relation law,

silent on the matter of the legality of same-sex marriages, as permitting such unions). Congress in PASPA itself saw a difference between general sports gambling activity and that which occurs under the auspices of state approval and authorization, and chose to reach private activity only to the extent that it is conducted "pursuant to State law."

In short, Appellants' attempt to read into PASPA a requirement that the states must affirmatively keep a ban on sports gambling in their books rests on a false equivalence between repeal and authorization and reads the term "by law" out of the statute, ignoring the fundamental canon that, as between two plausible statutory constructions, we ought to prefer the one that does not raise a series of constitutional problems. *See Clark v. Martinez,* 543 U.S. 371, 380-81 (2005).

To be sure, we take seriously the argument that many affirmative commands can be easily recast as prohibitions. For example, the background check rule of *Printz* could be recast as a requirement that the states *refrain* from issuing handgun permits *unless* background checks are conducted by their officials. The anti-commandeering principle may not be circumvented so easily. But the distinction between PASPA's blanket ban and *Printz*'s command, even if the latter is recast as a prohibition, remains. PASPA does not say to states "you may only license sports gambling if you conscript your officials into policing federal regulations" or otherwise impose any condition that the states carry out an affirmative act or

implement a federal scheme before they may regulate or issue a license. It simply bars certain acts under any and all circumstances. And if affirmative commands may always be recast as prohibitions, then the prohibitions in myriads of routine federal laws may always be rephrased as affirmative commands. This shows that Appellants' argument proves too much – the anti-commandeering cases, under that view, imperil a plethora of acts currently termed as prohibitions on the states.

And, to the extent we entertain the notion that PASPA's straightforward *prohibition* on action may be recast as presenting two *options,* these options are also quite unlike the two coercive choices available in *New York* – pass a law to deal with radioactive waste or expend resources in taking title to it. Neither of PASPA's two "choices" affirmatively requires the states to enact a law, and both choices leave much room for the states to make their own policy. Thus, under PASPA, on the one hand, a state may repeal its sports wagering ban, a move that will result in the expenditure of no resources or effort by any official. On the other hand, a state may choose to keep a complete ban on sports gambling, but it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be.

We agree that these are not easy choices. And it is perhaps true (although there is no textual or other support for the idea) that Congress may have suspected that most states would choose to keep an

actual prohibition on sports gambling on the books, rather than permit that activity to go on unregulated. But the fact that Congress gave the states a hard or tempting choice does not mean that they were given no choice at all, or that the choices are otherwise unconstitutional. *See United States v. Martinez-Salazar,* 528 U.S. 304, 315 (2000) ("A hard choice is not the same as no choice."); *see also F.E.R.C.,* 456 U.S. at 766 (upholding a choice between expending state resources to consider federal standards or abandoning field to federal regulation). And however hard the choice is in PASPA, it is nowhere near as coercive as the provisions in *New York* that punished states unwilling to enact a regulatory scheme and that did pass muster. *See New York,* 505 U.S. at 172, 173-74 (upholding a provision permitting states with waste disposal sites to charge more to non-compliant states and a statute taxing such states to the benefit of compliant states); *see also City of Abilene v. EPA,* 325 F.3d 657, 662 (5th Cir. 2003) (explaining that as long as "the alternative to implementing a federal regulatory program does not offend the Constitution's guarantees of federalism, the fact that the alternative is difficult, expensive or otherwise unappealing is insufficient to establish a Tenth Amendment violation"). PASPA imposes no punishment or punitive tax. We also disagree with the suggestion that the choices states face under PASPA are as coercive as the Medicaid expansion provision struck down in *Sebelius,* which threatened states unwilling to participate in a complex and extensive federal regulatory program with the loss of funding amounting to over ten

percent of their overall budget. *Sebelius,* 132 S. Ct. at 2581.

Finally, we note that the attempt to equate a ban on state-sanctioned sports gambling to a plan by Congress to force the states into banning the activity altogether gives far too much credit to Congress' strong-arming powers. The attendant reality is that in the field of regulating certain activities, such as gambling, prostitution, and drug use, states have always gravitated towards prohibitions, regardless of Congress' efforts. Indeed, as noted, *all but one* state prohibited broad state-sponsored gambling at the time PASPA was enacted. Congress, by prohibiting state-licensing schemes, may indeed have made it harder for states to turn their backs on the choices they previously made (although in PASPA it made it less hard for New Jersey), but that choice was already very hard, and very unlikely to be made to begin with (as New Jersey's history with the regulation of sports gambling also illustrates).

(c) PASPA as Regulating State Conduct – *Baker* and *Reno*

Additionally, PASPA is remarkably similar to the prohibitions on state action upheld in *Baker* and *Reno*. *Baker*'s regulations prohibited the states from issuing bearer bonds, which in turn required states to issue new regulations and invalidated old ones; *Reno*'s anti-disclosure provisions prohibited the states from disseminating certain information, necessitating

the expenditure of resources to comply with the federally imposed prohibitions. To the extent PASPA makes it unattractive for states to repeal their anti-sports wagering laws, which in turn requires enforcement by states, the effort PASPA requires is simply that the states enforce the laws they choose to maintain, and is therefore plainly less intrusive than the laws in *Baker* and *Reno*. PASPA also has the effect, like the laws in those two cases, of rendering inoperative any contrary state laws.

We are not persuaded by Appellants' arguments that *Baker* and *Reno* are inapposite. They contend, first, that *Reno* is different because it involved regulation of the states in the same way as private parties. But that overstates the regulations at issue in *Reno,* which were directed at state DMVs and only incidentally prohibited private persons from further disseminating data they may obtain from the DMVs. *See* 528 U.S. at 144. Indeed, the *Reno* Court did "not address the question whether general applicability is a constitutional requirement for federal regulation of the States." *Id.* at 151. And, as mentioned, PASPA *does* operate on private individuals insofar as it prohibits them from engaging in state-sponsored gambling. But private individuals cannot be prohibited from issuing gambling licenses, because they have never been able to do so. Second, we find no basis to distinguish PASPA from the laws in *Reno* and *Baker* on the ground that the latter regulate the states solely as participants in the market. DMVs are uniquely state institutions; states thus obtain information

through the DMVs not as participants in the market, but in their unique role as authorizers of commercial activity. PASPA is no different: it regulates the states' permit-issuing activities by prohibiting the issuance of the license altogether, as in *Baker,* where the state was essentially prohibited from issuing the bearer bond. Third, we decline to draw a distinction between PASPA and the laws at issue in *Reno* and *Baker* on the ground that PASPA involves a regulation of the states as states. The Supreme Court's anti-commandeering cases do not contemplate such distinction.[14]

Despite the fact that PASPA is very similar to the prohibition on state activity upheld unanimously in *Reno,* Appellants insist that certain statements in that opinion support its view that PASPA is unconstitutional. Appellants insist that under *Reno* a law is unconstitutional if it requires the states to govern according to Congress' instructions or if it "influences" the ways in which the states regulate their own citizens. *See* N.J. Br. at 3, 18, 40, 42, 43, 45-46, 52. But no one contends that PASPA requires the states to enact any laws, and we have held that it also does not require states to maintain existing laws. And one line from *Reno,* that the law upheld there did not "control

[14] And, arguably, the Supreme Court's Tenth Amendment jurisprudence cautions against drawing lines between activities that are "traditional" to state government and those that are not. *See Garcia,* 469 U.S. at 546 (calling such distinctions "unworkable").

or influence the manner in which States regulated private parties," 528 U.S. at 142, cannot possibly bear the great weight that Appellants would hoist upon it. Most federal regulation inevitably influences the manner in which states regulate private parties. If that were enough to violate the anti-commandeering principle, then *Hodel* and *F.E.R.C.* were wrongly decided. Indeed, nowhere in *Reno* (or *Baker,* from where that line was quoted, *see id.* (quoting *Baker,* 485 U.S. at 514)), did the Court suggest that the absence of an attempt to influence how states regulate private parties was *required* to avoid violating the anti-commandeering principle.[15]

(d) The Sports Wagering Law Conflicts With Federal Policy With Respect to Sports Gambling and is Therefore Preempted

Alternatively, to the extent PASPA coerces the states into keeping in place their sports-wagering

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[15] The parties spar over how the accountability concerns of anti-commandeering cases weigh here. But *New York* and *Printz* make clear that they are not implicated when Congress does not enlist the States in the implementation of a federal regulatory program. To strike down any law that may cause confusion as to whether a prohibition comes from the federal government or from a State's choice, before considering whether that law actually commandeers the States, is to put the cart before the horse. Indeed, the Supreme Court in *Reno* rejected the notion that simply raising the specter of accountability problems is enough to find an anti-commandeering violation. *See* 528 U.S. at 150-51.

bans, that coercion may be upheld as fitting into the exception drawn in anti-commandeering cases for laws that impose federal standards over conflicting state rules, in areas where Congress may otherwise preempt the field. Under this view, PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field as per the federal standard. In *Hodel,* for example, the choice was implementing certain minimum-safety regulations or living in a world where the federal government enforced them.

PASPA makes clear that the federal policy with respect to sports gambling is that such activity should not occur under the auspices of a state license. As noted, PASPA prohibits individuals from engaging in a sports gambling scheme "pursuant to" state law. 28 U.S.C. § 3702(2). In other words, even if the provision that offends New Jersey, § 3702(1), were excised from PASPA, § 3702(2) would still plainly render the Sports Wagering Law inoperative by prohibiting private parties from engaging in gambling schemes pursuant to that authority. Thus, the federal policy with respect to sports wagering that § 3702(2) evinces is clear: to stop private parties from resorting to state law as a cover for gambling on sports. The Sports Wagering Law, in purporting to permit individuals to skirt § 3702(2), "authorizes [private parties] to engage in conduct that the federal [Act] forbids, [and therefore] it 'stands as an obstacle to the[ ] accomplishment and execution of the full purposes and objectives of Congress,'" and accordingly conflicts with

PASPA and is preempted. *See Mich. Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.,* 467 U.S. 461, 469 (1984).[16]

And there are other provisions in federal law, outside of PASPA, aimed at protecting the integrity of sports from the pall of wagering and that further demonstrate the federal policy of disfavoring sports-gambling. Indeed, in enacting PASPA, Congress explicitly noted that the law was "complementary to and consistent with [then] current Federal law" with respect to sports wagering. Senate Report at 3557. Congress has, for example, criminalized attempts to fix the outcome of a sporting event, 18 U.S.C. § 224, barred the placement of a sports gambling bet through wire communications to or from a place where such bets are illegal, 18 U.S.C. § 1084, and proscribed interstate transportation of means for carrying out sports lotteries, 18 U.S.C. §§ 1301, 1307(d).[17]

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[16] New Jersey asks that we ignore this argument because it was not raised by the United States below. But it is axiomatic that we may affirm on any ground apparent on the record, particularly when considering *de novo* the constitutionally [sic] of a Congressional enactment. The United States may decide not to advance particular arguments, but we may not, consistent with our duty to "save and not to destroy," *Jones & Laughlin Steel,* 301 U.S. at 30, use that choice to declare unconstitutional an act of Congress. The same may be said of arguments that the United States and the Leagues' reading of PASPA has changed throughout the litigation and should therefore be discounted, *see, e.g.,* Oral Arg. Tr. 71:14-19 (June 26, 2013).

[17] Appellants point to a statement in the Senate Report wherein the Committee notes that, according to the Congressional

(Continued on following page)

Appellants contend that Congress has not preempted state law but instead incorporated it to the extent certain prohibitions are tied to whatever is legal under state law. But PASPA itself is not tied to state law. Rather, PASPA prohibits engaging in schemes *pursuant to* state law. 28 U.S.C. § 3702(2). To be sure, some of the other cited provisions tie themselves to state law – but the Tenth Amendment does not require that Congress leave *less* room for the states to govern. *Cf. F.E.R.C.,* 456 U.S. at 764 (noting that there is no Tenth Amendment problem if Congress "allow[s] the States to enter the field if they promulgate[ ] regulations consistent with federal standards").

Appellants also attempt to distinguish PASPA from other preemptive schemes. They note that preemptive schemes normally either impose an affirmative federal standard or a rule of non-regulation, and

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Budget Office, there would be "no cost to the federal government . . . from enactment of this bill," Senate Report at 3561, as proof that PASPA seeks to foist upon the states the responsibility for banning sports wagering. But this statement is taken out of context. The import of it was that PASPA would require no "direct spending or receipts" of funds, *id.,* but the Senate Report itself makes clear that the Justice Department would use already-earmarked funds to permit it to "enforce the law without utilizing criminal prosecutions of State officials," *id.* at 3557. For a report issued well before the opinions in *New York* and *Printz* delineated the contours of modern anti-commandeering jurisprudence, the Senate Report is remarkably clear in that it seeks to increase the federal government's role in policing sports wagering, not pass that obligation along to the states.

that PASPA does not impose an affirmative federal standard and cannot possibly be construed as a law aimed at permitting unregulated sports gambling because its aim was to stop the spread of sports gambling. But, PASPA's text and legislative history reflect that its goal is more modest – to ban gambling pursuant to a state scheme – because Congress was concerned that state-sponsored gambling carried with it a label of legitimacy that would make the activity appealing. Whatever else we may think were Congress' secret intentions in enacting PASPA, nothing we know of speaks to a desire to ban all sports wagering. Moreover, the argument once again ignores that PASPA does impose a federal standard directly on private individuals, telling them, essentially, thou shall not engage in sports wagering under the auspices of a state-issued license. *See* 28 U.S.C. § 3702(2).

* * *

We hold that PASPA does not violate the anti-commandeering doctrine. Although many of the principles set forth in anti-commandeering cases may abstractly be used to support Appellants' position, doing so would result in an undue expansion of the anti-commandeering doctrine. If attempting to influence the way states govern private parties, or requiring the expenditure of resources, or giving the states hard choices, were enough to violate anti-commandeering principles, then what of *Hodel, F.E.R.C., Baker,* and *Reno*? The overriding of contrary state law via the Supremacy Clause may result in influencing or changing state policies, but there is

nothing in the anti-commandeering cases to suggest that the principle is meant to apply when a law merely operates via the Supremacy Clause to invalidate contrary state action. Missing here is an affirmative command that the states enact or carry out a federal scheme and PASPA is simply nothing like the only two laws struck down under the anti-commandeering principle. Several important points buttress our conclusion: first, PASPA operates simply as a law of pre-emption, via the Supremacy Clause; second, PASPA thus only *stops* the states from doing something; and, finally, PASPA's policy of stopping state-sanctioned sports gambling is confirmed by the independent prohibition on private activity pursuant to any such law. When so understood, it is clear that PASPA does not commandeer the states.

C. Whether PASPA Violates the Equal Sovereignty of the States

Finally, we address Appellants' contention that PASPA violates the equal sovereignty of the states by singling out Nevada for preferential treatment and allowing only that State to maintain broad state-sponsored sports gambling.

1. Equal Sovereignty Cases – *Northwest Austin* and *Shelby County*

The centerpiece of Appellants' equal sovereignty argument is the Supreme Court's analysis of the Voting Rights Act of 1965 ("VRA") in *Northwest Austin*

Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009), and *Shelby County, Alabama v. Holder,* 133 S. Ct. 2612 (2013). In *Northwest Austin,* the Supreme Court was asked by a small utility district to rule on the constitutionality of § 5 of the VRA, which required the district to obtain preclearance from federal authorities before it could make changes to the manner in which its board was elected. The district had sought an exemption from the preclearance requirement, but the district court held that only states are eligible for such "bailouts" under the Act. *Nw. Austin,* 557 U.S. at 196-97. On direct appeal, the Supreme Court stated that § 5 raises "federalism concerns" because it "differentiates between the States." *Id.* at 203. The Court also explained that "[d]istinctions [between the states] can be justified in some cases" such as when Congress enacts "remedies for *local* evils which have subsequently appeared." *Id.* (citing *South Carolina v. Katzenbach,* 383 U.S. 301, 328-29 (1966)). However, the Court did not ultimately decide whether § 5 violated the equal sovereignty principle, invoking instead the canon of constitutional avoidance to construe the VRA's bailout provision to permit the district to obtain an exemption. *Id.* at 205.

In *Shelby County,* when asked to revisit the constitutionality of § 5, the Court reiterated the "basic principles" of equal sovereignty set forth in *Northwest Austin* and invalidated § 4(b) of the VRA, which set forth a formula used to determine what jurisdictions are covered by § 5 preclearance. 133 S. Ct. at 2622,

2630-31. Nevertheless, § 5 once more survived despite the expressed equal sovereignty concerns. *Id.* at 2631.

Appellants ask that we leverage these statements to strike down all of PASPA because it permits Nevada to license sports gambling. We decline to do so. First, the VRA is fundamentally different from PASPA. It represents, as the Supreme Court explained, "an uncommon exercise of congressional power" in an area "the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Shelby County,* 133 S. Ct. at 2623, 2624. The regulation of gambling via the Commerce Clause is thus not of the same nature as the regulation of elections pursuant to the Reconstruction Amendments. Indeed, while the guarantee of uniformity in treatment amongst the states cabins some of Congress' powers, *see, e.g.,* U.S. CONST., art. I., § 8, cl. 1 (requiring uniformity in duties and imposts); *id.* § 9, cl. 6 (requiring uniformity in regulation of state ports), no such guarantee limits the Commerce Clause. This only makes sense: Congress' exercises of Commerce Clause authority are aimed at matters of national concern and finding national solutions will necessarily affect states differently; accordingly, the Commerce Clause, "[u]nlike other powers of [C]ongress[,] . . . does not require geographic uniformity." *Morgan v. Virginia,* 328 U.S. 373, 388 (1946) (Frankfurter, J., concurring).

Second, New Jersey would have us hold that laws treating states differently can "only" survive if they are meant to "remedy local evils" in a manner that is

"sufficiently related to the problem that it targets." N.J. Br. at 55. This position is overly broad in that it requires the existence of a one-size-fits-all test for equal sovereignty analysis, which, as the foregoing shows, is a perilous proposition in the context of the Commerce Clause. And *Northwest Austin*'s statement that equal sovereignty may yield when local evils appear was made immediately after the statement that regulatory "[d]istinctions can be justified in *some* cases." 557 U.S. at 203 (emphasis added). Thus, local evils appear to be but *one* of the types of cases in which a departure from the equal sovereignty principle is permitted.

Third, there is nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of "sensitive areas of state and local policymaking." *Shelby County,* 133 S. Ct. at 2624. We "had best respect what the [Court's] majority says rather than read between the lines. . . . If the Justices are pulling our leg, let them say so." *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.,* 980 F.2d 437, 448 (7th Cir. 1992).

Fourth, even accepting that the equal sovereignty principle applies in the same manner in the context of Commerce Clause legislation, we have no trouble concluding that PASPA passes muster. Appellants' argument that PASPA's exemption does not properly remedy local evils because it "target[ed] the States in which legal sports wagering was absent," N.J. Br. at 56 (emphasis omitted), again distorts PASPA's

purpose as being to wipe out sports gambling altogether. When the true purpose is considered – to stop the *spread* of *state-sanctioned* sports gambling – it is clear that regulating states in which sports-wagering already existed would have been irrational. Targeting only states where the practice did not exist is thus more than sufficiently related to the problem, it is *precisely tailored* to address the problem. If anything, Appellants' quarrel seems to be with PASPA's actual goal rather than with the manner in which it operates.

Finally, Appellants ignore another feature that distinguishes PASPA from the VRA – that far from singling out a handful of states for disfavored treatment, PASPA treats *more favorably* a *single* state. Indeed, it is noteworthy that Appellants do not ask us to invalidate § 3704(a)(2), the Nevada grandfathering provision that supposedly creates the equal sovereignty problem. Instead, we are asked to strike down § 3702, PASPA's general prohibition on state-licensed sports gambling. Appellants do not explain why, if PASPA's preferential treatment of Nevada violates the equal-sovereignty doctrine, the solution is not to strike down only that exemption. The remedy New Jersey seeks – a complete invalidation of PASPA – does far more violence to the statute, and would be a particularly odd result given the law's purpose of curtailing state-licensed gambling on sports. That New Jersey seeks Nevada's preferential treatment, and not a complete ban on the preferences, undermines

Appellants' invocation of the equal sovereignty doctrine.

2. Grandfathering Clause Cases

Appellants also argue that PASPA's exemption for Nevada is invalid under the Supreme Court's analysis in *City of New Orleans v. Dukes,* 427 U.S. 297 (1976), and *Minnesota v. Clover Leaf Creamery,* 449 U.S. 456 (1981), of grandfathering provisions in economic legislation. But in both cases the Supreme Court *upheld* the provisions: in *Dukes,* an ordinance that banned push cart vendors from New Orleans' historic district, but grandfathered those of a certain vintage, 427 U.S. at 305; in *Clover Leaf,* a statute banning the sale of milk in non-recyclable containers but grandfathering non-recyclable paper containers, 449 U.S. at 469.

Two cases upholding economic ordinances aimed at private parties have little to say about state sovereignty. While Appellants contend that *Dukes* and *Clover Leaf Creamery* support their position because they upheld *temporary* grandfathering clauses, there was no indication in either case that the clauses upheld were indeed temporary, that the legislatures were obligated to rescind them in the future, or even that the supposedly temporal quality of the laws was the basis of the Court's holdings, other than a statement in passing in *Dukes* that the legislature had

chosen to "initially" target only a particular class of products. 427 U.S. at 305.[18]

Appellants note that there is no case where a court has "permitted a grandfathering rationale to serve as a justification for violating the fundamental principle of equal sovereignty." N.J. Br. at 59. But it is not hard to see why this is the case: only two Supreme Court cases in modern times have applied the equal sovereignty principle.[19]

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[18] Nor does our decision in *Delaware River Basin Commission v. Bucks County Water & Sewer Authority* support the notion that permanent grandfathering clauses are invalid, given that in that case we simply remanded for development of a record as to why the law at issue contained a grandfathering provision. 641 F.2d 1087, 1096-98 (3d Cir. 1981). PASPA's legislative history is clear as to the purpose behind its own exemptions, and thus survives *Delaware River Basin.*

[19] Appellants also rely on the so-called "equal footing" principle, the notion that Congress may not burden a new state's entry into the Union by disfavoring them over other states in support of their attack on Nevada's exemption. *See, e.g., Escanaba & Lake Mich. Transp. v. Chicago,* 107 U.S. 678, 689 (1883) (explaining that whatever restriction may have been imposed over Illinois' ability to regulate the operation of bridges over the Chicago River, such restrictions disappeared once Illinois was admitted into the Union as a state); *Coyle,* 221 U.S. at 567 (holding that Congress may not require Oklahoma to not change its capital as a condition of admission into the Union). But PASPA does not speak to conditions of admission into the Union.

V. CONCLUSION

If baseball is a game of inches, constitutional adjudication may be described as a matter of degrees. The questions we have addressed are in many ways *sui generis*. Neither the standing nor the merits issues we have tackled permit an easy solution by resorting to a controlling case that provides a definitive "Eureka!" moment. Our role thus is to distill an answer from precedent and the principles embodied therein. But we are confident that our adjudication of this dispute and our resolution of its merits leave us well within the strict bounds set forth by the Constitution and preserves intact the state-federal balance of power.

Having examined the difficult legal issues raised by the parties, we hold that nothing in PASPA violates the U.S. Constitution. The law neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment or anywhere else in our Constitutional structure. The heart of Appellants' constitutional attack on PASPA is their reliance on two doctrines that – while of undeniable importance – have each only been used to strike down notably intrusive and, indeed, extraordinary federal laws. Extending these principles as Appellants propose would result in significant changes to the day-to-day operation of the Supremacy Clause in our constitutional structure. Moreover, we see much daylight between the exceedingly intrusive statutes invalidated in the anti-commandeering cases and PASPA's much more straightforward mechanism of

stopping the states from lending their imprimatur to gambling on sports.

