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THE STAKES ARE HIGH: THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT IS CONSTITUTIONALLY VULNERABLE AND REFLECTS BAD POLICY

*Stephen Weinstein**

I. INTRODUCTION

Sports gambling is ubiquitous, despite the fact that gambling is *illegal* virtually everywhere. In 2015 alone, \$4.2 billion was legally wagered through Nevada's sportsbooks.¹ Although this number may seem high, it pales in comparison to the conservative estimate of \$150 billion illegally wagered on sports in the United States ("U.S.") that year.² Sports wagering was legal in the U.S. until Congress passed the Professional and Amateur Sports Protection Act of 1992 ("PASPA"), prohibiting state-sanctioned sports wagering in almost all States and driving the popularity of sports wagering to the black market.³

Professional and amateur sports have long been considered America's pastime, and they continue to increase in popularity every

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¹ Dustin Gouker, *Nevada Sportsbooks Took Record \$4.2 Billion in Wagers in 2015*, LEGAL SPORTS REPORT (Feb. 4, 2016), <http://www.legalsportsreport.com/7902/nevada-record-sports-betting-2015/>. Nevada is the only state allowed to offer single game wagering.

² Memorandum from Am. Gaming Ass'n to President-elect Donald J. Trump Transition Team (Dec. 2016), https://www.americangaming.org/sites/default/files/FINAL_AGAMemo_TrumpTransitionTeam.pdf.

³ 28 U.S.C.A. § 3702 (1992); Am. Gaming Ass'n, *supra* note 2. Delaware, Montana, Oregon, and Nevada are grandfathered in under a PASPA exception. *See* 28 U.S.C.A. § 3704(a) (1992).

year.⁴ Research conducted in 2015 revealed that 67% of U.S. adults follow at least one sport.⁵ However, professional football is America's favorite, evidenced by the fact that National Football League ("NFL") games garnered the top 43 of 50 spots for viewership out of all televised sporting events in 2015.⁶ The American Gaming Association estimated that of the \$90 billion wagered on NFL and college football games during the 2016 season, \$88 billion (98%) was wagered *illegally*.⁷ Although these estimates are not precise, due to obvious legality concerns, it is likely that the increased popularity of watching sports correlates with the growth in illegal sports wagering. In addition, the prohibition against sports wagering through PASPA drives a thriving gambling black market—the revenue of which is used to fund “criminal enterprises involved in human trafficking, racketeering, money laundering, extortion, and fraud.”⁸ There is clearly a need to regulate the sports wagering market.

Part II of this Note provides a background of the applicable constitutional laws that led to the enactment of PASPA, a description of its legislative history, and its resulting enforcement. Part III focuses on a series of cases decided by the U.S. Court of Appeals for the Third Circuit called *Christie I*,⁹ *Christie II*,¹⁰ and *Christie III*,¹¹ involving the constitutionality of PASPA. Part IV discusses the constitutionality of PASPA and concludes that PASPA is unconstitutional because it commandeers the States in violation of the Tenth Amendment of the U.S. Constitution.

Next, Part V discusses the policy concerns surrounding sports wagering and why it should be legal. This part describes the self-

⁴ *Pro Football is Still America's Favorite Sports*, THE HARRIS POLL (Jan. 26, 2016), http://www.theharrispoll.com/sports/Americas_Fav_Sport_2016.html.

⁵ *Id.*

⁶ Paulsen, *2015 Ratings Wrap: NFL Dominates Year of Milestones*, SPORTS MEDIA WATCH (Jan. 3, 2016), <http://www.sportsmediawatch.com/2016/01/most-watched-sporting-events-2015-nfl-college-football-basketball-nba-womens-world-cup-viewership/>.

⁷ Press Release, Am. Gaming Ass'n, UK Experts: Thriving Illegal Market and Lack of Regulation Create Atmosphere Ripe for Manipulation (Sept. 27, 2016), <https://www.americangaming.org/newsroom/press-releases/uk-experts-thriving-illegal-market-and-lack-regulation-create-atmosphere>.

⁸ Am. Gaming Ass'n, *supra* note 2.

⁹ Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013).

¹⁰ Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 799 F.3d 259 (3d Cir. 2015), *reh'g en banc granted, opinion vacated* (Oct. 14, 2015), *on reh'g en banc*, 832 F.3d 389 (3d Cir. 2016).

¹¹ Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 832 F.3d 389 (3d Cir. 2016).

defeating purpose of PASPA, the legality of fantasy sports, the public's generally accepting view of gambling, the effect of PASPA on the black market, and the impact that technological advances have had on sports wagering. Finally, Part VI concludes that PASPA should be repealed because it is unconstitutional and reflects outdated policy.

II. BACKGROUND

A. The United States Constitution and Federalism

After the American Revolution, the Founders, wanting to prevent tyranny associated with the concentration of power in a national government, established federalism—the division of power between the federal and state governments—as the backbone of the U.S.¹² Congress governs according to its enumerated powers, which is intended to limit the federal government's powers. Congress derives its enumerated powers specifically from Article 1, Section 8 of the U.S. Constitution, which includes, *inter alia*, the “Power to lay and collect Taxes;”¹³ “raise and support Armies;”¹⁴ “establish Post Offices and post Roads;”¹⁵ “borrow Money on the credit of the United States;”¹⁶ and “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁷ While Congress is given great deference in the enforcement of its laws under the necessary and proper clause,¹⁸ the U.S. Supreme Court's role is to determine the constitutionality of these laws, thereby putting a great check on Congress's power.¹⁹

One of Congress's most important enumerated powers is its power to regulate commerce²⁰ through three broad categories: 1) the “channels of interstate commerce; 2) the instrumentalities, or persons or things, in interstate commerce; and 3) activities that substantially

¹² U.S. CONST. art. I, § 8; U.S. CONST. amend. X; *The Founders and Federalism*, U.S. HISTORY, <http://www.ushistory.org/gov/3a.asp> (last visited Apr. 1, 2017).

¹³ U.S. CONST. art. I, § 8, cl. 1.

¹⁴ U.S. CONST. art. I, § 8, cl. 12.

¹⁵ U.S. CONST. art. I, § 8, cl. 7.

¹⁶ U.S. CONST. art. I, § 8, cl. 2.

¹⁷ U.S. CONST. art. I, § 8, cl. 3.

¹⁸ *McCulloch v. Maryland*, 17 U.S. 316, 324-25 (1819).

¹⁹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

²⁰ U.S. CONST. art. I, § 8, cl. 3.

affect interstate commerce.”²¹ Channels of interstate commerce are the avenues of travel which include, but are not limited to, railroads, highways, waterways, harbors, airports, and bridges,²² while the instrumentalities are the vessels used for interstate commerce, such as airplanes, boats, and cars.²³ However, the third category—activities that substantially affect interstate commerce—is most important and will be the focus of this Note because it provides the broadest authority for Congress to exercise its Commerce Clause power.²⁴ Specifically, it allows Congress to regulate purely *local* activity if that activity is “economic” as related to the production, distribution, and consumption of commodities and if that activity, when aggregated, has a substantial effect on interstate commerce.²⁵ Because Congress is given great deference when regulating interstate commerce, “court[s] 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.”²⁶

As provided in the Tenth Amendment, the States have presumed sovereign power over all that is not prohibited by the Constitution and not delegated to Congress.²⁷ However, under the Supremacy Clause, whenever an inconsistency between a federal and state law exists, the federal law reigns supreme, so long as that federal law is constitutional.²⁸ As such, the Tenth Amendment is an embodiment of federalism, as it represents dual sovereignty between the States and federal government.²⁹ Where Congress does not have the power to regulate, the States do.³⁰ This general governing power is known as the States’ “police power,” allowing the States to establish

²¹ Kelley v. United States, 69 F.3d 1503, 1507 (10th Cir. 1995) (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995)).

²² 29 C.F.R. § 776.29 (2017).

²³ *Id.*

²⁴ Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003).

²⁵ Wickard v. Filburn, 317 U.S. 111, 125, 128 (1942).

²⁶ Hodel v. Indiana, 452 U.S. 314, 323-24 (1981).

²⁷ U.S. CONST. amend. X.

²⁸ U.S. CONST. art. IV, § 2 (“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 . . .”).

²⁹ Alden v. Maine, 527 U.S. 706, 713-14 (1999).

³⁰ New York v. United States, 505 U.S. 144, 156 (1992).

and enforce laws protecting the welfare, safety, and health of the public.³¹

The Tenth Amendment has been interpreted to prohibit Congress from commandeering the States.³² Even though “Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts.”³³ To clarify, Congress cannot “regulate state government’s regulation of interstate commerce.”³⁴ An example of the anti-commandeering doctrine is exemplified in the Supreme Court’s decision in *New York v. United States*.³⁵ There, a federal statute required States to either provide for radioactive waste disposal or take title to waste made within the State’s borders.³⁶ Otherwise, the States would incur monetary damages.³⁷ The Court struck down this statute, holding that while Congress has the authority to regulate interstate commerce directly under the Commerce Clause, it did not have the authority to control state governments’ regulation of interstate commerce of radioactive waste disposal.³⁸

Congress unconstitutionally commandeers state governments if it “impos[es] targeted, affirmative, coercive duties upon state legislat[ive] or executive officials.”³⁹ In *Printz v. United States*,⁴⁰ the Supreme Court struck down the provisions of the Brady Act, a federal statute, that commanded state and local authorities to perform background checks on individuals seeking to purchase guns.⁴¹ The Court held that the “Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers,”⁴² reasoning that the States cannot be forced to

³¹ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012).

