

No. 13-967, -979, -980

In the Supreme Court of the United States

CHRIS CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL.,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

STEPHEN M. SWEENEY, PRESIDENT OF THE NEW JERSEY SENATE, ET AL.,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

*On Petitions for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit*

**BRIEF FOR AMICI CURIAE RYAN M. RODENBERG,
ANASTASIOS KABURAKIS, AND JOHN T. HOLDEN
IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI**

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INTEREST OF THE *AMICI CURIAE*¹

Ryan M. Rodenberg, Anastasios Kaburakis, and John T. Holden are sports law analytics scholars with a particular research focus on intellectual property and sports-wagering. They have published a number of academic articles in connection with such issues. They have a strong interest in ensuring that the nation's sports-wagering and intellectual property laws comply with the Constitution.

SUMMARY OF ARGUMENT

The Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701 *et seq.* (“PASPA”) violates Article I, § 8, cl. 8 of the United States Constitution (“Intellectual Property Clause”). The Intellectual Property Clause grants Congress the authority: “***To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.***” (emphasis added).

PASPA’s subsection labeled “Injunctions” includes the word “whose,” which confers ownership rights of “competitive game[s]” to Respondents and other

¹ Pursuant to Rule 37, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. Counsel for all parties were timely notified more than ten days before the filing of this brief. Letters from the parties consenting to the filing of the *amicus curiae* brief have been filed with the Clerk of the Court.

professional or amateur sports organizations for purposes of deputizing them to enforce the statute:

A civil action to enjoin a violation of § 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 (emphasis added). 28 U.S.C. § 3703.

The conferral of property rights under PASPA violates the Intellectual Property Clause because it goes beyond the scope of the Intellectual Property Clause's limitations in two distinct ways. First, the express grant of perpetual ownership rights with characteristics mimicking both patents and copyrights runs counter to various prongs of the Intellectual Property Clause, including the "limited Times," "Authors and Inventors," and "Writings and Discoveries" requirements. Second, conferring perpetual property rights to States exempted under PASPA's grandfathering provision violates the Intellectual Property Clause's "limited Times" requirement.

In a September 24, 1991 letter, the Department of Justice ("DOJ") raised a number of concerns in connection with the Senate bill (S. 474) that would become PASPA. Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). Two concerns predominated. First, the DOJ flagged a number of provisions in S. 474 that raised "federalism issues." *Id.*

Second, the DOJ found it “particularly troubling that S. 474 would permit enforcement of its provisions by sports leagues.” *Id.* Petitioners comprehensively address the DOJ’s first concern in their petitions for a writ of certiorari. We address the DOJ’s second concern in this brief as *amici curiae*.

PASPA confers a property right to 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”) (collectively “Sports Leagues”) through the use of statutory language deputizing Sports Leagues to enforce PASPA’s provisions. *See* 28 U.S.C. § 3703. By granting Sports Leagues monopoly-like proprietary ownership of athletic events with authority to act as a private attorney general under the statute, PASPA has conferred a *de facto* patent and copyright to the Sports Leagues in violation of the Constitution’s Intellectual Property Clause.

PASPA’s grandfathering clause also has the effect of conferring a property right to Nevada and a small number of other exempted States. The Court was troubled by PASPA’s carve-outs in *Greater New Orleans Broadcasting Association, Inc. et al. v. United States*. 527 U.S. 173 (1999). Justice Stevens, writing for a unanimous court, observed that PASPA “includes a variety of exemptions, some with obscured congressional purposes.” *Id.* at 179. PASPA’s conferral of monopoly-like property rights to certain favored States through the use of various grandfathering exemptions is unconstitutional under the Intellectual Property Clause.

Deciding whether PASPA is constitutionally valid under the Intellectual Property Clause provides the Court with an alternative legal ground to decide this case. This alternative is considerably narrower than the broad anti-commandeering and equal sovereignty arguments rooted in federalism set forth by the Petitioners. The argument we offer as *amici curiae* is specific to PASPA and, in turn, does not directly implicate any other federal statutes.

For these reasons, the Court should grant the petitions for a writ of certiorari.