New Jersey and any other state that may wish to legalize gambling on sports within their borders are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again choose to do so or, more broadly, may choose to undo PASPA altogether. It is not our place to usurp Congress' role simply because PASPA may have become an unpopular law. The forty-nine states that do not enjoy PASPA's solicitude may easily invoke Congress' authority should they so desire.

The District Court's judgment is AFFIRMED.

Nat'l Collegiate Athletic Ass'n, et al. v. Governor of the State of N.J., et al., Nos. 13-1713, 13-1714, 13-1715

VANASKIE, Circuit Judge, concurring in part and dissenting in part.

I agree with my colleagues that the Leagues have standing to challenge New Jersey's Sports Wagering Law, N.J. Stat. Ann. § 5:12A-2, and that the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3702, does not violate the principle of "equal sovereignty." I therefore join parts III and IV.C of the majority's decision in full. I also agree that, ordinarily, Congress has the authority to regulate gambling pursuant to the Commerce Clause, and thus I join part IV.A of the majority opinion as well.

Yet, PASPA is no ordinary federal statute that directly regulates interstate commerce or activities substantially affecting such commerce. Instead, PASPA prohibits states from authorizing sports gambling and thereby directs how *states* must treat such activity. Indeed, according to my colleagues, PASPA essentially gives the states the choice of allowing totally unregulated betting on sporting events or prohibiting all such gambling. Because this congressional directive violates the principles of federalism as articulated by the Supreme Court in *New York v. United States,* 505 U.S. 144 (1992), and *Printz v. United States,* 521 U.S. 898 (1997), I respectfully dissent from that part of the majority's opinion that upholds PASPA as a constitutional exercise of congressional authority.

I.

I agree with my colleagues that an appropriate starting point for addressing Appellants' claims is *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264 (1981). In *Hodel,* the Court reviewed the constitutionality of the federal Surface Mining Control and Reclamation Act, a comprehensive statutory scheme designed to regulate against the harmful effects of surface coal mining. *Id.* at 268. The act permitted states that wished to exercise permanent regulatory authority over surface coal mining to submit plans that met federal standards for federal approval. *Id.* at 271. In addition, the federal government created a federal enforcement program for

states that did not obtain federal approval for state plans. *Id.* at 272. Applying the framework set forth in the since-overruled case, *National League of Cities v. Usery,* 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985), the Court concluded that the act did not regulate "'States as States'" because the challenged provisions governed only private individuals' and business' activities and because "the States are not compelled to enforce the . . . standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.* at 287-88. The Court further explained that

> [i]f a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.

Id. at 288. Even post-*Garcia,* the Court has explained that the act at issue in *Hodel* presented no Tenth Amendment problem "because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." *Printz,* 521 U.S. at 926.

As the majority points out, a year later, in *FERC v. Mississippi,* 456 U.S. 742 (1982), the Court upheld the constitutionality of two titles of the Public Utility

Regulatory Policies Act ("PURPA"), which directed state regulatory authorities to "consider" certain standards and approaches to regulate energy and prescribed certain procedures, but did not require the state authorities to adopt or implement specified standards. *Id.* at 745-50. As in *Hodel,* the Court observed that Congress had authority to preempt the field at issue – in *FERC*'s case, energy regulation. *Id.* at 765. The Court explained:

> PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards. While the condition here is affirmative in nature – that is, it directs the States to entertain proposals – nothing in this Court's cases suggests that the nature of the condition makes it a constitutionally improper one. There is nothing in PURPA "directly compelling" the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a preemptible area on the consideration of federal proposals, they do not threaten the States' "separate and independent existence," *Lane County v. Oregon,* 7 Wall. 71, 76, 19 L.Ed. 101 (1869); *Coyle v. Oklahoma,* 221 U.S. 559, 580, 31 S.Ct. 688, 695, 55 L.Ed. 853 (1911), and do not impair the ability of the States "to function effectively in a federal system." *Fry v. United States,* 421 U.S., at 547, n.7, 95 S.Ct., at 1795, n.7; *National League of Cities*

> *v. Usery,* 426 U.S., at 852, 96 S.Ct., at 2474. To the contrary, they offer the States a vehicle for remaining active in an area of overriding concern.

Id. at 765-66.

Subsequently, the Supreme Court struck down provisions in two cases based on violations of federalism principles. At issue in the first case, *New York,* was a federal statute that intended to incentivize "States to provide for the disposal of low level radioactive waste generated within their borders." *New York,* 505 U.S. at 170. As "an alternative to regulating pursuant to Congress' direction," one of the "incentives" provided states the "option of taking title to and possession of the low level radioactive waste . . . and becoming liable for all damages waste generators suffer[ed] as a result of the State's failure to do so promptly." *Id.* at 174-75. At the outset, the Court characterized the issue before it as "concern[ing] the circumstances under which Congress may use the State as implements of regulation; that is, whether Congress may direct or otherwise motivate the States to regulate in a particular field or a particular way." *Id.* at 161.

The Court in *New York* held the "take title" provision unconstitutional because it "'commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'" in violation of the principles of federalism. *Id.* at 176 (quoting *Hodel,* 452 U.S. at 288).

The Court explained that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, *it lacks the power directly to compel the States to require or prohibit those acts.*" *Id.* at 166 (emphasis added). It further elaborated that "[t]he allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; *it does not authorize Congress to regulate state governments' regulation of interstate commerce.*" *Id.* (emphasis added).

Second, in *Printz,* the Court reviewed a temporary federal statutory provision that required certain state law enforcement officers to conduct background checks on potential handgun purchasers as part of a federal regulatory scheme. *Printz,* 521 U.S. at 903-04. Observing that "'[t]he Federal Government may not compel the States to enact or administer a federal regulatory program,'" *id.* at 933 (quoting *New York,* 505 U.S. at 188), the Court held that "Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Id.* at 935. The Court further explained that Congress categorically "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.*

Later, in *Reno v. Condon,* 528 U.S. 141 (2000), a case the majority regards as "remarkably similar" to the matter *sub judice,* (Maj. Op. at 43), a unanimous Court held that the Driver's Privacy Protection Act

("DPPA"), a generally applicable law which regulates the disclosure and resale by states and private persons of personal information contained in state department of motor vehicle records, "did not run afoul of the federalism principles enunciated in *New York* . . . and *Printz*." *Id.* at 143, 146, 151. After first determining that the DPPA was a proper exercise of congressional authority under the Commerce Clause, the Court rejected South Carolina's argument that the act violated federalism principles because it would "require time and effort on the part of state employees." *Id.* at 148, 150. Finding *New York* and *Printz* inapplicable, the Court relied instead on *South Carolina v. Baker,* 485 U.S. 505 (1988),[1] which "upheld a statute that prohibited States from issuing unregistered bonds because the law 'regulate[d] state activities,' rather than 'seeking[ing] [sic] to control or influence the manner in which States regulate private parties.'" *Reno,* 528 U.S. at 150 (quoting *Baker,* 485 U.S. at 514-15).[2] The Court further explained:

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[1] The majority also characterizes *Baker* as "remarkably similar" to PASPA's prohibition of state action. (Maj. Op. 43.)

[2] In *Baker,* the Court observed:

> The [intervenor] nonetheless contends that § 310 has commandeered the state legislative and administrative process because many state legislatures had to amend a substantial number of statutes in order to issue bonds in registered form and because state officials had to devote substantial effort to determine how best to implement a registered bond system. Such "commandeering" is, however, an inevitable consequence of regulating a state activity. Any federal regulation

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> The DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Id. at 151.

Most recently, in *National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566 (2012), the Court struck down, as violative of the Spending Clause, a provision in the Patient Protection and Affordable Care Act ("ACA") that would have withheld federal Medicaid grants to states unless they expanded their Medicaid eligibility requirements in accordance with conditions in the ACA. *Id.* at 2581-82, 2606-07 (plurality). Quoting *New York,* Chief Justice Roberts, writing for a three-justice plurality, observed that "'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'" *Id.* at 2602 (quoting *New York,* 505 U.S. at 162). The plurality then explained that, based

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> demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.

Baker, 485 U.S. at 514-15.

on that principle, *New York* and *Printz* had struck down federal statutes that "commandeer[ed] a State's legislative or administrative apparatus for federal purposes." *Id.* The plurality also noted that, within the authority of the Spending Clause, Congress may not create "inducements to exert a power akin to undue influence" where "pressure [would] turn[ ] into compulsion." *Id.* (internal quotations omitted). Recognizing that "'[t]he Constitution simply does not give Congress the authority to require the States to regulate,'" the plurality observed that "[t]hat is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system of its own." *Id.* (quoting *New York,* 505 U.S. at 178). The plurality ultimately concluded that the Medicaid conditions were unduly coercive and reiterated that "Congress may not simply 'conscript state [agencies] into the national bureaucratic army.'" *Id.* at 2604, 2606-07 (quoting *FERC,* 456 U.S. at 775 (O'Connor, J., concurring in judgment in part and dissenting in part)).

While Chief Justice Roberts' opinion concerning the Medicaid expansion provisions in *Sebelius* garnered the signatures of only three justices, the four dissenting justices also invoked the federalism principles of *New York* in concluding that the funding conditions in the Medicaid expansion impermissibly compelled states to govern as directed by Congress by coercing states' participation in the expanded program. *Id.* at 2660-62 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Thus, seven justices found the

Medicaid expansion unconstitutional, citing the federalism principles articulated in *New York* as part of the basis for their conclusion. Importantly, the seven-justice rejection of the Medicaid expansion based, in part, on *New York,* represents a clear signal from the Court that the principles enunciated in *New York* are not limited to a narrow class of cases in which Congress specifically directs a state legislature to affirmatively enact legislation. *Cf. United States v. Richardson,* 658 F.3d 333, 340 (3d Cir. 2011) (observing that even if not binding due to the votes of a splintered Court, "the collective view of [a majority of] justices is, of course, persuasive authority").

II.

New York and *Printz* clearly established that the federal government cannot direct state legislatures to enact legislation and state officials to implement federal policy. It is true that the two particular statutes under review in those cases involved congressional commands that states affirmatively enact legislation, *see New York,* 505 U.S. at 176-77, or affirmatively enforce a federal regulatory scheme, *see Printz,* 521 U.S. at 935. Nothing in *New York* or *Printz,* however, limited the principles of federalism upon which those cases relied to situations in which Congress directed affirmative activity on the part of the states. Rather, the general principle articulated by the Court in *New York* was that

> even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require *or prohibit those acts.* The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; *it does not authorize Congress to regulate state governments' regulation of interstate commerce.*

New York, 505 U.S. at 166 (emphasis added) (citations omitted). Here, it cannot be disputed that PASPA "regulate[s] state governments' regulation of interstate commerce." *See id.* States regulate gambling, in part, by licensing or authorizing such activity. By prohibiting states from licensing or authorizing sports gambling, PASPA dictates the manner in which states must regulate interstate commerce and thus contravenes the principles of federalism set forth in *New York* and *Printz*.[3]

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[3] I agree with my colleagues that Congress has the authority under the Commerce Clause to ban gambling on sporting events, and that such a ban could include state-licensed gambling. I part company with my colleagues because that is not what PASPA does. Instead, PASPA conscripts the states as foot soldiers to implement a congressional policy choice that wagering on sporting events should be prohibited to the greatest extent practicable. Contrary to the majority's view, the Supremacy Clause simply does not give Congress the power to tell the states what they can and cannot do in the absence of a validly-enacted federal regulatory or deregulatory scheme. As explained at pages 13-14, *infra,* there is no federal regulatory or deregulatory

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If the objective of the federal government is to require states to regulate in a manner that effectuates federal policy, any distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty is illusory. Whether stated as a command to engage in specific action or as a prohibition against specific action, the federal government's interference with a state's sovereign autonomy is the same. Moreover, the recognition of such a distinction is untenable, as affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct. Surely the structure of Our Federalism does not turn on the phraseology used by Congress in commanding the states how to regulate. An interpretation of federalism principles that permits congressional negative commands to state governments will eviscerate the constitutional lines drawn in *New York* and *Printz* that recognized the limit to Congress's power to compel state instrumentalities to carry out federal policy.

In addition, PASPA implicates the political accountability concerns voiced by the Supreme Court in *New York* and *Printz*. In *New York,* the Court observed that when the federal government preempts an area with a federal law to impose its view on an issue, it "makes the decision in full view of the public, and it will be federal officials that suffer the

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scheme on the matter of sports wagering. Instead, there is the congressional directive that states not allow it.

consequences if the decision turns out to be detrimental or unpopular." *New York,* 505 U.S. at 168. In contrast, the Court explained, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169. The Court also recognized in *Printz* that in situations where Congress compels state officials to "implement[ ] a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes" and that states "are . . . put in the position of taking the blame for [the federal program's] burdensomeness and for its defects." *Printz,* 521 U.S. at 930. Although PASPA does not "direct[ ] the States to regulate," *New York,* 505 U.S. at 169, or "implement[ ] a federal regulatory program," *Printz,* 521 U.S. at 930, its prohibition on state authorization and licensing of sports gambling similarly diminishes the accountability of federal officials at the expense of state officials. Instead of directly regulating or banning sports gambling, Congress passed the responsibility to the states, which, under PASPA, may not authorize or issue state licenses for such activities. New Jersey law regulates games of chance, *see* N.J. Stat. Ann. § 5:8-1, *et seq.,* state lotteries, *see id.* § 5:9-1, *et seq.,* and casino gambling within the state, *see id.* § 5:12-1, *et seq.* As a result, it would be natural for New Jersey citizens to believe that state law governs sports gambling as

well. That belief would be further supported by the fact that the voters of New Jersey recently passed a state constitutional amendment permitting sports gambling and their representatives in the state legislature subsequently enacted the Sports Wagering Law, at issue here, to regulate such activity. When New Jersey fails to authorize or license sports gambling, its citizens will understandably blame state officials even though state regulation of gambling has become a puppet of the federal government, whose strings are in reality pulled (or cut) by PASPA. States can authorize and regulate some forms of gambling, e.g., lotteries and casinos, but not other forms of gambling to implement policy choices made by Congress. Thus, accountability concerns arising from PASPA's restraint on state regulation also counsel in favor of concluding that it violates principles of federalism.

I do not suggest that the federal government may not prohibit certain actions by state governments – indeed it can. If Congress identifies a problem that falls within its realm of authority, it may provide a federal solution directly itself or properly incentivize states to regulate or comply with federal standards. For example, if Congress chooses to regulate (or deregulate) directly, it may require states to refrain from enacting their own regulations that, in Congress's judgment, would thwart its policy objectives. Illustrating this point, the Supreme Court held in *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374 (1992), that the federal Airline Deregulation Act, which "prohibited the States from enforcing any law

'relating to rates, routes, or services' of any air carrier" preempted guidelines regarding fair advertising set forth by an organization of state attorneys general. *Id.* at 378-79, 391. There, as the Court explained, the purpose of the federal prohibition against further state regulation was "[t]o ensure that the States would not undo federal deregulation with regulation of their own." *Id.* at 378. Thus, a state law contrary to a federal regulatory or deregulatory scheme is void under the Supremacy Clause.[4]

Unlike in *Morales* and other preemption cases in which federal legislation limits the actions of state governments, in this case, there is no federal scheme regulating or deregulating sports gambling by which to preempt state regulation. PASPA provides no federal regulatory standards or requirements of its own. Instead, it simply prohibits states from "sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing]" gambling on sports. 28 U.S.C. § 3702(1). And, PASPA certainly cannot be said to be a deregulatory measure, as its purpose was to stem the spread of state-sponsored sports gambling, not let

[4] Significantly, the majority opinion does not cite any case that sustained a federal statute that purported to regulate the states under the Commerce Clause where there was no underlying federal scheme of regulation or deregulation. In this sense, PASPA stands alone in telling the states that they may not regulate an aspect of interstate commerce that Congress believes should be prohibited.

it go unregulated.[5] *See* S. Rep. No. 102-248, at 3 (1991) ("The purpose of S. 474 is to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity."); *id.* at 4 ("Senate bill 474 serves an important public purpose, to stop the spread of State-sponsored sports gambling. . . .").

Moreover, contrary to the majority opinion's suggestion, other federal statutes relating to sports gambling do not aggregate to form the foundation of a federal regulatory scheme that can be interpreted as preempting state regulation of sports gambling. First, Section 1084 of Title 18 of the United States Code makes it a federal crime to use wire communications to transmit sports bets in interstate commerce unless the transmission is from and to a state where sports betting is legal. *See* 18 U.S.C. § 1084(a)-(b). Thus, under that section, state law, rather than federal law, determines whether the specified conduct falls within the criminal statute.[6] Second, another federal law

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[5] The majority reasons that PASPA does not commandeer the states in battling sports gambling because the states retain the choice of repealing their laws outlawing such activity, observing that PASPA does not "*require*[ ] that the states keep any law in place." (Maj. Op. at 39.) Contrary to the majority's supposition, it certainly is open to debate whether a state's repeal of a ban on sports gambling would be akin to that state's "authorizing" gambling on sporting events, action that PASPA explicitly forecloses.

[6] Accordingly, if a state repealed an existing ban on wagering on sporting events, federal law would not be implicated.

prohibits any "scheme . . . to influence . . . by bribery any sporting contest." *Id.* § 224(a). But, that same section expressly indicates that it "shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operations [sic] to the exclusion of any State," and further disavows any attempt to preempt otherwise valid state laws. *Id.* § 224(b). A third federal statute carves out an exception to the general federal prohibition against transporting or mailing material and broadcasting information relating to lotteries for those conducted or authorized by states. *Id.* § 1307(a)-(b). That exception, however, does not pertain to the transportation or mailing of "equipment, tickets, or material" for sports lotteries. *Id.* § 1307(b), (d). Thus, while state sports lotteries violate § 1307, that section does not provide a basis for inferring that it, together with PASPA, provides a federal regulatory scheme that preempts state regulation of sports gambling by private parties.[7] Further indicating federal deference to state laws on the subject, a fourth federal statute makes it a crime to transport wagering paraphernalia in interstate commerce but does not apply to betting materials to be used on sporting events in states where such betting is legal. *Id.* § 1953(a)-(b). As a

[7] PASPA only extends its prohibition to private persons to the extent persons "sponsor, operate, advertise, or promote [sports gambling] pursuant to the law or compact of a governmental entity." 28 U.S.C. § 3702(2). Because the federal statute applies only to persons who act pursuant to state law, it cannot be said to directly regulate persons.

result, the federal prohibition of state-authorized sports gambling does not emanate from a federal regulatory scheme that expressly or implicitly preempts state regulation that would conflict with federal policy. Instead, PASPA attempts to implement federal policy by telling the states that they may not regulate an otherwise unregulated activity. The Constitution affords Congress no such power. *See New York,* 505 U.S. at 178 ("The Constitution . . . gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly. . . .").

In addition to preempting state regulation with federal regulation, in some circumstances, Congress may regulate states directly as part of a generally applicable law. *See, e.g., New York,* 505 U.S. at 160 (collecting cases). That is what Congress did with the DPPA, which the Court expressly found in *Reno* to be generally applicable. *See Reno,* 528 U.S. at 151 ("[W]e need not address the question whether general applicability is a constitutional requirement for federal regulation of the States, because the DPPA is generally applicable. The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information. . . ."). Yet, unlike the DPPA in *Reno,* but like the act in *New York,* PASPA is not an example of a generally applicable law that subjects states to the same federal regulation as private parties. *See New York,* 505 U.S. at 160 ("This litigation presents no occasion to apply or revisit the

holdings of . . . cases [concerning generally applicable laws], as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties."). In addition to its restrictions on actions by state governments relating to sports gambling, PASPA also forbids "a person to sponsor, operate, advertise, or promote" sports gambling if done "*pursuant to the law or compact of a governmental entity.*" 18 U.S.C. § 3702(2) (emphasis added); *see also supra* note 2. Thus, PASPA's reach to private parties is predicated on a state's authorization of sponsorship, operation, advertisement, or promotion of sports gambling pursuant to state law.[8] Accordingly, PASPA cannot be said to "subject[ ] . . . States[s] to the same legislation applicable to private parties," *New York,* 505 U.S. at 160, for state law determines whether § 3702(2) reaches any particular individual.

Nor does *Reno* stand more generally for the proposition that a violation of "anti-commandeering" federalism principles occurs only when Congress requires affirmative activity by state governments. It is true that in upholding the DPPA, the Court noted that it "d[id] not require the South Carolina Legislature to enact any laws or regulations, and it d[id] not

[8] According to the majority, a state would presumably not run afoul of PASPA if it merely refused to prohibit sports gambling. The resulting unregulated market, however, portends grave consequences for which state officials would be held accountable, even though it would be federal policy that prohibits the states from taking effective measures to regulate and police this activity. In this sense, PASPA is indeed coercive.

require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno,* 528 U.S. at 151. Read in context, however, that statement does not suggest that the principles of federalism articulated in *New York* and *Printz* are limited only to situations in which Congress compels states to enact laws or enforce federal regulation. The two sentences preceding that statement make that clear. First, the Court recognized that "the DPPA d[id] not require the States in their sovereign capacity to regulate their own citizens." *Id.* But here, PASPA *does* "require states in their sovereign capacity to regulate their own citizens," *id.,* because it dictates *how* they must regulate sports gambling. Pursuant to PASPA, states may not "sponsor, operate, advertise, promote, license, or authorize" such activity, 28 U.S.C. § 3702(1). Thus, states must govern accordingly, even if that means by refraining from providing a regulatory scheme that governs sports gambling.

Second, the Court explained in *Reno* that, "[t]he DPPA regulates the States *as owners* of data bases" of personal information in motor vehicle records. *Reno,* 528 U.S. at 151 (emphasis added). The fact that the DPPA regulated states as "suppliers to the market for motor vehicle information," *id.,* clearly indicates that the Court viewed the DPPA as direct congressional regulation of interstate commerce, *id.* at 148 (recognizing that motor vehicle information, in the context of the DPPA, is "an article of commerce"), rather than a federal requirement for the states to regulate such activity, *see New York,* 505 U.S. at 166

("The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."). Although the Court declined to find that *New York* and *Printz* governed the DPPA merely because it would "require time and effort on the part of state employees," it clarified that federally mandated action by states to comply with federal regulations is not necessarily fatal to a federal law that "'regulate[s] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" *Reno,* 528 U.S. at 150 (quoting *Baker,* 485 U.S. at 514-15) (second alteration in original).

The direct federal regulation of interstate commerce under the DPPA obviously distinguishes *Reno* from *New York* and *Printz,* where the federal statutes at issue in those cases required states to enact legislation and enforce federal policy, respectively. But it also distinguishes *Reno* from this case. As the Court recognized, "[t]he DPPA establishe[d] a regulatory scheme." *Reno,* 528 U.S. at 144, 148, 151. As discussed above, however, PASPA is not itself a regulatory scheme, nor does it combine with several other scattered statutes in the criminal code to create a federal regulatory scheme. And while Congress could have regulated sports gambling directly under the Commerce Clause, just as it regulated motor vehicle information under the DPPA, it did not. Instead, it chose to set federal parameters as to how states may

regulate sports gambling. As a result, any reliance on *Reno* to uphold PASPA is misplaced.

Hodel and *FERC* also provide no support for upholding PASPA. In *Hodel,* the statute at issue permitted states to submit a state regulatory plan for federal approval if they wished to regulate surface coal mining; if states did not seek or obtain approval, then a federal enforcement program would take effect. *Hodel,* 452 U.S. at 271-72. The Court determined that the federal statute did not "commandeer[ ] the legislative process of the States" because states had a choice about whether to implement regulation that conformed to federal standards or let the federal government bear the burden of regulation. *Id.* at 288; *see also Printz,* 521 U.S. at 925-26 ("In *Hodel* . . . we concluded that the Surface Mining Control and Reclamation Act of 1977 did not present [a Tenth Amendment] problem . . . because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise preempted field." (citation omitted)). If PASPA provided a similar choice to states – to either implement state regulation of sports gambling that met federal standards or allow federal regulation to take effect – then perhaps it would pass constitutional muster. But it does not. Therefore *Hodel* is inapplicable to the case at hand.