³² Printz v. United States, 521 U.S. 898, 925 (1997).

³³ *New York*, 505 U.S. at 166.

³⁴ *Id.*

³⁵ 505 U.S. 144.

³⁶ *Id.* at 144.

³⁷ *Id.*

³⁸ *Id.* at 166.

³⁹ Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 158, 158 (2001).

⁴⁰ 521 U.S. 898 (1997).

⁴¹ *Id.* at 935.

⁴² *Id.*

“absorb the financial burden of implementing a federal regulatory program”⁴³ and take the blame for possible program defects.⁴⁴

In contrast, the Supreme Court held in *Reno v. Condon*⁴⁵ that the Driver’s Privacy Protection Act of 1994 (“DPPA”), “which establish[ed] a regulatory scheme that restrict[ed] the States’ ability to disclose a driver’s personal information without the driver’s consent,” did not violate the Tenth Amendment.⁴⁶ Even though the DPPA required time and effort on the part of state employees to learn and execute the system,⁴⁷ the Court distinguished the DPPA from the federal statutes in *New York* and *Printz* because the DPPA did “not require the States in their sovereign capacity 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.”⁴⁸ In other words, the DPPA did not require or influence States’ regulation of their own citizens, as it instead merely regulated States as owners of databases.⁴⁹ The Court regarded the DPPA as a general applicable law because it subjected States to the same federal regulation as private parties.⁵⁰

In sum, Congress cannot commandeer a State’s legislature or control its regulation of private citizens.⁵¹ If Congress wants to pass a law that governs the manner of private activities, it must provide the States with a *choice* of self-enforcing the federal law or allowing the federal government to enforce it instead.⁵² Because Congress cannot dodge accountability for federal policy, it cannot force state action to implement a federal policy according to Congress’s instructions.⁵³

⁴³ *Id.* at 930.

⁴⁴ *Id.*

⁴⁵ 528 U.S. 141 (2000).

⁴⁶ *Id.* at 141-42.

⁴⁷ *Id.* at 150.

⁴⁸ *Id.* at 151.

⁴⁹ *Id.*

⁵⁰ *Reno*, 528 U.S. at 151.

⁵¹ *Id.*; *New York v. United States*, 505 U.S. 144, 166 (1992).

⁵² *New York*, 505 U.S. at 145.

⁵³ *Id.* at 145-46.

B. PASPA

PASPA prohibits sports wagering conducted by, or authorized under the law of, any State or other governmental entity.⁵⁴ Specifically, PASPA states:

It shall be unlawful for [either] a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or 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 ... 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.⁵⁵

Additionally, it authorizes the U.S. Department of Justice (“DOJ”) and any professional or amateur sports organization to commence a civil action for illegal sports wagering,⁵⁶ allowing them to enforce restrictions via injunctive relief against the States.⁵⁷

Congress passed PASPA to: 1) stop the spread of sports wagering; 2) maintain the integrity of America’s national pastime of amateur and professional sports; and 3) reduce the promotion of sports wagering among America’s youth.⁵⁸ The Committee of the Judiciary, when voting in favor of enacting PASPA, opined that the “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.”⁵⁹ The Committee viewed sports wagering as a national problem that needed to be stopped before it infected every State.⁶⁰

However, Congress undermined PASPA’s purpose when it carved out exceptions for several States to either continue or enact

⁵⁴ 28 U.S.C.A. § 3702 (1992).

⁵⁵ *Id.*

⁵⁶ 28 U.S.C.A. § 3703 (1992).

⁵⁷ *Id.*

⁵⁸ S. REP. NO. 102-248, at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3555.

⁵⁹ *Id.*

⁶⁰ *Id.*

legislation allowing sports wagering.⁶¹ Specifically, Congress allowed Delaware, Montana, Oregon, and Nevada to retain their respective legislation that had already legalized a form of sports wagering.⁶² Additionally, Congress carved out a special exception for New Jersey,⁶³ allowing it to authorize sports wagering within one year of PASPA's enactment.⁶⁴ New Jersey was granted this exception to provide its voters the opportunity to decide if they wanted to legalize sports wagering in Atlantic City casinos.⁶⁵ However, the exception provided that if New Jersey did not pass a statute authorizing sports wagering within that one-year period, sports wagering in New Jersey would be completely prohibited.⁶⁶ New Jersey did not seize the opportunity to pass its own statute, and thus the window to legally enact sports wagering in New Jersey closed.⁶⁷

During the pre-enactment hearings, PASPA did not go unchallenged. Iowa Senator Chuck Grassley and the DOJ were the biggest opponents of PASPA,⁶⁸ arguing that the legislation: 1) promoted discrimination among the States via the "grandfather" clause; 2) lacked justification; and 3) fundamentally restricted the right of States to raise revenue to fund critical State programs.⁶⁹ Specifically, for the first point, they alleged that PASPA's grandfather provision discriminated against forty-six of the fifty States by allowing only Delaware, Montana, Oregon, and Nevada to continue to legally operate sports wagering, thus creating a monopoly on the industry.⁷⁰

⁶¹ 28 U.S.C.A. § 3704(a) (1992).

⁶² *Id.*

⁶³ Atlantic City, New Jersey was the only location that could meet the exception provided in 28 U.S.C.A. § 3704(a)(3). See Christopher L. Soriano, *The Efforts to Legalize Sports Betting in New Jersey: A History*, N.J. LAWYER MAGAZINE (Apr. 2013), http://www.duanemorris.com/articles/static/soriano_njlawyer_0413.pdf.

⁶⁴ 28 U.S.C.A. § 3704(a)(3) (1992).

⁶⁵ 138 Cong. Rec. H11756-02, H11757 (1992). New Jersey was provided this special exception based on its extensive role in the gaming industry.

⁶⁶ 28 U.S.C.A. § 3704(a)(3) (1992).

⁶⁷ The New Jersey Senate supported a referendum to amend the state constitution to permit the Legislature to authorize sports betting, but strong opposition by New Jersey Senator Bill Bradley, PASPA's sponsor, resulted in the vote never taking place and New Jersey's grace period expired. Soriano. *Supra* note 63; Joseph F. Sullivan, *Gambling Debate Rages Anew Over Sports*, N.Y. TIMES (Nov. 20, 1991), <http://www.nytimes.com/1991/11/20/nyregion/gambling-debate-rages-anew-over-sports.html>.

⁶⁸ S. REP. NO. 102-248, at 12 (1991), as reprinted in 1992 U.S.C.C.A.N. 3553, 3562.

⁶⁹ *Id.*

⁷⁰ *Id.* at 12-13. The Senate hearing did not refer to Montana as an exempt state because Montana passed its law pertaining to sports wagering after this hearing.

For the second point, they argued that the legislation was without merit because the grandfather clause defeated the very intent and purpose behind enacting PASPA.⁷¹ Although PASPA was enacted to prohibit sports wagering because it was seen as “evil” and a threat to America’s youth and to the integrity of sporting events, the legislation did not ban sports wagering in all States but instead merely limited its applicability.⁷² For the third point, the DOJ noted that determinations of how to raise revenue have typically been left to the States.⁷³ The DOJ was concerned with federalism issues if PASPA was read as anything beyond a clarification of current federal law.⁷⁴ This point led to the recent litigation challenging the constitutionality of PASPA.

III. LEGALITY OF NEW JERSEY’S LAWS UNDER PASPA AND THE CONSTITUTIONALITY OF PASPA

Facing a substantial decline in casino and racetrack revenue, the New Jersey legislature held public hearings in 2010 to determine whether it should amend its Constitution to legalize sports wagering.⁷⁵ The New Jersey Senate State Government, Wagering, Tourism, & Historic Preservation Committee then approved the amendment by a vote of 4-0, with one abstention.⁷⁶ Following another public hearing, the New Jersey Legislature approved the amendment by a supermajority,⁷⁷ and an official ballot was conducted among New Jersey citizens in which 64% voted in favor of the amendment.⁷⁸ In 2011, as a result of this resounding support, the New Jersey Constitution was amended to allow the Legislature to “authorize by

⁷¹ *Id.* at 13-16.

⁷² 28 U.S.C.A. § 3704 (1992).

⁷³ S. REP. NO. 102-248, at 13.

⁷⁴ *Id.*

⁷⁵ Brief for Appellants Christopher J. Christie, David L. Rebeck, and Frank Zanzuccki at 1, *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey* (No. 13-1715), 2013 WL 1873966, at *1; *Public Hearing on N.J. Sports Betting Set for Atlantic City*, GAMBLING911 (Mar. 31, 2010), <http://www.gambling911.com/gambling-news/public-hearing-nj-sports-betting-set-atlantic-city-033110.html>.

⁷⁶ *Public Hearing on N.J. Sports Betting Set for Atlantic City*, *supra* note 75.

⁷⁷ *New Jersey Sports Betting Amendment, Public Question 1 (2011)*, BALLOTPEDIA, [https://ballotpedia.org/New_Jersey_Sports_Betting_Amendment_Public_Question_1_\(2011\)](https://ballotpedia.org/New_Jersey_Sports_Betting_Amendment_Public_Question_1_(2011)) (last visited Apr. 2, 2017).