ARGUMENT

I. PASPA’s Conferral of Property Rights to the Respondent Sports Leagues Violates the Intellectual Property Clause of the Constitution

A. PASPA Violates the Express Limitations Embodied in the Intellectual Property Clause

PASPA’s subsection labeled “Injunctions” includes the word “whose,” which confers ownership rights of “competitive game[s]” to the Sports Leagues for certain purposes under the statute:

A civil action to enjoin a violation of § 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 (emphasis added). 28 U.S.C. § 3703.

As a pronoun, the word “whose” is the possessive form of the word “who,” and used as an adjective. The word “whose” is defined as “a possessor” and “that which belongs to whom.” *Merriam Webster’s Collegiate Dictionary* at 1352 (10th ed. 1993).

PASPA was enacted by Congress pursuant to the Commerce Clause. However, the conferral of property rights under the straightforward language in § 3703 implicates the Intellectual Property Clause. When Congress granted ownership of “competitive game[s]” under § 3703 to the Sports Leagues as a mechanism to deputize the Sports Leagues for purposes of PASPA enforcement, such conferral took the functional form of a patent, with ancillary characteristics common to a copyright, and bestowed the Sports Leagues with the right to exclude sports-wagering otherwise permissible under state law. PASPA’s property right conferral is within the purview of the Intellectual Property Clause and must comply with its express limitations.

Reading a conferral of property rights into PASPA is supported by the Sports Leagues’ own statements in this case. The Sports Leagues posit that they have a proprietary interest in “the degree to which others derive economic benefits from their own games.” Response Brief of Plaintiffs-Appellees at 18, *NCAA et al. v. Christie et al.*, (June 7, 2013) No. 13-1713, 13-1714, 13-1715. The Sports Leagues also contend that they “have an essential interest in how their games are perceived and the degree to which their sporting events become betting events” (emphasis removed). *Id.* at 13-14. The Sports Leagues further reference “legally protected interests of the organizations that produce the underlying games.” Plaintiffs’ Memorandum of Law

in Opposition to Defendants’ Motion to Dismiss the Complaint at 1, *NCAA et al. v. Christie et al.*, (Oct. 1, 2012) No. 3:12-cv-4947 (MAS) (LHG).

The DOJ supports the Sports Leagues’ legal position on this point. The DOJ claimed “PASPA does give the leagues a protected legal interest that has been invaded by New Jersey’s authorization of sports gambling...” Brief for Appellee United States at 17 *NCAA et al. v. Christie et al.*, (June 7, 2013) No. 13-1713, 13-1714, 13-1715. The DOJ explained its finding of a protected legal interest for the Sports Leagues by drawing an analogy to intellectual property law: “...the legal protection that PASPA accords to sports leagues is similar to the protections traditionally afforded in fields such as copyright and trademark law, where authors and companies are given the right not to have their creative works exploited by other parties.” *Id.* at 22, n. 7.

PASPA’s legislative history also coincides with the contemporary statements of the Sports Leagues and the DOJ in this case. PASPA was debated in the Senate by the Subcommittee on Patents, Copyrights, and Trademarks. The title of the statute itself is also revealing of PASPA’s intent and effect. PASPA stands for “Professional and Amateur Sports **Protection** Act” (emphasis added). PASPA protects select professional and amateur sports leagues from the perceived ills of regulated sports-wagering through the allocation of ownership interests to “competitive game[s]” in § 3703. Such protection manifests itself in the Sports Leagues being deputized to sue under PASPA for injunctive relief in the same way patent holders and copyright holders can file suit to protect their property interests.

In testimony provided to the Senate Subcommittee on Patents, Copyrights, and Trademarks on June 26, 1991, NBA commissioner David Stern provided his view on PASPA's intended protection and the overlap between sports-wagering and intellectual property in the context of PASPA: "Conducting a sports lottery or permitting sports gambling involves the use of professional sports leagues' games, scores, statistics and team logos, in order to take advantage of a particular league's popularity; such use violates, misappropriates, and infringes upon numerous league property rights." Testimony of David J. Stern, Subcommittee on Patents, Copyrights and Trademarks, *Prohibiting State-Sanctioned Sports Gambling*, Hearing, June 26, 1991, at 51.