In addition, in upholding Titles I and III of PURPA in *FERC,* the Court focused on the fact that those titles merely required that states "*consider* the suggested federal standards" as a condition to

continued state regulation. *FERC,* 456 U.S. at 765; *see also id.* at 765-66 ("In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States' separate and independent existence, and do not impair the ability of the States to function effectively in a federal system." (citations omitted) (internal quotation marks omitted)). Here, PASPA does not provide suggested federal standards and approaches that states must consider in their regulation of sports gambling. Rather, PASPA strips any regulatory choice from state governments.[9] Furthermore, while the PURPA titles in *FERC* did "not involve the compelled exercise of Mississippi's sovereign powers," *id.* at 769, PASPA does indeed suffer from the obverse of such a constitutional defect: it prohibits the exercise of states' sovereign powers. *FERC* is thus distinguishable and inapposite.

Finally, as recognized by the majority, our decision in *Office of the Commissioner of Baseball v.*

[9] The majority asserts that the two "choices" presented to a state by PASPA – to "repeal its sports wagering ban [or] to keep a complete ban on sports wagering" – "leave much room for the states to make their own policy." (Maj. Op. at 41.) Even if the majority's reading of PASPA as affording these choices is correct, I fail to discern the "room" that is accorded the states to make their own policy on sports wagering. It seems to me that the only choice is to allow for completely unregulated sports wagering (a result that Congress certainly did not intend to foster), or to ban sports wagering completely.

Markell, 579 F.3d 293 (3d Cir. 2009), does not bind us to reject a challenge to PASPA on federalism grounds. In that case, we determined that a statutory phrase concerning the extent to which states grandfathered under PASPA could operate certain types of sports gambling was unambiguous. *Id.* at 302-03. As a result of the unambiguous language in PASPA, "we f[ou]nd unpersuasive Delaware's argument that its sovereign status requires that it be permitted to implement its proposed betting scheme." *Id.* at 303. That finding, however, related to our conclusion that PASPA gave clear notice of its "'alter[ation] [of] the usual constitutional balance' with respect to sports wagering," and thus satisfied the requirement of *Gregory v. Ashcroft,* 501 U.S. 452 (1991). *See Markell,* 579 F.3d at 303. Yet, here, we are not dealing with a question of which sovereign – state or federal – has the authority under either the "usual" or "altered" constitutional balance to regulate sports gambling. Congress does have the authority to regulate sports gambling when it does so itself. In this case, however, we are faced with the issue of whether Congress has the authority to regulate how states regulate sports gambling. Thus, our rejection of Delaware's "sovereign status" argument has no bearing on the issue before us. Furthermore, *Markell* provides no guidance in this case, because there we addressed only the meaning of the statutory exception to PASPA relating to grandfathered states found at 28 U.S.C. § 3704(a)(1). *Markell,* 579 F.3d at 300-01. We did not pass upon the issue of whether Congress may constitutionally restrict how states can regulate under § 3702(1).

In sum, no case law supports permitting Congress to achieve federal policy objectives by dictating how states regulate sports gambling. Instead of directly regulating state activities or interstate commerce, PASPA "seek[s] to control or influence the manner in which States regulate private parties," a distinction the Supreme Court has recognized as significant. *See Reno,* 528 U.S. at 150 (internal quotation marks omitted) ("In *Baker,* we upheld a statute that prohibited States from issuing unregistered bonds because the law 'regulate[d] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" (quoting *Baker,* 485 U.S. at 514-15)); *see also New York,* 505 U.S at 166 ("The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.").

Moreover, no legal principle exists for finding a distinction between the federal government compelling state governments to exercise their sovereignty to enact or enforce laws on the one hand, and restricting state governments from exercising their sovereignty to enact or enforce laws on the other. In both scenarios the federal government is regulating how *states* regulate. If Congress identifies a problem involving or affecting interstate commerce and wishes to provide a policy solution, it may regulate the commercial activity itself, *see New York,* 505 U.S. at 166, and may even regulate state activity that involves

interstate commerce, *see Reno,* 528 U.S. at 150-51; *Baker,* 485 U.S. at 514. In addition, Congress may provide states a choice about whether to implement state regulations consistent with federal standards or let federal regulation preempt state law, *see Hodel,* 452 U.S. at 288, and may require states to "consider" federal standards or approaches to regulation in deciding how to regulate in a pre-emptible area, *see FERC,* 456 U.S. at 765-66. Furthermore, Congress may "encourage a State to regulate in a particular way," *New York,* 505 U.S. at 166 – even in areas outside the scope of Congress's Article I, § 8 powers – by "attach[ing] conditions on the receipt of federal funds," *South Dakota v. Dole,* 483 U.S. 203, 206-07 (1987). But, what Congress may not do is "regulate state governments' regulation." *See New York,* 505 U.S. at 166. Whether commanding the use of state machinery to regulate or commanding the nonuse of state machinery to regulate, the Supreme Court "has been explicit" that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 162. Because that is exactly what PASPA does here, I conclude it violates the principles of federalism articulated in *New York* and *Printz.* Therefore, I would reverse the District Court's order granting summary judgment for Plaintiffs and vacate the permanent injunction.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 12-4947 (MAS) (LHG) **OPINION** (Filed Feb. 28, 2013)

SHIPP, District Judge.

This matter comes before the Court upon several motions filed by the Parties. The National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Office of the Commissioner of Baseball doing business as Major League Baseball ("MLB") (collectively, "Plaintiffs" or "the Leagues") filed their Complaint on August 7, 2012. (Compl., ECF No. 1.) On August 10, 2012, Plaintiffs filed a "Motion for Summary Judgment and, If Necessary to Preserve the Status Quo, a Preliminary Injunction" seeking to enjoin Defendants Christopher J. Christie, Governor of the State of New Jersey, David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and Frank Zanzuccki, Executive Director of the New Jersey

Racing Commission (collectively, "Defendants" or the "State"), from implementing N.J. Stat. Ann. 5:12A-1, *et seq*. (2012) ("New Jersey's Sports Wagering Law" or "Sports Wagering Law"). (Pls.' Br., ECF No. 10-2.) On November 21, 2012, Defendants filed a Cross Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment. (Defs.' Br., ECF No. 76-1.) Defendants' Cross Motion challenged the constitutionality of the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701, *et seq*. On November 21, 2012, the New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA"), and Sheila Oliver and Stephen Sweeney ("Legislative Intervenors") filed Motions to Intervene, which included opposition to Plaintiffs' Summary Judgment Motion. (NJTHA's Mot. to Intervene, ECF No. 72; Legislative Intervenors' Mot. to Intervene, ECF No. 75.) NJTHA's and the Legislative Intervenors' Motions to Intervene were subsequently granted on December 11, 2012. (ECF No. 102.)[1]

On November 27, 2012, the Court entered an Order Certifying Notice of a Constitutional Challenge to the United States Attorney General. (ECF No. 84.) The Leagues filed a Reply in support of their Motion for Summary Judgment, as well as Opposition to

[1] After the Court granted leave to intervene, NJTHA's Opposition Brief was docketed separately. (NJTHA's Opp'n Br., ECF 108.) Legislative Intervenors did not file a separate brief as to constitutionality but included arguments in their Motion to Intervene. (Legislative Br., ECF No. 75-1.)

Defendants' Cross Motion, on December 7, 2012. (Pls.' Reply & Opp'n, ECF No. 95.) That submission included a request for a permanent injunction. (*Id.* at 20.)

On January 22, 2013, the United States filed a Notice of Intervention. (ECF No. 128.) On the same date, the Court entered an Order granting the Department of Justice ("DOJ") leave to file a brief regarding the constitutionality of PASPA. (ECF No. 129.) The DOJ filed its brief on February 1, 2013. (DOJ's Br., ECF No. 136.) On February 8, 2013, NJTHA, Legislative Intervenors, and Defendants filed additional submissions in response to the DOJ's brief. (NJTHA's Reply to DOJ, ECF No. 138) (Legislative Int.'s Reply to DOJ, ECF No. 139) (Defs.' Reply to DOJ, ECF No. 140.)

The Court heard oral argument on the Cross Motions for Summary Judgment on February 14, 2013. (ECF No. 141.)

The Court, having considered the Parties' submissions, for the reasons stated below, and for other good cause shown, finds that Plaintiffs are entitled to summary judgment and a permanent injunction.

I. Summary of the Court's Opinion

This case requires the Court to determine whether an act of Congress is unconstitutional because it purportedly violates New Jersey's sovereign rights. After careful consideration, the Court has determined

that Congress acted within its powers and the statute in question does not violate the United States Constitution.

Congress, pursuant to an 88-5 vote in the Senate and with the vocal support of one of New Jersey's own Senators,[2] enacted PASPA in 1992 to stop the spread of gambling on professional and amateur sports. To that end, PASPA made it unlawful for States to authorize a sports wagering system. PASPA included a grandfather clause which exempted states with preexisting sports wagering laws. PASPA also granted New Jersey a one year window to legalize wagering on sports. New Jersey did not exercise that option. Over twenty years later, however, New Jersey amended its state constitution and passed a law authorizing gambling on sports. That law directly conflicts with PASPA.

Professional and amateur sports leagues sued the Governor of New Jersey and other State officials to prevent the implementation of New Jersey's Sports Wagering Law. The State, and other Defendants who intervened in the case, argue that PASPA violates the federal Constitution and cannot be used by the Leagues to prevent the implementation of legalized sports wagering. The Leagues disagree. If Defendants are correct, they will be permitted to enact

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[2] *See* U.S. Senate Roll Call Votes, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=102&session=2&vote=00111.

their proposed sports wagering scheme. If they are not, Defendants will be prohibited from enacting sports wagering in New Jersey because PASPA is a federal law which overrides New Jersey's law.

This case presents several issues. Specifically, it is alleged that PASPA violates: 1) the Commerce Clause; 2) the Tenth Amendment; 3) the Due Process Clause and Equal Protection Principles; and 4) the Equal Footing Doctrine. The Court begins its analysis of these issues with the time-honored presumption that PASPA, enacted by a co-equal branch of government, is constitutional. Moreover, the Court is required to adopt an interpretation that would deem the statute constitutional so long as that reading is reasonable. Pursuant to this mandate, the Court has determined that PASPA is a reasonable expression of Congress' powers and is therefore constitutional.

First, PASPA is a rational expression of Congress' powers under the Commerce Clause. The fact that PASPA allows legalized sports wagering to continue in those states where it was lawful at the time of its enactment does not deprive the statute of constitutionality because Supreme Court precedent permits "grandfathering." Second, PASPA does not violate the Tenth Amendment because it does not force New Jersey to take any legislative, executive or regulatory action. PASPA also does not raise the political accountability concerns outlined by the Supreme Court's Tenth Amendment jurisprudence. Third, regarding Defendants' additional allegations, the Court has

determined that Congress had a rational basis to enact PASPA in the manner it chose.

Although some of the questions raised in this case are novel, judicial intervention is generally unwarranted no matter how unwise a court considers a policy decision of the legislative branch. As such, to the extent the people of New Jersey disagree with PASPA, their remedy is not through passage of a state law or through the judiciary, but through the repeal or amendment of PASPA in Congress.

II. Background

Congress enacted PASPA in 1992 to prevent the spread of state-sponsored sports gambling and to protect the integrity of professional and amateur sports. S. Rep. No. 102-248, at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555. PASPA renders it unlawful for:

> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to

> participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702.

In considering PASPA, the Senate Judiciary Committee stated, "[a]lthough the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively . . . or to prohibit lawful sports gambling schemes . . . that were in operation when the legislation was introduced." S. Rep. No. 102-248, at 8, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559. Accordingly, PASPA provided the following exceptions:

> (a) Section 3702 shall not apply to –
>
> (1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;
>
> (2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both –
>
> (A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 . . . actually was conducted . . . at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme . . . conducted exclusively in casinos located in a municipality, but only to the extent that –

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation. . . .

. . . .

28 U.S.C. § 3704.

PASPA's "grandfather clause" resulted in exceptions for four states: Delaware, Oregon, Montana and Nevada. Additionally, New Jersey was the only state qualified to establish sports gambling within the one-year period outlined in § 3704(a)(3). New Jersey chose not to exercise that opportunity.

Two decades later, on January 17, 2012, New Jersey enacted the Sports Wagering Law. It allows casinos, among other entities, to "operate a sports pool" and apply for "a license to operate a sports pool." N.J. Stat. Ann. § 5:12A-2(a). On October 15, 2012, New Jersey promulgated regulations (the "Regulations") pursuant to the Sports Wagering Law. N.J. Admin. Code § 13:69N-1.11, *et seq.* The Sports Wagering Law and Regulations reflect New Jersey's intention to sponsor, operate, advertise, promote, license and/or authorize sports gambling. The Leagues assert that New Jersey enacted the Sports Wagering Law in violation of the clear mandates of PASPA, and therefore, in violation of the Supremacy Clause of the United States Constitution. U.S. Const. art. VI., cl. 2 ("[T]he Laws of the United States . . . shall be the supreme law of the land."). Defendants and Defendant-Intervenors argue, in sum, that PASPA is unconstitutional.

As drafted, the two statutory regimes cannot coexist. Accordingly, if PASPA is held to be constitutional, then the Sports Wagering Law must be stricken as preempted by the Supremacy Clause. Conversely, if this Court finds PASPA unconstitutional, it must be invalidated and the New Jersey Sports Wagering Law may be implemented.

In the twenty plus year history of PASPA, three challenges have been lodged against its provisions. One lawsuit, which involved NJTHA and a New Jersey State Senator, challenged but did not reach the constitutionality of PASPA. *See Interactive Media*

Entm't & Gaming Ass'n, Inc. v. Holder, 09-1301 (GEB), 2011 WL 802106 (D.N.J. Mar. 7, 2011). In addition, a *pro se* litigant lodged a Tenth Amendment challenge against PASPA which was resolved without reaching the merits of the constitutionality argument. *See Flagler v. U.S. Attorney for Dist. of N.J.,* 06-3699 (JAG), 2007 WL 2814657 (D.N.J. Sept. 25, 2007).

In 2009, the Third Circuit Court of Appeals had the opportunity to consider PASPA in *Office of the Commissioner of Baseball v. Markell,* 579 F.3d 293 (3d Cir. 2009). Although not presented with a direct constitutional challenge to PASPA, the Third Circuit found that PASPA was "not . . . ambiguous." *See Markell,* 579 F.3d at 303. In addition, the *Markell* Court found the argument that a state's sovereignty requires it to be permitted to implement a betting scheme of that state's choosing "unpersuasive." *Id.* The *Markell* Court also recognized the "grandfathering" provisions of PASPA, stating, "[a]lthough PASPA has broadly prohibited state-sponsored sports gambling since it took effect on January 1, 1993, the statute also 'grandfathered' gambling schemes in individual states 'to the extent that the scheme was conducted by that State' between 1976 and 1990." *Id.* at 296-97.

III. Legal Standard and Analysis

A. Summary Judgment

Summary judgment is appropriate if the record shows "that there is no genuine dispute as to any

material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A district court considers the facts drawn from the "materials in the record, including depositions, documents, electronically stored information, affidavits . . . or other materials" and must "view the inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion." Fed. R. Civ. P. 56(c)(1)(A); *Curley v. Klem,* 298 F.3d 271, 276-77 (3d Cir. 2002) (internal quotations omitted). The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby,* 477 U.S. 242, 251-52 (1986). More precisely, summary judgment should be granted if the evidence available would not support a jury verdict in favor of the non-moving party. *Id.* at 248-49. The material facts in the instant matter are not disputed. Therefore, the case is ripe for decision at the summary judgment stage.

B. Congressional Statutes are Presumptively Constitutional

It is a basic tenet of constitutional law that Congressional statutes are presumptively constitutional and should not be struck down unless "clearly demonstrated" otherwise. *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2579 (2012) (quoting *United States v. Harris,* 106 U.S. 629, 635 (1883)); *Reno v. Condon,* 528 U.S. 141, 148 (2000); *Close v. Glenwood*

Cemetery, 107 U.S. 466, 475 (1883) ("[E]very legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established . . . ."); *Koslow v. Pennsylvania,* 302 F.3d 161, 175 (3d Cir. 2002) (internal citations omitted) ("Federal statutes are presumed constitutional."). When presented with two possible interpretations of a statute, "courts should adopt the meaning" which finds the statute constitutional. *Sebelius,* 132 S. Ct. at 2593; *see also Blodgett v. Holden,* 275 U.S. 142, 148 (1927) (J. Holmes, concurring) ("[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.").

Moreover, "[t]he question is not whether that is the most natural interpretation of the [statute], but only whether it is a 'fairly possible' one." *Sebelius,* 132 S. Ct. at 2594 (quoting *Crowell v. Benson,* 285 U.S. 22, 62 (1932)). Therefore, "every *reasonable* construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* (emphasis added) (quoting *Hooper v. California,* 155 U.S. 648, 657 (1895)).

C. The Constitutionality of PASPA

Defendants challenge the presumption of constitutionality by arguing that PASPA violates 1) Congress' powers accorded to it under the Commerce Clause, 2) the Tenth Amendment's limitations on Congress' powers, and 3) the Due Process Clause and

Equal Protection Principles. Additionally, NJTHA argues that PASPA violates the Equal Footing Doctrine. Each constitutional challenge will be addressed in turn.

1) The Commerce Clause

a. The Parties' Positions

Defendants argue that PASPA is an unconstitutional and improper use of Congress' Commerce Clause powers. (Defs.' Br. at 33-36.) Specifically, Defendants challenge the exceptions made for states which conducted legalized sports gambling prior to the enactment of PASPA as unconstitutionally discriminatory. (*Id.* at 33.) Defendants reiterate this argument in lodging a challenge against PASPA as violating "equal sovereignty." (*Id.*) In addition, NJTHA argues that PASPA exceeds and does not comport with Congress' broad powers to regulate interstate commerce. (NJTHA's Opp'n Br. at 36-39.)

In response, Plaintiffs and the DOJ argue that PASPA is a permissible exercise of Congress' powers pursuant to the Commerce Clause and the Necessary and Proper Clause. (Pls.' Br. at 7-13; DOJ's Br. at 13-17.)

b. Discussion

1) PASPA's Relation to Interstate Commerce

Congress has the authority to "regulate Commerce with foreign Nations, and among the several States. . . ." and "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the powers it has under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3, 18. It is Defendants' burden to overcome the "substantial deference [given] to a Congressional determination that it had the power to enact particular legislation." *United States v. Parker,* 108 F.3d 28, 30 (3d Cir. 1997) (citation omitted).

It is well established that "Congress' power under the Commerce Clause is very broad." *Fry v. United States,* 421 U.S. 542, 547 (1975). Congress is empowered to "regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce." *Gonzales v. Raich,* 545 U.S. 1, 17 (2005). "[A]ctivity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." *Fry,* 421 U.S. at 547.

With the presumption of constitutionality guiding the Court's analysis,

> [a] court may invalidate legislation enacted under the Commerce Clause *only* if it is clear that there is no rational basis for a

> congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.

Hodel v. Indiana, 452 U.S. 314, 323-24 (1981) (internal citations omitted) (emphasis added).

The Supreme Court has clearly instructed that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 470 (1981). The testimony that is part of the legislative record includes the following:

1. The spread of legalized sports gambling would change forever – and for the worse – what [professional and amateur sports] games stand for and the way they are perceived.

2. Sports gambling threatens the integrity of, and public confidence in, amateur and professional sports.

3. Widespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think "the fix was in" whenever their team failed to beat the point-spread.

4. Teenage gambling-related problems are increasing. Of the approximately 8 million compulsive gamblers in America, 1 million of them are under 20.

5. Governments should not be in the business of encouraging people, especially young people, to gamble.

6. *Sports gambling is a national problem. The harms it inflicts are felt beyond the borders of those States that sanction it.* The moral erosion it produces cannot be limited geographically. Once a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure. The current pressures in such places as New Jersey . . . to institute casino-style sports gambling illustrate the point. Without Federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop irreversible momentum.

7. *[T]he interstate ramifications of sports betting are a compelling reason for federal legislation.*

8. Although the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively to [States] which instituted sports lotteries prior to the introduction of our legislation.

S. Rep. No. 102-248, at 5-8 (emphasis added), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556-3559.

The Third Circuit has consistently followed Supreme Court precedent in recognizing the expansive nature of the Commerce Clause. In *United States v. Riehl,* the Third Circuit analyzed a constitutional

challenge to Title VIII of the Organized Crime Control Act of 1970. 460 F.2d 454 (3d Cir. 1972). The *Riehl* Court stated that "[i]llegal gambling has been found by Congress to be in the class of activities which exerts an effect upon interstate commerce." *Id.* at 458. According to the *Riehl* Court, "Congress has chosen to protect commerce and the instrumentalities of commerce. . . . We may not substitute our judgment . . . [n]or may we sit in judicial review of congressional legislative findings." *Id.*

Notably, Defendants and NJTHA concede that Congress has the authority to regulate gambling pursuant to its Commerce Clause powers. (*See* Certified Transcript of Oral Arguments ("Tr.") 49:17-19; 73:7-13, respectively.)

In analyzing whether there is a sufficient nexus between interstate commerce and a regulated activity, the Court need not determine whether the spread of legalized sports gambling would have an effect on interstate commerce in fact, but merely whether a "rational basis" existed for Congress to reach that conclusion. *See Gonzales v. Raich,* 545 U.S. at 22.

With this well-established analytical framework as a back-drop, the Court finds that PASPA satisfies rational basis review. PASPA was enacted to prevent the spread of legalized sports gambling and safeguard the integrity of professional and amateur sports. The Senate Judiciary Committee has concluded that sports gambling is a "national problem" that in the absence of federal legislation would spread throughout the

country unabashedly. S. Rep. No. 102-248, at 5, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556.

While the congressional findings underpinning PASPA need not specifically reference the Commerce Clause, the Senate Judiciary Committee's conclusion is consistent with Plaintiffs' and the DOJ's position that the spread of legalized sports gambling will impact interstate commerce. Notably, the Senate Judiciary Committee found that the "harms [legalized sports gambling] inflicts are felt beyond the borders of those States that sanction it." S. Rep. No. 102-248, at 5, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556. Additionally, the Senate Judiciary Committee found that "[w]ithout Federal legislation, sports gambling is likely to spread . . . and ultimately develop irreversible momentum." *Id.* Therefore, Congress had a rational basis to conclude that legalized sports gambling would impact interstate commerce.[3]

2) PASPA's Grandfathering Clause Comports with the Commerce Clause

In addition, the presence of a grandfathering clause does not undermine rational basis review. The Congressional findings demonstrate that Congress had a rational basis to exempt pre-existing sports

[3] The Court, however, recognizes that Congress' Commerce Clause powers are not without limits. *See U.S. v. Lopez,* 514 U.S. 549, 565 (1995); *United States v. Morrison,* 529 U.S. 598, 613 (2000).

gambling systems.[4] The findings also reflect that Congress desired to protect the reliance interests of the few states that had legalized gambling operations. As such, the exceptions made for particular states do not impugn rational basis review.[5] *See*

[4] While not squarely before the Court, it is worth mentioning that Defendants, in essence, make a fairness argument. From the purview of Defendants, it is unfair for other states to do what New Jersey cannot. However, in navigating this fairness argument, there is an inherent conflict in Defendants' positions. Defendants argue that it is unfair for other States to allow gambling, while simultaneously taking the position that gambling should be permitted in New Jersey but betting on college games in New Jersey, and on New Jersey collegiate sport teams, should be prohibited. At a minimum, the statutory framework of New Jersey's Sports Wagering Law implicitly recognizes the deleterious effects PASPA targets. At most, this framework potentially runs afoul of the protections afforded by the dormant commerce clause. *See Or. Waste Sys., Inc. v. Dep't of Envt'l Quality,* 511 U.S. 93, 99-101 (1994).

