Nos. 16-476, -477

In the Supreme Court of the United States

CHRISTOPHER J. 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.

On Writs of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF PROFESSOR RYAN M. RODENBERG AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*[1]

Ryan M. Rodenberg works as an associate professor at Florida State University with a research focus on forensic sports law analytics. He has published a number of academic and non-academic articles about sports gambling and has testified before Congress regarding the same. He has a strong interest in ensuring that the nation's sports gambling laws comply with the Constitution and are correctly interpreted.

SUMMARY OF ARGUMENT

This is the wrong case—with the wrong plaintiffs—to address whether a federal statute that prohibits modification or repeal of state prohibitions on private sports gambling conduct impermissibly commandeers the regulatory power of States in contravention of *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997).

Governor Christie, various New Jersey state officials, and the New Jersey Thoroughbred Horsemen's Association (collectively "Petitioners") can comply with the sports betting ban in the Professional

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[1] Pursuant to Rule 37, *amicus curiae* certifies 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 *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Florida State University is not a signatory to this brief and the views expressed herein are solely those of *amicus curiae*. Counsel for all parties were timely notified more than ten days before the filing of this brief. Written communication from the parties consenting to the filing of the *amicus curiae* brief have been filed with the Clerk of the Court.

and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701 et seq. ("PASPA") by doing nothing. Indeed, Petitioners' anti-commandeering argument only arose when New Jersey opted to repeal an existing law and was sued for allegedly violating PASPA's proscription. Both *New York* and *Printz* involved affirmative obligations about what States must do pursuant to a Congressional directive. PASPA contains no such directive, only a negative requirement that New Jersey and certain other States not alter their own sports gambling laws to permit the activity. PASPA's peculiarity cautions against a conventional anti-commandeering analysis of the type offered by the litigants.

This case differs from *New York* and *Printz* in other important ways too. Unlike *New York* and *Printz*, the United States is not a party to this litigation. The Federal Government, through the Department of Justice ("DOJ"), neither initiated the lawsuit nor intervened as a litigant. Instead the plaintiffs are various private sports leagues, a quintet comprised of the National Collegiate Athletic Association ("NCAA"), National Basketball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Office of the Commissioner of Baseball ("MLB") (collectively "Respondents"). Congress included a clause in PASPA that outsources a type of "privatized commandeering" not seen in *New York* or *Printz*.

PASPA also includes a perpetual grandfathering clause that exempts certain States from its ban, a coverage formula that departs markedly from the statutes at issue in *New York* and *Printz*. In practice,

PASPA prevents some states, but not others, from modifying or repealing their own sports gambling laws in whole or in part. Whether Congress can pass such a law is a question worthy of constitutional inquiry, but it is not the precise question addressed by the Court in either *New York* or *Printz*. Two PASPA-specific features—PASPA's offloading of regulatory authority to private entities and PASPA's unequal treatment among the States—raise constitutional issues not seen in *New York* or *Printz* and take this case outside the typical anti-commandeering context. As a result, this case gives rise to several alternative lines of analyses not brought to the Court's attention by the litigants. *Amicus curiae* provides such analysis.

The Court can resolve this case in several ways without even addressing Petitioners' anti-commandeering arguments.

At the outset, this case can be resolved through a proper textual reading of the statute, as the injunctive relief extended to Respondents exceeded what is allowed under PASPA's text. "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam). The district court erred in granting a broad injunction against Petitioners that attached to non-litigant third parties. Recognizing the limitations of PASPA § 3703, even the Respondents argued against such an injunction prior to the district court judge's *sua sponte* reversal about the scope of the injunction against Petitioners. The court of appeals decision affirming the underlying injunction should be vacated

and remanded for further consideration as to whether Respondents have standing to assert claims on their own behalf and on behalf of others under PASPA § 3703.

Beyond this, two portions of PASPA are unconstitutional. Both parts are severable, providing the Court with an option to limit its ruling and avoid upholding or eviscerating PASPA *in toto*. Neither of these unconstitutional portions of PASPA—§ 3704(a)(1)-(2)'s exemptions for certain favored States and § 3703's delegation of regulatory power to private entities—were addressed in the petitions for writ of certiorari, but both provide the Court with sufficient grounds to decide this case.

First, PASPA's uneven ban on sports wagering and disparate treatment of the States runs afoul of the equal sovereignty doctrine as set forth in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) and *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009). PASPA discriminates among the States on two levels: (i) between favored grandfathered States and non-grandfathered States and (ii) between Nevada and other grandfathered States. PASPA's exemptions in § 3704(a)(1)-(2) fail the equal sovereignty doctrine's requirement that differential treatment between the States be "sufficiently related to the problem that it targets." *Nw. Austin* at 203. Congress enacted PASPA to address a "national problem" that "cannot be limited geographically." S. REP. 102-248 at 5, *Professional and Amateur Sports Protection* (1991). Exempting certain States from PASPA's coverage runs counter to the statute's core justification. Indeed, the Court already found PASPA's exemptions to derive from "obscured

Congressional purposes." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 179 (1999). PASPA's unconstitutional grandfather clause should be severed from the remainder of the statute.