The plain language of PASPA, especially when coupled with the 1991 Congressional testimony and the statements by the Sports Leagues and the DOJ in this case, implicates the Constitution's Intellectual Property Clause. Art. I, § 8, cl. 8 of the Constitution grants Congress the authority: "***To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.***" (emphasis added). The Sports Leagues did not author, invent, write, or discover the respective athletic events they are involved in. Others did. As such, PASPA § 3703's possessive "whose competitive game" language and Congress's award of protectable ownership rights over such games are contrary to the Intellectual Property Clause.

Congress has enacted patent and copyright laws pursuant to the Intellectual Property Clause. Patent

law protection is granted for useful, novel, and non-obvious inventions. 35 U.S.C. §101-103. Patents are granted following review by the U.S. Patent and Trademark Office (“USPTO”). If approved, a patent permits the holder to exclude others from claiming the invention for a period of usually twenty years. Patents operate as a duly authorized monopoly for a limited duration of time. The Sports Leagues did not obtain a formal patent from the USPTO in connection with individual sporting events. Congress simply granted a quasi-patent for sports-wagering purposes via § 3703 of PASPA.

Copyright law protects “original works of authorship fixed in any tangible medium of expression, now known or later developed.” 17 U.S.C. § 101. Copyright categories are specifically enumerated and include literary works, musical recordings, and movies. *Id.* at § 102. Sporting events are not included as discussed *infra*.

PASPA’s conferral of property rights to the Sports Leagues is functionally akin to a patent. The “whose competitive game” language in § 3703 of PASPA provides the holders of the *de facto* patent with the statutory authority to exclude others – in this case the State of New Jersey’s desire to offer regulated sports-wagering pursuant to a duly enacted state law. A right to exclude is exactly the type of property right conferred on the Sports Leagues by PASPA. Through the ownership interests granted in § 3703 of PASPA, the Sports Leagues are permitted to file suit and seek to exclude certain States from organizing sports-wagering activities otherwise permitted in the

jurisdiction. PASPA's remedy, an injunction, mirrors that afforded to patent holders.

Congress's conferral of ownership interests over athletic events to Sports Leagues functions as a monopoly and runs counter to Court precedent. The Court found: "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit...It is intended to motivate the creative activity of authors and inventors." *Sony v. Universal City Studios*, 464 U.S. 417 at 429 (1984). PASPA fails to meet this standard in two ways. First, PASPA's ownership privileges under § 3703 attach to only "a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation." Second, PASPA's purpose is wholly unrelated to the creative activity of authors and inventors.

With PASPA's grant of a proprietary right to the Sports Leagues operating as the functional equivalent of a patent, it is useful to gauge the scope of Congress's authority to grant patents. In *Graham v. John Deere*, the Court made clear:

Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must "promote the Progress of...useful Arts." This is the standard

expressed in the Constitution and it may not be ignored. 383 U.S. 1 at 6 (1966).

When juxtaposed with the Intellectual Property Clause's requirements, PASPA's grant of a patent-like property right to Sports Leagues fails on multiple counts. First, the power to exclude States from effectuating regulated sports-wagering programs is unrelated to, and in direct conflict with, the Intellectual Property Clause's requirement that such grants "promote the Progress of Science and useful Arts." According to two scholars, "[a] corollary principle [of the Intellectual Property Clause] demands that Congress initially direct exclusive grants to those who provide the public with the new creation. Monopolies are not rewards Congress may grant to favored special-interest groups." Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1164 (2000).

Second, PASPA's grant of property rights is perpetual, putting it at odds with the "limited Times" requirement of the Intellectual Property Clause. Third, as detailed in *National Basketball Association v. Motorola* discussed *infra*, the Sports Leagues do not qualify as "Authors" under the Intellectual Property Clause. 105 F.3d 841 (2d Cir. 1997). Fourth, athletic events do not constitute "Writings [or] Discoveries" under the Intellectual Property Clause given their spontaneous nature and accompanying uncertainty of outcome.