⁷⁸ New Jersey County Vote Results for Sports Betting Amendment, ASSOCIATED PRESS (Nov. 9, 2011), http://hosted.ap.org/dynamic/files/elections/2011/by_county/NJ_Page_1108.html?SITE=AP&SECTION=POLITICS.

law wagering . . . on the results of any professional, college, or amateur sport or athletic event”⁷⁹ but the constitutional provision was narrowly tailored to allow sports wagering only at Atlantic City’s casinos and sports gambling houses, and at racetracks within the State of New Jersey.⁸⁰

Thereafter, in 2012, the New Jersey Legislature enacted the “Sports Wagering Law” pursuant to the new provision in New Jersey’s Constitution.⁸¹ This law provided the New Jersey Legislature with the authority to only license sports gambling and sports pools in Atlantic City’s casinos and racetracks within New Jersey.⁸² Sports wagering remained prohibited in New Jersey except to the extent that a casino or racetrack was authorized by the State.⁸³ Additionally, New Jersey passed substantive regulations to actively and closely monitor all organizations that were approved for sports wagering under this law.⁸⁴

A. 2012 Law: New Jersey District Court

In August 2012, the National Basketball Association (“NBA”), Major League Baseball, the National Collegiate Athletic Association, the National Football League (“NFL”), and the National Hockey League (“NHL”) (collectively “the Leagues”) exercised their right under PASPA and sued New Jersey Governor Chris Christie, New Jersey’s Racing Commissioner, and New Jersey’s Director of Gaming Enforcement (collectively, “New Jersey”) in the U.S. District Court of the District of New Jersey.⁸⁵ Specifically, they requested an injunction, alleging that New Jersey’s new statute violated PASPA.⁸⁶

⁷⁹ N.J. CONST. art. IV, § 7, ¶ 2(D), (F); Brief for Appellants Christopher J. Christie, David L. Rebeck, and Frank Zanzuccki at 13, *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey* (No. 13-1715), 2013 WL 1873966, at *13.

⁸⁰ N.J. CONST. art. IV, § 7, ¶ 2(D), (F). There are some exceptions. No wager can be placed on college games or athletic events that take place in New Jersey or on any game in which a New Jersey college team participates. Wagering is limited to individuals who are 21 years or older. *Id.*

⁸¹ See N.J. STAT. ANN. §§ 5:12A-1 to 5:12A-6 (2012), *invalidated* by *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See generally N.J. ADMIN. CODE § 13:69N (2012).

⁸⁵ *Nat’l Collegiate Athletic Ass’n v. Christie*, 926 F. Supp. 2d 551, 553 (D.N.J.), *aff’d sub nom.* *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013).

⁸⁶ *Id.*

Although the DOJ had initially opposed PASPA,⁸⁷ as the first case challenging PASPA's constitutionality, the DOJ intervened as a plaintiff pursuant to 28 U.S.C. § 2403 in January 2013.⁸⁸ The Plaintiffs then moved for summary judgment, advancing their position that PASPA is a "permissible exercise of Congress's power pursuant to the Commerce Clause and the Necessary and Proper Clause."⁸⁹ They argued that Congress has the authority under the Commerce Clause to regulate wagering because wagering is an activity that has a substantial effect on interstate commerce.⁹⁰ As a result, they reasoned that New Jersey's Sports Wagering Law should be struck down as a violation of PASPA.⁹¹ In opposition, New Jersey argued that PASPA was unconstitutional.⁹² Specifically, it argued that PASPA violated: 1) the Commerce Clause and 2) the Tenth Amendment's limitations on Congress's powers.⁹³

The district court ultimately concluded that PASPA was a proper exercise of Congress's commerce power because "Congress had a rational basis to conclude that legalized sports betting would impact interstate commerce."⁹⁴ Furthermore, the court concluded that PASPA did not violate the Tenth Amendment because it did not force the States to engage in affirmative activity.⁹⁵ Specifically, the court stated that "[n]o action on the part of the States is required in order for PASPA to achieve its ends."⁹⁶ Therefore, the court granted summary judgment in favor of the Plaintiffs and permanently enjoined New Jersey from enacting the Sports Wagering Law.⁹⁷ New Jersey subsequently appealed.⁹⁸

⁸⁷ See *supra* notes 69-75 and accompanying text.

⁸⁸ *Nat'l Collegiate Athletic Ass'n*, 926 F. Supp. 2d at 553-54.

⁸⁹ *Id.* at 558.

⁹⁰ Brief in Support of Plaintiff's Motion for Summary Judgment, *Nat'l Collegiate Athletic Ass'n v. Christie* (No. 12-cv-04947), 2012 WL 3964728 (D.N.J. Dec. 21, 2012).

⁹¹ *Nat'l Collegiate Athletic Ass'n*, 926 F. Supp. 2d at 554.

⁹² *Id.* at 557.

⁹³ *Id.* New Jersey also argued that PASPA violated the Due Process Clause and Equal Protection Clause. The court concluded Congress had a rational basis to enact PASPA, and as such ruled against New Jersey's Due Process Clause and Equal Protection Clause claims. *Id.* at 576.

⁹⁴ *Id.* at 560.

⁹⁵ *Nat'l Collegiate Athletic Ass'n*, 926 F. Supp. 2d at 570-72.

⁹⁶ *Id.* at 572 (emphasis omitted).

⁹⁷ *Id.* at 579.

⁹⁸ *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 217 (3d Cir. 2013).

B. *Christie I*

On appeal, the U.S. Court of Appeals for the Third Circuit, in what is referred to as *Christie I*, affirmed the lower court's decision.⁹⁹ Here, New Jersey did not challenge Congress's ability to directly regulate sports wagering under the Commerce Clause but instead argued that "PASPA's operation over the Sports Wagering Law violate[d] the anti-commandeering principle" because it prevented States from repealing an existing law.¹⁰⁰

The *Christie I* court began by analyzing the Commerce Clause, which grants Congress the ability to "regulate an activity that 'substantially affects interstate commerce' if it 'arise[s] out of or [is] connected with a commercial transaction.'"¹⁰¹ The court first determined that wagering—the "engaging in a game for money, property, checks, or any representative of value"¹⁰²—and national sports operated by for-profit leagues¹⁰³ are economic activities.¹⁰⁴ Next, the court reasoned that professional and amateur sports events substantially affect interstate commerce because thousands of sports teams and clubs operate across the U.S.¹⁰⁵ Because wagering follows sporting events, wagering also substantially affects interstate commerce.¹⁰⁶ Therefore, as PASPA seeks to limit both wagering and its effect on national sports, the court concluded that these are "quintessentially economic" activities that have a substantial effect on interstate commerce, and thus Congress had a rational basis for determining that sports wagering affects interstate commerce.¹⁰⁷

In addressing the constitutionality of PASPA under the anti-commandeering doctrine, the court in *Christie I* held that PASPA was constitutional because it merely prohibits "the issuance of gambling licenses or the affirmative authorization by law of gambling schemes"¹⁰⁸ and, as such, does not commandeer the States at all.¹⁰⁹

⁹⁹ *Id.* at 241.

¹⁰⁰ *Id.* at 227, 232.

¹⁰¹ *Id.* at 224 (quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995)).

¹⁰² *Id.* at 225 (internal citation omitted).

¹⁰³ *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 225.

¹⁰⁴ *Id.* at 224-25.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 225.

¹⁰⁸ *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 232 (internal citation omitted).

¹⁰⁹ *Id.*

Specifically, the court reasoned that when “Congress passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the [S]tates what to do, it is *barring them* from something they want to do.”¹¹⁰ Rather than affirmatively requiring or coercing the States to pass laws prohibiting sports wagering, Congress merely *invalidated* state laws that were contrary to PASPA.¹¹¹

To distinguish PASPA from the laws struck down in *New York*¹¹² and *Printz*,¹¹³ the court relied, in part, on *Reno v. Condon*, which, as stated above,¹¹⁴ upheld the DPPA because it did not require the States to enact laws or regulations or control the manner in which States regulate private citizens.¹¹⁵ The court also relied on the Tenth Circuit’s decision in *Kelley v. United States*,¹¹⁶ which upheld the constitutionality of an intrastate motor carrier statute because it only preempted state law and “did not ‘compel[] the [S]tates to . . . enact[] or administer[] a federal regulatory program.’”¹¹⁷ Additionally, the court relied on the U.S. District Court for the Eastern District of California’s decision in *California Dump Truck Owners Ass’n v. Davis*,¹¹⁸ which upheld the constitutionality of a Federal Aviation Administration Authorization Act provision because it told the States what not to do and thus did not command the States to affirmatively act.¹¹⁹ Based on these three cases, the court in *Christie I* held that PASPA did not commandeer New Jersey’s legislative process because “[a]ll that is prohibited is the issuance of gambling ‘license[s]’ or the affirmative ‘authoriz[ation] by law’ of gambling schemes.”¹²⁰ The court noted that there is a stark difference between having no law in place to govern sports wagering and enacting a law that authorizes sports wagering.¹²¹ If there was no difference between the two, PASPA could be construed as commandeering a State’s legislature by

¹¹⁰ *Id.* at 230 (emphasis added).

¹¹¹ *Id.* (emphasis added).

¹¹² 505 U.S. 144 (1992).

¹¹³ 521 U.S. 898 (1997).

¹¹⁴ See *supra* notes 45-50 and accompanying text.

¹¹⁵ *Nat’l Collegiate Athletic Ass’n*, 730 F.3d at 228-29.

¹¹⁶ 69 F.3d 1503 (10th Cir. 1995).

¹¹⁷ *Nat’l Collegiate Athletic Ass’n*, 730 F.3d at 230 (quoting *Kelley*, 69 F.3d at 1510).