Second, PASPA's delegation of regulatory power to private sports leagues in § 3703 is an unconstitutional deprivation of Petitioners' due process rights under the private nondelegation doctrine. PASPA violates well-established constitutional limits on the legislative delegation of regulatory power as set forth in *Carter v. Carter Coal Co*., 298 U.S. 238 (1936) and *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015). The Court has made clear that Congress cannot delegate regulatory authority to a private entity. Through PASPA, Congress has given private sports leagues a decisive role in determining what types of sports gambling are lawful among the States. The DOJ previously found it "particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues." 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). The Court should sever PASPA's unconstitutional delegation of regulatory power to private entities in § 3703.

For these reasons, this case can be decided via alternative means as outlined by *amicus curiae*.

ARGUMENT

This case—commonly referred to as "*Christie II*"—is the second iteration of the litigation commenced by the five sports league plaintiffs against Petitioners in connection with New Jersey's quest to legalize sports gambling. *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, 832 F.3d 389 (3d Cir. 2016) (en banc). *Christie II* involves New Jersey's attempt to partially repeal its prohibitions on sports betting. In contrast, the "*Christie I*" case pertained to a New Jersey law that affirmatively authorized sports betting, subject to regulation by the state. *Nat'l Collegiate Athletic Ass'n, et al. v. Governor of N.J.,* et al., 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014). The Respondents prevailed in the *Christie I* case, with a divided court of appeals finding New Jersey's enabling legislation violated PASPA. With the primary litigants exactly the same in both cases, *amicus curiae* draws from both lawsuits here.

I. The District Court's Grant of Injunctive Relief to Non-Litigant Third Parties Is Contrary to the Professional and Amateur Sports Protection Act's Statutory Text

This case can be resolved statutorily. As a canon of constitutional avoidance, "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam); see also *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (J. Brandeis, concurring). Pointedly, "[w]hen the

validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 465-66 (1989) quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

The district court, in an order upheld by the court of appeals, issued a broad injunction preventing Petitioners from permitting intrastate gambling on all sporting events. This injunctive relief attached to sporting events wholly unrelated to Respondents. The injunction issued in this case runs counter to PASPA's text and is inconsistent with the DOJ and Respondents' position.

The district court judge initially granted injunctive relief to Respondents in a manner "limited to the application that's been put before the [c]ourt which is limited to the plaintiffs' games." Order on Plaintiffs' Application for a Temporary Restraining Order, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.* No. 3:14-cv-14-6450 (MAS) (LHG) (Oct. 24, 2014). Hours later, with no citation to authority and no supplemental briefing, the district court reversed itself and ruled, in relevant part: "The scope of restraints is NOT limited to the games sponsored by the plaintiffs' leagues" (emphasis in original). *Id*. This *sua sponte* reversal extended PASPA-derived injunctive relief to all sports leagues, even those with no nexus to this case. PASPA's statutory text does not permit such an extension. The regulatory enforcement provision in PASPA reads as follows:

> A civil action to enjoin a violation of Section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation. 28 U.S.C. § 3703.

PASPA § 3702 attaches to both governmental and private conduct and reads as follows:

> It shall be unlawful for –
> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games. 28 U.S.C. § 3702.[2]

[2] Under PASPA, "the term 'person' has the meaning given such term in section 1 of title 1." 28 U.S.C. § 3701(4). There, "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

The DOJ is not a plaintiff in this case. The Respondents are the only plaintiffs. A straightforward reading of § 3703 clearly ties the phrase "whose competitive game" to the individual sports organization who filed suit under PASPA. The word "whose" in § 3703 functions as a possessor tethered to the individual sports organization alleging the PASPA violation. Neither PASPA's text nor PASPA's legislative history include any evidence that PASPA was intended to function as a *qui tam* statute or quasi-class action where one or more sports leagues can file suit on behalf of other non-litigant sports leagues. According to the Solicitor General, "PASPA… authorizes sports leagues to seek injunctions against violations involving *their* games" (emphasis added). Brief for the United States as Amicus Curiae at 3, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie, et al.*, Nos. 16-476 and 16-477 (May 2017). The Respondents themselves made this point clear:

> In PASPA, Congress did not grant a cause of action to remedy some undifferentiated public interest, but granted a right of action only to those whose discernable interests PASPA was enacted to protect – professional and amateur sports organizations whose own games are the object of a challenged violation. Plaintiffs' Reply Brief in Support of Their Motion for Summary Judgment and…, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.,* No. 3:12-cv-4947 (MAS) (LHG) (Dec. 12, 2012).