PASPA's grant of copyright-like power to the Sports Leagues is equally evident under § 3703's "whose

competitive game” language. The Sports Leagues’ complaint in this case makes clear that athletic contests are not scripted, implicating the “Writings” requirement of the Intellectual Property Clause and the “fixation” language in the Copyright Act of 1976. 17 U.S.C. § 101, *et seq.* In their initial complaint, the Sports Leagues argued that “the outcomes of collegiate and professional athletic contests must be determined, and must be perceived by the public as being determined, solely on the basis of honest athletic competition.” Complaint for Decl. and Inj. Relief, at 3 *NCAA et al. v. Christie et al.* No. 3:12-cv-4947 (MAS) (LHG) (Aug. 7, 2012). Unlike live musicals, theatrical plays, and professional wrestling, honestly competitive sports are unscripted, making them incompatible with copyright law’s constitutional and statutory requirements. Contrary to the games’ telecasts and broadcasts, which have clearly been found to be copyrightable content, the games *per se* have not been definitively deemed worthy of copyright protection (discussed *infra*). Additionally, the “whose competitive game” wording of § 3703 creates the suspicion of a *sui generis* Intellectual Property Clause violation by basing a property right granted by PASPA to a concept that has no owner.

PASPA’s conferral of property rights in § 3703 also highlights a conflict between the Commerce Clause and the Intellectual Property Clause. Indeed, a prominent scholar observed: “The overwhelming view among commentators is that the Intellectual Property Clause’s limits apply to all of Congress’s power and therefore that Congress may not look to other Article I, Section 8 powers in order to avoid those limits.” Thomas B. Nachbar, *Intellectual Property and Constitutional*

Norms, 104 COLUMBIA L. REV. 272, 274 (2004). The implications for the Intellectual Property Clause’s external limitations on PASPA are profound. Another scholar flags the issue generally as follows: “Since the late twentieth century, Congress has increasingly reached beyond the [Intellectual Property] Clause’s means to promote the [Intellectual Property] Clause’s ends, often asserting its expansive – and less limited – commerce and treaty powers.” Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61(7) DUKE L. J. 1329.

B. Disputes Over Property Rights in Underlying Athletic Events Have Resulted in a Circuit Split and an Intra-Circuit Split

It would be a *non sequitur* to grant property rights to private actors lacking a valid claim for a particular ownership interest. Prior to PASPA, professional and amateur sports leagues in the United States have never had a property interest in sporting events that attaches to, and in turn restricts, one’s right to offer otherwise permissible sports-wagering. However, the issue of whether such leagues hold a property interest in the underlying athletic contests generally (precisely what § 3703 of PASPA grants via its “whose competitive game” language) is unsettled law. Courts are divided. A review of relevant cases sheds light on how courts have viewed the same type of property right the Sports Leagues were granted under PASPA § 3703. The litany of cases below highlights the difficulty courts have faced in deciding the issue.

Subsequent to the passing of the Copyright Act of 1976, and well before PASPA’s adoption, in *National Football League, et al. v. Governor of Delaware*, 435 F.

Supp. 1372 (D. Del. 1977), the NFL and 28 teams filed suit seeking injunctive relief barring Delaware from conducting a lottery game based on professional football games involving NFL-affiliated teams. The league defined its product as being the total end result of its labor, including the public interest which it generated. Deciding on the league's assertion that Delaware misappropriated the product of the league's labor and the games' popularity, Judge Stapleton held:

“[P]laintiffs’ argument paints with too broad a brush... The only tangible product of plaintiffs’ labor, which defendants utilize in the Delaware Lottery, are [sic] the schedule of NFL games and the scores. These are obtained from public sources and are utilized only after plaintiffs have disseminated them at large and no longer have any expectation of generating revenue from further dissemination...” 435 F. Supp. 1372, 1377.

The district court of Delaware concluded that: (i) featuring NFL schedules and scores, and using the games’ popularity by the Delaware lottery did not constitute misappropriation of NFL property and (ii) even if the lottery scheme violated federal antigambling laws, the NFL lacked a private cause of action. With the passing of PASPA fifteen years later, the Sports Leagues were granted such a private cause of action via § 3703.