[5] Defendants argue that, in an invalid exercise of Congress' Commerce Clause powers, PASPA has violated the fundamental principle that each State has equal sovereignty before the Federal Government by discriminating in favor of states which had legalized sports wagering pre-existing PASPA. (Defs.' Br. at 33-36.) Plaintiffs argue, correctly, that "there is no requirement for uniformity in connection with the Commerce Power." *Currin v. Wallace,* 306 U.S. 1, 14 (1939); *see Railway Labor Execs. Ass'n v. Gibbons,* 455 U.S. 457, 468 (1982); *Hodel,* 452 U.S. at 332. "The States are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status." *Fry,* 421 U.S. at 548. The Court, guided by the presumption in favor of PASPA's constitutionality, finds that Congress' use of its Commerce Clause powers, which here effectuates a difference in treatment of States that have developed a reliance interest on sports gambling pre-dating the inception of PASPA, is both rational and constitutional.

Nordlinger v. Hahn, 505 U.S. 1, 13 (1992) ("[P]rotect[ing] legitimate expectation and reliance interests do[es] not deny equal protection of the laws."). It is also rational for Congress to remedy a national problem piecemeal. *See City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) (finding it permissible for a legislature to: 1) adopt regulations that only partially ameliorate a perceived evil, 2) defer complete elimination of the evil to future regulations, and 3) implement grandfathering provisions treating similarly situated entities differently predicated upon substantial reliance interests).

Finally, the Court declines to adopt Defendants' argument that *Delaware River Basin* requires heightened scrutiny of grandfather clauses and falls outside of Congress' powers under the Commerce Clause. (Defs.' Br. at 35, 38.) In *Delaware River Basin,* the Third Circuit found that the grandfather provision in that case "appear[ed] to be . . . arbitrary, rather than . . . rational." *Del. River Basin Commn. v. Bucks County Water & Sewer Auth.,* 641 F.2d 1087, 1098 (3d Cir. 1981). Significantly, *Delaware River Basin* lacked legislative findings that the Court could analyze to determine whether the statute passed rational basis review. Nearly twenty years had passed since the statute's enactment and the Third Circuit stated that it "perceive[d] no reliance interest in free enjoyment of an amount exceeding actual usage." *Id.* at 1099. Nevertheless, the Third Circuit remanded for further proceedings rather than finding the statute unconstitutional. *Id.* at 1100. On remand, the Eastern District

of Pennsylvania noted that substantial reliance interests are "proper grounds for insulating enterprises already *in situ* from the burdens of a newly adopted regulatory scheme." *Del. River Basin Comm'n v. Bucks Cnty. Water & Sewer Auth.,* 545 F. Supp. 138, 145 (E.D. Pa. 1982). Prior to reaching its holding, the district court stated that "the Supreme Court has not said that permanent grandfathering is *per se* [problematic]." *Id.* at 147. Finally, the district court concluded that the relevant exemptions differentiated "in a manner that is rationally related to the goal[ ] of preserving . . . and protecting significant reliance interests. . . ." *Id.* at 148.

Unlike *Delaware River Basin,* the Court here has legislative findings to consider. Specifically, the legislative record reveals that the committee believed all sports gambling is harmful, but had no desire to threaten or to prohibit lawful sports gambling schemes in operation prior to the legislation. S. Rep. No. 248, at 8, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559. Congress has determined that the substantial reliance interests of the grandfathered states merit preservation and protection. The grandfather clause contained in PASPA passes rational basis review. As such, the Court finds that PASPA's regulation of sports betting is constitutional pursuant to Congress' Commerce Clause powers.

2) Anti-Commandeering Principle

For the reasons stated below, the Court has determined that PASPA does not violate the Tenth Amendment. Most importantly, it neither *compels* nor *commandeers* New Jersey to take any action. Moreover, the federal officials who passed PASPA, and continue to support it, are clearly accountable to the citizens of the several States. PASPA, therefore, does not violate the Tenth Amendment.

a. The Parties' Positions

Defendants argue that PASPA requires New Jersey to prohibit sports wagering in violation of the Anti-Commandeering principle set forth in *New York v. United States,* 505 U.S. 144 (1992). Integral to Defendants' argument is the proposition that "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." (Defs.' Reply to DOJ at 1 (quoting *New York,* 505 U.S. at 166).)

NJTHA argues that PASPA violates principles of federalism through 1) a "negative command prohibiting [New Jersey] from enacting any law legalizing or licensing Sports Betting," and 2) an "affirmative command requiring [New Jersey] to maintain State laws criminalizing sports betting." (NJTHA's Opp'n Br. at 3-4.) The Legislative Intervenors take a similar position. (Legislative Br. at 11.)

Plaintiffs respond that PASPA does not commandeer or compel the states to do anything. (Pls.' Reply & Opp'n at 9.) Rather, PASPA only prohibits authorizing gambling on professional or amateur sports. (*Id.*) Plaintiffs cite a number of cases for the proposition that Congress is free to exercise its power to prohibit states from conflicting with federal policy. (*Id.*) DOJ takes a position similar to Plaintiffs and contends that the Tenth Amendment is only implicated "when a federal statute requires *affirmative* State action." (DOJ's Br. at 9.)

Whether or not PASPA violates the Anti-Commandeering principles that flow from the Tenth Amendment depends on the extent to which the issue presently before the Court is analogous to the Supreme Court's decisions in *New York* and its progeny.

B. Discussion

1) Federalism and the Tenth Amendment

The Tenth Amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

As noted numerous times, it is an express declaration of the idea which permeates the Constitution: the powers of the Federal Government are limited to the powers enumerated therein; all others are retained by the several States and the people. *See*

New York, 505 U.S. at 156-57 (The Amendment's restraint upon Congress "is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology."); *United States v. Darby,* 312 U.S. 100, 124 (1941) (The Tenth Amendment "states but a truism that all is retained which has not been surrendered."); 3 J. Story, Commentaries on the Constitution of the United States 752 (1833) (The Tenth Amendment "is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.").

The diffusion of power between the States and the Federal Government was purposefully designed. *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."). As stated by James Madison:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id. at 459 (quoting The Federalist No. 51, pp. 323 (C. Rossiter ed. 1961)).

Beyond the protection of the rights of the people through the diffusion of power, the Tenth Amendment is an express recognition that "[a]lthough the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Printz v. United States,* 521 U.S. 898, 918-19 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)); *see Ashcroft,* 501 U.S. at 457-58.

The balance of power amongst the several States and the Federal Government was of utmost importance to the drafters of the Constitution and those who attended the Constitutional Convention. *See New York,* 505 U.S. at 163 ("[T]he question whether the Constitution should permit Congress to employ state governments as regulatory agencies was a topic of lively debate among the Framers."). The Articles of Confederation prevented Congress from acting upon the people directly; "Congress 'could not directly tax or legislate upon individuals; it had no explicit 'legislative' or 'governmental' power to make binding 'law' enforceable as such.'" *Id.* (quoting Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1447 (1987)). Rather, Congress was required to pass laws and hope that States would pass "intermediate legislation" allowing Congress' will to be done upon the people. *Id.* (quoting The Federalist No. 15, p. 109 (C. Rossiter ed. 1961)).

Upon this stage, two opposing plans were considered by the Constitutional Convention: 1) the Virginia Plan, under which "Congress would exercise legislative authority directly upon individuals," and 2) the

New Jersey Plan, whereby "Congress would continue to require the approval of the States before legislating, as it had under the Articles of Confederation." *Id.* at 164 (citation omitted). "In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan." *Id.* at 165; *Printz,* 521 U.S. at 919-20 ("[T]he Framers rejected the concept of a central government that would act upon and through the States.").

In return for the power to act upon the people directly, the Federal Government is forbidden from directly *compelling* the States to pass laws which do the Federal Government's bidding. *New York,* 505 U.S. at 166. For example, "[t]he allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* However, "[t]he Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause." *Ashcroft,* 501 U.S. at 460. "As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Id.* As such, "Congress may legislate in areas traditionally regulated by the States." *Id.*

2) Pre-*New York* Case Law

The question in this case, whether PASPA violates the system of dual sovereignty by prohibiting New Jersey from enacting state sponsored sports betting, is informed and controlled by Supreme Court opinions over the past forty years. There has been a particularly dynamic development in Tenth Amendment case law over the past two decades. *See New York, supra,* (1992), *Printz, supra,* (1997), *Reno, supra* (2000); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective,* 59 Vand. L. Rev. 1629, 1636-42 (2006)).

Before *New York* and its ensuing case law can be discussed, an understanding of the cases which led to *New York* is required. The first of these cases is *National League of Cities v. Usery,* 426 U.S. 833 (1976). In *National League of Cities,* the Supreme Court held that application of the 1974 extension to the Fair Labor Standards Act ("FLSA") to the employees of state and municipal governments violated the Tenth Amendment. *Id.* at 851. In order to reach that decision, the *National League of Cities* Court inquired whether the FLSA intruded upon "functions essential to [the] separate and independent existence" of the States and whether the areas sought to be regulated by the Federal Government were "traditional aspects of state sovereignty." *Id.* at 845, 849 (citation and internal quotation marks omitted). The Court found that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages [paid to state employees], what hours those persons will work,

and what compensation will be provided where these employees may be called upon to work overtime." *Id.* at 845. As such, it then held that "both the minimum wage and the maximum hour provisions [in the FLSA] will impermissibly interfere with the integral governmental functions of these bodies" and found them both to be improper exercises of Congress' powers barred by the Tenth Amendment. *Id.* at 851.

The concept that the Tenth Amendment protects States' traditional governmental functions would eventually be overruled in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 531 (1985). In the meantime, however, the Supreme Court decided several additional Tenth Amendment cases.

In *Hodel v. Virginia Surface Mineral & Reclamation Association, Inc.,* an association of mining companies and Virginia filed suit seeking declaratory and injunctive relief prohibiting the Secretary of the Interior from implementing various provisions of the Surface Mining Control and Reclamation Act of 1977 (the "Mining Control Act"). 452 U.S. 264, 268, 273 (1981). Virginia contended that certain provisions of the Mining Control Act which "prescribe[d] performance standards for surface coal mining" violated the Tenth Amendment because regulation of coal mining impermissibly intruded on the "traditional governmental function of regulating land use." *Id.* at 283-84. The Supreme Court, describing its interpretation of the rule set forth in *National League of Cities,* stated that a Tenth Amendment violation only existed when Congressional action: 1) regulated the "States as

States;" 2) impermissibly "address[ed] matters that are indisputably 'attribute[s] of state sovereignty;'" or 3) "directly impair[ed the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" *Id.* at 287-88 (quoting *Nat'l League of Cities,* 426 U.S. at 845-54).

The *Hodel* Court held that the Mining Control Act did not violate the Tenth Amendment because it only acted upon private individuals and businesses, rather than upon "States as States," and did not *compel* Virginia to *enforce* the standards contained in the act or expend any funds doing so. *Id.* at 288. Rather than *compelling* Virginia to adopt regulations, the Mining Control Act "establishe[d] a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Id.* at 289. In the end, the Court held that "there can be no suggestion that the [Mining Control Act] *commandeers* the legislative processes of the States by *directly compelling* them to *enact* and *enforce* a federal regulatory program." *Id.* at 288 (emphasis added). Although the exact analytical framework used in *National League of Cities* and *Hodel* has been abandoned, the genesis of the underpinnings of the subsequent case law is readily apparent.[6]

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[6] Another case occupying the time between *National League of Cities* and *Garcia* is *F.E.R.C. v. Mississippi,* 456 U.S. 742

(Continued on following page)

The focus on areas of "traditional governmental functions" outlined in *National League of Cities* was overturned in *Garcia.* Pursuant to *National League of Cities,* the district court in *Garcia* found that "municipal ownership and operation of a mass-transit system is a traditional governmental function and thus . . . is exempt from the obligations imposed by the FLSA." *Garcia,* 469 U.S. at 530. That determination was in conflict with "three Courts of Appeals and one state appellate court. . . ." *Id.* The Supreme Court abandoned the rationale of *National League of Cities* and held that "the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest." *Id.* at 531, 538-39 (surveying lower court cases in which the "traditional governmental function" notion in *National League of Cities* had led to confusing and irreconcilable decisions).

Rather than look to "traditional governmental functions," the *Garcia* Court turned to "a different

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(1982). In *F.E.R.C.,* the Supreme Court again confronted a Tenth Amendment challenge to a federal statute, the Public Utility and Regulatory Policies Act of 1978 ("PURPA"). *Id.* at 745. An extended discussion is not required other than to note that PURPA's requirement that States must "enforce standards promulgated by FERC" and "consider specified ratemaking standards" were hallmarks of the "cooperative federalism" described, and approved, in *Hodel. Id.* at 759, 767.

measure of state sovereignty" and found that a Tenth Amendment violation would only occur when "the procedural safeguards inherent in the structure of the federal system" had failed to protect a State from the encroachment of the Federal Government. *Id.* at 550, 552. Stated differently, the Tenth Amendment's "limits are structural, not substantive-i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker,* 485 U.S. 505, 512 (1988) (construing the holding of *Garcia*). The *Garcia* Court held that there had been no failure of "the national political process" which was "destructive of state sovereignty or violative of any constitutional provision" when Congress decided to include the States, and state owned entities such as transit systems, within the ambit of the FLSA. *Garcia,* 469 U.S. at 554. The *Garcia* Court, however, declined to "identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Id.* at 556. The issue would be partially resolved in *New York*.

A final pre-*New York* case, however, requires discussion. In *South Carolina v. Baker,* the state of South Carolina sued the Secretary of the Treasury to prevent the implementation of a federal tax statute. 485 U.S. at 507-08. The statute in question, the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), required states to issue bonds in registered form if

the bond holders wished to qualify for a federal income tax exemption. *Id.* Prior to the enactment of TEFRA, a holder of a state or municipal bond could qualify for the exemption regardless of whether the bond was a registered bond or a bearer bond. *Id.* at 508. In order to reduce tax avoidance and evasion, the exemption was deemed to no longer apply to bearer bonds. *Id.* at 508-09. The States[7] argued that TEFRA "effectively require[d that States] issue bonds in registered form" because, without the exemption, the bonds were not marketable. *Id.* at 511. "For the purposes of Tenth Amendment analysis," the Supreme Court agreed and conducted its review as though TEFRA "directly regulated States by prohibiting outright the issuance of bearer bonds." *Id.*

The States contended that the political process alluded to in *Garcia* had failed them and that Congress was "uninformed" when it concluded that unregistered bonds were linked to tax evasion. *Id.* at 513. The Court rejected that argument and held that South Carolina was not "deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* According to the *Garcia* Court, the Tenth Amendment does "not authorize [ ] courts to second-guess the substantive basis for

[7] Twenty-three (23) states joined in an *amicus* brief filed in support of South Carolina's suit. *Id.* at 507. The Court's discussion will refer to the plaintiffs in *Baker,* therefore, as the "States."

congressional legislation." *Id.* Nor is it "implicated" when "the national political *process* did not operate in a defective manner." *Id.*

The States made an additional argument: TEFRA was unconstitutional "because it commandeer[ed] the state legislative and administrative process by coercing States into enacting legislation authorizing bond registration and into administering the registration scheme." *Id.* The Court rejected that contention, finding that any associated legislative amendments that the States might have to draft in order to be in compliance with the statute were merely "an inevitable consequence of regulating a state activity." *Id.* at 514. Otherwise, "any State could immunize its activities from federal regulation by simply codifying the manner in which it engages in those activities." *Id.* at 515. Stated differently, the States' "theory of 'commandeering' would not only render *Garcia* a nullity, but would also restrict congressional regulation of state activities even more tightly than it was restricted under the now overruled *National League of Cities* line of cases." *Id.*

The Supreme Court has recognized that its jurisprudence regarding the Tenth Amendment "has traveled an unsteady path." *New York,* 505 U.S. at 160. Although not fully consistent with each other, and based upon shifting rationale, certain concepts can be gleaned from the evolution of the Supreme Court's pre-*New York* case law. Those concepts, especially the degree of commandeering of the States' legislative processes required to trigger the Tenth

Amendment and the framework of federalism which the Supreme Court's decisions attempted to protect, are brought into closer focus in the following cases.

3) *New York* and its Progeny

Ruling 6-3 in *New York v. United States,* the Supreme Court struck down a provision of a federal statute that *compelled* the States to provide a regulatory framework for disposal of low level radioactive waste or be forced to take title to the waste. 505 U.S. at 173-77. In the process of doing so, the Supreme Court set forth its clearest definition yet of what type of congressional action pursuant to the Commerce Clause violated the Tenth Amendment. As framed by Justice O'Connor, *New York* "concern[ed] the circumstances under which Congress may *use* the States as *implements* of regulation; that is, whether Congress may *direct* or otherwise *motivate* the States to *regulate* in a particular field in a particular way." *Id.* at 162 (emphasis added).

Congress enacted the Radioactive Waste Policy Amendments Act of 1985 ("Waste Policy Act") in an effort to address the problem of radioactive waste disposal. *Id.* at 150. The key section of the Waste Policy Act reviewed by the Court "provide[d] three types of incentives to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders[:]" 1) monetary incentives, 2) access incentives, and 3) the "take title provision." *Id.* at 152.

In reaching its decision, the Court initially noted that Congressional regulation of low level nuclear waste pursuant to the Commerce Clause was permissible. *Id.* at 160. The Court and the parties also agreed that Congressional action in this area would preempt state law through the operation of the Supremacy Clause. *Id.* That was not, however, the end of the Court's analysis.

The Court found the first two incentives well within Congress' power "under the Commerce and Spending Clauses." *Id.* at 173-74. The third provision, which offered States "the option of taking title to and possession of the low level radioactive waste" in lieu of "regulating pursuant to Congress' direction," was "of a different character" and rejected by the Court. *Id.* at 174-75. In essence, the Court found that "Congress ha[d] crossed the line distinguishing encouragement from *coercion.*" *Id.* at 175 (emphasis added).

Citing *Hodel,* the Court reiterated that "Congress may not simply '*commandee*[*r*] the legislative processes of the States by *directly compelling* them to *enact* and *enforce* a federal regulatory program.'" *Id.* at 161 (quoting *Hodel,* 452 U.S. at 288) (emphasis added). This is so because "the Constitution has never been understood to confer upon Congress the ability to *require* the States to *govern* according to Congress' instructions." *Id.* at 162 (emphasis added) (citing *Coyle v. Smith,* 221 U.S. 559, 565 (1911)). If that were the case, the "accountability of both state and federal officials" would be seriously "diminished" because the federal officials who mandated that a State act in a

certain way would "remain insulated from the electoral ramifications of their decision[s]." *Id.* at 168-69. That lack of accountability undermined the balance of power amongst the Federal Government and the several States. *See id.*

Speaking directly to the take title provision, the Court further noted that the States were presented with a "'choice' of either *accepting ownership* of waste or *regulating* according to the instructions of Congress." *Id.* at 175 (emphasis added). Neither "choice," alone, would have been constitutionally permissible if presented to the States as a "freestanding requirement." *Id.* at 175-76 ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all."). Importantly, and unlike the first two provisions of § 2021e,

> the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. In this provision, Congress has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply *forcing* the States to submit to another federal instruction.

Id. at 176 (emphasis added). Such power "has never been understood to lie within the authority conferred upon Congress by the Constitution." *Id.* at 162. Because the Waste Policy Act left States with "no option other than that of *implementing legislation* enacted

by Congress" it "infringe[d] upon the core of state sovereignty reserved by the Tenth Amendment" and was "inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 177 (emphasis added). As such, the Court struck down the take title provision. *Id.*

The Supreme Court's focus on *coercion* and *commandeering* continued in *Printz v. United States.* In *Printz,* the Supreme Court struck down the Brady Handgun Violence Protection Act ("Brady Act"), because it *commandeered* State law enforcement officers to perform background checks on prospective handgun purchasers. *Printz,* 521 U.S. at 935. In essence, Congress had "direct[ed] state law enforcement officers to participate . . . in the *administration* of a federally enacted regulatory scheme." *Id.* at 904 (emphasis added). This was held to be unconstitutional because:

> The Federal Government may neither issue directives *requiring* the States to address particular problems [as in *New York*], nor *command* the States' officers, or those of their political subdivisions, to *administer* or *enforce* a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such *commands* are fundamentally incompatible with our constitutional system of dual sovereignty.

Id. at 935 (emphasis added).

Citing to its opinions in *Hodel* and *F.E.R.C.,* the Court noted that Congress "may not *compel* the States to *implement,* by *legislation* or *executive action,* federal regulatory programs." *Id.* at 925 (emphasis added). Specifically, the Court stated that no Tenth Amendment violation occurred in *Hodel,* because the Mining Control Act "merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." *Id.* at 926 (citing *Hodel,* 452 U.S. at 288). Similarly describing *F.E.R.C.,* the Court noted that Congress' actions therein "contain[ed] only the 'command' that state agencies 'consider' federal standards, and again only as a precondition to continued state regulation of an otherwise pre-empted field." *Id.* (citing *F.E.R.C.,* 456 U.S. at 764-65). The Supreme Court considered the two cases easily distinguishable from the *affirmative* "federal *command* to the States" which was occurring in *Printz*. *Id.* (emphasis added) (citing *F.E.R.C.,* 456 U.S. at 761-62). The independence and continued vitality of the federalist system at the core of our "compound republic," could not coexist with the Brady Act, which "*dragooned*" State executive officials "into *administering* federal law." *Id.* at 922, 928 (emphasis added).

Finally, and consistent with a rationale for its decision in *New York,* the Supreme Court referred to the clear "accountability" problems which arose from having state executive officials implement a federal regulatory scheme. *Id.* at 930 ("By forcing state governments to absorb the financial burden of

implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes," as well as by shunting onto state officials "the blame for [the Brady Act's] burdensomeness and . . . defects."). The critical defect in the Brady Act was, therefore, the *affirmative conscription* of state executive officials as part of a system to implement federal regulation along with a concomitant shift in accountability.

Unlike *New York* and *Printz,* the Court in *Reno v. Condon* found that a federal statute, the Driver's Privacy Protection Act ("DPPA"), did not violate the Tenth Amendment. 528 U.S. 141 (2000). "The DPPA regulates the disclosure and resale of personal information contained in the records of state DMVs" and "generally prohibits any state DMV, or officer, employee, or contractor thereof, from 'knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.'" *Id.* at 143-44 (citing 18 U.S.C. § 2721(a)). South Carolina brought suit asserting that "the DPPA violates the Tenth Amendment because it thrusts upon the States all of the day-to-day responsibility for administering its complex provisions . . . and thereby makes state officials the unwilling implementors of federal policy. . . ." *Id.* at 149-50 (internal quotation marks omitted). The Supreme Court rejected that reasoning and held that, although the DPPA would require "time and effort on

the part of state employees" to conform to it, the DPPA *does not* "require the states in their sovereign capacity to *regulate* their own citizens;" "to *enact* any laws or regulations;" or "require state officials to *assist* in the *enforcement* of federal statutes *regulating* private individuals." *Id.* at 150-51 (emphasis added). Unlike the statutes at issue in *New York* and *Printz,* the DPPA lacked an *affirmative* aspect which violated the Tenth Amendment.[8]

4) PASPA Does Not Violate the Tenth Amendment

Several key concepts can be drawn from the preceding case law which directly illuminate the case at bar. Defendants and Defendant-Intervenors state that *New York* must necessarily be read to limit the power of Congress to restrict the legislative prerogatives of the States. This reads too far into those decisions and the Court respectfully declines to adopt

[8] NJTHA supplements the analysis of *New York* and *Printz* with a discussion of the Supreme Court's holding in *Sebelius. Sebelius* is inapposite to the issue presented in this case. In short, the Medicaid expansion program passed under Congress' Spending Clause power as part of the Affordable Care Act ("ACA"), was rejected by the Supreme Court because it was financially coercive and forced states to accept the Medicaid expansion or forgo all federal funding for their preexisting Medicaid programs. *Sebelius,* 132 S. Ct. at 2603-04. That type of coercion was deemed a violation of the Tenth Amendment. PASPA, however, does not function similar to the ACA. Other than *Sebelius'* discussion of *New York* and *Printz,* it does not illuminate the Court's decision regarding PASPA.

such an interpretation. PASPA does not violate the Tenth Amendment.