The following verbatim transcript and order—from the hearing where the judge issued his initial order from the bench via teleconference—illustrates the

district court's error in granting a broad injunction that stretched well beyond what is allowed by PASPA's text:

> THE COURT: Can you hear me?
> MR. RICCIO: Yes, I can hear you now. I was unclear whether the scope of your injunction is limited to the plaintiffs' games and not other sporting contests that the plaintiffs have no interest in.
> THE COURT: Well, right now the only – the scope is limited to the application that's been put before the Court which is limited to the plaintiffs' games.
> MR. RICCIO: That was the clarification I was seeking. Thank you, your Honor.
> THE COURT: That's all we have for today counsel. Order on Plaintiffs' Application for a Temporary Restraining Order, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.,* No. 3:14-cv-14-6450 (MAS) (LHG) (Oct. 24, 2014).

Within hours, the district court reversed itself and added the following to its order:

> **ADDENDUM**: Upon further consideration of the question posed by [Mr. Riccio] as to the scope of the temporary restraining order, this court finds that the temporary restraining order restrains the implementing, enforcing, or taking any action pursuant to New Jersey Senate Bill 2460 (P.L. 2015, c. 62), the 2014 Law, and would apply to any 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. The scope of restraints is NOT limited to the games sponsored by the plaintiffs' leagues (emphasis in original). *Id*.

The district court's modified order goes beyond what PASPA's statutory text permits Respondents to seek. The Respondents emphasized this precise issue twice previously. First, Respondents wrote: "If New Jersey had singled out the World Series, for state-sponsored gambling, then only Major League Baseball could sue." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint at 15, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, No. 3:12-cv- 4947 (MAS) (LHG) (Oct. 1, 2012). Second, during oral argument, Respondents explained:

> And PASPA actually responds to that very specifically because it gives the NFL the right to bring an action based on authorized gambling on NFL games. It gives the NBA standing to bring the challenge based on gambling on NBA games. So it's not like the NFL can bring a claim about NBA, gambling on NBA. It's very specific to their legal entitlement to protect their product. Transcript of Oral Argument at 38, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, Nos. 13-1713, 13-1714 & 13-1715, 730 F.3d 208 (3d Cir. June 26, 2013).

Uninvolved sports leagues should not—indeed, cannot—be subject to any injunction based on Respondents' alleged individualized harms. Neither should Petitioners. PASPA's statutory text does not allow it. Court precedent does not allow it either. Injunctive relief "should be no more burdensome to the

defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Likewise, there is "the general prohibition on a litigant raising another person's legal rights" *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The district court issued a sweeping injunction against Petitioners that Respondents did not request. PASPA's statutory text plainly does not allow a basketball league to obtain an injunction preventing a State from permitting betting on football, baseball, hockey, tennis, golf, or mixed martial arts. Respondents should be among those most concerned about the district court's broad grant of injunctive relief to non-parties. Under the district court's interpretation of PASPA, a lone wolf sports league could obtain across-the-board injunctions in multiple States to bar types of sports-betting-related activities—such as daily fantasy sports—that the majority of the Respondents support.[3] For example, under the district

[3] The emergence of paid daily fantasy sports illustrates a PASPA-relevant policy divide among Respondents. One of the Respondents—the NCAA—considers daily fantasy sports to be a form of sports gambling and opposes the activity. The other four Respondents distinguish daily fantasy sports from other forms of sports gambling. PASPA's sports betting ban covers "betting, gambling, or wagering scheme[s] based…on one or more competitive games in which amateur or professional athletes participate…or on one or more performances of such athletes in such games." 28 U.S.C. § 3702. Such language captures daily fantasy sports. Indeed, legislative history suggests that PASPA's general ban on sports gambling was intended to be broad: "The prohibition of [§] 3702 applies regardless of whether the scheme is based on chance or skill, or on a combination thereof. Moreover, the prohibition is intended to be broad enough to include all schemes involving an actual game or games, or an actual

court's interpretation about the availability and scope of PASPA's injunctive relief, an anti-gambling stalwart could form a basement ping pong league for the express purpose of filing PASPA lawsuits across the country, even if the underlying sports gambling alleged to be in violation of PASPA is wholly unconnected to the plaintiff.

PASPA is a sword that cuts both ways under the district court's interpretation of § 3703. This leaves a majority of the Respondents in a vulnerable position. With three of the Respondents owning equity interests in daily fantasy sports companies, certain plaintiffs in this case could become PASPA defendants in future cases under the portion of PASPA § 3702(2) that attaches to private sports-betting-related activities conducted "pursuant to the law or compact of a

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performance or performances therein." S. REP. NO. 102-248 at 9, *Professional and Amateur Sports Protection* (1991). Both PASPA's main sponsor—Senator Dennis DeConcini of Arizona—and the DOJ are on the record suggesting that fantasy sports fall under PASPA's purview too. See Ryan M. Rodenberg and John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L. J. ONLINE 1, 11 n.58 and 26 n.132 (2017). States differ markedly in how they define sports gambling, with most viewing the relative level of skill involved dispositive in determining legality. See Ryan M. Rodenberg, *Why Do States Define Gambling Differently?* ESPN.COM (Feb. 18, 2016). On this point, the Respondents have posited: "Sports gambling—particularly when it involves betting on the outcome of a single athletic contest—is an activity in which skill plays a significant role, as bettors gather and analyze information relating to the teams and sports on which they are betting and compare their own internal assessments with those generated by odds-makers." Verified Complaint at 16, *Office of the Comm'r of Baseball et al. v. Gov. Markell*, 2009 WL 2450284, No. 09-538 (D. Del. July 24, 2009).