¹¹⁸ 172 F. Supp. 2d 1298 (E.D. Cal. 2001) (challenging the applicability of a safety regulation exception in the FAAA Act as it applied to local municipalities).

¹¹⁹ *Id.* at 1304.

¹²⁰ *Nat’l Collegiate Athletic Ass’n*, 730 F.3d at 232.

¹²¹ *Id.*

forcing it to enact a law prohibiting sports wagering.¹²² As a result, the court rejected New Jersey's arguments that PASPA was unconstitutional for violating the anti-commandeering doctrine under the Tenth Amendment.¹²³

Additionally, the court disagreed with New Jersey's argument that a repeal of New Jersey's previous prohibition on sports wagering would equate to authorizing the activity.¹²⁴ The court stated that PASPA allows States to repeal laws prohibiting sports in their entirety because "having no law in place governing sports wagering is [not] the same as authorizing it by law"¹²⁵ and the "lack of an affirmative prohibition . . . does not mean [the activity] is *affirmatively* authorized by law."¹²⁶ Therefore, PASPA leaves the States with two choices: 1) repeal their sports wagering ban; or 2) keep a complete ban on sports wagering.¹²⁷ In reaching this decision, the court in *Christie I* stated that "it is left up to each [S]tate 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."¹²⁸ New Jersey then appealed to the Supreme Court, which denied certiorari.¹²⁹

C. 2014 Law: District Court and *Christie II*

In response to *Christie I*, New Jersey enacted a law in 2014 that repealed all sports wagering regulations, penalties, and prohibitions as applied to casinos and racetracks.¹³⁰ This law, like the 2012 Sports Wagering Law, was designed to allow sports wagering at casinos and racetracks. While the 2012 law permitted New Jersey to regulate and authorize which casinos and racetracks were permitted to offer sports wagering, the 2014 law removed all government involvement at these locations and placed a ban on *all* sports wagering *except* as applied to

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 232.

¹²⁶ *Id.*

¹²⁷ *Id.* at 233.

¹²⁸ *Id.*

¹²⁹ *Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014).

¹³⁰ N.J. STAT. ANN. § 5:12A-7 (2014) (repealed N.J. STAT. ANN. §§ 5:12A-1 to 5:12A-6), *invalidated* by *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 832 F.3d 389, 392 (3d Cir. 2016).

casinos or racetracks.¹³¹ In other words, the 2014 law affirmatively prohibited sports wagering at all locations and businesses except at casinos and racetracks.¹³² New Jersey relied on *Christie I*'s holding that the "lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law"¹³³ and thus believed this 2014 partial repeal law was not in violation of PASPA because it did not explicitly authorize sports gambling at casinos and racetracks.¹³⁴ The Leagues challenged this partial repeal by filing suit against New Jersey again in district court.¹³⁵ The district court granted summary judgment in favor of the Leagues and issued a permanent injunction against New Jersey after concluding that the 2014 partial repeal was preempted by PASPA.¹³⁶ The district court interpreted *Christie I* as holding that PASPA offers only two choices: 1) maintain prohibitions on sports wagering; or 2) *completely* repeal the prohibitions.¹³⁷ It thereby held that a partial repeal results in state-sanctioned sports wagering in violation of PASPA.¹³⁸

New Jersey subsequently appealed to the Third Circuit, arguing that its partial repeal was specifically permitted by *Christie I*.¹³⁹ New Jersey pointed out that *Christie I* reasoned that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law."¹⁴⁰ Because the 2014 repeal did not explicitly authorize sports wagering at casinos and racetracks but instead simply removed the regulations governing these locations, New Jersey alleged that this law was not an affirmative authorization of sports wagering

¹³¹ *Id.* (emphasis added). Additionally, sports wagering was prohibited by anyone under 21 years old, on games played in New Jersey, or in which a New Jersey team participates. *Id.*

¹³² *Id.*

¹³³ Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 232 (3d Cir. 2013).

¹³⁴ § 5:12A-7.

¹³⁵ Nat'l Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 3d 488, 490-91 (D.N.J. 2014), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 799 F.3d 259 (3d Cir. 2015), *reh'g en banc granted, opinion vacated* (Oct. 14, 2015), *on reh'g en banc*, 832 F.3d 389 (3d Cir. 2016), and *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 832 F.3d 389 (3d Cir. 2016).

¹³⁶ *Id.* at 508.

¹³⁷ *Id.* at 501 (emphasis added).

¹³⁸ *Id.* at 505.

¹³⁹ Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 799 F.3d 259, 264 (3d Cir. 2015), *reh'g en banc granted, opinion vacated* (Oct. 14, 2015), *on reh'g en banc*, 832 F.3d 389 (3d Cir. 2016).

¹⁴⁰ Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 232 (3d Cir. 2013).

as prohibited under PASPA.¹⁴¹ The Third Circuit (“*Christie II*”) affirmed the lower court’s decision and held that the 2014 partial repeal violated PASPA because it authorized sports gambling.¹⁴² New Jersey requested a hearing en banc, which was granted.¹⁴³

D. *Christie III*

In October 2015, the Third Circuit, sitting en banc, vacated *Christie II*’s decision¹⁴⁴ and, in a 9-3 ruling, (“*Christie III*”) held that the partial repeal violated PASPA and PASPA did not violate the Tenth Amendment.¹⁴⁵ The majority explicitly rejected *Christie I*’s reasoning that a repeal cannot constitute an authorization.¹⁴⁶ It further concluded that “a [S]tate’s decision to *selectively* remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, ‘authorization’ under PASPA.”¹⁴⁷ The court reasoned that New Jersey’s 2014 partial repeal, which removed the prohibition only at casinos and racetracks, was in fact an authorization of sports wagering at these locations.¹⁴⁸ Additionally, the court rejected what it considered dicta from *Christie I*’s decision pertaining to a State’s options under PASPA.¹⁴⁹ In doing so, *Christie III* refused to identify the specific options left to the States under PASPA except to suggest that a complete repeal or a partial repeal allowing friends and families to make *de minimis* wagers between themselves may be allowed.¹⁵⁰

¹⁴¹ *Nat’l Collegiate Athletic Ass’n*, 799 F.3d at 266.

¹⁴² *Id.* at 268.

¹⁴³ *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 832 F.3d 389, 392 (3d Cir. 2016); The Third Circuit only granted one hearing en banc out of 2,402 appeals, or in other words .04% of the time. *U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2014*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/statistics_import_dir/B10Sep14.pdf (last visited Mar. 31, 2017).

¹⁴⁴ *Nat’l Collegiate Athletic Ass’n*, 832 F.3d at 392.

¹⁴⁵ *Id.* at 390.

¹⁴⁶ *Id.* at 396-97.

¹⁴⁷ *Id.* at 401.

¹⁴⁸ *Id.* at 397.

¹⁴⁹ *Nat’l Collegiate Athletic Ass’n*, 832 F.3d at 397. *Christie I* stated a State has two options: repeal its sports wagering ban or maintain a complete prohibition. *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208, 233 (3d Cir. 2013).

¹⁵⁰ *Nat’l Collegiate Athletic Ass’n*, 832 F.3d at 401-02.

Christie III rejected New Jersey's Tenth Amendment argument, although for different reasons than articulated in *Christie I*. Specifically, the court in *Christie I* held that PASPA was constitutional because it does not require the States to keep any laws in place,¹⁵¹ while the court in *Christie III* held that PASPA was constitutional because: 1) it does not present the States with a coercive choice and 2) it does not require the States to take any action.¹⁵² The court in *Christie III* held that the States are not presented with a coercive choice because the States are "afforded sufficient room under PASPA to craft their own policies"¹⁵³ and 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."¹⁵⁴ Additionally, PASPA does not require States to take any action because "PASPA does not command [S]tates take any affirmative steps."¹⁵⁵ As such, the court upheld PASPA's constitutionality and ruled that the 2014 law violated PASPA.¹⁵⁶ Therefore, *Christie III* affirmed the district court's decision granting a permanent injunction.¹⁵⁷

Judge Fuentes, joined by Judge Restrepo, dissented from the majority's holding that New Jersey's partial repeal is an authorization of sports wagering.¹⁵⁸ Judge Fuentes stated that PASPA prohibits the States from sponsoring, operating, advertising, promoting, licensing, or *authorizing* sports wagering *by law or compact*.¹⁵⁹ As such, he stated that "authorization by law . . . *cannot merely be inferred*, . . . [it] requires a specific legislative enactment that affirmatively allows [citizens] of th[at] [S]tate to bet on sports."¹⁶⁰ Therefore, the dissent contended that the 2014 repeal did not explicitly or implicitly authorize sports wagering because it did not *affirmatively* allow sports wagering.¹⁶¹ Rather, New Jersey's 2014 law merely left casinos and racetracks in a state of limbo—they were unregulated because sports

¹⁵¹ *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 237.

¹⁵² *Nat'l Collegiate Athletic Ass'n*, 832 F.3d at 402.

¹⁵³ *Id.* at 401.

¹⁵⁴ *Id.* at 402 (quoting *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 231).

¹⁵⁵ *Nat'l Collegiate Athletic Ass'n*, 832 F.3d at 402.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (Fuentes, J., dissenting).

¹⁵⁹ *Id.* at 403 (Fuentes, J., dissenting).

¹⁶⁰ *Nat'l Collegiate Athletic Ass'n*, 832 F.3d at 403 (Fuentes, J., dissenting) (emphasis added).