The Supreme Court's Tenth Amendment jurisprudence, as far as it concerns the scope of Congress' powers pursuant to the Commerce Clause, has several clear threads. In fact, those threads can be construed in the *affirmative* nature of the acts Congress is prohibited from requiring of the States. Whether the terminology used was *compel,*[9] *commandeer,*[10] *instruct,*[11] *legislate,*[12] *enact,*[13] *regulate,*[14] *enforce,*[15] *implement,*[16] *dragoon,*[17]

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[9] "To cause or bring about by force, threats, or overwhelming pressure." Black's Law Dictionary (9th ed. 2009).

[10] "To take arbitrary or forcible possession of." Merriam-Webster's Collegiate Dictionary 248 (11th ed. 2005).

[11] "To give an order or command to." Merriam-Webster's Collegiate Dictionary 649 (11th ed. 2005).

[12] "To make or enact laws." Black's Law Dictionary (9th ed. 2009).

[13] "To establish by legal and authoritative act . . . to make (as a bill) into law." Merriam-Webster's Collegiate Dictionary 409 (11th ed. 2005)

[14] "To govern or direct according to rule; to make regulations for or concerning." Merriam-Webster's Collegiate Dictionary 1049 (11th ed. 2005).

[15] "To give force or effect to (a law, etc.); to compel obedience to." Black's Law Dictionary (9th ed. 2009).

[16] "To carry out, accomplish; esp: to give practical effect to and ensure of actual fulfillment by concrete measures." Merriam-Webster's Collegiate Dictionary 624 (11th ed. 2005).

[17] "To force into compliance esp. by violent measures." Merriam-Webster's Collegiate Dictionary 378 (11th ed. 2005).

conscript,[18] or *govern,*[19] one thread is clear: Congress cannot, via the Commerce Clause, force States to engage in *affirmative* activity. *See New York,* 505 U.S. at 178 (Congress may not "*command* a state government to *enact state* regulation . . . [and] may not *conscript* state governments as its agents.") (first, second and fourth emphasis added).

The difference between an affirmative command and a prohibition on action is not merely academic or insubstantial.[20] Simply stated, Defendants request that the Court read *New York* and *Printz* to displace the long held understanding that an otherwise permissible congressional action violates the Tenth Amendment because it excludes a State from

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[18] "To enroll into service by compulsion." Merriam-Webster's Collegiate Dictionary 265 (11th ed. 2005).

[19] "To exercise continuous sovereign authority over; esp: to control and direct the making and administration of policy in." Merriam-Webster's Collegiate Dictionary 541 (11th ed. 2005)

[20] Two Courts of Appeals cases decided following *New York* and *Printz* further demonstrate that Congress' powers are only limited by the Tenth Amendment when Congress attempts to *affirmatively direct* the actions of the States. *See ACORN v. Edwards,* 81 F.3d 1387, 1394 (5th Cir. 1996) (holding that a provision in the Lead Contamination Control Act of 1988, which "*require*[*d*] each State to '*establish a program*' " to implement the act, violated the Tenth Amendment) (emphasis added), *cert. denied,* 521 U.S. 1129 (1997); *Bd. of Natural Res. v. Brown,* 992 F.2d 937, 947 (9th Cir. 1993) (holding that federal timber harvesting statutes which required States to "*determine*" species of trees to be cut and to "*administer*" regulations to bring the federal statute into effect were impermissible "*direct commands*" barred by the Tenth Amendment) (emphasis added).

enacting legislation in an area in which Congress had made its will clear. Such an expansive construction of these cases cannot be adopted by the Court, especially in light of the rule that Congressional statutes are presumptively constitutional and should be construed accordingly. *See Sebelius,* 132 S. Ct. at 2594.

Moreover, and as noted in *Hodel* and *F.E.R.C.,* the Tenth Amendment is not a bar to Congress' power to preempt state regulations. *See F.E.R.C.,* 456 U.S. at 759 ("[T]he Federal Government may *displace* state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.' ") (emphasis added and citation omitted); *Hodel,* 452 U.S. at 289-90 ("[T]he Tenth Amendment [does not limit] congressional power to pre-empt or *displace* state regulation of private activities affecting interstate commerce.") (emphasis added); *see also Rowe v. N.H. Motor Transp. Ass'n,* 552 U.S. 364 (2008) (holding that a federal statute which deregulated interstate trucking preempted Maine's state law controlling the distribution of tobacco); *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 378 (1992) (holding the Airline Deregulation Act preempted "States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes"). The ability of Congress to restrict States' legislative prerogatives in the areas discussed in *Rowe* and *Morales* was not even subjected to a Tenth Amendment challenge because the power to *restrict,* rather than *compel,* the

actions of States in preempted spheres was, and remains, a settled issue.

Here, Congress has acted through its enumerated powers under the Commerce Clause and determined to control sports betting to the *exclusion* of the States (except to the extent that several states have been grandfathered in). As such, the prohibition in PASPA more closely tracks the statutes in *Morales* and *Rowe* than it does the *affirmative* conduct that the statutes in *New York* and *Printz* required. Although PASPA is not part of a larger single regulatory statute or act passed by Congress such as the Airline Deregulation Act or Clean Air Act, it can reasonably be seen as part of a larger Congressional scheme controlling the area of sports wagering.

To that point, federal criminal statutes forbid wagering on professional and amateur sports except to the extent permitted under state law. *See* 18 U.S.C. 1084(b) ("placing of bets or wagers on a sporting event" where such activity "is legal" under State law does not violate federal criminal laws otherwise prohibiting wagering on sporting events). Here, through PASPA, Congress has chosen to close that loophole and further restrict the areas in which sports wagering is occurring by forbidding any additional states to legalize sports wagering. Although approached differently than general federal regulatory schemes, the effect is substantially the same. Congress has chosen through PASPA to limit the geographic localities in which sports wagering is lawful. It does no more or less. The Court, therefore, cannot conclude that

PASPA usurps State sovereignty. The fact that gambling might be considered an area subject to the States' traditional police powers does not change this conclusion. *See Hodel,* 452 U.S. at 291-92 (an exercise of Congressional power pursuant to the Commerce Clause which displaces the States' police powers does not violate the Tenth Amendment). This construction of PASPA is both constitutional and reasonable. As such, the Court finds no reason to hold that PASPA violates the Tenth Amendment. *See Sebelius,* 132 S. Ct. at 2594 (when presented with two reasonable interpretations of a statute, courts must adopt the construction which finds the statute constitutional).

Defendants argue that the holding in *Coyle* requires the Court to find that PASPA unconstitutionally commandeers the States. (Defs.' Reply to DOJ 4-5; ECF No. 140.) The Court respectfully declines to adopt Defendants' reading of *Coyle.* First, *Coyle* is more properly understood as an Equal Footing case. And while *New York* may have featured language from *Coyle,* Justice O'Connor did not use *Coyle* as the *sine qua non* of the holding. Second, unlike PASPA, the actions of Congress at issue in *Coyle* were not based upon the Commerce Clause. Third, the dictate from Congress under suspicion in *Coyle* was of an entirely different character as compared to PASPA. In *Coyle,* Congress had conditioned Oklahoma's entrance to the Union with the command that Oklahoma shall not relocate its capital until after 1913. *Coyle,* 221 U.S. at 563-64. That was rightly described as a restriction of a power which would deprive Oklahoma of

"attributes essential to its equality in dignity and power with the other states." *Id.* at 568.

Here, PASPA cannot be said to restrict New Jersey in the same manner. Congress has the power to regulate gambling. *See generally Champion v. Ames,* 188 U.S. 321 (1903); *United States v. Vlanich,* 75 F. App'x 104 (3d Cir. 2003); *Riehl, supra.* Moreover, *Coyle* specifically noted that the right to relocate a state's capital "purely [pertained] to the internal policy of the state." *Id.* at 579. State authorized sports wagering cannot reasonably be described as purely pertaining to the internal policies of a state. Because sports wagering's effects are felt outside the state, and the ability to regulate gambling is within the purview of Congress, Congress' restriction of such does not violate or constrain any "attributes essential to [New Jersey's] equality in dignity and power with the other states." *Id.* at 568.

Defendants also argue that *Reno* "rejected the action/inaction dichotomy" relied upon by the DOJ and outlined above by the Court. (Defs.' Reply to DOJ 7 n. 5.) Rather, Defendants allege that the true touchstone of the Tenth Amendment is whether Congressional action seeks to "control or influence the manner in which States regulate private parties." *Reno,* 528 U.S. at 150. The Court declines to adopt Defendants' interpretation of *Reno. See id.* at 151 (the true issue in *Reno,* and under the Tenth Amendment, is whether Congressional action "*require*[*s*] the States in their sovereign capacity to *regulate* their own citizens") (emphasis added).

Moreover, and similar to the DPPA, PASPA does not utilize the States to "control or influence the manner in which States regulate private parties." *Id.* at 150. As noted earlier, Title 18, along with PASPA, forms the federal framework which controls sports wagering. No *action* on the part of the States is *required* in order for PASPA to achieve its ends, namely, restriction of the spread of state authorized sports wagering. In short, PASPA is controlling and influencing the spread of legalized sports wagering, not New Jersey. Moreover, the *Reno* Court itself noted that *New York* and *Printz* focused on concrete restrictions of Congress' powers: The DPPA did "not require the States in their sovereign capacity to *regulate* their own citizens," did "not require the [States] to *enact* any laws or regulations, and it [did] not require state officials to *assist* in the *enforcement* of federal statutes regulating private individuals," therefore making the DPPA "consistent with the constitutional principles enunciated in *New York* and *Printz*." *Id.* at 151 (emphasis added). As such, like the DPPA, PASPA must be found to be "consistent with . . . *New York* and *Printz*." *Id.* at 151; *see also Sebelius,* 132 S. Ct. at 2593 ("[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.").

Finally, one of the main concerns of *New York* and *Printz* was the manner in which federal commandeering of the States led to a lack of accountability to the citizenry. *New York,* 505 U.S. at 168-69; *Printz,* 521

U.S. at 930. That concern is not implicated by PASPA. Here, it is eminently clear to anyone who wishes to inquire that the impediment to New Jersey's desire to implement legalized sports betting resides with the decision that *Congress* rendered. As such, there is little chance that the federal officials who voted for PASPA, and continue to support it, will "remain insulated from the electoral ramifications of their decision." *New York,* 505 U.S. at 169. As noted in *Garcia* and *Baker,* if the people of New Jersey wish to change or abolish PASPA because they disagree with the policy judgments contained therein, they must do so through the "national political process." *Baker,* 485 U.S. at 512; *Garcia,* 469 U.S. at 551. As such, accountability concerns do not sway the Court's decision.

For the reasons stated above, PASPA does not violate the Tenth Amendment.[21]

3) The Due Process Clause and Equal Protection Principles

a. The Parties' Positions

Defendants argue that PASPA violates the Fifth Amendment protections of the Due Process Clause

[21] It is a foundational principle of statutory interpretation that "when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 254 (1992) (citations omitted). Accordingly, the Court does not reach Defendants' alternative argument that PASPA and the Sports Wagering Law may be construed such that there is no conflict.

and Equal Protection Principles. (Defs.' Br. 36-38.) In response, Plaintiffs and the DOJ contend that a state is not a person for purposes of Fifth Amendment analysis. (Pls.' Br. 11; DOJ's Br. 21-22.) In addition, both Plaintiffs and the DOJ argue that PASPA does not violate either the Due Process Clause or Equal Protection Principles. Defendants reply that they have both direct standing and *parens patriae* standing on behalf of the citizens of New Jersey. (Defs.' Reply Br. 14.) Defendants further assert, that even in absence of their standing, Defendant-Intervenors have standing. (*Id.*) In furtherance of their argument that PASPA violates the Due Process Clause and Equal Protection, Defendants allege that the reliance interests underlying the grandfathering clause of PASPA are insufficient to survive rational basis scrutiny. (Defs.' Reply to DOJ 14-15.)

b. Discussion

The Fifth Amendment Due Process Clause provides, in relevant part, that "[n]o *person* shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V (emphasis added). In addition, the Fifth Amendment Due Process Clause "contains an equal protection component prohibiting the United States from invidious discrimination between individuals or groups." *Washington v. Davis,* 426 U.S. 229, 239 (1976) (citing *Bolling v. Sharpe,* 347 U.S. 497 (1954)).

It is clearly established that the State of New Jersey, as a governmental entity, is not a "person" and therefore is not afforded the protections of the Due Process Clause. "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court." *South Carolina v. Katzenbach,* 383 U.S. 301, 323-24 (1966).

The Court is not persuaded by Defendants' alleged *parens patriae* standing.[22] Defendants then assert

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[22] In *Massachusetts v. Mellon,* the Court considered:

> [W]hether the suit may be maintained by the state as the representative of its citizens. To this the answer is not doubtful. We need not go so far as to say that a state may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the right to do so does not arise here. Ordinarily, at least, the only way in which a state may afford protection to its citizens in such cases is through the enforcement of its own criminal statutes, where that is appropriate, or by opening its courts to the injured persons for the maintenance of civil suits or actions. But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as *parens patriae,* may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the federal government. In that field it is the United States,

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that Defendant-Intervenors are "persons" for purposes of Fifth Amendment protection. Should the Court disagree, there would be no need for Fifth Amendment analysis. While the Defendant-Intervenors do not dedicate much, if any, attention to this discrete issue, the Court will assume, *arguendo,* that Defendant-Intervenors are "persons" for this limited purpose.

The Due Process and Equal Protection concerns lodged here are subject to rational basis review.[23] *See FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993). Rational basis review requires "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*

> and not the state, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

262 U.S. 447, 485-86 (1923) (internal citation omitted).

[23] Defendants rely on *Northwest Austin Mun. Dist. No. 1 v. Holder,* 557 U.S. 193, 203 (2009), for the proposition that any "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." (*See also* Tr. at 99:17-20.) NJTHA requests that the Court adopt the *dicta* in *Northwest Austin* as the controlling standard in this case. (*Id.* at 68:18-22.) A deeper inspection of *Northwest Austin* reveals that the Supreme Court exercised "constitutional avoidance" and resolved the case on grounds that did not address constitutionality, by way of the Commerce Clause or otherwise. The Court is not inclined to adopt NJTHA's proposed standard. Rather, the Court adheres to the long standing rational basis standard.

by Doe, 509 U.S. 312, 320 (1993). A classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (internal citation omitted). "[A] legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* (internal citation omitted). "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.* at 321.

Since PASPA's classification neither involves fundamental rights, nor proceeds along suspect lines, it is accorded a presumption of validity. PASPA advances the legitimate purpose of stopping the spread of legalized sports gambling and of protecting the integrity of athletic competition. Congress made clear that it was concerned primarily with the *spread* of legal sports gambling, as distinguished from the mere *existence* of legal sports gambling. *See* S. Rep No. 102-248, at 5, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556 ("Once a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure. Without federal legislation, sports gambling is likely to spread on a piecemeal basis. . . ."). It was not Congress' stated purpose to *extinguish* legalized sports wagering. Rather, Congress saw the spread of legalized sports wagering as having the propensity to impact the youth, the integrity of amateur and professional sports, and as encouraging potentially

addictive behaviors, and was concerned with these ills spreading and "ultimately develop[ing] irreversible momentum." *Id.*

PASPA's provisions are rationally related to Congress' aims. The grandfathering clause, which responded to substantial reliance interests, also serves to prevent the geographic spread of legalized sports wagering. Put differently, the exceptions in PASPA are not meant to eradicate the problem, but merely to contain it. Accordingly, the specific exceptions afforded in PASPA do not impugn its rationality.

Several cases support the Court's holding. In *New Orleans v. Dukes,* the Court upheld a grandfathering clause which guides the Court's review of PASPA. 427 U.S. at 305. In *Dukes,* the issue before the Court concerned a New Orleans ordinance which excepted "vendors who have continuously operated the same business . . . for eight or more years prior to January 1, 1972. . . ." *Id.* at 298. Pursuant to this exception, only two vendors were permitted to continue operation and were effectively given a monopoly. *Id.* at 300. The grandfathering clause was challenged on Equal Protection grounds. *Id.* at 301. The Court held it "obvious" that the City's classification rationally furthered its objective "to preserve the appearance and custom valued by the Quarter's residents and . . . tourists." *Id.* at 304 (internal citation omitted). The economic decision was made by the City that the practice "should be substantially curtailed . . . if not totally banned." *Id.* at 305. The Court found that "rather than proceeding by the immediate and

absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage." *Id.* at 305. The Court stated, "[t]his gradual approach to the problem is not constitutionally impermissible." *Id.*; *see also Wawa, Inc. v. New Castle Cnty. Del.,* 391 F. Supp. 2d 291, 295-96 (D. Del. 2005) (stating that "grandfathering of existing uses often passes rational basis review, because it protects the reliance interests of property owners whose uses were legal when the government acted" and holding that "the County has acted rationally to reduce the danger . . . even if it has not immediately eliminated every danger.")

In *Minnesota v. Clover Leaf Creamery Company,* the United States Supreme Court heard an appeal from the Supreme Court of Minnesota in which the Court considered an Equal Protection challenge to a state statute's grandfathering provision. 449 U.S. 456 (1981). The statute at issue created a classification in which "paper containers are to be preserved while plastic nonrefillables are to be banned." *Clover Leaf Creamery Co. v. State,* 289 N.W.2d 79, 81 (Minn. 1979). In essence, the Minnesota Legislature granted the paper container industry a perpetual monopoly.

The Supreme Court of Minnesota struck down the statute because it violated Equal Protection. *Id.* at 87. In reaching this conclusion, the Court relied upon evidentiary findings which "conclusively demonstrate[d] that plastic nonrefillables present fewer solid waste problems than paper containers" and, accordingly, undermined the legislative findings of the

statute. *Id.* at 84. The Supreme Court of Minnesota held that discrimination against plastic nonrefillables was not rationally related to the statute's legislative purpose of easing solid waste disposal problems. *Id.* at 86-87. In addition, the Court stated that "the original version of the Act included a provision banning paper containers, but that provision was eventually removed from the Act. There is no evidence, therefore, that paper containers will cease to be used in the Minnesota milk market." *Id.* at 86. A justice of the Minnesota Supreme Court dissented and noted that "[t]he U.S. Supreme Court has frequently observed that a step-by-step approach in economic regulation is permissible . . . and has *never required actual evidence that a legislature intends to take a further step in the near future in the relevant economic area being regulated.*" *Id.* at 88 (internal citations omitted) (emphasis added).

The United States Supreme Court overturned the Minnesota state courts and upheld the grandfathering provision. The Court found the "State's approach fully supportable under our precedents," noting that "this Court has made clear that a legislature need not 'strike at all evils at the same time or in the same way.'" *Clover Leaf Creamery Co.,* 449 U.S. at 466 (citing *Semler v. Or. State Bd. of Dental Exam'rs,* 294 U.S. 608, 610 (1935)). The Court defined the issue as not "whether *in fact* the Act will promote [a] more desirable [outcome]." *Id.* at 466. Rather, the Court found that "the Equal Protection Clause is satisfied by our conclusion that the . . . Legislature

could rationally have decided that its ban . . . might foster [a] desirable [outcome.]" *Id.* at 466. The Court warned that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature" and concluded that the ban must be sustained under the Equal Protection Clause. *Id.* at 470.

The Court must heed the Supreme Court's strong admonition. The exceptions at issue in PASPA do not offend rational basis review where Congress, whose evaluation is not to be substituted by the Court, has determined "that all such sports gambling is harmful," but "has no wish to apply this prohibition retroactively." S. Rep. No. 102-248, at 8, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559. The reliance interests of the excepted states, coupled with the government's legitimate interest in stemming the tide of legalized sports gambling, provide ample support for upholding PASPA pursuant to rational basis review.[24]

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[24] PASPA is not entirely unique because other statutes also treat States differently. *See, e.g.,* 42 U.S.C. § 7543(a)-(b) (the Clean Air Act prohibits states from enacting their own vehicle emission standards, but provides an exception for states which controlled auto emissions prior to March 30, 1966 – California is the only such State and is therefore free to set its own standard); 29 U.S.C. § 1144(b)(5) (retroactively exempting a Hawaii statute, by name, from the scope of ERISA preemption); *McKay v. Thompson,* 226 F.3d 752, 755-56 (6th Cir. 2000) (Citing favorably Pub. L. No. 93-579, § 7, 88 Stat. 1896, 1909; and upholding a grandfathering clause that provided for an exception based on the maintenance of "a system of records in existence and operating before January 1, 1975[;]" and stating "[t]he NVRA does

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4) The "Equal Footing" Doctrine

NJTHA also challenges PASPA on "Equal Footing" grounds. (NJTHA's Opp'n Br. 19-25.) According to NJTHA, the Equal Footing Doctrine provides for the admission of additional states on equal footing with the original States and is analogous to the present case because the states should enjoy equal footing under PASPA. (*Id.* at 19-21.) At oral argument, however, NJTHA stated that "when we use the term 'equal footing' and 'equal sovereignty,' we mean the same thing[.]" (Tr. 67:17-19.)

NJTHA relies upon *Coyle v. Smith,* 221 U.S. at 567. As previously discussed, the issue before the Court in *Coyle* was "whether there is anything in the decision of this court which sanctions the claim that Congress may, by the imposition of conditions in an enabling act, deprive a *new* state of any of those attributes essential to its equality in dignity and power with other states." *Coyle,* 221 U.S. at 568 (emphasis added).

The matter presently before the Court does not involve a State that is either attempting to enter the Union or one that is recently admitted to the Union. New Jersey, as one of the original colonies, is inappropriately situated to make an argument that it is

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not specifically forbid use of social security numbers. As previously discussed, the Privacy Act contains a more specific 'grandfather' provision that Congress intended to survive the more general provisions of the NVRA.")

being treated differently than the original colonies pursuant to the Equal Footing Doctrine. *See Coyle v. Smith,* 221 U.S. 559, 579 (1995) [sic]; *United States v. Alaska,* 521 U.S. 1, 5 (1888) [sic] (stating that *newly admitted* States are admitted on an "equal footing" with the original Thirteen Colonies). The Court, accordingly, does not find good cause to expand the Equal Footing Doctrine in the manner requested by NJTHA. As such, the constitutionality of PASPA withstands NJTHA's Equal Footing challenge.

D. The Propriety of a Permanent Injunction

The Court has determined that PASPA is constitutional, and due to the operation of the Supremacy Clause, New Jersey's Sports Wagering Law is preempted. As argued by Plaintiffs, it is debatable whether a separate showing for a permanent injunction is necessary where New Jersey is in clear violation of a valid federal statute. (*See* Pls.' Reply & Opp'n at 21.) Moreover, considering the Third Circuit's decision in *Markell, see* 579 F.3d at 304, and the District Court of Delaware's ensuing *pro forma* entrance of injunctive relief, *see OFC Comm Baseball v. Markell,* No. 09-538 (GMS) (D. Del. Sept. 1, 2009; Nov. 9, 2009) (ECF Nos. 36, 42), the Court is likely bound to enter the requested injunctive relief.