governmental entity." 28 U.S.C. § 3702(2).[4] The lower court's expansive reading of injunctive relief available via § 3703 invites other sports leagues to sue under PASPA as a means to further their own self-interested regulatory efforts. Likewise, sports leagues who have moved past any Semmelweis reflex and are now supportive of legalized sports betting—a growing group that includes one of the Respondents[5]—will be incentivized to file "reverse PASPA" lawsuits in an effort to undo sweeping injunctions secured by other sports leagues in various jurisdictions. All of this could result if the district court's flawed statutory interpretation of PASPA is not corrected.

The district court's impermissibly broad injunction should be vacated and remanded for further consideration into whether Respondents have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical'" sufficient to obtain injunctive relief under PASPA for themselves and others. *Spokeo v. Robins*, 136 S. Ct. 1540, 1548 (2016) quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[6]

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[4] Since this case started, over a dozen states have enacted new laws permitting private daily fantasy sports companies to operate.

[5] One month after filing this PASPA lawsuit against Petitioners, one of the Respondents—the NBA—publicly reversed course on its previously held stance against legalized sports betting. Adam Silver, *Legalize Sports Betting*, NEW YORK TIMES (Nov. 14, 2014).

[6] The Court has expressed "serious constitutional doubt" whether Congress can statutorily establish standing if Article III's threshold requirements are not met. *Gollust v. Mendell*, 501 U.S. 115, 125 (1991). "Although 'Congress may grant an express right

II. Two Portions of the Professional and Amateur Sports Protection Act Are Unconstitutional and Severable

Petitioners argue that PASPA should be declared unconstitutional *in toto* as a violation of the anti-commandeering doctrine. Petitioners root their arguments firmly in § 3702, PASPA's general ban on sports betting. Such placement is tenuous. The Court has previously upheld Congress' power to regulate gambling nationwide under the Commerce Clause.

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of action to persons who otherwise would be barred by prudential standing rules, Art[icle] III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself.'" *Id*. quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975); see also John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993). The Third Circuit emphasized that plaintiff injuries must be "based in reality." *Doe v. Nat'l Bd. of Medical Examiners*, 199 F.3d 146, 153 (3d Cir. 1999). To date, the parties have not disputed jurisdiction in this case. However, the Court "bear[s] an independent obligation to assure [itself] that jurisdiction is proper." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008). "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Cases become moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). Plaintiffs "must maintain a 'personal stake' in the outcome of the litigation throughout its course." *Gollust v. Mendell*, 501 U.S. 115, 125 (1991) quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 395-97 (1980). Issues about justiciability can even be raised by *amicus curiae* as late as oral argument. *Honig v. Doe*, 484 U.S. 305, 317 n.5 (1988).

Champion v. Ames, 188 U.S. 321, 326-30 (1903).[7] Indeed, during oral argument, counsel for Petitioners conceded this point, confirming that Congress could "have simply banned all sports betting." Transcript of Oral Argument at 62, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, Nos. 14-4546, 14-4568, 14-4569, 799 F.3d 259 (3d Cir. Mar. 17, 2015).

PASPA is unconstitutional for two mutually exclusive reasons outside of Petitioners' anti-commandeering argument. PASPA violates both the equal sovereignty doctrine and the private nondelegation doctrine. These two unconstitutional portions can be severed from PASPA's core, a result supported by Court precedent. In *United States v. Booker*, the Court concluded that courts should "refrain from invalidating more of the statute than is necessary." 543 U.S. 220, 258 (2005). Relatedly, there is a "presumption…in favor of severability." *Regan v. Time, Inc*., 468 U.S. 641, 652 (1984).

A. The Professional and Amateur Sports Protection Act's Preferences for Certain States Via a Permanent Grandfathering Clause Violates the Equal Sovereignty Doctrine

The "purpose of [PASPA] is to prohibit sports gambling conducted by, or authorized under the law of, any State or other governments." S. REP. NO. 102-248 at 3, *Professional and Amateur Sports Protection* (1991). Sports betting was described as a "national

[7] The Court has also upheld Congressional power to ban gambling generally as a vice activity. *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

problem" that "cannot be limited geographically." *Id*. at 5. Accordingly, PASPA includes a blanket ban on sports gambling in § 3702.