Six years before PASPA’s enactment, and two decades prior to a different panel of the same Circuit reaching a contrary conclusion, an Eighth Circuit decision in *National Football League v. McBee & Bruno’s, Inc.*, 792 F.2d 726 (8th Cir. 1986) recognized

a broad-scope property right in sports leagues' games. The case revolved around St. Louis restaurateurs, who used "clean satellite feeds" (stadium images received by a satellite dish without any identifying information) to broadcast local games otherwise blacked-out in the region. Agreeing with the district court, the Eighth Circuit held that "the game... constituted the work of authorship." 792 F.2d 726, 732. The Eighth Circuit was convinced by the plaintiffs, who claimed copyright over "the game, the game action [and] the noncommercial elements of the game." 792 F.2d 726, 732.

The same year, the Seventh Circuit decided *Baltimore Orioles, Inc. v. Major League Baseball Players Assn.*, 805 F.2d 663 (7th Cir. 1986). The Seventh Circuit considered whether players' performances contained the necessary "modicum of creativity" for copyrightability. 805 F.2d 663, 669 n. 7. The Seventh Circuit ultimately aligned with Congressional guidance during deliberations of the Copyright Act of 1976. H.R. REP. No. 94-1476 at 52 (1976). Specifically, competitive games' copyrightability was recognized as long as it pertained to the broadcast and recording of a game:

"[E]ven if the Players' performances were not sufficiently creative...the cameramen and director contribute creative labor to the telecasts. The work that is the subject of copyright is not merely the Players' performances, but rather the telecast of the Players' performances. The creative contribution of the cameramen and director

alone suffices for the telecasts to be copyrightable.” 805 F.2d 663, 669 n. 7.

After the passage of PASPA, federal courts continued grappling with pertinent questions regarding the scope of Sports Leagues’ property rights over underlying athletic events. Conceivably, the constitutionality of PASPA’s § 3703 property right acknowledgment and the Sports Leagues’ deputization under the statute, combined with PASPA’s *de facto* patent and copyright grants, would be espoused by courts. Namely, if federal courts agreed with PASPA’s conferral of property rights in the underlying games to the Sports Leagues, decisions would be reached accordingly. That, however, has not been the case.

The Second Circuit, in *Natl. Basketball Assn. v. Motorola, Inc., et al.*, 105 F.3d 841 (2d Cir. 1997), decided a dispute over time-sensitive data dissemination as follows:

“[T]he underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute ‘original works of authorship’ under 17 U.S.C. § 102(a)... [The] list does not include athletic events, and, although the list is concededly nonexclusive, such events are neither similar nor analogous to any of the listed categories.” *Motorola*, 105 F.3d 841, 846.

Conversely, in *Morris Communications Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004), the Eleventh Circuit held that the PGA Tour may preempt a media organization from disseminating time-sensitive information such as compilations of golf

scores. The factual scenario of this case pertained to purported proprietary data, which the PGA Tour selectively shared with media in the confines of its tournaments and wished to protect prior to online publication (on its own website). Interestingly, in the course of ruling in favor of the PGA Tour on antitrust grounds, the Eleventh Circuit acknowledged that “facts, such as golf scores, and compilations of facts are generally not a proper subject for copyright protection.” 364 F.3d 1288, 1292 n.6. Further, “[C]opyright law does not protect factual information, like golf scores.” *Id.* at 1298 n.15.

In *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, LP*, 505 F.3d 818 (8th Cir. 2007), the Eighth Circuit decided a case involving fantasy sports operators, in which using combinations of names and statistics for commercial purposes was deemed protected by the First Amendment. The court concluded: “[T]he information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a First Amendment right to use information that is available to everyone.” 505 F.3d 818, 823.

