

**BRINGING DOWN THE HOUSE:  
AN EXAMINATION OF THE LAW AND POLICY UNDERPINNING  
THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION  
ACT OF 1992**

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*Abstract*

*Since the economic downturn stemming from the 2008 Financial Crisis, states have had to be creative about raising revenue to combat rising budget shortfalls. New Jersey attempted such a measure in 2012 by enacting legislation that would permit state-regulated sports wagering at racetracks and Atlantic City casinos. New Jersey's sports wagering law, however, came into direct conflict with the Professional and Amateur Sports Protection Act of 1992 ("PASPA"). PASPA makes it illegal for forty-six states to authorize, sponsor, or regulate gambling on professional or amateur sports. Not long after New Jersey enacted its sports wagering law, the National Collegiate Athletic Association, Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League (the "Leagues") brought suit pursuant to PASPA to permanently enjoin New Jersey's sports wagering law.*

*In response to the Leagues' injunctive action, New Jersey asked the federal judiciary to strike down PASPA as an unconstitutional expression of Congress's power under: (1) the Commerce Clause; (2) the Tenth Amendment; or (3) the Equal Sovereignty doctrine. While New Jersey has proposed a construction of the Commerce Clause that is not widely held, the State has raised a Tenth Amendment argument for PASPA's unconstitutionality that calls into question courts' current understanding and application of the anti-commandeering principle, submitting that a negative prohibition is the functional equivalent of a command to affirmatively act. In addition, New Jersey has raised arguments for PASPA's unconstitutionality pursuant to the murky Equal Sovereignty doctrine that only recently surfaced in *Shelby County v. Holder*. However, both the federal district court and the federal circuit court*

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held in favor of the Leagues. Furthermore, in June 2014 the Supreme Court denied New Jersey's petition for a writ of certiorari, seemingly halting the State's sports wagering initiative.

While the Supreme Court has declined the opportunity to decide the legality of PASPA, from a policy perspective, hindsight and contemporary circumstances indicate that PASPA has failed to achieve the legislative objectives that inspired its enactment. PASPA has become an impractical barrier to raising revenue that the United States can no longer afford and, accordingly, should be repealed so that states may replace its punitive prohibitions with legislation that better serves their individual needs and interests.

#### TABLE OF CONTENTS

INTRODUCTION.....	1099
I. LEGISLATIVE MOTIVATIONS FOR PASPA .....	1101
A. PASPA's Proffered Legislative Objectives .....	1101
B. Cultural and Historical Motivations for PASPA ....	1101
II. THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION	
ACT .....	1105
A. Textual Analysis of PASPA.....	1105
B. Legislative Challenges to Senate Bill 474 .....	1108
III. LEGAL CHALLENGES TO PASPA PRIOR TO NCAA I.....	1110
A. Office of Comm'r of Baseball v. Markell .....	1110
B. Interactive Media Entm't & Gaming Ass'n, Inc. v.	
Holder.....	1112
C. New Jersey's Sports Wagering Law .....	1114
IV. CASE HISTORY: NCAA V. CHRISTIE/GOVERNOR OF N.J. ....	1114
A. Overview.....	1114
B. NCAA I: Plaintiff's Arguments in Support of Summary	
Judgment and Injunction.....	1115
C. NCAA I: New Jersey's Arguments in Support of	
Dismissal.....	1117
D. NCAA I: New Jersey's Arguments in Support of	
Summary Judgment .....	1118
E. NCAA I: District Court Decision .....	1121
F. Equal Sovereignty Doctrine: Intervening Case Law	
.....	1123
G. NCAA II: Third Circuit Decision .....	1124
H. NCAA II: Petition for Certiorari .....	1127
I. NCAA II: Prospects for Eventual Reversal .....	1128
J. Circumventing PASPA: New Jersey's September 2014	
Directive .....	1131
V. POLICY BENEFITS OF STATE-REGULATED SPORTS	
WAGERING.....	1133
VI. MOVING PAST PASPA: A BLUEPRINT FOR STATES TO	
FOLLOW.....	1136
CONCLUSION.....	1137