PASPA's general ban on sports betting is subject to several exemptions under § 3704(a); two exemptions are relevant to analyzing PASPA under the equal sovereignty doctrine. PASPA § 3704(a)(1) exempts sports lotteries "to the extent that the scheme was conducted…at any time during the period beginning January 1, 1976, and ending August 31, 1990." PASPA § 3704(a)(2) exempts sports gambling that was "authorized by statute as in effect on October 2, 1991 [and] actually was conducted…at any time during the period beginning September 1, 1989, and ending October 2, 1991." PASPA's text does not mention by name the exempt States, but PASPA's legislative history alludes to no fewer than nine States as being exempt in some way: (i) Nevada; (ii) Delaware; (iii) Oregon; (iv) Montana; (v) North Dakota; (vi) Arizona; (vii) South Dakota; (viii) New Mexico; and (ix) Wyoming.[8] Ryan M. Rodenberg and John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L. J. ONLINE at 16 (2017).

As derived from the Tenth Amendment, the equal sovereignty doctrine's test is easily summarized: "[A] departure from the fundamental principle of equal

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[8] Beyond exemptions for certain States, PASPA's legislative history suggests certain Native American tribes may be exempt too: "An Indian tribe may conduct, and may allow to be conducted, on lands of the tribe in a State, only those particular sports gambling schemes that were in operation on such lands prior to August 31, 1990." S. REP. NO. 102-248 at 10, *Professional and Amateur Sports Protection* (1991).

sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203. Further, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." *Shelby County*, 133 S. Ct. at 2629.

In *Shelby County*, the Court made two other points relevant to the PASPA context here. First, the Court highlighted that the portion of the Voting Rights Act at issue was temporary in nature. *Id*. at 2625. Second, the Court recognized that invalidating one severable portion of the Voting Rights Act would not disturb the statute's blanket ban on racial discrimination in voting. *Id*. at 2631.

PASPA's unconstitutionality under the equal sovereignty doctrine is triggered by its exemptions under § 3704(a)(1) and § 3704(a)(2), not PASPA's general ban on sports gambling in § 3702. The resulting discrimination between States manifests itself in two ways. First, PASPA differentiates favored grandfathered States and non-grandfathered States, with the latter completely barred from legalizing sports betting within their borders. Second, Nevada is treated more favorably than some of the other exempted States. Both tiers of state-level distinctions violate the equal sovereignty doctrine.

Far from being "sufficiently related to the problem that it targets," PASPA's permanent exemptions for at least nine States are completely divorced from any relationship to the "national problem" of sports gambling. PASPA stands alone in this regard: "[T]here is no recognizable legislative precedent for perpetually

allowing purportedly undesirable behavior in certain jurisdictions, but not others." John T. Holden, Anastasios Kaburakis & Ryan M. Rodenberg, *Sports Gambling and Your Grandfather (Clause)*, 26 STAN. L. & POL'Y REV. ONLINE 1, 7-8 (2014). This permanency contravenes the Court's mandate that divisions between the States must make "sense in light of current conditions." PASPA's permanent grandfather clause precludes sports wagering in disfavored States forever. All of these factors firmly place PASPA's exemptions for certain States in unconstitutional territory *vis-à-vis* the equal sovereignty doctrine.

According to the Third Circuit, "the Supreme Court, while testing the constitutionality of a 'grandfather' provision, has emphasized the importance of articulating the legislative purpose." *Delaware River Basin Comm'n v. Bucks County*, 641 F.2d 1087, 1095 (3d Cir. 1981).[9] PASPA's grandfather clause is unsupported by the statute's legislative history. The Court has already looked at the rationale behind PASPA's exemptions, finding "some with obscured Congressional purposes." *Greater New Orleans Broadcasting Ass'n, Inc. et al. v. United States*, 527 U.S. 173, 179 (1999). Likewise, counsel for Respondents previously argued that the legislative history pertaining to PASPA's carve-outs was "undeniably muddled" and "internally inconsistent." Brief in Opposition at 17, *Gov. Markell v. Office of the Comm'r of Baseball*, No. 09-914, 559 U.S. 1106, *cert.*

[9] *Delaware River Basin* cited two Court decisions for this finding: *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970) (per curiam) and *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936).

denied (2010). These findings cut against any reasonable justification Congress may have had to differentiate between the States on the issue of sports gambling.

Devoid of justification and unrelated to PASPA's goal of banning sports betting, PASPA's state-differentiating exemptions in § 3704(a)(1) and § 3704(a)(2) are unconstitutional under the equal sovereignty doctrine and should be severed from the remainder of the statute.

B. The Professional and Amateur Sports Protection Act's Conferral of Regulatory Power to Sports Leagues for Use Against States Violates the Private Nondelegation Doctrine

Prior to PASPA's enactment, the DOJ told Congress that it was "particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues." 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). The DOJ did not elaborate on its finding, but *amicus curiae* does here.

Through PASPA, Congress has unconstitutionally delegated regulatory power over sports gambling to self-interested sports leagues in violation of the private nondelegation doctrine as derived from Article I and set forth by the Court in *Carter v. Carter Coal Co*., 298 U.S. 238 (1936) and discussed, most recently, in *Dep't*

of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225 (2015).[10] Via the deputizing provision of PASPA § 3703, Congress has delegated the authority to shape federal sports gambling policy to private entities, with PASPA-backed sports leagues left to choose whether to regulate or not according to their own interests.[11] Petitioners—and potentially other States—are deprived of basic due process protections as a result.