PASPA’s deputization of Sports Leagues and embedded property right[s] to “competitive game[s]” under § 3703 have not been uniformly accepted in various federal courts. The Second Circuit (*National Basketball Association v. Motorola, Inc., et al.*) and the Eleventh Circuit (*Morris Communications Corp. v. PGA Tour, Inc.*) are largely at odds. The Eighth Circuit (*National Football League v. McBee & Bruno’s, Inc.* and *C.B.C. Distribution & Mktg., Inc. v. Major League*

Baseball Advanced Media, LP) seemingly has an intra-circuit split. Notwithstanding the obvious First Amendment issues connected to the commodification of news from sporting events, the judicial divergence on this issue yields substantial doubt in regard to PASPA's constitutional underpinnings and compatibility with the Intellectual Property Clause.

II. The Conferral of Perpetual Property Rights to Favored States via PASPA's Grandfathering Clause Violates the Intellectual Property Clause

"Grandfathering" or "grandfather clauses" are defined as: "A statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect." *Black's Law Dictionary* at 560 (7th ed. 2000). The historical usage of grandfathering has been well documented, notably Article II, § 1, cl. 5 of the Constitution provides for the exemption of non-natural born citizens to be eligible for the Presidency, provided they were citizens at the time of adoption. The exemption provided under Article II would see a termination period extending no further than the death of the last person born prior to adoption. The Constitution further grandfathered President Truman from the limitations imposed on presidential term limits, pursuant to the XXII Amendment. *See* U.S. Const. amend. XXII, § 1. The grandfathering exemption contained in both instances is of limited and foreseeable duration. PASPA's grandfathering clause is of neither a limited nor foreseeable duration.

The PASPA exemptions provided for Nevada and the other favored States confer an intellectual property

right and monopoly for the continued operation of sports-wagering schemes in these states. The opening remarks of Senator Dennis DeConcini noted that the “intent of the legislation is not to interfere with existing law, operations or revenue streams.” See Senator Dennis DeConcini, Opening Statement to the Senate, Subcommittee on Patents, Copyrights and Trademarks, *Prohibiting State-Sanctioned Sports Gambling*, Hearing, June 26, 1991. In grandfathering the sports-wagering processes in the exempted states, Congress has granted a property right drawing the invocation of the Intellectual Property Clause. The Sports Leagues seemingly understood this too. In 2009, NBA commissioner David Stern stated “there’s a federal statute that gives [Nevada] a monopoly of types [on sports-wagering]. And we actually supported that statute back in [19]92.” See Ian Thomsen, Stern Open to Legalized Betting, Rule Changes, SportsIllustrated.com (December 11, 2009).

The Court addressed the interpretation of the Constitution’s “science and the useful Arts” provision in *Eldred v. Ashcroft*, 537 US 186 at 216 (2003) citing *Pennock v. Dialogue*, 27 U.S. 1 (1829). The Intellectual Property Clause was found to create the desirability of spreading useful and novel creations while providing the creator with protection. PASPA’s conferral of a property right does the opposite, providing protection for an activity Congress has deemed undesirable. Additionally, the Court has further elaborated that the Intellectual Property Clause does not require the government to incentivize new works. See *Golan v. Holder*, 132 S. Ct. 873 at 888 (2012). PASPA does not promote the creation of new works. Instead, PASPA imposes a prohibition on new forms of sports-wagering

in States not benefitting from PASPA's grandfathering provisions.

The "limited Times," provision of the Intellectual Property Clause has been held by the Court to be evolutionary. *See generally Eldred v. Ashcroft* 537 US 186 (2003). To date, there has been no interpretation that the "limited Times" provision allows for indefinite protection to a rights holder. PASPA's grandfathering provision provides an indefinite monopoly to Nevada and the other exempted states. The indefinite nature of the grandfathering provision is inconsistent with the "limited Times" provision of the Intellectual Property Clause. PASPA's grandfathering provisions were noted by the Court as deriving from "obscured congressional purposes," and lead to §3702 being "somewhat unclear." *See Greater New Orleans Broadcasting Ass'n., Inc. v. United States*, 527 US 173 at 179-180 (1999).