## INTRODUCTION

In January 2012, New Jersey Governor Chris Christie signed into law legislation that would allow the State to regulate sports wagering at racetracks and Atlantic City casinos.<sup>1</sup> For New Jersey, it marked the end of a lengthy process that involved a legislative proposal to amend the state constitution,<sup>2</sup> and a voter referendum that approved the proposed amendment by a nearly two-to-one margin.<sup>3</sup> Legalizing sportsbooks in New Jersey, according to one study, would bring \$1.3 billion in revenue and, at a proposed tax rate of 9.25%, net the state government \$120 million in tax revenue.<sup>4</sup>

In August 2012, however, the National Collegiate Athletic Association (“NCAA”), Major League Baseball (“MLB”), the National Basketball Association (“NBA”), the National Football League (“NFL”), and the National Hockey League (“NHL”) (collectively, the “Leagues”) filed an injunctive suit against New Jersey in federal court,<sup>5</sup> pursuant to the Professional and Amateur Sports Protection Act of 1992 (“PASPA”).<sup>6</sup> Passed by Congress in 1992, PASPA makes it unlawful for state government actors in forty-six states to authorize, sponsor, or regulate gambling on professional or amateur sports.<sup>7</sup>

After the District Court granted the Leagues’ motion for summary judgment and permanently enjoined New Jersey’s sports wagering law (“*NCAA I*”),<sup>8</sup> New Jersey appealed to the United States Court of Appeals for the Third Circuit (“*NCAA II*”).<sup>9</sup> On September 17, 2013, however, the Third Circuit affirmed the District Court, holding that PASPA is a constitutional exercise of Congress’s enumerated powers and, consequently, preempted New Jersey’s attempt to regulate sports

1. New Jersey Sports Wagering Law, 2011 N.J. Laws 1723 (2012) (codified at N.J. STAT. ANN. §§ 5:12A-1 to -6, -24, -194 (West 2012) (repealed 2014)).

2. See S. Con. Res. 132, 214th Leg., 1st Ann. Sess. (N.J. 2010) (proposing amendment to N.J. CONST. art. IV, § 7, ¶ 2(D)).

3. See Christopher L. Soriano, *The Efforts to Legalize Sports Betting in New Jersey—A History*, N.J. LAW., Apr. 2013, at 22, 24.

4. See *Public Hearing Before the S. Econ. Growth Comm.: S. Con. Res. 132*, 214th Leg., 1st Ann. Sess. 5 (N.J. 2010) (statement of S. Raymond J. Lesniak, Chair, S. Econ. Growth Comm.).

5. Nat’l Collegiate Athletic Ass’n v. Christie (*NCAA I*), 926 F. Supp. 2d 551, 553 (D.N.J. 2013), *aff’d*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014).

6. 28 U.S.C. §§ 3701-04 (2012).

7. 28 U.S.C. §§ 3702, 3704 (2012); see also Kyle Smith, *Legalize Sports Betting, and Let Gov. Chris Christie Spike the Football*, FORBES (Aug. 23, 2012, 12:31 PM), <http://www.forbes.com/sites/kylesmith/2012/08/23/legalize-sports-betting-and-let-gov-chris-christie-spike-the-football/>.

8. *NCAA I*, 926 F. Supp. 2d at 554.