The Court's "so-called 'private nondelegation doctrine' flows logically from the three Vesting Clauses." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135

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[10] Senator Bill Bradley explained how PASPA is tethered to Congressional lawmaking efforts: "To aid in the enforcement of this legislative goal of proscribing sports betting, [PASPA] authorizes parties such as the [DOJ] and any affected sports organization to seek injunctive relief against an infringement of the act." Bill Bradley, *The Professional and Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. OF SPORT L. 5, 9 (1992).

[11] Oregon State Lottery director James J. Davey elaborated in Congressional testimony: "While it is true the federal government has regulated interstate wagering, the federal government has not attempted to tell the states what they can do within their own borders. This legislation would do precisely that. Moreover, it would delegate to private parties, the professional sports leagues, the power to enforce these restrictions against the sovereign states. If Congress can enact this legislation, what is to stop it from prohibiting state lotteries altogether in favor of a national lottery, or of authorizing other private parties to enforce their 'special interests' against the states." Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcommittee on Economic and Commercial Law of the House of Representatives Committee on the Judiciary at 158, 102d Congress (Sept. 12, 1991). Massachusetts State Lottery director Thomas O'Heir agreed: "[PASPA] would delegate to private parties the power to enforce…restrictions against the States." *Id*. at 168.

S. Ct. 1225, 1252 (2015) (Justice Thomas concurring). The doctrine's constraints on congressional authority are "merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private." *Id*. The risks of such an arrangement are considerable: "One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern." *Id.* at 1234 (Justice Alito concurring).[12]

The Federal Government has repeatedly positioned PASPA as a regulatory statute. According to the DOJ in 2009, "Congress enacted PASPA…intending to further regulate interstate sports gambling." Federal Defendants' Opposition to Governor Jon S. Corzine's Motion to Intervene at 1, *Interactive Media Entm't & Gaming Ass'n v. Holder*, No. 09-1301, 2011 WL 802106 (D.N.J. July 20, 2009). The DOJ elaborated a year later: "To regulate sports betting, an activity with uncontested effect on interstate commerce, Congress enacted a national policy." Reply in Support of Federal Defendants' Motion to Dismiss at 7, *Interactive Media Entm't & Gaming Ass'n v. Holder*, No. 09-1301, 2011 WL 802106 (D.N.J. Oct. 18, 2010). In 2014, the Solicitor General wrote: "PASPA does not merely limit

[12] Such concerns implicate the Constitution's structure too: "The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. See *INS v. Chadha*, 462 U.S. 919, 959 (1983). It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1237 (2015) (Justice Alito concurring).

the regulatory reach of the States; it directly regulates private conduct as well." Brief for the United States in Opposition at 17, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, Nos. 13-967, 13-979 and 13-980 (May 2014). According to the Solicitor General in 2017, "portions of [§] 3702(1) permissibly 'regulate[] state activities.'" Brief for the United States as Amicus Curiae at 13, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, Nos. 16-476 and 16-477 (May 2017) quoting *South Carolina v. Baker*, 485 U.S. 505, 514 (1988).

The way PASPA regulates—as demonstrated in this case with the Federal Government absent as a litigant and only Respondents furthering the PASPA claims against Petitioners—is by outsourcing a form of privatized regulatory power for unilateral use against the States. PASPA is also a purely elective statute as evidenced by the discretionary word "may" in § 3703, giving rise to the possibility of selective enforcement. Such a regulatory apparatus violates the private nondelegation doctrine.

The Court has largely allowed Congress to delegate rulemaking power to other governmental entities. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); see also *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). However, since *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), the Court has made clear that delegations of regulatory power to private non-governmental entities is prohibited as a "denial of rights safeguarded by the due process clause of the Fifth Amendment." In *Carter Coal*, the Court explained that a delegation to a private party "is legislative delegation in its most obnoxious form; for it is not even

delegation to an official or an official body, presumptively disinterested, but to private persons whose interest may be and often are adverse to the interests of others in the same business." *Id*.; *see also Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (challenged statute was permissible because it did not "delegate regulatory power to private individuals").

The Court recently revisited this issue in *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015). There, the Court reversed a decision finding a violation of the private nondelegation doctrine on the basis that the regulator in question, Amtrak, was a government actor, not a private party. The Respondents in this case are undoubtedly private entities. When delegating to private parties, "there is not even a fig leaf of constitutional justification." *Id*. at 1237 (Justice Alito concurring). Further, "[b]y any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'" *Id*. at 1238, quoting *Carter Coal*, 298 U.S. at 311.