The Court addressed grandfathering in *Dukes v. City of New Orleans*, 420 U.S. 297 (1976). It was determined that a New Orleans municipal ordinance banning pushcart vendors from the French Quarter, except those who had done so continuously for eight consecutive years, did not violate the equal protection clause of the 14th Amendment. In *Dukes*, a grandfathered push cart vendor's right to operate was limited to that vendor's lifespan. The limited durational scope of the grandfathering provision was not addressed in a manner that would provide elucidation on the indefinite nature of PASPA's containment-based grandfathering provision; meaning that it seeks to contain and prevent the spread of an undesirable activity.

In *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981), the Court addressed the constitutionality of a grandfathering provision contained in a Minnesota state statute banning the sale of dairy products in certain types of containers, but exempting others, including paperboard containers. It was held that the Minnesota statute did not violate the 14th Amendment. The issue in this case can be distinguished from *Clover Leaf Creamery*, as the purpose of the Minnesota legislation was to specifically eliminate the use of certain non-conforming plastic containers, not to eliminate all non-conforming containers. PASPA distinctly exempts Nevada and the other favored States from its prohibition on State-sponsored sports-wagering schemes.

The Third Circuit highlighted both cases, stating “[Christie, et al.] 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...” See *NCAA, et al. v. Governor of the State of New Jersey, et al.*, 730 F.3d at 239-240 (3d Cir. 2013). While the Third Circuit noted that the Court did indeed uphold both ordinances containing grandfather clauses, PASPA’s exemptions are distinguishable. The *Dukes* grandfathering provision was foreseeably terminable upon the death of a New Orleans pushcart vendor. PASPA’s grandfathering clause is perpetual. Similarly, the ordinance in *Clover Leaf Creamery* can be distinguished given that the grandfathering clause banned one type of dairy container, but not another. This would be akin to PASPA banning one type of sports wager, but not another. PASPA does no such thing, as non-

grandfathered States are barred from offering any type of sports-wagering.

The Third Circuit's decision and interpretation of the grandfathering clause in PASPA was at least partially predicated upon the assumption that "PASPA's legislative history is clear as the purpose behind its own exemptions..." *Id.* at 240 n. 18. The Third Circuit is in error on this point, as its conclusion directly contradicts the Court's decision in *Greater New Orleans Broadcasting Association, Inc. et al.*, 527 U.S. 173 (1999). In *Greater New Orleans*, the Court found that PASPA "includes a variety of exemptions, some with **obscured** congressional purposes" (emphasis added). *Id.* at 179. The Court further found that PASPA's "exemptions make the scope of § 3702's advertising prohibition somewhat **unclear**" (emphasis added). *Id.* at 180.

In addition to creating a property right for Nevada and the other favored states in violation of the Intellectual Property Clause, PASPA has created a perpetual grandfathering clause for containment-based legislation. The Intellectual Property Clause requires protections be enacted for "limited Times," and even legislation not covered by it with containment-based provisions has historically had foreseeable termination points. Not all grandfathering exemptions are created equal and thereby, even if the conclusion that grandfathering need not be for a definitive time horizon for neutral or ameliorative exemptions, there is a legislative implication that containment-based exemptions such as PASPA need to include some foreseeable termination point.

CONCLUSION

In 1991, the DOJ found it “particularly troubling” that the Sports Leagues were deputized to enforce PASPA. Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991). We agree. In 1999, the Court found some of PASPA’s various exemptions to derive from “obscured congressional purposes.” *Greater New Orleans Broadcasting Ass’n.*, 527 U.S. 173 at 179 (1999). We agree. In 2013, the DOJ analogized Congress’s grant of property rights under PASPA to those of intellectual property. Brief for Appellee United States at 17 *NCAA, et al. v. Christie, et al.*, (June 7, 2013) No. 13-1713, 13-1714, 13-1715. We agree. What the *amici curiae* offer here is an alternative to Petitioners’ anti-commandeering and equal sovereignty arguments. Our position is one narrowly focused on PASPA’s conferral of property rights and the implications for such conferral vis-à-vis the Constitution’s Intellectual Property Clause.

The Court should grant the petitions for writ of certiorari.

Respectfully submitted,

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