¹⁶¹ *Id.* (Fuentes, J., dissenting) (emphasis added).

wagering prohibitions were not applicable to them.¹⁶² Furthermore, pursuant to this partial repeal, New Jersey could not, and did not propose to, perform any actions prohibited by PASPA such as sponsoring, operating, advertising, promoting, licensing, or authorizing by law sports wagering.¹⁶³ Because having no law in place at several locations did not equate to New Jersey's authorizing sports wagering, Judge Fuentes argued that the partial repeal did not violate PASPA.¹⁶⁴ Judge Fuentes interestingly posed the following hypothetical scenario:

Suppose the State did exactly what the majority suggests it could have done: repeal completely its sports betting prohibitions. In that circumstance, sports betting could occur anywhere in the State and there would be no restrictions as to age, location, or whether a bettor could wager on games involving local teams. Would the State violate PASPA if it later enacted limited restrictions regarding age requirements and places where wagering could occur? Surely no conceivable reading of PASPA would preclude a [S]tate from *restricting* sports wagering in this scenario. Yet the 2014 Repeal comes to the same result.¹⁶⁵

In essence, Judge Fuentes argued that if a State issued a complete repeal allowing sports wagering to be conducted anywhere in the State, as the majority inferred is permissible,¹⁶⁶ that State would not violate PASPA by enacting a law to restrict the age of bettors.¹⁶⁷ He further argued that because New Jersey's 2014 law achieves the same outcome, it too did not violate PASPA.¹⁶⁸

Judge Vanaskie separately dissented based on the Tenth Amendment, which, in his view, prohibits PASPA from compelling the States to govern private sports wagering activity.¹⁶⁹ He criticized the majority for "dodg[ing] the inevitable conclusion that PASPA

¹⁶² *Id.* at 405 (Fuentes, J., dissenting).

¹⁶³ *Id.* at 406 (Fuentes, J., dissenting).

¹⁶⁴ *Id.* at 405 (Fuentes, J., dissenting).

¹⁶⁵ *Nat'l Collegiate Athletic Ass'n*, 832 F.3d at 405 (Fuentes, J., dissenting).

¹⁶⁶ *See supra* note 150 and accompanying text.

¹⁶⁷ *Nat'l Collegiate Athletic Ass'n*, 832 F.3d at 405 (Fuentes, J., dissenting).

¹⁶⁸ *Id.* (Fuentes, J., dissenting).

¹⁶⁹ *Id.* at 411 (Vanaskie, J., dissenting).

conscripts the States to prohibit wagering on sports by suggesting that some partial repeal of the ban on sports gambling would not be tantamount to authorization of gambling.”¹⁷⁰ Furthermore, he argued that PASPA controls “the manner in which States regulate private parties” because the States’ agendas are disregarded and the States must regulate their citizens according to Congress’s instruction.¹⁷¹ Judge Vanaskie viewed *Christie III* as leaving the State without a choice.¹⁷² Specifically, while *Christie I*’s decision gave the States an option to repeal, “in whole or in part, existing bans” on sports wagering, Judge Vanaskie criticized the majority’s holding in *Christie III* for leaving the States without a choice because a repeal—whether in whole or in part—is implicit authorization.¹⁷³

Overall, the dissenters argued that, under the majority opinion, every state law—except one that completely repeals all sports wagering prohibitions—will likely violate PASPA.¹⁷⁴ However, in the view of this author, the majority in *Christie III* correctly determined that the 2014 sports wagering law violates PASPA because it effectively permitted gambling at specified locations, albeit subject to certain restrictions.¹⁷⁵ The majority was correct in reaching this result even though the 2014 law on its face did not explicitly authorize sports wagering activity.¹⁷⁶ The law clearly had an equivalent effect. Nonetheless, as explained in Part IV below, the dissent correctly concluded that PASPA violates the Tenth Amendment.

E. Supreme Court Consideration

New Jersey’s petition for certiorari is currently pending before the U.S. Supreme Court.¹⁷⁷ On January 17, 2017, the Supreme Court

¹⁷⁰ *Id.* at 406 (Vanaskie, J., dissenting).

¹⁷¹ *Id.* at 410 (Vanaskie, J., dissenting) (emphasis omitted).

¹⁷² *Nat’l Collegiate Athletic Ass’n*, 832 F.3d at 411 (Vanaskie, J., dissenting).

¹⁷³ *Id.* (Vanaskie, J., dissenting) (emphasis omitted).

¹⁷⁴ *Id.* at 405-06, 411 (Fuentes, J., dissenting) (Vanaskie, J., dissenting); *See supra* note 150 and accompanying text.

¹⁷⁵ Sports wagering was prohibited for anyone under 21 years old, on games played in New Jersey, or in which a New Jersey team participates. N.J. STAT. ANN. § 5:12A-7 (2014).

¹⁷⁶ As Judge Fuentes argued, New Jersey’s 2014 law, on its face, did not authorize the sports wagering because the statute did not affirmatively authorize casinos and racetracks to engage in sports wagering activities. *Nat’l Collegiate Athletic Ass’n*, 832 F.3d at 403 (Fuentes, J., dissenting).

¹⁷⁷ *Christie v. Nat’l Collegiate Athletic Ass’n*, No. 16-476, 2017 WL 160450, at *1 (U.S. Jan. 17, 2017).

invited the acting U.S. Solicitor General to file a brief “expressing the views of the United States.”¹⁷⁸ Although the Supreme Court did not officially grant a *writ of certiorari*, its request for the Solicitor General’s opinion was a positive sign for New Jersey on a day when the Court denied over 130 appeal petitions.¹⁷⁹ The Court’s request for the Solicitor General’s viewpoint is significant because the Solicitor General’s interpretation of the federal statute or request to grant the petition will likely have a significant impact on the Court’s decision.¹⁸⁰ Additionally, the eight justices at the time¹⁸¹ would not have requested the federal government’s opinion if they did not believe the case was significant. The Solicitor General has not provided an early indication of his view on this case; however, considering President Trump is in favor of legalizing sports wagering, there may be reason to think that the opinion of the Solicitor General will lean in New Jersey’s favor. The confirmation of Justice Neil Gorsuch to the Supreme Court may also tilt the scales in favor of New Jersey as Justice Gorsuch has taken a strict textualist interpretation of the Constitution¹⁸² and seems to favor State power over federal power.¹⁸³ Although the Solicitor

¹⁷⁸ *Id.*; The Solicitor General appears before the Supreme Court on behalf of the United States. At the time of the Supreme Court’s invitation Ian Health Gershengorn was the acting U.S. Solicitor General. Noel Francisco became acting U.S. Solicitor General on January 23, 2017. See Robert Barnes, *Trump Nominates D.C. Lawyer Noel Francisco as Solicitor*, THE WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/politics/courts_law/trump-nominates-dc-lawyer-noel-francisco-as-solicitor-general/2017/03/08/c62b0774-040f-11e7-b9fa-ed727b644a0b_story.html?utm_term=.7961bfd0b100.

¹⁷⁹ *Orders in Pending Cases*, U.S. SUPREME COURT (Jan. 17, 2017), https://www.supremecourt.gov/orders/courtorders/011717zor_5h26.pdf.

¹⁸⁰ John Brennan, *Two Attorneys Explain Significance of U.S. Supreme Court Notice on NJ Sports Betting*, N. JERSEY (Jan. 17, 2017), <http://www.northjersey.com/story/news/business/meadowlands-matters/2017/01/17/supreme-court-nj-sports-betting/96661138/>.

¹⁸¹ At the time of the Supreme Court’s decision, Justice Neil Gorsuch had not yet been confirmed as a justice of the Supreme Court.

¹⁸² See, e.g., *U.S. v. Law*, 572 F. App’x 644, 648 (10th Cir. 2014) (Gorsuch, J., concurring); *U.S. v. Games-Perez*, 667 F.3d 1136, 1143-44 (10th Cir. 2012) (Gorsuch, J., concurring). As a strict textualist, Justice Gorsuch may conclude with Judge Fuentes of the Third Circuit that New Jersey’s 2014 law did not violate PASPA by authorizing sports wagering because it did not *affirmatively* allow sports wagering. See *supra* note 176.

¹⁸³ Justice Gorsuch has disagreed with the use of the Dormant Commerce Clause doctrine, which is used to limit a State’s power to regulate interstate commerce when Congress has not acted under the Commerce Clause. Justice Gorsuch has indicated his agreement with Justices Scalia and Thomas that the doctrine is “absent from the Constitution’s text and incompatible with its structure.” *Energy and Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1171 (10th Cir. 2015); Kevin Simpson, *Neil Gorsuch: Elite Credentials, Conservative Western Roots Land Denver Native on SCOTUS List*, DENVER POST (Dec. 11, 2016), <http://www.denverpost.com/2016/12/11/neil-gorsuch-trump-scotus-list/>; Eric Citron,

General has no deadline to submit a brief, the Solicitor General's usual practice is to file its briefs by May, which, if the petition is granted, would result in the Supreme Court hearing oral arguments during its 2018 term.¹⁸⁴

IV. ANTI-COMMANDEERING DOCTRINE

The anti-commandeering doctrine under the Tenth Amendment provides that Congress does not have the power to either commandeer State or local government officials to carry out a federal program or compel the States to legislate in a certain way.¹⁸⁵ PASPA runs afoul of this anti-commandeering principle because Congress is burdening the States with the responsibility to prohibit sports wagering. If Congress wants to prohibit sports wagering, it should do so directly and not use the States to carry out its will.