The rationale underpinning the private nondelegation doctrine relates to the Appointments Clause barring private parties from exercising "significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Through PASPA, private sports leagues are empowered to file suit against States and non-governmental entities operating pursuant to state or local law.[13] Such power is significant, as it carries with

[13] The Senate Report accompanying PASPA did allude to one constraint of sports leagues: "The committee would like to make it clear that this bill does not benefit professional sports financially. It does not reserve the right to the leagues to hold their own sports

it the ability to shape sports gambling laws nationwide. PASPA gives sports leagues a substantial role in determining what types of sports betting are either legal or illegal. For example, counsel for Respondents opined during oral argument that States could comply with PASPA via a partial repeal of its own laws pertaining to sports "wagers under $100 between personal acquaintances or family members." Transcript of Oral Argument at 44, *Nat'l Collegiate Athletic Ass'n et al. v. Gov. Christie et al.*, Nos. 14-4546, 14-4568, 14-4569, 799 F.3d 259 (3d Cir. Mar. 17, 2015).

The lessons of *Carter Coal* and *Ass'n of Am. R.R.* are directly applicable to the sports gambling context in this case. Through PASPA, Congress has delegated regulatory power to private sports leagues on par with that of the DOJ. Since enactment, only private sports leagues have initiated PASPA lawsuits against States. The Attorney General has never initiated a PASPA lawsuit.

Ten years ago, the Respondents communicated a private-nondelegation-doctrine-related concern to Congress, expressing reservations about private parties' role in banning gambling. The year after the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") was enacted, Congress considered a House bill (H.R. 2046) that would roll back some of UIGEA's restrictive internet gambling provisions. 31 U.S.C. § 5361 *et seq.*

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gambling operations. They are clearly prohibited under this bill from instituting their own sports betting scheme." S. REP. 102-248 at 8, *Professional and Amateur Sports Protection* (1991).

Included in the draft bill was an opt-out clause permitting sports leagues to prohibit internet gambling on affiliated sporting events. The NFL, MLB, NBA, NHL, and NCAA—the same five sports leagues who are the Respondents here—sent a May 31, 2007 letter to Congress in opposition to H.R. 2046 generally and the opt-out provision specifically.[14] In relevant part, the Respondents wrote:

> [T]he opt-outs are subject to challenge in U.S. courts on the grounds that Congress has unconstitutionally delegated its lawmaking power (to ban Internet gambling) to private parties (commissioners of various sports leagues and conferences). Letter from Rick Buchanan (NBA), Elsa Kircher Cole (NCAA), William Daly (NHL), Tom Ostertag (MLB) & Jeffrey Pash (NFL) to Members of the House Financial Services Committee (May 31, 2007).

The grant of opt-in regulatory power under PASPA is functionally analogous to the proposed opt-out clause the Respondents argued against in their joint 2007 letter to Congress. PASPA's conferral of broad sports gambling regulatory power to private sports leagues is also in direct conflict with Congress' finding that "the States should have the primary responsibility for

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[14] Two years later, one of the Respondents—the NFL—similarly cautioned the Delaware Supreme Court against allowing a delegation of regulatory power to a government official in developing "specific sports betting games" when Delaware was considering expanding its sports lottery options. Brief of the Nat'l Football League as Amicus Curiae in Support of the Negative Position at 13, No. 150-2009, *In re Request of the Governor for an Advisory Opinion*, 12 A.3d 1104 (Del. May 9, 2009).

determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1).[15] In accord, the DOJ posited that "it is left to the states to decide whether to permit gambling activities based upon sporting events." 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). Under PASPA, sports leagues have priority over States in this regard.

Others have expressed similar concerns. According to Iowa Senator Chuck Grassley, "[PASPA] would prohibit purely intrastate activities. The Federal Government also has never authorized private parties to enforce such restrictions against the States. This legislation would do so." S. REP. 102-248 at 12, *Professional and Amateur Sports Protection* (1991). Two commentators concurred: "PASPA is vulnerable to constitutional challenges based on its procedural mechanisms. . . PASPA is a facially unprecedented law, giving sports organizations the ability to trump state legislators." I. Nelson Rose and Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45(2) CONN. L. REV. 653, 687 (2012).

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[15] This finding is consistent with a prior statement made by executives from Respondents: "[w]hether you think gambling liberalization is a bad idea or a good one, the policy judgments of State legislatures and Congress must be respected." Letter from Rick Buchanan (NBA), Elsa Kircher Cole (NCAA), William Daly (NHL), Tom Ostertag (MLB) & Jeffrey Pash (NFL) to Members of Congress (July 30, 2007).