9. See Nat’l Collegiate Athletic Ass’n v. Governor of N.J. (*NCAA II*), 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014).

wagering within the state pursuant to the Supremacy Clause.<sup>10</sup>

The Third Circuit's affirmance left New Jersey with one remaining avenue: to petition the Supreme Court for a writ of certiorari, which it did in February 2014.<sup>11</sup> In its petition for certiorari, the State argued in most pertinent part that the Third Circuit's decision should be reversed because the court: (1) failed to adequately rebut PASPA's implication of Tenth Amendment jurisprudence, specifically the anti-commandeering principle, which prohibits the federal government from passing laws that "command" the states to affirmatively act; and (2) incorrectly applied the doctrine of equal sovereignty among the states, which New Jersey argued, in the wake of the Supreme Court's decision in *Shelby County v. Holder*,<sup>12</sup> renders PASPA unconstitutional for facially discriminating between the states.<sup>13</sup> In June 2014, however, the Supreme Court denied New Jersey's petition for certiorari.<sup>14</sup>

Considering the substantive law underlying New Jersey's appeal, this note posits that if and when the Court reaches the issue, PASPA will pass constitutional muster. That does not mean, however, that PASPA represents sound policy. Rather, this note recommends that Congress take occasion to repeal PASPA, and allow the states to regulate sports wagering in a manner that best serves their interests.

In Part I, this note examines the legislative motivations for PASPA, with a discussion of the cultural and historical factors that ran parallel to its enactment. In Part II, this note examines the several components that comprise PASPA, while also discussing the legislative challenges to Senate Bill 474, the legislative precursor to PASPA. In Part III, this note examines the legal challenges to PASPA that were made prior to *NCAA I*, as well as the legislative endeavor undertaken by New Jersey to enact legislation that authorized sports wagering. In Part IV, the case history of New Jersey's legal battle against the Leagues is dissected, with a focus on: (1) the arguments made by the parties in *NCAA I* and *II* regarding the constitutionality of PASPA; (2) the decisions reached by each court; (3) PASPA's purported constitutionality or unconstitutionality in light of an evolving jurisprudence; (4) New Jersey's petition for certiorari; and (5) an analysis of how the Supreme Court might decide the constitutionality of PASPA. In Part V, this note sets out the policy benefits offered by a state-regulated sports wagering regime, and in Part VI, this note proposes a blueprint, derived from Ontario's sports

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10. *Id.* at 215, 240-41 (citing U.S. CONST. art. VI, cl. 2).

11. See Petition for a Writ of Certiorari, *Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014) (No. 13-967), 2014 WL 572929 [hereinafter Petition for Certiorari].

12. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

13. See Petition for Certiorari, *supra* note 11, at 2-4.

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

wagering law, for states to adopt as their own in a hypothetical, “post-PASPA” United States.

## I. LEGISLATIVE MOTIVATIONS FOR PASPA

### A. PASPA’S Proffered Legislative Objectives

As set out in the legislative history of PASPA, the purpose of the bill was “to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity.”<sup>15</sup> Furthermore, the legislative history indicates that the policy motivations underpinning the enactment of PASPA concerned “an important public purpose[:] to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime.”<sup>16</sup> Congress concluded that “[s]ports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling. It undermines public confidence in the character of professional and amateur sports.”<sup>17</sup> Of particular concern for Congress was that legalization of sports gambling in a state would actually *increase* the amount of illegal sports gambling occurring in that state,<sup>18</sup> and the purportedly corrupting influence that state-regulated sports wagering schemes would have on young people.<sup>19</sup>

To achieve its stated objective of “maintaining the integrity of our national pastime,” the means elected by Congress was legislation that expressly prohibited states from “sponsoring, operating, advertising, promoting, licensing, or authorizing sports lotteries or any other type of sports betting that is based on professional or amateur games or performances therein.”<sup>20</sup>

### B. Cultural and Historical Motivations for PASPA

No individual impetus for PASPA is identified in its legislative history. Accordingly, to properly deconstruct Congress’s legislative intent in enacting PASPA, it is necessary to explore the cultural and

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15. S. REP. NO. 102-248, at 3 (1991).

16. *Id.* at 4. The “national pastime” referred to here appears to be Major League Baseball. A discussion of the historical context for this statement is set out *infra* Part I.B.