Historically, States have regulated sports wagering pursuant to their police power.¹⁸⁶ That is to say, States have been able to implement their own regulations in the field of gambling subject to overarching federal laws. However, PASPA removes this power from the States without preempting the field.¹⁸⁷ Pursuant to the Supremacy Clause, Congress can choose to preempt the field of sports wagering by regulating the field itself.¹⁸⁸ But that is not what Congress did. Instead, PASPA put the onus on the States. In doing so, it created the same accountability problems that the Court identified in *Printz*.¹⁸⁹

Potential Nominee Profile: Neil Gorsuch, SCOTUSBLOG (Jan. 13, 2017), <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/>.

¹⁸⁴ *Supreme Court Procedures*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Apr. 4, 2017); Steve Silver, *The Supreme Court Just Asked the Trump Administration to Weigh in on Legal Sports Betting in New Jersey*, VICE SPORTS (Jan. 17, 2017), https://sports.vice.com/en_us/highlight/the-supreme-court-just-asked-the-trump-administration-to-weigh-in-on-legal-sports-betting-in-new-jersey.

¹⁸⁵ *New York v. United States*, 505 U.S. 144, 166 (1992).

¹⁸⁶ *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003).

¹⁸⁷ When Congress preempts an area of law, the federal law must be applied over any conflicting or absent state law in this area. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

¹⁸⁸ *See New York*, 505 U.S. at 168.

¹⁸⁹ *See supra* notes 40-44. In *Printz*, the Brady Act raised accountability concerns because it required state and local authorities to conduct a background check on gun owners pursuant to Congress's instructions. Any complaints by a State's citizens would fall on the State and not on Congress, even though the States were solely acting according to Congress's instructions.

PASPA raises accountability concerns because State citizens are likely to blame the State when it acts to prohibit sports wagering even though it is merely doing the bidding of Congress. If Congress wants to prohibit sports wagering, Congress should do so itself and bear the political repercussions. As the Court held in *New York*, “[a]ccountability is thus diminished when, due to federal coercion, elected [S]tate officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”¹⁹⁰ As PASPA requires the States to govern according to Congress’s instructions, without preempting the field or itself acting, PASPA violates the principle of federalism under the Tenth Amendment.

Realistically, either a State’s partial or complete repeal of its sports prohibition violates PASPA. While New Jersey was not allowed to enact a regulatory scheme permitting sports wagering (e.g., 2012 law)¹⁹¹ or to partially repeal that law in a way that *implicitly* authorized sports wagering in Atlantic City (e.g., 2014 law),¹⁹² the Third Circuit suggested that a different sort of partial repeal—one that allowed friends and family to make *de minimis* bets—would be allowed because it would not have the “type of authorizing effect” as the 2014 law.¹⁹³ The court refused to specify what other types of partial repeals would be authorized under PASPA¹⁹⁴ and provided no guidance or explanation as to why authorizing bets among friends and family would be permissible under PASPA while authorizing some gambling at casinos and racetracks was prohibited.¹⁹⁵ The court’s comments suggest that the allowable “authorizing effect” of *de minimis* bets may refer to the relatively low value of wagers placed and the informal manner of how wagers are placed, but the court failed to provide any definitive explanation.¹⁹⁶ In this author’s view, there is no basis to distinguish *de minimis* bets from the wagering implicitly authorized pursuant to New Jersey’s 2014 law because both types of repeals would be geared towards private citizens, and PASPA, in any event, carves out no exception based on the amount wagered, who places the

¹⁹⁰ *New York*, 505 U.S. at 169.

¹⁹¹ *See supra* Part III, Section B.

¹⁹² *See supra* Part III, Section D.

¹⁹³ *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 832 F.3d 389, 402 (3d Cir. 2016).

¹⁹⁴ *Id.*

¹⁹⁵ *See id.*

¹⁹⁶ *Id.* at 401-02.

bet, or the “authorizing effect.”¹⁹⁷ Instead, PASPA ensures that a private citizen violates state law rather than federal law, even if the State does not want a governing sports wagering prohibition.

Although the majority suggested a complete repeal of a State’s prohibitions on sports wagering is permissible,¹⁹⁸ this statement is difficult to reconcile with the court’s conclusion that a partial repeal is an implicit authorization.¹⁹⁹ Specifically, a complete repeal undermines and is contrary to the goals of PASPA because a State that does not prohibit sports wagering by law implicitly allows individuals and private entities to conduct sports wagering. The Third Circuit’s decision turned on the *effect* of the law and not “on the way in which the [S]tate has enacted its directive.”²⁰⁰ A complete repeal operates the same as a partial repeal (e.g., the 2014 law) because even though a complete repeal would lift sports wagering prohibitions for the entire state and a partial repeal would lift sports wagering prohibitions only in certain areas, the effect of both is to allow sports wagering, which, in any event, is prohibited by PASPA. In other words, allowing sports wagering, *in any way*, is prohibited, no matter the scale. Thus, any repeal—be it partial or complete—of a sports wagering prohibition violates PASPA.

Thus, New Jersey is left with a single choice: maintain a complete prohibition. The Supreme Court has previously held in *New York*²⁰¹ that forcing the States to legislate in a prescribed way violates the Tenth Amendment.²⁰² In that case, the Court struck down the federal statute that required States to either provide for radioactive waste disposal or take title to waste made within the State’s borders as a violation of the Tenth Amendment.²⁰³ The Court reasoned that “[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript [S]tate governments as its agents.”²⁰⁴ Therefore, when a State is offered a choice between two unconstitutional coercive choices, the State is left

¹⁹⁷ See 28 U.S.C.A. §§ 3702, 3704 (1992).

¹⁹⁸ *Nat’l Collegiate Athletic Ass’n*, 832 F.3d at 401-02.

¹⁹⁹ *Id.* at 398.

²⁰⁰ *Id.* at 397.

²⁰¹ See *supra* notes 35-38.

²⁰² *New York v. United States*, 505 U.S. 144, 146 (1992).

²⁰³ *Id.*

²⁰⁴ *Id.* at 178.

with no choice at all.²⁰⁵ PASPA governs an activity that Congress wants to prohibit but gives the States the full burden of enforcing its prohibition. To comply with PASPA, States must leave their prohibitions governing sports wagering in effect or potentially forego any regulation at all. Congress, in effect, hijacks New Jersey's Legislature by prohibiting it from partially or completely repealing its sports wagering prohibition and forcing it to keep its prohibitions in place. As such, Congress coercively forces the States to act as Congress's agents in violation of the Tenth Amendment principles.

In contrast, the Supreme Court has upheld federal acts where Congress provides States with a choice to either implement a law consistent with federal standards or abandon the field entirely, thereby allowing Congress to directly regulate the activity. In *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*,²⁰⁶ the Court upheld the federal Surface Mining Control and Reclamation Act, which imposed federal environmental protection standards for coal mining.²⁰⁷ The Court held the Act constitutional because it provided the States with a choice to either follow the Act and adopt a coal mining plan according to federal standards or allow the "full regulatory burden [to] be borne by the Federal Government."²⁰⁸ The Act did not force the States to enact a law but instead created federal regulations within the coal mining industry, a preempted field, which the States had a choice to adopt or not adopt.

Additionally, the Supreme Court upheld the Public Utility Regulatory Policies Act ("PURPA"), a federal act, in *F.E.R.C. v. Mississippi*²⁰⁹ because the States had a choice between "abandoning regulation of the [energy] field altogether or considering the federal standards."²¹⁰ PURPA allowed the States' continued regulation in the energy field on the condition that they consider federal standards and did not compel the States to enact a legislative program.²¹¹ Similar to *Hodel*, the Court noted that Congress could have instead preempted the field of energy regulation.²¹²

²⁰⁵ *Id.* at 146 (providing that States must take title to the waste or regulate pursuant to Congress's direction).

²⁰⁶ 452 U.S. 264 (1981).

²⁰⁷ *Id.* at 305.

²⁰⁸ *Id.* at 288.

²⁰⁹ 456 U.S. 742 (1982).

²¹⁰ *Id.* at 766.

²¹¹ *Id.* at 765.

²¹² *Id.* at 764-65.

The federal acts in both *Hodel* and *F.E.R.C.* differ from PASPA because the States, under PASPA, do not have a choice to implement their own laws consistent with federal standards. Instead, States are directed by the federal government to not authorize or license sports gambling in any way. If a State decides that it no longer wants to regulate sports wagering, and it repeals its statute or regulations, that State violates PASPA because such a repeal is analogous to an authorization of sports wagering.²¹³ Although a State is theoretically allowed to issue a complete repeal, as noted earlier, doing so would implicitly allow sports wagering to be conducted by any individual within the State.²¹⁴ Akin to a partial repeal, a complete repeal would frustrate the central purpose of PASPA. As such, a complete repeal would likely be struck down by the courts as analogous to an authorization of sports wagering.

In rejecting the Tenth Amendment argument, the Third Circuit repeatedly relied on *Reno v. Condon*,²¹⁵ in which the Supreme Court upheld the constitutionality of the DPPA.²¹⁶ However, PASPA is distinguishable from the DPPA. The DPPA was held constitutional because it “[d]id not require (1) ‘the States in their sovereign capacity to regulate their own citizens,’ (2) ‘the . . . Legislature to enact any laws or regulations,’ or (3) ‘state officials to assist in the enforcement of federal statutes regulating private individuals.’”²¹⁷ However, unlike the DPPA, PASPA requires States to regulate in their sovereign capacity because PASPA prohibits private activity pursuant to state law by directing *how* States must govern their citizens. Through PASPA, States are acting on behalf of Congress, thus violating the first and third principles listed above. In addition, PASPA violates the second principle because although the court held that PASPA does not require States to pass new laws, it does prevent the States from repealing existing laws, which is equivalent to forcing the States to

²¹³ *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 832 F.3d 389, 397 (3d Cir. 2016).