The Congressional Record includes evidence of Respondents' role in setting PASPA's parameters before the statute was enacted too. During an October 7, 1992 debate on the Senate floor, New Mexico Senator Pete Domenici asked Arizona Senator Dennis DeConcini if New Mexico's law permitting "Keirin" bicycle race betting would be exempt under PASPA. The verbatim transcript is below:

> **Senator Domenici**: So, it is my understanding that my good friend from Arizona cleared the possibility of exempting Keirin from the provisions of this bill with our Nation's major sports organizations, the national [sic] Football League, the National Basketball Association, Major League Baseball, the National Hockey League, and the National Collegiate Athletic Association, to ensure they had no concerns.
> **Senator DeConcini**: It is my understanding that the leagues and the NCAA do not object to this type of pari-mutuel bike racing and did not intend for the bill to cover such a sport. 138 CONG. REC. 33,823 (Oct. 7, 1992) (statements of Sen. Domenici and Sen. DeConcini)

PASPA's delegation of regulatory power to self-interested private sports leagues is the type of unconstitutional conferral the private nondelegation doctrine addresses. Outsourcing to private actors the ability to commandeer States' choices regarding sports gambling regulation is pernicious to constitutional due process considerations, as it vanquishes any political accountability. The impact on Petitioners has been particularly severe. The will of New Jersey's voters, legislature, and governor was overridden by a

congressional delegation of power to private parties. The discretionary nature of PASPA's conferral of regulatory authority to private entities puts coercive pressure on States to only pass sports wagering laws that meet with Respondents' approval.[16]

If PASPA's outsourcing of regulatory power to private entities is upheld, the policy implications will be profound. Congress could be emboldened to statutorily skirt due process protections via legislation that empowers private entities to sue sitting state governors and other state public officials whenever

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[16] For example, in 2009, one of the Respondents—the NFL—sent a letter to Delaware Governor Jack Markell that read, in relevant part: "I have read recent reports that your office is reviewing the possible establishment of a sports lottery in Delaware. The NFL's position on such lotteries that involve our games is that they are an additional threat to the integrity of our league and contrary to the public good. We strongly urge you to reject any proposal to permit a sports lottery in Delaware. We appreciate the financial difficulties that Delaware faces in today's economic times. We hesitate to interject ourselves into your state's affairs. However, when pro-gambling forces in Delaware advocate the use of our NFL games and players as betting vehicles, we do not believe it is in our best interests to stay on the sidelines. … We remain hopeful that the legislature will not pass—and you will not support—any bill that permits a sports lottery in Delaware. However, if a sports lottery is authorized, the NFL will necessarily give the final proposal the most careful scrutiny, both to protect the rights of our member clubs and to ensure that any lottery complies with strict federal law and the restrictions of the Delaware Constitution (emphasis in original)." Letter from Roger Goodell, National Football League, to the Honorable Jack Markell, Governor of Delaware (Mar. 17, 2009). The same five sports leagues who are Respondents in this case subsequently filed a PASPA lawsuit against Gov. Markell. *Office of the Comm'r of Baseball, et al. v. Gov. Markell*, 579 F.3d 293 (3d Cir. 2009) *cert. denied*, 559 U.S. 1106 (2010).

States pursue measures to regulate certain industries or implement voter-approved referendums inconsistent with Congress' then-existing leanings. Examples outside of PASPA and sports betting are plentiful.

What if Congress banned certain States from enacting or amending a minimum wage law and delegated follow-up regulatory efforts—via civil litigation seeking injunctive relief against state officials trying to boost wages among hourly workers—to private fast food companies who oppose high minimum wages? Or, what if Congress prohibited the vast majority of States from enacting laws to address hydraulic fracturing, with private oil and natural gas companies statutorily deputized to sue governors who signed fracking legislation? Such hypotheticals seem absurd, but both mimic how PASPA operates in the sports wagering context. In this case, five sports leagues who claimed to have an anti-sports gambling stance twenty-five years ago have now weaponized PASPA to prevent some States from enacting certain forms of sports betting legislation.

The portion of PASPA in § 3703 that confers regulatory power to sports leagues for use against the States is unconstitutional under the private nondelegation doctrine and is severable from the remainder of PASPA. By severing the unconstitutional portion of § 3703, the Court would simply be narrowing PASPA's jurisdictional authority to the Federal Government only. Such severing would cleanse PASPA of its current private nondelegation doctrine infirmities.

CONCLUSION

Under PASPA, disfavored States are bereft of options to address sports gambling within their borders. States without sanctuary under PASPA's grandfather clause can either (i) do nothing in a pressing area of concern or (ii) be susceptible to repeated regulatory litigation initiated by private actors. Such a Hobson's choice is unconstitutional.

The parties have positioned this case for resolution on anti-commandeering grounds under *New York* and *Printz*. Such positioning is misplaced. PASPA differs markedly from the statutes invalidated in *New York* and *Printz*. Through PASPA, Congress has directed States not to legislatively address sports gambling, while effectively leaving the regulatory enforcement of PASPA's decree to self-interested private parties. Also, via a grandfather clause, PASPA mandates that its ban on sports gambling only applies to certain States. This type of "outsourced commandeering" that applies in some States, but not others, puts PASPA in an unconstitutional territory far removed from *New York* and *Printz*.

Beyond PASPA's two-pronged unconstitutionality under the equal sovereignty doctrine and the private nondelegation doctrine, the district court also erroneously granted injunctive relief to non-litigant third parties. The lower court's misinterpretation of PASPA's text presents the Court with a non-constitutional option to resolve the case, as the underlying injunction should be vacated and the case remanded. *Amicus curiae* submits that these alternatives provide the Court with the framework for deciding this case.

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