Nevertheless, and in an abundance of caution, the Court will analyze the factors necessary for an injunction. This four factor test requires a demonstration: (1) of irreparable injury; (2) of inadequacy of

remedies at law to compensate for said injury; (3) that a balance of the hardships favors the party seeking the injunction; and (4) that a permanent injunction would serve the public interest. *See eBay Inc. v. MercExchange, LLC,* 547 U.S. 388, 391 (2006). "The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *Id.*

1) Irreparable Injury

Plaintiffs have demonstrated irreparable injury because the Sports Wagering Law has been enacted in violation of federal law. The Third Circuit in *Markell* recognized that the spread of sports gambling "would engender the very ills that PASPA sought to combat." 579 F.3d at 304. Moreover, the enactment of the Sports Wagering Law in violation of the Supremacy Clause, alone, likely constitutes an irreparable harm requiring the issuance of a permanent injunction. *See Am. Exp. Travel Related Servs. Co., Inc. v. Sidamon-Eristoff,* 755 F. Supp. 2d 556, 614 (D.N.J. 2010), *aff'd sub nom., New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff,* 669 F.3d 374 (3d Cir. 2012); *Ass'n for Fairness in Bus., Inc. v. New Jersey,* 82 F. Supp. 2d 353, 363 (D.N.J. 2000) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm.") (quoting *Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 715 (9th Cir. 1997)).

2) Inadequacy of Monetary Damages

Plaintiffs demonstrate an inadequacy of a remedy at law because New Jersey, by operation of the Eleventh Amendment, cannot be forced to pay retroactive money damages. *See Temple Univ. v. White,* 941 F.2d 201, 215 (3d Cir. 1991) ("As to the inadequacy of legal remedies, the Eleventh Amendment bar to an award of retroactive damages against the Commonwealth [of Pennsylvania] clearly establishes that any legal remedy is unavailable and that the only relief available is equitable in nature.").

3) Comparative Hardship to the Parties

Here, no hardship will befall Defendants. In essence, the entrance of a permanent injunction will do nothing more than require that New Jersey comply with federal law. "The only hardship imposed upon the Defendants is that they obey the law." *Coach Inc.* [*v.*] *Fashion Paradise, LLC,* No. 10-4888 (JBS), 2012 WL 194092, at *9 (D.N.J. Jan. 20, 2012); *Port Drivers Fed'n 18, Inc. v. All Saints Exp., Inc.,* 757 F. Supp. 2d 443, 461 (D.N.J. 2010); *see also Sierra Club v. Franklin Cnty. Power of Ill., LLC,* 546 F.3d 918, 936 (7th Cir. 2008). Accordingly, the balance of the hardships weighs in favor of the Court entering a permanent injunction.

4) Public Interest

The entrance of a permanent injunction in this case advances the public interest. The public interest

is favored by protecting valid federal statutes from being infringed upon and upholding the mandates of the United States Constitution. *Am. Civil Liberties Union v. Ashcroft,* 322 F.3d 240, 247 (3d Cir. 2003) (affirming the district court's finding that "the public interest was not served by the enforcement of an unconstitutional law") (citation and quotation marks omitted), *aff'd and remanded,* 542 U.S. 656 (2004); *see generally Nat'l R.R. Passenger Corp.,* No. 08-5398, 2010 WL 92518, at *9 (E.D. Pa. Jan. 8, 2010).

Accordingly, Defendants are permanently enjoined from sponsoring, operating, advertising, promoting, licensing, or authorizing a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

IV. Conclusion

After careful consideration of the Parties' submissions, the Court has determined that PASPA is a constitutional exercise of Congress' powers pursuant to the Commerce Clause. PASPA does not violate the Tenth Amendment, Due Process Clause or Equal Protection Principles; nor does it violate the Equal Footing Doctrine. Plaintiffs' Motion for Summary Judgment, therefore, is GRANTED. Plaintiffs have also demonstrated that they are entitled to a

permanent injunction. Defendants' Cross Motion for Summary Judgment is DENIED. An Order consistent with this Opinion will be filed on this date.

/s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Dated: February 28, 2013

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 12-4947 (MAS) (LHG) **ORDER** (Filed Feb. 28, 2013)

This matter comes before the Court upon several motions filed by the Parties. The National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Office of the Commissioner of Baseball doing business as Major League Baseball ("MLB") (collectively, "Plaintiffs" or "the Leagues") filed their Complaint on August 7, 2012. (Compl., ECF No. 1.) On August 10, 2012, Plaintiffs filed a "Motion for Summary Judgment and, If Necessary to Preserve the Status Quo, a Preliminary Injunction" seeking to enjoin Defendants Christopher J. Christie, Governor of the State of New Jersey, David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission (collectively, "Defendants" or the

"State"), from implementing N.J. Stat. Ann. 5:12A-1, *et seq*. (2012) ("New Jersey's Sports Wagering Law" or "Sports Wagering Law"). (Pls.' Mot. Summ. J., ECF No. 10.)

On November 21, 2012, Defendants filed a Cross Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment. (Defs.' Cross Mot. Summ. J., ECF No. 76.) On the same date, the New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA"), and Sheila Oliver and Stephen Sweeney ("Legislative Intervenors") filed Motions to Intervene, which included opposition to Plaintiffs' Summary Judgment Motion. (NJTHA's Mot. to Intervene, ECF No. 72; Legislative Intervenors' Mot. to Intervene, ECF No. 75.) NJTHA's and the Legislative Intervenors' Motions to Intervene were subsequently granted on December 11, 2012. (ECF No. 102.) The Leagues filed a Reply in support of their Motion for Summary Judgment, as well as Opposition to Defendants' Cross Motion, on December 7, 2012. (Pls.' Reply & Opp'n, ECF No. 95.) That submission included a request for a permanent injunction. (*Id.* at 20.)

On January 22, 2013, the United States filed a Notice of Intervention. (ECF No. 128.) The DOJ filed its brief on February 1, 2013. (DOJ's Br., ECF No. 136.) On February 8, 2013, NJTHA, Legislative Intervenors, and Defendants filed additional submissions in response to the DOJ's February 1, 2013 brief. (ECF Nos. 138, 139 and 140, respectively). The Court heard oral argument on the Cross Motions for Summary Judgment on February 14, 2013. (ECF No. 141.)

The Court, having considered the Parties' submissions, for the reasons stated in the Opinion filed on this date, and for other good cause shown,

IT IS on this 28th day of February, 2013, **ORDERED** that:

1) Plaintiffs' Motion for Summary Judgment (ECF No. 10) is **GRANTED**;

2) Plaintiffs' Request for a Permanent Injunction (ECF No. 95) is **GRANTED**; and

3) Defendants' Cross Motion for Summary Judgment (ECF No. 76) is **DENIED**.

/s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

yNOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. Christopher J. CHRISTIE, et al., Defendants.	Civil Action No. 12-4947 (MAS) (LHG) **MEMORANDUM OPINION** (Filed Dec. 21, 2012)

SHIPP, District Judge.

This matter comes before the Court upon several motions filed by the Parties. The National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Office of the Commissioner of Baseball doing business as Major League Baseball ("MLB") (collectively, "Plaintiffs" or "the Leagues") filed their Complaint on August 7, 2012. (Compl., ECF No. 1.) On August 10, 2012, Plaintiffs filed a "Motion for Summary Judgment and, If Necessary to Preserve the Status Quo, a Preliminary Injunction" seeking to enjoin Defendants Christopher J. Christie, Governor of the State of New Jersey, David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and Frank

Zanzuccki, Executive Director of the New Jersey Racing Commission (collectively, "Defendants" or the "State"), from implementing N.J. Stat. Ann. 5:12A-1, *et seq*. (West 2012) ("New Jersey's Sports Wagering Law" or "Sports Wagering Law"). (Pls.' Mot. Summ. J., ECF No. 10.) On September 7, 2012, Defendants filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) asserting that Plaintiffs lacked standing pursuant to Article III of the U.S. Constitution. (Defs.' Mot. Dismiss, ECF No. 29-1.) Plaintiffs filed their Opposition to Defendants' Motion to Dismiss on October 1, 2012. (Pls.' Opp'n to Defs.' Mot. to Dismiss, ECF No. 39.) Defendants replied to Plaintiffs' Opposition on October 9, 2012. (Defs.' Reply, ECF No. 43.)

On November 21, 2012, following expedited discovery regarding standing, Defendants filed a Cross Motion for Summary Judgment. Defendants' Cross Motion challenged Plaintiffs' standing and raised constitutional challenges to the controlling federal statute. (Defs.' Cross Mot., ECF No. 76.) Defendants submitted their Statement of Undisputed Material Facts along with their Cross Motion. (Defs.' SUMF, ECF No. 78-2.) On December 7, 2012, Plaintiffs filed their Reply in response to Defendants' Cross Motion and in support of Plaintiffs' Motion for Summary Judgment. (Pls.' Reply, ECF No. 95.) Plaintiffs included their Response to Defendants' Statement of Undisputed Material Facts. (Pls.' Response to Defs.' SUMF, ECF No. 96-13.)

On November 21, 2012, the State filed a Notice of Constitutional Question. (ECF No. 79.) The Court certified the Notice of Constitutional Challenge to the United States Attorney General on November 27, 2012. (ECF No. 84.) As a result of the constitutional challenge and pursuant to Federal Rule of Civil Procedure 5.1(c), the United States Attorney General has until January 20, 2013, to enter an appearance in this case. (ECF No. 84.) Therefore, the Court limited the December 18, 2012 Oral Argument to the issue of standing. (ECF No. 106.)

For the reasons stated below, and other good cause shown, the Court finds that Plaintiffs have demonstrated, based on undisputed material facts, standing to challenge New Jersey's Sports Wagering Law. As such, the Court denies both of Defendants' motions: the Motion to Dismiss in full and the Motion for Summary Judgment in so far as it challenges Plaintiffs' standing.

I. Background

On December 8, 2011, the New Jersey Legislature amended the New Jersey Constitution to permit gambling "on the results of any professional, college, or amateur sport or athletic event" except collegiate games involving New Jersey colleges or venues. N.J. Const., Art. IV, Sec. VII Para. 2(D), (F). The amendment limited the permissible gambling fora to Atlantic City's casinos and gambling houses as well as horse racing tracks. *Id.* To this end, on January 17, 2012, New Jersey enacted the Sports Wagering Law

authorizing gambling on the Leagues' sporting events pursuant to the amendment's structure and limitations. On July 2, 2012, the New Jersey Division of Gaming Enforcement proposed a series of regulations further delineating practices and procedures related to the Sports Wagering Law. These regulations went into effect on October 15, 2012. N.J. Admin. Code § 13:69-1.1, *et seq*.

On August 7, 2012, the Leagues filed a complaint claiming that the Sports Wagering Law violates the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701, *et seq*. Enacted in 1992, PASPA prohibits any person or governmental entity from "authorizing . . . betting, gambling, or wagering" on amateur or professional sporting events. § 3702. On August 10, 2012, the Leagues filed a "Motion for Summary Judgment and, if Necessary to Preserve the Status Quo, a Preliminary Injunction." The Leagues assert that the integrity of their games and reputation with their fan base will be injured by implementation of the Sports Wagering Law. Plaintiffs argue that summary judgment is appropriate because of the alleged violation of PASPA. Further, the Leagues rely heavily on *Office of Commissioner of Baseball, et al. v. Markell, et al.,* where the Third Circuit held that Delaware's attempt to authorize state-sponsored gambling violated PASPA. 579 F.3d 293 (3d Cir.2009), *cert. denied*, 130 S. Ct. 2403 (2010). Defendants, however, argue that Plaintiffs have failed to establish the minimum injury required for standing. Standing is a threshold jurisdictional

requirement and must be addressed before the Court can reach the merits of Plaintiffs' Complaint.

II. Legal Standard and Analysis

A. Summary Judgment

Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A district court considers the facts drawn from the "materials in the record, including depositions, documents, electronically stored information, affidavits . . . or other materials" and must "view the inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion." Fed. R. Civ. P. 56(c)(1)(A); *Curley v. Klem,* 298 F.3d 271, 276-77 (3d Cir. 2002) (internal quotations omitted). The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby,* 477 U.S. 242, 251-52 (1986). More precisely, summary judgment should be granted if the evidence available would not support a jury verdict in favor of the non-moving party. *Id.* at 248-49. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48 (emphasis in original).

These requirements apply as fully to an inquiry regarding standing as they do to any other issue before the Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

B. Standing

A plaintiff seeking injunctive relief must show the following in order to establish Article III standing: (1) he is under threat of suffering injury-in-fact that is both "concrete and particularized" and "actual and imminent;" (2) the threat is fairly traceable to the challenged action of the defendant; and (3) it is likely that a favorable judicial decision will prevent or redress the injury. *See Summers v. Earth Island Inst.,* 555 U.S. 488, 493 (2009) (internal citations omitted). The three elements constitute "the irreducible constitutional minimum" of Article III standing. *Lujan,* 504 U.S. at 560-61. After careful consideration, the Court finds that the Leagues demonstrated Article III standing.

1. Implications of *Markell*

As a preliminary matter, the Parties dispute the significance of the Third Circuit's decision in *Markell* on the standing analysis in the present case. Plaintiffs assert that the court performed an extensive jurisdictional analysis in *Markell.* (Pls.' Opp'n to Mot. to Dismiss at 8 n.3.) Plaintiffs also assert that the Third Circuit is keenly aware of its affirmative duty to assure itself that there is Article III standing. (*Id.*)

Finally, Plaintiffs note that *Markell's* omission of a specific standing analysis "strongly suggest[s]" that, to the Third Circuit, the Leagues' "standing to challenge a state's violation of PASPA was obvious." (*Id.*) Defendants, on the other hand, argue that a "drive-by jurisdictional analysis" which does not specifically address an issue such as standing "does not create binding precedent." (Defs.' Reply Br. in Supp. of Mot. to Dismiss at 5 n.3 (citing *United States v. Stoerr,* No. 11-2787, 2012 WL 3667311, at *5 n.5 (3d Cir. Aug. 28, 2012).) In effect, Defendants argue that the Third Circuit failed to sufficiently demonstrate satisfaction of its affirmative duty to ensure that the Leagues possessed Article III standing. (Defs.' Reply Br. in Supp. of Mot. to Dismiss at 5 n.3.)

The Court does not find Defendants' arguments regarding *Markell* persuasive. The facts contained in the public record for *Markell* do not indicate that the Third Circuit performed a "drive-by jurisdictional analysis." Although the *Markell* parties did not brief or argue the precise standing issue currently before this Court, the pleadings in *Markell* did raise an issue of standing. *See generally* Defendants Jack A. Markell and Wayne Lemons' Answer to the Leagues' Complaint, C.A. No. 09-538, Doc. No. 26, Fourth Affirmative Defense (stating "Plaintiffs lack standing under PASPA to seek relief respecting any sporting events with which they are not affiliated."). Further, the Third Circuit's *Markell* decision opened "by considering whether [the Third Circuit had] jurisdiction. . . ." *Markell,* 579 F.3d at 297-300. Therefore, the Third

Circuit must have assured itself "that plaintiffs . . . suffered an injury-in-fact sufficient to support Article III standing." *Alston v. Countrywide Fin. Corp.,* 585 F.3d 753, 762 (3d Cir. 2009).

2. Injury-in-Fact

The facts in the present case indicate that the Leagues have suffered an injury-in-fact sufficient to support Article III standing. "[I]njury-in-fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers,* 555 U.S. at 497. In addition, the injury-in-fact requirement cannot be waived "at the behest of Congress." *Lujan,* 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in judgment). In its most basic form, standing requires that "the party bringing suit must show that the action injures him in a concrete and personal way." *Id.* The mandates of Article III are intended to "limit access to the federal courts to those litigants best suited to assert a particular claim." *The Pitt News v. Fisher,* 215 F.3d 354, 362 (3d Cir. 2000) (internal citations omitted).

"The contours of the injury-in-fact requirement, while not precisely defined, are very generous." *Bowman v. Wilson,* 672 F.2d 1145, 1151 (3d Cir. 1982). The standard is met as long as the party alleges a specific "identifiable trifle" of injury. *United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 690 n.14 (1973) (internal citations

omitted). The Plaintiffs may also demonstrate injury-in-fact by showing a "personal stake in the outcome of [the] litigation," *Pitt News,* 215 F.3d at 360.

Plaintiffs argue that their games are the very object of the sports betting at issue and that they have an interest in how their athletic contests are perceived by fans. (Pls.' Opp'n to Defs.' Mot. to Dismiss at 7-8; Pls.' Reply at 3.) According to Plaintiffs, their fans' perception of the integrity of their games will decline if the Sports Wagering Law goes into effect. (Pls.' Reply at 6.) In addition, Plaintiffs assert that the Sports Wagering Law will result in an increase of legal and illegal gambling. During oral argument, Plaintiffs stated, "legalizing gambling does not regulate illegal gambling, it fuels illegal gambling. . . . " (Oral Arg. Tr. 35:18-20.)

Regarding injury-in-fact, Defendants dismiss as mere conjecture Plaintiffs' assertions that legalized gambling will impugn the Leagues' bonds with their fans and that their reputations will suffer harm. (Defs.' Mot. to Dismiss 7; Defs.' Cross Mot. at 15, 17 .) Defendants argue that since the Leagues have enjoyed success despite the existence of legalized sports betting, it is implausible that Plaintiffs will suffer harm should the Sports Gambling Law take effect. (Defs.' Mot. to Dismiss at 7-8; Defs.' Cross Mot. at 15.) Defendants also challenge the imminence of any harm, stating that even if injury flowed from the Sports Gambling Law, it is by no means immediate. (Defs.' Mot. to Dismiss at 10; Defs.' Cross Mot. at 20.) Finally, Defendants further argue that the alleged

injury is not sufficiently "concrete" or "particularized" to any individual player, team, or League. (Defs.' Mot. to Dismiss at 11.)

Plaintiffs must set forth a "*trifle*" of an injury-in-fact. Based on an examination of the Statements and Responses to the Undisputed Material Facts, the Court finds that Plaintiffs demonstrated sufficient undisputed material facts to warrant a finding of injury-in-fact. The Leagues articulated a particularized injury based upon the negative effect the Sports Wagering Law would have upon perception of the integrity of the Leagues' games and their relationship with their fans.

Plaintiffs' interest in protecting how they are perceived by their fans is sufficient to create the identifiable trifle of injury necessary for purposes of standing. The Third Circuit addressed the issue of injury-in-fact based on perception in *Doe v. National Board of Medical Examiners,* 199 F.3d 146, 153 (3d Cir. 1999). In *Doe,* the Third Circuit found that the plaintiff made a reasonable and justifiable showing that being flagged as disabled by the defendant would have an adverse effect on how the plaintiff would be perceived by third-parties who had the power to affect his future employment. *Id.*

In setting forth its perception-based injury-in-fact analysis, the *Doe* Court relied in substantial part upon *Meese v. Keene,* 481 U.S. 465 (1987). The plaintiff, a California State Senator, sought to challenge a federal law which required that certain materials be

labeled as "political propaganda." *Id.* at 467. Specifically, the plaintiff sought to exhibit three Canadian films which had been designated as political propaganda and wished to avoid being regarded as a "disseminator of foreign political propaganda" by the public. *Id.* The district court held that the plaintiff had standing because "damage to [the plaintiff's] reputation" would flow from being associated with materials deemed political propaganda. *Id.* at 468. The United States Supreme Court, upon appeal, upheld the district court's determination that the plaintiff had standing. Citing the district court, the Supreme Court found that if the plaintiff "were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired." *Id.* at 473 (citation omitted). Additionally, the finding of reputational harm was supported by uncontradicted affidavits. *Id.* at 473-74. Those affidavits contained the "results of an opinion poll" and the "views of an experienced political analyst." *Id.*

Doe and *Meese* both make clear that harm to the way one is perceived is a sufficient basis to find standing so long as that perceived harm is based in reality. At oral argument, Defendants attempted to distinguish *Doe* with *Simon, et al. v. Eastern Kentucky Welfare Rights Organization, et al.,* 426 U.S. 26 (1975). (*See* Oral Arg. Tr. 20:13-18.) The Court does not find Defendants' argument persuasive. *Simon* does not speak to the primary challenge that *Doe*

presents for Defendants-specifically, that an adverse effect on perception, rooted in reality, is sufficient injury-in-fact for purposes of Article III standing. Here, the facts demonstrate a perception based in reality. For purposes of standing, Plaintiffs demonstrated, at least by an identifiable trifle, that state-sanctioned gambling will adversely impact how the Leagues are perceived by those who can affect their future, specifically their fans.

The following undisputed material facts support the Court's conclusion that the Leagues have demonstrated injury-in-fact:

1. **2009 NBA Integrity Study** – This study found that 5% of the respondents felt that gambling, and 10% felt that game fixing, most negatively affected the integrity of the Leagues' games. (2009 NBA Integrity Study 6, ECF. No. 78-40.) Even among those fans who did not consider game fixing or gambling to be their utmost concern, significant percentages of fans responded that game fixing and gambling were a "problem" for the Leagues. Specifically, 33% of NBA fans, 15% of NFL fans, 13% of MLB fans, 7% of NHL fans, 18% of NCAA Basketball fans and 15% of NCAA Football fans thought game fixing was problematic. (*Id.* at 7.) Gambling was cited as a problem among 36% of NBA fans, 26% of NFL fans, 28% of MLB fans, 15% of NHL fans, 22% of NCAA Basketball fans and 22% of NCAA Football fans. (*Id.*)

2. **2003 & 2008 NCAA National Studies on Collegiate Sports Wagering and Associated Behaviors** – This study found that 1.5% of men's basketball players and 1.6% of football players knew of a teammate who took money to play poorly, 1.2% of men's basketball players and 2.8% of football players provided inside information to outside sources, 2.1% of men's basketball players and 2.3% of football players were asked to affect the outcome of a game "because of gambling debt," and 1% and 1.4%, respectively, actually did so. (2003 NCAA National Study on Collegiate Sports Wagering and Associated Behaviors 24-25, ECF No. 95-18.) In a follow-up study performed in 2008, the results found that 3.8% of men's basketball players, 3.5% of football players, and 1.4% of all other student-athletes were contacted by outside sources to provide inside information, and that .9%, 1.1% and 0.7%, respectively, actually did so; 1.6% of men's basketball players, 1.2% percent of football players, and 1.1% of all other student-athletes were asked to affect the outcome of a game. (2008 NCAA Study on Collegiate Wagering 34-35, ECF No. 95-25.)

3. **2007 NBA Las Vegas/Gambling Survey** – An additional survey found that 11% of the respondents to the survey would "somewhat oppose" legalized sports gambling throughout the U.S. and

> an additional 27% "strongly opposed" legalized gambling throughout the United States; therefore, 38% of total survey respondents opposed legalizing gambling nationwide. (2007 NBA Las Vegas/ Gambling Survey 7, ECF No. 96-9.) Only 1% of respondents stated they would spend more money on the Leagues, defined by the Leagues as "ticketing and merchandise," if a professional sports franchise was located in Las Vegas, where there is legalized gambling. (*Id.*) Additionally, 17% of respondents stated that they "would definitely spend *less* money on the league[s]," if professional sports franchises were situated in Las Vegas. (*Id.*) (Emphasis added.)

The 2007 NBA Las Vegas/Gambling Survey draws an undisputed direct link between legalized gambling and harm to the Leagues. Placing professional sports in close geographic proximity to legalized gambling, the exact situation which 17% of survey respondents disapproved, would automatically and immediately occur if legalized sports gambling pursuant to the Sport Wagering Law was implemented. In addition to the three professional sports teams located in New Jersey (the New York Giants, New York Jets and New Jersey Devils), ten additional professional sports teams are also located in close

proximity to New Jersey.[1] When provided with the opportunity during oral argument to address the concerns of these 17% of fans, Defendants declined. (*See* Oral Arg. Tr. 21:19-23:10.)