²¹⁴ See *supra* text accompanying notes 191-205.

²¹⁵ 528 U.S. 141 (2000).

²¹⁶ See *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 832 F.3d 389, 400-02 (3d Cir. 2016); see also *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208, 228-31, 234-37 (3d Cir. 2013).

²¹⁷ *Nat’l Collegiate Athletic Ass’n*, 832 F.3d at 410 (Vanaskie, J., dissenting) (quoting *Reno*, 528 U.S. at 151).

pass legislation.²¹⁸ Therefore, PASPA is distinguishable from the DPPA with regard to the three principles the Court enunciated and as such violates the Tenth Amendment.

Furthermore, because the federal government regulates sports wagering via state law by compelling the States to conform to PASPA, PASPA ensures that sports wagering violates state law, not federal law. While it is well established that the federal government cannot “seek to control or influence the manner in which States regulate private parties,”²¹⁹ the federal government could offer States the choice to regulate the private activity according to federal standards or preempt state law entirely.²²⁰ However, Congress has failed to do either here.

Because States cannot abandon their regulation of sports wagering, as doing so could be seen as authorizing the activity under PASPA, they are forced to do the bidding of Congress. While the Third Circuit, in dicta, indicated that not all repeals would amount to an authorization it failed to provide any meaningful guidance.²²¹ Even though *Christie III* stated there is an area between a repeal and authorization that may be valid, the Third Circuit’s decisions show that it is unlikely one can ever be found because any removal of a prohibition constitutes government authorization.

Ultimately, by preventing States from repealing existing laws, the court essentially forced States to regulate activities that they may desire to leave unregulated. *Christie III* refused to equate preventing States from repealing laws with forcing a State to legislate, which would run afoul of the Tenth Amendment’s anti-commandeering principles. But, as the dissenting justices found, the decision should be seen as forcing New Jersey to govern according to Congress’s instructions regarding sports wagering. Viewed that way, PASPA violates State sovereignty under the Tenth Amendment.

²¹⁸ *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) (“[P]reventing the [S]tate from repealing an existing law is no different from forcing it to pass a new one; in either case, the [S]tate is being forced to regulate conduct that it prefers to leave unregulated.”).

²¹⁹ *South Carolina v. Baker*, 485 U.S. 505, 514 (1988).

²²⁰ *New York v. United States*, 505 U.S. 144, 167 (1992); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 764-65 (1982).

²²¹ *Nat’l Collegiate Athletic Ass’n*, 832 F.3d at 401-02.

V. SPORTS WAGERING SHOULD BE LEGAL THROUGHOUT THE U.S.

A. Public Policy – PASPA No Longer Has a Place in the U.S.

For several decades, many amateur and professional sports leagues opposed sports wagering on their games.²²² However, in recent years, league commissioners, team owners, the casino gambling industry, the American Gaming Association, the U.S. Conference of Mayors, and the National Council of State Legislatures have been much more open to the possibility of legalized sports wagering.²²³ President Trump appears to share this sentiment, as he stated in 2015 that he is comfortable with the idea of sports wagering due to its already existing prominence in the black market.²²⁴ In February 2017, he advised that he wanted the input of the league commissioners, law enforcement officials, and other organizations before he would push for legalization legislation in Congress.²²⁵ It is likely that as public opinion becomes more supportive of legalized sports wagering, PASPA may be amended or repealed entirely.

The fear of games being fixed or tainted because of gambling—one purpose for passing PASPA—has lost its force. In a 2016 study about the Super Bowl, a majority of respondents wanted Congress to change America’s current sports wagering laws because they believed that “regulat[ing] sports wagering would protect a game’s integrity, benefit communities and enhance consumer safety, and increase fan

²²² See Will Hobson, *Sports Gambling in U.S.: Too Prevalent to Remain Illegal?*, THE WASH. POST (Feb. 27, 2015), https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html?utm_term=.820a488f551e.

²²³ Max Willens, *MLB Commissioner Changes Gambling Stance: Federal System A ‘Pretty Good Idea’*, INT’L BUS. TIMES (Mar. 2, 2015), <http://www.ibtimes.com/mlb-commissioner-changes-gambling-stance-federal-system-pretty-good-idea-1833046>; Tony Batt, *NHL Rolls the Dice on Las Vegas*, GAMBLING COMPLIANCE (June 23, 2016), http://www.becker-poliakoff.com/webfiles/pdf/Wallach/gamblingcompliance_vegas_hockey_2016-06-23.pdf; Am. Gaming Ass’n, *supra* note 2.

²²⁴ *Highlights From Donald Trump’s Interview on The Herd With Colin Cowherd*, FOX SPORTS (Nov. 2, 2015), <http://www.foxsports.com/presspass/latestnews/2015/11/02/presidential-candidate-donald-trump-on-the-herd>; Press Release, White House, Radio Interview of President Trump by Jim Gray, Westwood One Sports Radio (Feb. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/05/radio-interview-president-trump-jim-gray-westwood-one-sports-radio>.

²²⁵ Fox Sports, *supra* note 224; White House, *supra* note 224.

engagement.”²²⁶ As for sports leagues, the NHL recently approved a new team based in Las Vegas that will begin playing in the 2017-2018 season,²²⁷ and the NFL has approved one of its franchises to relocate to Las Vegas as early as 2019.²²⁸ Placing a sports franchise in Las Vegas will permit consumers to *legally* wager on the participating Las Vegas teams.²²⁹

The risk of corruption among games is heightened by the *illegality* of sports wagering, *not* its legalization, because it is impossible to properly determine the kind and the amount of suspicious wagering that are altering game lines.²³⁰ Additionally, the black market of illegal sports gambling drives revenue which criminal organizations use to fund “enterprises involv[ing] [] human trafficking, racketeering, money laundering, extortion, and fraud.”²³¹ These acts of extortion, among other activities, have other criminal and violent consequences via collection methods, which involve threats of assault or death, assault, murder, kidnapping, and destruction of the debtor’s property.²³² Speaking at a law enforcement summit in Washington D.C. in June 2016, FBI Chief Jay Bartholomew of the Transnational Organized Crime Unit acknowledged that the FBI sees the strong ties

²²⁶ Howard Stutz, *Survey: Americans Want Ability to Legally Wager in the Super Bowl*, THE MELLMAN GROUP (Feb. 3, 2016), <http://mellmangroup.com/survey-americans-want-ability-to-legally-wager-in-the-super-bowl/>.

²²⁷ Batt, *supra* note 223.

²²⁸ Ken Belson and Victor Mather, *Raiders Leaving Oakland Again, This Time for Las Vegas*, N.Y. TIMES (Mar. 27, 2017), https://www.nytimes.com/2017/03/27/sports/football/nfl-oakland-raiders-las-vegas.html?_r=0.

²²⁹ Wagering on individual sports games is legal in Las Vegas, Nevada.

²³⁰ Game lines refers to the point spread, which is the number of points each team has either added to or subtracted from its final score for betting purposes. *Glossary*, PREGAME, <http://pregame.com/EN/main/sports-betting-basics/glossary/terms/line.html> (last visited Apr. 4, 2017).

²³¹ Am. Gaming Ass’n, *supra* note 2.

²³² See generally JAY S. ALBANESE, GAMBLING & ORGANIZED CRIME: AN ANALYSIS OF FEDERAL CONVICTIONS IN 2014 (2015), http://stopillegalgambling.org/aga-assets/uploads/2016/03/Albanese_Illegal_Gambling_OC_Report_2014_cases_FINAL.pdf; see also Press Release, Dep’t of Justice, U.S. Attorney’s Office, Dist. of Mass., Quincy Man Sentenced for Running Illegal Gambling Business in Boston’s Chinatown, Using Violence to Collect Debts (Mar. 4, 2016), <https://www.justice.gov/usao-ma/pr/quincy-man-sentenced-running-illegal-gambling-business-boston-s-chinatown-using-violence>; see also Press Release, Dep’t of Justice, U.S. Attorney’s Office, S. Dist. of N.Y., Manhattan U.S. Attorney Charges 46 Leaders, Members, and Associates of Several Organized Crime Families of La Cosa Nostra with Wide-Ranging Racketeering Charges (Aug. 4, 2016), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-charges-46-leaders-members-and-associates-several-organized-crime>.

that illegal sports wagering has to organized crime.²³³ Furthermore, because online gambling has become prominent in recent years,²³⁴ black market gambling has become much more accessible.

However, under PASPA, the States cannot develop and enforce a regulatory scheme to monitor wagers placed, report unusual line movements, set age minimums and verifications, grant licenses for sportsbooks, and establish hotlines and agencies for those who have gambling addictions.²³⁵ As such, PASPA should be replaced with a federal regulation providing States with the option to authorize sports wagering to maintain the integrity of sporting events and protect consumers nationwide.