While most of these studies alone may not constitute a direct causal link between legalized gambling and negative issues of perception on the part of Plaintiffs' fans, sufficient support to draw this conclusion exists. As conceded by Defendants' expert, Mr. Willig, "legalizing sports wagering in New Jersey . . . could stimulate a certain amount of sports wagering that would not otherwise occur. Such new (legal) wagering would result in an overall increase in total (legal plus illegal) sports wagering." (Willig Report ¶ 10(b), ECF No. 78-4.) Therefore, even assuming that the aforementioned harm to Plaintiffs' reputation could only be traced to illegal gambling, Defendants' implementation of the Sports Wagering Law will increase the total pool of gambling, "legal plus illegal," such that fans' negative perceptions attributed to game fixing and gambling will necessarily increase. Defendants' actions, as conceded by

[1] Six professional sports teams are located in the metropolitan New York City area: the New York Knicks, New York Nets, New York Yankees, New York Mets, New York Rangers and New York Islanders. Four professional sports teams are located in Philadelphia: the Philadelphia Phillies, Philadelphia Flyers, Philadelphia 76ers and Philadelphia Eagles. A considerable number of collegiate sports teams which would be objects of the Sports Wagering Law are also located close to New Jersey's borders.

Defendants' expert and as further supported by the record, will cause this increase.

The facts of the present case fit squarely within the matrix of harm outlined in *Meese* and *Doe*. Both cases persuade the Court that Plaintiffs have demonstrated standing due to an injury-in-fact traceable to the Sports Wagering Law. *Meese* makes abundantly clear that uncontroverted material facts contained in opinion polls, such as those regarding Plaintiffs' reputational harm which will likely result if the Sport Wagering Law is given full effect, are proper grounds to find that Plaintiffs have standing.

In *Meese,* the plaintiff's purported injury-in-fact was a risk that "the much larger audience that is his constituency would be influenced against him. . . ." *Id.* at 475. Plaintiffs' fans are much like the *Meese* plaintiff's constituents. The Leagues have a "personal stake" in assuring that their relationship with their fans is not tainted by legalized gambling. Plaintiffs have also shown a congressionally recognized risk of reputational injury. Thus, Plaintiffs' injury is a far cry from a "generalized grievance shared in substantially equally [sic] measure by all or a large class of citizens." *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (internal citations omitted).

Along with Plaintiffs' established injury-in-fact, the provisions of PASPA further afford Plaintiffs a cause of action. While the Court takes no position as to whether PASPA affords standing in absence of an injury, PASPA clearly affords Plaintiffs a cause of

action and Plaintiffs have identified at least a "trifle" of an injury. As such, Plaintiffs have standing to bring this suit and the Court has jurisdiction to address the merits.

Plaintiffs bolster their position by reference to New Jersey's prohibition of gambling on its own college and university teams and all collegiate sporting events within New Jersey. (Pls.' Opp'n to Defs.' Mot. to Dismiss 10; Pls.' Reply at 5.) This could be interpreted to suggest that New Jersey is attempting to protect the integrity of college teams and games located in New Jersey against injury related to sports gambling. (*Id.*) Defendants argue that this carve-out was made in response to a request from the NCAA and that their mere acquiescence to the NCAA's request is not a concession of injury. (Defs.' Reply at 5 n.4.) Plaintiffs' argument regarding this issue is duly noted by the Court.

For the reasons set forth above, Plaintiffs established an injury-in-fact.[2]

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[2] In an attempt to undermine Plaintiffs' alleged injury, Defendants analogize legalized sports betting and fantasy sports. (Defs.' Cross Motion at 18-19.) Defendants contend that this analogy impacts the injury-in-fact analysis because Plaintiffs' involvement with fantasy sports implicitly indicates that Plaintiffs do not believe that gambling (in the form of fantasy sports) injures them. (Defs.' Cross Mot. at 6, 18-20.) The Court is not persuaded by Defendants' analogy. Notably, Congress excluded fantasy sports from prohibition under the Unlawful Internet Gambling Act ("UIGEA"), 31 U.S.C. § 5362(1)(E)(ix). In addition, United States District Judge Dennis M. Cavanaugh's

(Continued on following page)

3. Traceability of Plaintiffs' Injury to Defendants

In order to establish Article III standing, "there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan,* 504 U.S. at 560 (internal citations omitted).

Defendants argue that "it is not conceivable that a non-trivial increase in the risk of match-fixing could be 'fairly traceable' to the Sports Wagering Law." (Defs.' Mot. to Dismiss at 16.) Further, Defendants allege that any potential injury to Plaintiffs would be traceable to the independent actions of Plaintiffs' agents. (Defs.' Mot. to Dismiss at 17-18; Defs.' Cross Mot. at 14.) As such, any alleged injury would be self-inflicted. Finally, Defendants also contend that any harm to the Leagues should be attributed to illegal, rather than legal gambling. (Oral Arg. Tr. 23:11-24:7.)

Plaintiffs assert that they have an interest in their sporting events being free from government

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decision holding that fantasy sports fall outside the definition of gambling envisioned by New Jersey's *qui tam* statute, N.J. Stat. Ann. 2A:40-6, lends further support to Plaintiffs' position. *See Humphrey v. Viacom, Inc.,* No. 06-2768, 2007 WL 1797648 (D.N.J. June 20, 2007). The Court is simply not convinced that legalized gambling, as permitted by the Sports Wagering Law, is similar enough to fantasy sports to inform the Court's standing analysis.

sponsored gambling and cite to *Markell* for the proposition that New Jersey's conduct will "engender the very ills that PASPA sought to combat." (Pls.' Opp'n to Defs.' Mot. to Dismiss at 18.) Plaintiffs argue that each increase of state-sponsored gambling is distinctly harmful and redressable. (*Id.* at 18-19.) Plaintiffs further argue that if they are successful their alleged injury would be reduced, and thus, the traceability and redressability standards are satisfied. (*Id.* at 19.) In response to Defendants' contention that Plaintiffs' own agents will cause any harm, Plaintiffs state that the personal interest which is the predicate for the Leagues' standing is based on the production and marketing of their contests, the perception of the fans regarding same, and in whether athletic contests constitute the basis for state sponsored gambling. According to Plaintiffs, the State's very invasion into these interests is the cause of their injuries and is redressable by enjoining Defendants from moving forward with the sports gambling law. (*Id.* at 20.)

The Court finds Plaintiffs' alleged injuries fairly traceable to Defendants. Defendants' argument that the perceived injury of match-fixing would be caused by the Leagues' own referees and players misses the point. Critically, the Leagues' referees and players need not *actually* engage in gambling or game fixing in order for fans to have an increased perception that the integrity of the games is suffering due to the expansion of legalized gambling.

It is also reasonable, and likely, that a *perceived* increase in match-fixing and the increase of gambling

will be attributable, at least in part, to the implementation of the Sports Wagering Law. Defendants' expert stated that the enactment of legal gambling in New Jersey will likely lead to an increase in illegal gambling. Therefore, the Sports Wagering Law will, at a minimum, likely increase the perception that the integrity of the Leagues' games is being negatively impacted by sports betting. (*See generally* Willig Report ¶ 10(b)).

Finally, 17% of the Leagues' fans responded they would spend less money on the Leagues if they placed a professional sports team in close proximity to legalized sports gambling. (*See* 2007 NBA Las Vegas/ Gambling Survey 7.) This undisputed fact clearly indicates that implementation of the Sports Wagering Law will cause traceable harm to Plaintiffs.

For these reasons, the Court concludes that the undisputed facts demonstrate injury-in-fact traceable to Defendants' proposed implementation of the Sports Wagering Law.

4. Redressability

In addition to the injury-in-fact and traceability requirements, a plaintiff must demonstrate that the purported harm will be redressed if the relief it seeks is granted. *See Massachusetts v. EPA,* 549 U.S. 497, 524 (2007). In *Massachusetts,* the Supreme Court addressed the issue of redressability in the motor vehicle regulatory context. (*Id.*) The Court found that "[w]hile it may be true that regulating motor-vehicle

emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it." *Id.* at 525 (emphasis in original). Here, Plaintiffs have demonstrated that even an incremental reduction in the impact of gambling is sufficient to establish redressability. As such, enjoining the implementation of the Sports Wagering Law will redress the incremental harm that will be caused by implementation of the legalized sports betting.

III. Conclusion

For the reasons set forth above, Plaintiffs have made an adequate showing of standing. Accordingly, Defendants' Motion to Dismiss is DENIED. Additionally, Defendants' Motion for Summary Judgment is DENIED insofar as it seeks a finding as a matter of law that Plaintiffs do not have standing. Plaintiffs' Motion to Preclude the Expert Testimony of Robert D. Willig (ECF No. 98) is administratively terminated as moot. An Order consistent with this Opinion will be filed on this date.

/s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

Dated: December 21, 2012

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE, et al., Defendants.	Civil Action No. 12-4947 (MAS) (LHG) **ORDER** (Filed Dec. 21, 2012)

This matter comes before the Court upon Plaintiffs' "Motion for Summary Judgment and, If Necessary to Preserve the Status Quo, a Preliminary Injunction" (ECF No. 10), Defendants' Motion to Dismiss (ECF No. 29), and Defendants' Cross Motion for Summary Judgment (ECF No. 76). The Court held oral argument on December 18, 2012, with respect to standing only. For the reasons stated in the Opinion filed on this date, and for other good cause shown,

IT IS on this 21st day of December, 2012, **ORDERED** that:

1) Plaintiffs have demonstrated standing and this case will proceed to the merits;

2) Defendants' Motion to Dismiss (ECF No. 29) is **DENIED**;

3) Defendants' Cross Motion for Summary Judgment (ECF No. 76) is **DENIED** in

so far as it challenges Plaintiffs' standing;

4) Plaintiffs' Motion to Preclude the Expert Testimony of Robert D. Willig (ECF No. 98) is administratively terminated as moot; and

5) A date for oral argument regarding the constitutional issues will be issued after January 20, 2013.

/s/ Michael A. Shipp
MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos.:13-1713, 13-1714, 13-1715

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association;
NATIONAL BASKETBALL ASSOCIATION, a joint venture;
NATIONAL FOOTBALL LEAGUE, an unincorporated association;
NATIONAL HOCKEY LEAGUE, an unincorporated association;
OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL;

UNITED STATES OF AMERICA
(Intervenor in the District Court),

v.

GOVERNOR OF THE STATE OF NEW JERSEY;
DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey;
FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission;

Defendants-Appellants in No. 13-1715;

STEPHEN M. SWEENEY; SHEILA Y. OLIVER,

Intervenor-Defendants in the District Court and Appellants in No. 13-1713;

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.

Intervenor-Defendant in the District Court and Appellant in No. 13-1714

(D. NJ. No. 3-12-cv-04947)

SUR PETITION FOR REHEARING

(Filed Nov. 15, 2013)

Present: McKEE, *Chief Judge,* RENDELL, AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY, JR., and VANASKIE, *Circuit Judges*

The petition for rehearing filed by the Governor of the State of New Jersey, David L. Rebuck, Frank Zanzuccki, New Jersey Thoroughbred Horsemen's Association, Inc., and Sheila Y. Oliver and Stephen M. Sweeney, **appellants** in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petitions for

rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ *Julio M. Fuentes*
Circuit Judge

Dated: November 15, 2013
tyw/cc: All Counsel of Record

28 U.S.C. § 3701. Definitions

For purposes of this chapter [28 USCS §§ 3701 et seq.] –

(1) the term "amateur sports organization" means –

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means –

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

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28 U.S.C. § 3702. Unlawful sports gambling

It shall be unlawful for –

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

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28 U.S.C. § 3703. Injunctions

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

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28 U.S.C. § 3704. Applicability

(a) Section 3702 shall not apply to –

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both –

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending

October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that –

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter [effective Jan. 1, 1993], to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 [28 USCS § 3702] shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

N.J. Const., Art. IV, Sec. VII Paragraph 2. Gambling

2. No gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by, the legally qualified voters of the State voting at a general election, except that, without any such submission or authorization:

A. It shall be lawful for bona fide veterans, charitable, educational, religious or fraternal organizations, civic and service clubs, senior citizen associations or clubs, volunteer fire companies and first-aid or rescue squads to conduct, under such restrictions and control as shall from time to time be prescribed by the Legislature by law, games of chance of, and restricted to, the selling of rights to participate, the awarding of prizes, in the specific kind of game of chance sometimes known as bingo or lotto, played with cards bearing numbers or other designations, 5 or more in one line, the holder covering numbers as objects, similarly numbered, are drawn from a receptacle and the game being won by the person who first covers a previously designated arrangement of numbers on such a card, when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, religious or public-spirited uses, and in the case of bona fide veterans' organizations and senior citizen associations or clubs to the

support of such organizations, in any municipality, in which a majority of the qualified voters, voting thereon, at a general or special election as the submission thereof shall be prescribed by the Legislature by law, shall authorize the conduct of such games of chance therein;

B. It shall be lawful for the Legislature to authorize, by law, bona fide veterans, charitable, educational, religious or fraternal organizations, civic and service clubs, senior citizen associations or clubs, volunteer fire companies and first-aid or rescue squads to conduct games of chance of, and restricted to, the selling of rights to participate, and the awarding of prizes, in the specific kinds of games of chance sometimes known as raffles, conducted by the drawing for prizes or by the allotment of prizes by chance, when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, religious or public-spirited uses, and in the case of bona fide veterans' organizations and senior citizen associations or clubs to the support of such organizations, in any municipality, in which such law shall be adopted by a majority of the qualified voters, voting thereon, at a general or special election as the submission thereof shall be prescribed by law and for the Legislature, from time to time, to restrict and control, by law, the conduct of such games of chance;

C. It shall be lawful for the Legislature to authorize the conduct of State lotteries restricted to the selling of rights to participate therein and the awarding of prizes by drawings when the entire net

proceeds of any such lottery shall be for State institutions and State aid for education; provided, however, that it shall not be competent for the Legislature to borrow, appropriate or use, under any pretense whatsoever, lottery net proceeds for the confinement, housing, supervision or treatment of, or education programs for, adult criminal offenders or juveniles adjudged delinquent or for the construction, staffing, support, maintenance or operation of an adult or juvenile correctional facility or institution;

D. It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the State, of gambling houses or casinos within the boundaries, as heretofore established, of the city of Atlantic City, county of Atlantic, and to license and tax such operations and equipment used in connection therewith. Any law authorizing the establishment and operation of such gambling establishments shall provide for the State revenues derived therefrom to be applied solely for the purpose of providing funding for reductions in property taxes, rental, telephone, gas, electric, and municipal utilities charges of eligible senior citizens and disabled residents of the State, and for additional or expanded health services or benefits or transportation services or benefits to eligible senior citizens and disabled residents, in accordance with such formulae as the Legislature shall by law provide. The type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment shall be determined by or pursuant to

the terms of the law authorizing the establishment and operation thereof.

It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place;

E. It shall be lawful for the Legislature to authorize, by law, (1) the simultaneous transmission by picture of running and harness horse races conducted at racetracks located within or outside of this State, or both, to gambling houses or casinos in the city of Atlantic City and (2) the specific kind, restrictions and control of wagering at those gambling establishments on the results of those races. The State's share of revenues derived therefrom shall be applied for services to benefit eligible senior citizens as shall be provided by law; and

F. It shall be lawful for the Legislature to authorize, by law, the specific kind, restrictions and control of wagering on the results of live or simulcast running and harness horse races conducted within or outside of this State. The State's share of revenues derived therefrom shall be used for such purposes as shall be provided by law.

It shall also be lawful for the Legislature to authorize by law wagering at current or former running and harness horse racetracks in this State on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.

N.J. Stat. § 5:12A-1. Definitions relative to sports wagering

As used in this act:

"casino" means a licensed casino or gambling house located in Atlantic City at which casino gambling is conducted pursuant to the provisions of P.L.1977, c.110 (*C.5:12-1* et seq.);

"Casino Control Commission" means the commission established pursuant to section 50 of P.L.1977, c.110 (*C.5:12-50*);

"collegiate sport or athletic event" means a sport or athletic event offered or sponsored by or played in connection with a public or private institution that offers educational services beyond the secondary level;

"division" means the Division of Gaming Enforcement established pursuant to section 55 of P.L.1977, c.110 (*C.5:12-55*);

"operator" means a casino or a racetrack which has elected to operate a sports pool, either independently or jointly;

"professional sport or athletic event" means an event at which two or more persons participate in sports or athletic events and receive compensation in excess of actual expenses for their participation in such event;

"prohibited sports event" means any collegiate sport or athletic event that takes place in New

Jersey or a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place;

"racetrack" means the physical facility where a permit holder conducts a horse race meeting with parimutuel wagering under a license by the racing commission pursuant to P.L.1940, c.17 (*C.5:5-22* et seq.), and includes the site of any former racetrack;

"racing commission" means the New Jersey Racing Commission established by section 1 of P.L.1940, c.17 (*C.5:5-22*);

"sports event" means any professional sport or athletic event and any collegiate sport or athletic event, except a prohibited sports event;

"sports pool" means the business of accepting wagers on any sports event by any system or method of wagering; and

"sports wagering lounge" means an area wherein a sports pool is operated.

N.J. Stat. § 5:12A-2. Casino, racetrack may operate sports pool; severability

a. In addition to casino games permitted pursuant to the provisions of P.L.1977, c.110 (*C.5:12-1* et seq.), a casino may operate a sports pool upon the approval of the division and in accordance with the provisions of this act and applicable regulations

promulgated pursuant to this act. In addition to the conduct of parimutuel wagering on horse races under regulation by the racing commission pursuant to chapter 5 of Title 5 of the Revised Statutes, a racetrack may operate a sports pool upon the approval of the division and the racing commission and in accordance with the provisions of this act and applicable regulations promulgated pursuant to this act. Upon approval of the division and racing commission, a casino and a racetrack in this State may enter into an agreement to jointly operate a sports pool at the racetrack, in accordance with the provisions of this act and applicable regulations promulgated pursuant to this act.

With regard to this act, P.L.2011, c.231 (*C.5:12A-1* et al.), the duties specified in section 63 of P.L.1977, c.110 (*C.5:12-63*) of the Casino Control Commission shall apply to the extent not inconsistent with the provisions of this act. In addition to the duties specified in section 76 of P.L.1977, c.110 (*C.5:12-76*), the division shall hear and decide promptly and in reasonable order all applications for a license to operate a sports pool, shall have the general responsibility for the implementation of this act and shall have all other duties specified in that section with regard to the operation of a sports pool.

The license to operate a sports pool shall be in addition to any other license required to be issued pursuant to P.L.1977, c.110 (*C.5:12-1* et seq.) to operate a casino or pursuant to P.L.1940, c.17 (*C.5:5-22* et seq.) to conduct horse racing. No license to

operate a sports pool shall be issued by the division to any entity unless it has established its financial stability, integrity and responsibility and its good character, honesty and integrity. No license to operate a sports pool shall be issued by the division to any entity which is disqualified under the criteria of section 86 of P.L.1977, c.110 (*C.5:12-86*).

No later than five years after the date of the issuance of a license and every five years thereafter or within such lesser periods as the division may direct, a licensee shall submit to the division such documentation or information as the division may by regulation require, to demonstrate to the satisfaction of the director of the division that the licensee continues to meet the requirements of the law and regulations.

b. A sports pool shall be operated in a sports wagering lounge located at a casino or racetrack. A sports wagering lounge may be located at a casino simulcasting facility. The lounge shall conform to all requirements concerning square footage, design, equipment, security measures and related matters which the division shall by regulation prescribe. The space required for the establishment of a lounge shall not reduce the space authorized for casino gaming activities as specified in section 83 of P.L.1977, c.110 (*C.5:12-83*).

c. The operator of a sports pool shall establish or display the odds at which wagers may be placed on sports events.

d. An operator shall accept wagers on sports events from persons physically present in the sports wagering lounge. A person placing a wager shall be at least 21 years of age.

e. An operator shall not admit into the sports wagering lounge, or accept wagers from, any person whose name appears on the exclusion list maintained by the division pursuant to section 71 of P.L.1977, c.110 (*C.5:12-71*) or on any self-exclusion list maintained by the division pursuant to sections 1 and 2 of P.L.2001, c.39 (*C.5:12-71.2* and *C.5:12-71.3*, respectively). Sections 1 and 2 of P.L.2002, c.89 (*C.5:5-65.1* and *C.5:5-65.2*, respectively), shall apply to the conduct of sports wagering under this act.

f. The holder of a license to operate a sports pool may contract with an entity to conduct that operation, in accordance with the regulations of the division. That entity shall obtain a license as a casino service industry enterprise prior to the execution of any such contract, and such license shall be issued pursuant to the provisions of P.L.1977, c.110 (*C.5:12-1* et seq.) and in accordance with the regulations promulgated by the division in consultation with the commission.

g. If any provision of this act, P.L.2011, c.231 (*C.5:12A-1* et al.), or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision

or application, and to this end the provisions of this act are severable.

N.J. Stat. § 5:12A-3. Employees, licensed, registered

a. All persons employed directly in wagering-related activities conducted within a casino or a racetrack in a sports wagering lounge shall be licensed as a casino key employee or registered as a casino employee, as determined by the commission, pursuant to the provisions of P.L.1977, c.110 (*C.5:12-1* et seq.). All other employees who are working in the sports wagering lounge may be required to be registered, if appropriate, in accordance with regulations of the division promulgated in consultation with the commission.

b. Each operator of a sports pool shall designate one or more casino key employees who shall be responsible for the operation of the sports pool. At least one such casino key employee shall be on the premises whenever sports wagering is conducted.

N.J. Stat. § 5:12A-4. Authority of division to regulate

Except as otherwise provided by this act, the division shall have the authority to regulate sports pools and the conduct of sports wagering under this act to the same extent that the division regulates other casino games. No casino or racetrack shall be authorized to operate a sports pool unless it has

produced information, documentation, and assurances concerning its financial background and resources, including cash reserves, that are sufficient to demonstrate that it has the financial stability, integrity, and responsibility to operate a sports pool. In developing rules and regulations applicable to sports wagering, the division shall examine the regulations implemented in other states where sports wagering is conducted and shall, as far as practicable, adopt a similar regulatory framework. The division, in consultation with the commission, shall promulgate regulations necessary to carry out the provisions of this act, including, but not limited to, regulations governing the:

a. amount of cash reserves to be maintained by operators to cover winning wagers;

b. acceptance of wagers on a series of sports events;

c. maximum wagers which may be accepted by an operator from any one patron on any one sports event;

d. type of wagering tickets which may be used;

e. method of issuing tickets;

f. method of accounting to be used by operators;

g. types of records which shall be kept;

h. use of credit and checks by patrons;

i. type of system for wagering;

j. protections for a person placing a wager; and

k. display of the words, "If you or someone you know has a gambling problem and wants help, call 1-800 GAMBLER," or some comparable language approved by the division, which language shall include the words "gambling problem" and "call 1-800 GAMBLER," on all print, billboard, sign, online, or broadcast advertisements of a sports pool and in every sports wagering lounge.

N.J. Stat. § 5:12A-4.1. Use of mobile gaming devices permitted under certain circumstances

a. Notwithstanding the provisions of any other law to the contrary, the Division of Gaming Enforcement may authorize the use of mobile gaming devices approved by the division within an approved hotel facility that operates a sports pool pursuant to the provisions of P.L.2011, c.231 (*C.5:12A-1* et seq.), to enable a player to place wagers on sports or athletic events, provided the player has established an account with the casino licensee, the wager is placed by and the winnings are paid to the patron in person within the approved hotel facility, the mobile gaming device is inoperable outside the approved hotel facility, and provided that the division may establish any additional or more stringent licensing or other regulatory requirements necessary for the proper

implementation and conduct of mobile gaming as authorized by this section.

For the purposes of this subsection, the approved hotel facility shall include any area located within the property boundaries of the casino hotel facility, including any outdoor recreation area or swimming pool, where mobile gaming devices may be used by patrons in accordance with this section, but excluding parking garages or parking areas, provided that mobile gaming shall not extend outside of the property boundaries of the casino hotel facility.

b. Notwithstanding the provisions of any other law to the contrary, the Division of Gaming Enforcement and the New Jersey Racing Commission may authorize the use of mobile gaming devices approved by the division and the commission within a racetrack that operates a sports pool pursuant to the provisions of P.L.2011, c.231 (*C.5:12A-1* et seq.), to enable a player to place wagers on sports or athletic events, provided the player has established an account with the permitholder, the wager is placed by and the winnings are paid to the patron in person within the racetrack, the mobile gaming device is inoperable outside the racetrack, and provided that the division and the commission may establish any additional or more stringent licensing or other regulatory requirements necessary for the proper implementation and conduct of mobile gaming as authorized by this section.

For the purposes of this subsection, a racetrack shall include any area located within the property boundaries of the racetrack facility where mobile gaming devices may be used by patrons in accordance with this subsection, but excluding parking garages or parking areas, provided that mobile gaming shall not extend outside of the property boundaries of the racetrack.

N.J. Stat. § 5:12A-5. Adoption of comprehensive house rules

Each operator shall adopt comprehensive house rules governing sports wagering transactions with its patrons. The rules shall specify the amounts to be paid on winning wagers and the effect of schedule changes. The house rules, together with any other information the division deems appropriate, shall be conspicuously displayed in the sports wagering lounge and included in the terms and conditions of the account wagering system, and copies shall be made readily available to patrons.

N.J. Stat. § 5:12A-6. Agreements to jointly establish sports wagering lounge; taxes; license fee for compulsive gambling programs

Whenever a casino licensee and a racetrack permit holder enter into an agreement to jointly establish a sports wagering lounge, and to operate

and conduct sports wagering under this act, the agreement shall specify the distribution of revenues from the joint sports wagering operation among the parties to the agreement. The sums received by the casino from the joint sports wagering operation shall be considered gross revenue as specified under section 24 of P.L.1977, c.110 (*C.5:12-24*). The sums actually received by the horse racing permit holder from any sports wagering operation, either jointly established with a casino or established independently or with non-casino partners, less only the total of all sums actually paid out as winnings to patrons, shall be subject to an 8% tax to be collected by the division and paid to the Casino Revenue Fund created under section 145 of P.L.1977, c.110 (*C.5:12-145*) to be used for the funding of programs for senior citizens and disabled residents and to an investment alternative tax in the same amount and for the same purposes as provided in section 3 of P.L.1984, c.218 (*C.5:12-144.1*).

A percentage of the fee paid for a license to operate a sports pool shall be deposited into the State General Fund for appropriation by the Legislature to the Department of Health and Senior Services to provide funds for prevention, education, and treatment programs for compulsive gambling programs that meet the criteria developed pursuant to section 2 of P.L.1993, c.229 (*C.26:2-169*), such as those provided by the Council on Compulsive Gambling of New Jersey, and including the development and implementation of programs that identify and assist problem

gamblers. The percentage shall be determined by the division.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, NATIONAL BASKETBALL ASSOCIATION, a joint venture, NATIONAL FOOTBALL LEAGUE, an unincorporated association, NATIONAL HOCKEY LEAGUE, an unincorporated association, and OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, **Plaintiffs,** **-vs-** **CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission,** **Defendants,**	**CIVIL ACTION NUMBER:** **3: 12-cv-04947-MAS-LHG**

-and-

STEPHEN M. SWEENEY, President of the New Jersey Senate, SHEILA Y. OLIVER, Speaker of the New Jersey General Assembly, and NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Defendants-Intervenors.

Clarkson S. Fisher United States Courthouse
402 East State Street
Trenton, New Jersey 08608
February 14, 2013

[2] **BEFORE:** HONORABLE MICHAEL A. SHIPP
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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BY: PAUL J. FISHMAN, ESQ.,
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and
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For the District of New Jersey.

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GIBBONS, PC
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and
THOMAS VALEN, ESQUIRE
Attorneys for the Intervenor Defendant.

* * *

[106] THE COURT: Please be seated, folks. I had an opportunity to take a quick look at my notes here. I only have one follow-up question, and it's really for the plaintiffs and the Department of Justice. And that is whether or not – I want to make sure that we're clear as to whether or not you're

contending that there is any kind of regulatory scheme in place as a result of either the criminal laws and PASPA combined or the like. I need to just kind of make sure I'm clear on that whole issue if you are asserting that. You may not be at all.

MR. FISHMAN: I think it's my view, Judge, that there is no regulatory scheme in place in New Jersey because of PASPA, okay. New Jersey has a regulatory scheme in place that is comprised, as I understand it – I'm a federal prosecutor, not a state prosecutor – of criminal laws and civil sanctions that determine what people can and can't do. Those laws have morphed over time as the state legislature has seen fit to [107] amend them.

We're not, by the way, as Mr. Griffinger said, contending that the legislature is frozen in time in 1992. The legislative history and the rational-basis question that you asked, is frozen in time in 1992. But the legislature can continue to tinker with state gambling laws. And it has a regulatory scheme, but it's not a regulatory scheme because of PASPA. It has a regulatory scheme because it is good, sound state government to have a regulatory scheme that involves gambling. Because, as Mr. Olson points out, having people running a muck [sic], gambling illegally is not a healthy thing. And the Department of Justice certainly doesn't want that either.

THE COURT: But to the extent that we're talking about any kind of Supremacy Clause analysis

for preemption purposes, are you contending that there is any kind of regulatory scheme in place?

MR. FISHMAN: No. If I might clarify, I don't think anybody is arguing the actual Doctrine of Preemption because there is a whole law of preemption out there that Mr. Olson is probably way more familiar with than I am, and there are different kinds of preemption. We are simply arguing there is a Supremacy Clause issue here. Congress has said, you can't do this, and all the states must follow that command. I will say that, no, there is a regulatory regime that New Jersey has [108] in place, not because of PASPA. It can enforce that regulatory regime to the extent that it deems it is appropriate to do that or not given what other resource constraints it has. And PASPA does not compel them to do more or to do less in that regard.

THE COURT: Okay.

MR. GRIFFINGER: I thought I heard your Honor to ask whether or not there was a federal regulatory scheme combining PASPA and some other federal regulation, not the state. Was that not –

THE COURT: But I think you've clarified my question, though, by way of your follow up to the question. So, even if the question might have been unartfully phrased, you certainly answered my question.

MR. FISHMAN: I'm better than I thought I was, Judge.

MR. GRIFFINGER: But we do recognize that there is no federal regulatory scheme in place?

THE COURT: Right. Okay.

MR. GRIFFINGER: Thank you.

* * *

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, NATIONAL BASKETBALL ASSOCIATION, a joint venture, NATIONAL FOOTBALL LEAGUE, an unincorporated association, NATIONAL HOCKEY LEAGUE, an unincorporated association, and OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, Plaintiffs, v. CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, DAVID L. REBUCK, Director of the New Jersey Division of	C.A. No.12-cv-04947(MAS)(LHG) Honorable Michael A. Shipp, U.S.D.J. Honorable Lois H. Goodman, U.S.M.J. **DEFENDANT-INTERVENOR NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.'S STATEMENT OF UNDISPUTED MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1**

Gaming Enforcement and Assistant Attorney General of the State of New Jersey, and FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission,

Defendants,

and

STEPHEN M. SWEENEY, President of the New Jersey Senate, SHEILA Y. OLIVER, Speaker of the New Jersey General Assembly, and NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Defendants-Intervenors.

Pursuant to Local Rule 56.1, and in opposition to Plaintiffs' motion for summary judgment, defendant-intervenor New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") respectfully submits this Statement of Undisputed Material Facts.

RESPONSIVE STATEMENT TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS

1. The NJTHA agrees with the statement made in Paragraph 1 of Plaintiffs' Statement of Undisputed Material Facts ("Plaintiffs' Statement").

2. The NJTHA disagrees with the statement made in Paragraph 2 of Plaintiffs' Statement inasmuch as it is an incomplete recitation of a provision of PASPA and the Court is respectfully referred to PASPA for an accurate and complete recitation of its provisions.

3. The NJTHA agrees in part with the statement made in Paragraph 3 of Plaintiffs' Statement. It would be more accurate, however, to state that PASPA purports to permit a professional sports organization or amateur sports organization (as those terms are defined in PASPA) to commence an action to enjoin a violation of section 3702 of PASPA if a competitive game of such professional sports organization or amateur sports organization (as those terms are defined in PASPA) is alleged to be the basis of such violation.

4. The NJTHA agrees in part with the statements made in Paragraph 4 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire Section 3704(a) for a complete recitation of its provisions regarding the instances in which Section 3702 of PASPA does not apply.

5. The NJTHA disagrees with the statements made in Paragraph 5 of Plaintiffs' Statement inasmuch as they are an incomplete recitation of the legislative history of PASPA and respectfully refers the Court to PASPA's legislative history for a complete recitation of the statements made in various committee meetings.

6. The NJTHA disagrees with the statements made in Paragraph 6 of Plaintiffs' Statement inasmuch as they are an incomplete recitation of the legislative history of PASPA and respectfully refers the Court to PASPA's legislative history for a complete recitation of the statements made in various committee meetings.

7. The NJTHA disagrees with the statements made in Paragraph 7 of Plaintiffs' Statement inasmuch as they are an incomplete recitation of the legislative history of PASPA and respectfully refers the Court to PASPA's legislative history for a complete recitation of the statements made in various committee meetings.

8. The NJTHA disagrees with the statements made in Paragraph 8 of Plaintiffs' Statement inasmuch as they are an incomplete recitation of the legislative history of PASPA and respectfully refers the Court to PASPA's legislative history for a complete recitation of the statements made in various committee meetings.

9. The NJTHA disagrees with the statements made in Paragraph 9 of Plaintiffs' Statement inasmuch as they are an incomplete recitation of the legislative history of PASPA and respectfully refers the Court to PASPA's legislative history for a complete recitation of the statements made in various committee meetings.

10. The NJTHA agrees in part with the statement made in Paragraph 10 of Plaintiffs' Statement.

It would be more accurate, however, to quote the entire amendment to Article IV, Section VII, paragraph 2 of the New Jersey Constitution for a full recitation of its terms.

11. The NJTHA agrees in part with the statement made in Paragraph 11 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire former version of Article IV, Section VII, paragraph 2 of the New Jersey Constitution (before the December 2011 amendment) for a full recitation of its terms.

12. The NJTHA agrees in part with the statement made in Paragraph 12 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire amendment to Article IV, Section VII, paragraph 2 of the New Jersey Constitution for a full recitation of its terms.

13. On information and belief, the NJTHA agrees with the statement made in Paragraph 13 of Plaintiffs' Statement.

14. The NJTHA agrees with the statement made in Paragraph 14 of Plaintiffs' Statement.

15. The NJTHA agrees in part with the statements made in Paragraph 15 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire Sports Gambling Law referenced therein for a complete recitation of its provisions.

16. The NJTHA agrees in part with the statements made in Paragraph 16 of Plaintiffs' Statement.

It would be more accurate, however, to quote the entire Sports Gambling Law referenced therein for a complete recitation of its provisions.

17. The NJTHA agrees in part with the statements made in Paragraph 17 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire Sports Gambling Law referenced therein for a complete recitation of its provisions.

18. The NJTHA agrees in part with the statements made in Paragraph 18 of Plaintiffs' Statement. It would be more accurate, however, to quote the entire Sports Gambling Law referenced therein for a complete recitation of its provisions.

19. On information and belief, the NJTHA agrees with the statement made in Paragraph 19 of Plaintiffs' Statement.

20. On information and belief, the NJTHA agrees with the statement made in Paragraph 20 of Plaintiffs' Statement.

21. On information and belief, the NJTHA agrees with the statement made in Paragraph 21 of Plaintiffs' Statement.

22. The NJTHA disagrees with the statement made in Paragraph 22 of Plaintiffs' Statement inasmuch as it is an inaccurate description of a statement made in the article referenced in Paragraph 22 of Plaintiffs' Statement and the NJTHA respectfully refers the Court to that article for the complete report

made therein and for the full statements that were purportedly made by the individuals quoted therein.

SUPPLEMENTAL STATEMENT OF MATERIAL FACTS

23. The NJTHA has more than 3,000 members, consisting of thoroughbred horse owners and horse trainers from around the world. Verified Answer and Affirmative Defenses ¶36.

24. The NJTHA is also the licensed operator and permit holder of Monmouth Park Racetrack, a thoroughbred racetrack located in Oceanport, New Jersey ("Monmouth Park"). *Id.*

25. As a racetrack operator and permit holder the NJTHA has the legal right, pursuant to New Jersey law, subject to the regulations of the New Jersey Division of Gaming Enforcement and the New Jersey Racing Commission, to engage in the business of accepting wagers on the results of certain professional and amateur sports events. *Id.*

26. The NJTHA intends to exercise its legal right to accept wagers on the results of certain professional and amateur sports events pursuant to New Jersey law, subject to the regulations of the New Jersey Division of Gaming Enforcement and the New Jersey Racing Commission. *Id.*

27. On or about October 28, 1992, Congress enacted the Professional and Amateur Sports

Protection Act ("PASPA"), codified at 28 U.S.C. §3701, *et seq*.

28. Prior to the enactment of PASPA, the United States Department of Justice, in letters dated September 24, 1991 to then Senator Joseph Biden, then Chairman of the Senate Judiciary Committee, and then Senator Dennis DeConcini, a then member of the Senate Judiciary Committee, formally opposed enactment of PASPA based on the fact that, *inter alia*, PASPA raised federalism issues for the reasons that it was an intrusion by the federal government upon the States' sovereign rights to decide how to raise revenues for themselves; to decide for themselves what gambling policies to enact; and because PASPA empowered private sports organizations to enforce PASPA's provisions by suing States in federal courts. Verified Answer and Affirmative Defenses, Exhibits C and D.

29. Thoroughbred racing in New Jersey provides substantial economic and other benefits to the general public, creates employment opportunities for thousands of people, and generates substantial revenues for the State of New Jersey. Verified Answer and Affirmative Defenses ¶48.

30. Monmouth Park is an integral part of all aspects of the equine industry in New Jersey. *Id.*

31. If Monmouth Park is forced to close it will mean the death of the thoroughbred racing industry in New Jersey. *Id.*

32. Wagering on New Jersey Thoroughbred and Standardbred horse races in New Jersey has waned in recent years resulting in the loss of jobs as well as causing economic distress to the equine industry in New Jersey, especially to Monmouth Park. Verified Answer and Affirmative Defenses ¶49.

33. The NJTHA believes that sports betting is an essential component of the NJTHA's overall plan to make Monmouth Park an economically self-sustaining Thoroughbred Racetrack, better able to compete with racetracks in surrounding States that are bolstered by casino revenues. *Id.*

34. The New Jersey equine industry is critical to New Jersey's economy and the preservation of open space in New Jersey. In a Report, prepared by Karyn Malinowski, Ph.D. of the Rutgers Equine Science Center, it was concluded that if racing-related and breeding farms in New Jersey were to cease operations it would have a $780 million negative annual impact, put 7,000 jobs in danger, eliminate $110 million in tax revenues, and leave over 163,000 acres of open space vulnerable to future development. Verified Answer and Affirmative Defenses ¶50.

35. The competitive disadvantages created by PASPA's exemption, in favor of four (4) States, from PASPA's prohibition against sports betting, especially neighboring Delaware, has combined with other factors to put the New Jersey horse industry, and Monmouth Park in particular, at such a severe disadvantage that the economic viability of the New Jersey

horse industry and Monmouth Park has been and continues to be seriously damaged. Verified Answer and Affirmative Defenses ¶51.

36. On November 8, 2011 New Jersey citizens, by a 64%-36% margin, voted to amend the New Jersey Constitution so as to authorize the New Jersey Legislature to enact a law allowing wagering on certain sporting events at Atlantic City casinos and at horse racetracks in New Jersey, including Monmouth Park. Verified Answer and Affirmative Defenses ¶52.

37. The voter referendum, approved by New Jersey voters, provided as follows:

> "Shall the amendment to Article IV, Section VII, paragraph 2 of the Constitution of the State of New Jersey, agreed to by the Legislature, providing that it shall be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City and at current or former running and harness horse racetracks on the results of professional, certain college, or amateur sport or athletic events, be approved?"

Id.

38. On December 8, 2011, Article IV, Section VII, paragraph 2 of the New Jersey Constitution was amended in conformity with the voter referendum. Verified Answer and Affirmative Defenses ¶53.

39. The Amendment provides:

> It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place;
>
> * * *
>
> It shall also be lawful for the Legislature to authorize by law wagering at current or former running and harness horse racetracks in this State on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.

N.J. Const. art. IV, §7, cl. 2(d) and 2(f).

40. On January 17, 2012 the Governor of New Jersey signed into law an Act supplementing Title 5 of the Revised Statutes and amending P.L. 1977, C. 110 and P.L. 1992, C. 9, "permitting wagering at casinos and racetracks on the results of certain professional or collegiate sports or athletic events"

(hereinafter "New Jersey's Sports Betting Law"). Verified Answer and Affirmative Defenses ¶54.

41. It is contemplated that a portion of the tax revenues generated from New Jersey's Sports Betting Law will be used to benefit senior and disabled New Jersey citizens as well as help to offset New Jersey State budget shortfalls. *Id.*

42. It is further contemplated that profits from New Jersey's Sports Betting Law will promote the economic survival of Monmouth Park, the profitability of New Jersey casinos, the economic viability of the New Jersey horse industry, and the creation of jobs. *Id.*

43. There is an actual threat of an injunction being entered against the NJTHA based on the NJTHA's decision to conduct wagering on sports events at Monmouth Park pursuant to New Jersey's Sports Betting Law and implementing regulations. Verified Answer and Affirmative Defenses ¶55.

44. Declaratory relief is necessary to assist the NJTHA in its ability to make responsible decisions about its future as it moves forward with its plans to implement sports wagering in accordance with New Jersey's Sports Betting Law and implementing regulations. *Id.*

45. The actual threat of an injunction against the NJTHA is based on this lawsuit filed by the

Plaintiffs herein seeking Declaratory and Injunctive Relief. *Id.*

Respectfully submitted,

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Dated: December 13, 2012

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE et al., Defendants.	Civil Action No. 3:12-cv-04947 (MAS) (LHG) Honorable Michael A. Shipp, U.S.D.J.

DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1

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Attorneys for Defendants

Pursuant to Local Rule 56.1, defendants Christopher J. Christie, David L. Rebuck, and Frank Zanzuccki submit this Statement of Undisputed Material Facts in support of Defendants' cross-motion for summary judgment, as well as in support of Defendants' opposition to Plaintiffs' motion for summary judgment.

* * *

8. The annual volume of legal sports wagering in Nevada has increased from approximately $1.5 billion shortly before PASPA's enactment, to $2.9 billion in 2011. Slocum Decl. Exhibit 1 (Willig Report ¶ 17); *see also id.* Exhibit 2 (Results from 2008 NCAA Study on Collegiate Wagering [Plaintiffs' 00003053] (stating that "Approximately $2.57 billion was gambled in 2008 in Nevada's legal sports book.")).

* * *

15. The total volume of sports wagering in the United States is estimated to be in the hundreds of billions of dollars annually, with the illegal sports wagering market having increased from an estimated $50 billion in 1989 (adjusting for inflation) to an estimated range of $270 to 500 billion today. Slocum Decl. Exhibit 1 (Willig Report ¶ 22); *id.* Exhibit 6 (Pedowitz Report to NBA Board of Governors, Oct. 1, 2008 [Plaintiffs' 00003465-66] ("[T]otal volume of

sports betting in the United States is $325 to $400 billion")); *see also id.* Exhibit 7 (National Gambling Impact Study Commission Report, 1999 [Plaintiffs' 00002363] (1999 estimate of illegal sports betting in the U.S. ranged from $80 billion to $380 billion)); *id.* Exhibit 8 (Emmert Dep. 17:17-18:10 (illegal sports gambling industry is "very significant activity")); *id.* Exhibit 3 (Goodell Dep. 28:7-29:4 ("I think it's fair to say it's a billion dollars plus.")); *id.* Exhibit 9 (Selig Dep. 10:20-11:17 (admitting "huge" nature of illegal sports gambling); *id.* Exhibit 10 (MLB 30(b)(6) Dep. 26:5-14 ("There's no question there's illegal betting going on.")); *id.* Exhibit 5 (Stern Dep. 14:12-20 (illegal gambling is a multibillion dollar enterprise)).

* * *

Dated:
November 21, 2012

Respectfully submitted,

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[SEAL] **U. S. Department of Justice**
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 24, 1991

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This presents the views of the Department of Justice on S. 474, the "Professional and Amateur Sports Protection Act."

The proposed legislation would prohibit states from operating, authorizing, advertising, or otherwise promoting a lottery or any other betting, gambling, or wagering scheme that is based, directly or indirectly, on a professional or amateur sports game or performance. The bill contains exemptions for lotteries or other betting activities in a state that were actually conducted by that state prior to August 31, 1990, or were conducted in the state between September 1, 1989, and August 31, 1990. Thus, the sports-based lotteries and betting and wagering activities that are already in operation in Oregon, Nevada, and Delaware would be grandfathered. The proposed legislation also expressly exempts parimutuel racing from its prohibitions.

Current Federal law provides a variety of restrictions on the conduct of lotteries and other gambling and betting activities. *See, e.g.,* 18 U.S.C. §§ 1084, 1301-1304, 1953, 1955; 15 U.S.C. §§ 1171-1178. Generally speaking, it is left to the states to decide whether to permit gambling activities based upon sporting events, although Federal law generally prohibits any use of an interstate facility in connection with such sports-based gambling activities.

Section 1307 of Title 18, United States Code, however, expressly permits states to conduct and advertise their own state-authorized "lotteries," as defined in subsection 1307(d). Although Section 1307 specifically excludes the placing or accepting of bets or wagers on sporting events, or contests from the definition of permissible state-conducted lotteries, neither the statute nor its legislative history answers the question of whether a state may base its lottery on the outcome of sporting events. *See* 1974 U.S. Code Cong. & Adm. News 7007 (original enactment of Section 1307); 1988 U.S. Code Cong. & Adm. News 4349 (amendment to Section 1307); *see also United States v. Baker*, 364 F.2d 107 (3d Cir.), *cert. denied*, 385 U.S. 986 (1966); *United States v. Forte*, 83 F.2d 612 (D.C. Cir. 1936). In the absence of any statutory guidance on subsection 1307(d), the Department of Justice has not taken any action against any state operating a sports-based lottery.

Our understanding is that S. 474 is, in effect, intended to clarify the prohibition on wagering on sporting events. As drafted, however, the proposed

legislation may render unlawful certain state lotteries that, although they use a sports theme, do not relate to a particular sporting event. For example, a simple scratch lottery ticket that compares the score of one imaginary football team to another would be impermissible under the language of S. 474. Moreover, the bill applies to both individual amateur sports and team amateur sports, but only to team professional sports. The reason for this distinction is unclear.

Also unclear is the purpose of the exception for parimutuel racing in S. 474. Parimutuel racing is not an amateur sport. Therefore, the bill's prohibition on sports-based lotteries would only apply to parimutuel racing – absent the express exception – if parimutuel racing were a team sport. Further, the parimutuel racing exception raises questions about the application of the proposed legislation to other sports, such as jai alai.

Finally, we note that determinations of how to raise revenue have typically been left to the states. The Department is concerned that, to the extent the bill can be read as anything more than a clarification of current law, it raises federalism issues. It is particularly troubling that S. 474 would permit enforcement of its provisions by sports leagues.

For these reasons, the Department opposes enactment of S. 474 as drafted. If Congress finds clarification of the sports gambling prohibition of Section 1307 necessary, we suggest that the term

"lottery" be more fully defined. The "lotteries" that have prompted the introduction of S. 474 may not be true lotteries, in that they may involve more than mere chance in determining winners: knowledge of the sports and teams in question may enhance a player's chances of winning. By carefully defining the term "lottery," the problems of overbreadth and ambiguity discussed above may be avoided.

I hope that this response adequately addresses your concerns.

Sincerely,

/s/ W. Lee Rawls
W. Lee Rawls
Assistant Attorney General