B. PASPA's Self-Defeating Intent

The intent of PASPA to prohibit sports wagering was undercut in its inception by the statute's exceptions that permitted several States to permit forms of sports wagering.²³⁶ Even though the Committee of the Judiciary believed sports wagering to be harmful, it voluntarily chose to exempt those States that had already enacted a form of legalized sports wagering because the Committee did not want to threaten those economies already relying on sports wagering.²³⁷ Additionally, a special exception was geared towards New Jersey due to its historically unique role in the gambling industry, allowing it to join the "grandfathered" States if it passed a law authorizing sports wagering within one year of PASPA.²³⁸ If PASPA was intended to stop the corruptible, immoral activity of "fixing" games, then why carve out exceptions for several States to legally operate sports wagering at all? Nonetheless, Congress included exceptions, thus

²³³ ILLEGAL GAMBLING ADVISORY BOARD, LAW ENFORCEMENT SUMMIT ON ILLEGAL SPORTS BETTING: AFTER-ACTION REPORT 9 (2015), https://www.americangaming.org/sites/default/files/research_files/After%20Action%20Report_PDF-Web.pdf.

²³⁴ Walt Bogdanich, James Glanz & Agustin Armendariz, *Cash Drops and Keystrokes: The Dark Reality of Sports Betting and Daily Fantasy Games*, N.Y. TIMES (Oct. 15, 2015), <https://www.nytimes.com/interactive/2015/10/15/us/sports-betting-daily-fantasy-games-fanduel-draftkings.html>.

²³⁵ See Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0.

²³⁶ 28 U.S.C.A. § 3704(a) (1992).

²³⁷ S. REP. NO. 102-248, at 8 (1991), as reprinted in 1992 U.S.C.C.A.N. 3553, 3559.

²³⁸ 28 U.S.C.A. § 3704(a)(3).

providing a tell-tale sign that sports wagering, even when PASPA was enacted in 1992, was not an activity that must be prohibited.

C. Betting on Fantasy Teams Undercuts PASPA's Central Goals

Although sports wagering is illegal in the majority of States, participation in fantasy sports leagues²³⁹ is regarded as legal under federal law even when monetary compensation is provided to the winners. In fact, the Unlawful Internet Gambling Enforcement Act of 2006, a federal statute, expressly provides an exception for fantasy sports.²⁴⁰ Fantasy sports leagues are legal when: 1) the prize offered is set in advance of the game and does not depend on the number of participants; 2) “[a]ll winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance”²⁴¹ of the individual athletes; and 3) no winning outcome is based on a score, point-spread, or performance of any single team, teams, or individual athlete.²⁴² Practically, this exception allows fans to enter a paid fantasy sports league where they construct a fantasy team consisting of several athletes, even if the entire fantasy team is composed of athletes from the same real-life team. There is no durational requirement for the fantasy sports leagues—a player can participate in a daily, weekly, or season-long competition.²⁴³

Although fantasy sports are legal under federal law, there are differing views as to their legality among States.²⁴⁴ In most States,

²³⁹ Fantasy Sports in this section refers to pay to enter fantasy sports leagues such as DraftKings and FanDuel.

²⁴⁰ 31 U.S.C.A. § 5362(E)(IX) (2006).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *See id.*

²⁴⁴ Many States have launched unsuccessful attacks on daily fantasy sports operators. Initially, New York State Attorney General Eric Schneiderman accused daily fantasy sports operators of illegal gambling under New York law. The Attorney General issued cease-and-desist orders and was granted a temporary injunction against fantasy sports operators. However, while an appeal of the injunction was pending, the New York State Legislature quickly passed a bill to regulate daily fantasy sports. *See Joe Drape, Fantasy Sites DraftKings and FanDuel Stop Taking Bets in New York*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/2016/03/22/sports/football/draftkings-and-fanduel-stop-taking-bets-in-new-york.html>; *see also* Chris Grove, *What are the States Where You Can Play Daily*

sports fantasy leagues are legal unless three elements are met: 1) consideration;²⁴⁵ 2) reward;²⁴⁶ and 3) chance.²⁴⁷ The difference between fantasy sports and sports wagering is that fantasy sports are considered to be a game of strategy and skill while sports wagering is often thought to be based on chance, driven by factors beyond a participant's control and not on judgment, practice, or skill.²⁴⁸

Fantasy sports are primarily based on strategy and skill because they involve drafting teams and setting lineups to maximize points, even though players may lack familiarity with substantially all of the athletes' statistics.²⁴⁹ Sports wagering is considered a game of chance because individual games are a function of myriad factors, such as the health and mood of the players and condition of the playing field.²⁵⁰ However, the distinction between the two is more illusory than the law makes it seem. Weather, illness, injuries, unlucky breaks, and "off days" are all factors, among others, that contribute to a player's performance that affect both the individual performer and the team. As such, there is *always* an element of chance when deciding on the outcome of a third party's performance, regardless if the third party is a team or individual athlete. Paid fantasy sports leagues and sports wagering are also similar because they both require risking money to partake in the activity, they both involve a commission taken by the entity accepting or organizing the game, and they both involve an activity whose outcome is uncertain. The DOJ has similarly argued

Fantasy Sports?, LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/> (last visited Apr. 4, 2017).

²⁴⁵ Consideration is a performance or promise that is bargained for in exchange of a return promise or performance. RESTATEMENT (SECOND) OF CONTRACTS § 71 (2013). In the context of gambling, most courts have held consideration is providing money or valuable property in exchange for greater winnings while some courts hold consideration to be any legal detriment even if non-monetary in value. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 27 (2012).

²⁴⁶ A reward is a tangible prize that an individual gets for winning a bet. Edelman, *supra* note 245, at 28.

²⁴⁷ Erica Buerger, *Better to be Good than Lucky: Using Fantasy Sports Strategy to Defend the Legal Status of America's Newest Pastime*, TIMELY TECH (Feb. 12, 2013), <http://illinoisjltip.com/timelytech/better-to-be-good-than-lucky-using-fantasy-sports-strategy-to-defend-the-legal-status-of-americas-newest-pastime/>.

²⁴⁸ Edelman, *supra* note 245, at 26-28.

²⁴⁹ See *Why Fantasy Sports is Not Gambling: Understanding a Game of Skill*, FANTASY SPORTS TRADE ASS'N, <http://fsta.org/research/why-fantasy-sports-is-not-gambling/> (last visited Apr. 4, 2017).

²⁵⁰ Nat'l Football League v. Governor of State of Del., 435 F. Supp. 1372, 1385 (D. Del. 1977).

that sports wagering involves substantial skill and “sports bettors can employ superior knowledge of the games, teams, and players in order to exploit odds that do not reflect the true likelihoods of the possible outcomes.”²⁵¹ Since both fantasy sports and sports wagering involve elements of chance, skill, and strategy, they should both be governed under the same standard, and as such, sports wagering should be considered legal.

VI. CONCLUSION

Sports wagering, whether legal or illegal, is and will remain a fact of life in the United States as amateur and professional sports continue to rise in popularity. PASPA is an outdated law that contributes to a thriving underground sports wagering market. Because States have no practical options to craft a policy that regulates sports wagering, attempts to minimize or eliminate the underground market have been unsuccessful.

Pursuant to the Commerce Clause,²⁵² Congress can regulate certain economic activities that have a substantial effect on interstate commerce when aggregated.²⁵³ However, the anti-commandeering doctrine under the Tenth Amendment limits Congress’s power by prohibiting Congress from directly compelling a State legislature to require or prohibit acts contained in federal laws.²⁵⁴ Even though Congress can regulate some intrastate activity under the Commerce Clause, it cannot regulate a State government’s regulation of these activities.²⁵⁵

Outside of the grandfathered States, PASPA prohibits State governments from “sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing] by law” sports wagering.²⁵⁶ Although Congress created exceptions for several States to continue operating sportsbooks, it intended, by enacting PASPA, to: 1) stop the spread of sports gambling; 2) maintain the integrity of America’s

²⁵¹ Brief for Appellant at 29-30, *U.S. v. Discristina*, 726 F.3d 92 (2d Cir. 2013) (No. 12-3720), 2012 WL 6800562, at *30. The DOJ argued that the federal law that defines gambling includes games of skill, e.g., sports wagering, and therefore, should also include poker, which is also a game of skill. *Id.*

²⁵² U.S. CONST. art. I, § 8, cl. 3.

²⁵³ *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

²⁵⁴ *New York v. United States*, 505 U.S. 144, 166 (1992).

²⁵⁵ *Id.*

²⁵⁶ 28 U.S.C.A. § 3702 (1992).

national pastime, both amateur and professional sports; and 3) reduce the promotion of sports gambling among America's youth.²⁵⁷

The Third Circuit's decisions essentially leave the States with only one choice: prohibit all sports wagering. By preventing States from repealing their sports wagering laws, PASPA is in essence compelling States to enforce federal legislation in violation of the anti-commandeering doctrine of the Tenth Amendment. There is no accountability by the federal government nor recourse through the state political process to change the policy because the States are forced to do Congress's bidding by keeping state prohibitions in place.

The American public, the President, league commissioners, owners of professional teams, and members of the federal government all agree that it is time to repeal PASPA and allow all States the opportunity to permit sports wagering.²⁵⁸ Regardless of its legality, sports wagering is prominent in the U.S. and is currently catering to criminal organizations through their operation of underground sports wagering services, which jeopardize the integrity of sports and safety of the consumer, and remove billions of dollars of tax revenue from States and local communities. It is time for Congress to accept that gambling is here to stay and should be brought into the legal realm so that it can finally be regulated.

In conclusion, as a matter of policy, Congress should repeal PASPA and enact a new framework that will permit and regulate sports wagering effectively. On constitutional grounds, PASPA should be deemed unconstitutional under the Tenth Amendment as it compels the States, without another alternative, to do Congress's bidding.

²⁵⁷ S. REP. NO. 102-248, at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3555.

²⁵⁸ *See supra* Part V, Section A.