17. *Id.*

18. *Id.* at 7 (“[I]llegal entrepreneurs can always ‘outmarket’ their legitimate counterparts, offering credit, better odds, higher payout, and, most important, tax-free winnings. For this reason, legalized sports gambling would likely draw new recruits to illegal gambling. As . . . the commissioner of baseball, testified, ‘once the moral status of sports betting has been redefined by legalization . . . many new gamblers will be created, some of whom inevitably will seek to move beyond lotteries to wagers with higher stakes and more serious consequences.’”).

19. *Id.* at 4 (Congress concluded that “[s]tate-sanctioned sports gambling will promote gambling among our Nation’s young people”).

20. *Id.*

political setting that served as the backdrop for the statute's passage.

In February 1989, eight months prior to the introduction of PASPA's predecessor legislation in Congress, Major League Baseball acted upon "serious allegations" concerning its all-time leader in hits, and then-current manager of the Cincinnati Reds, Pete Rose.<sup>21</sup> MLB summoned Rose to the commissioner's office to respond to allegations that he had gambled on baseball games,<sup>22</sup> and shortly thereafter, the league appointed former federal prosecutor John M. Dowd as Special Counsel to the Commissioner to investigate the allegations and issue a report with his findings.<sup>23</sup> In March 1989, *Sports Illustrated* became the first media outlet to publish, for public consumption, a detailed report on the allegations that Rose had wagered on baseball.<sup>24</sup> In August 1989, acting on the findings contained within the Special Counsel's report, Commissioner A. Bartlett Giamatti stated that he had concluded that Rose "bet on baseball," and announced that Rose would receive a lifetime banishment from MLB.<sup>25</sup>

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21. *Pete Rose Chronology*, CINCINNATI.COM (Dec. 12, 2002), <http://reds.enquirer.com/2002/12/12/1212agt.html>.

22. *Id.*

23. See Report by John M. Dowd et al., Special Counsel for the Comm'r, In re: Peter M. Rose, Manager, Cincinnati Reds Baseball Club (May 9, 1989), available at <http://www.seanlahman.com/baseball-archive/pete-rose/dowd-report/> [hereinafter Dowd Report].

24. *Pete Rose Chronology*, *supra* note 21.

25. *Id.* Interestingly, MLB's zero tolerance policy for gambling has roots much deeper and older than the Rose scandal. In 1919, members of the Chicago White Sox were paid by the notorious gangster Arnold Rothstein to "throw," or deliberately lose, that season's World Series; this became known as the Black Sox scandal. Douglas O. Linder, *The Black Sox Trial: An Account*, FAMOUS AM. TRIALS (2010), <http://law2.umkc.edu/faculty/projects/ftrials/blacksox/blacksoxaccount.html>. Seeking to restore its image as a "cherished national pastime" by dispelling popular notions that baseball had become overwrought with corruption, Major League Baseball's owners appointed then United States District Judge Kenesaw Mountain Landis to become the league's first commissioner. See Chil Woo, *All Bets are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 572-73 (2013). Judge Landis's first act as commissioner is credited as being his most famous: In the summer of 1921, Judge Landis banished each player implicated in the Black Sox scandal from Major League Baseball for life. Notably, none of the players implicated in the Black Sox scandal had been convicted of any crime. See Rob Neyer, *Landis Had Major Impact as First Commish*, ESPN (Jan. 23, 2004, 6:41 PM), [http://sports.espn.go.com/mlb/columns/story?columnist=neyer\\_rob&id=1714894](http://sports.espn.go.com/mlb/columns/story?columnist=neyer_rob&id=1714894). In remarks that Judge Landis used as his justification for the unprecedented penalty, he announced the institution of a zero tolerance, prophylactic policy, which very clearly influenced Major League Baseball's decision to banish Rose from the game in 1989:

Regardless of the outcome of juries, no player that throws a ball game, no player that entertains proposals or promises to throw a game, no player that sits in a conference with a bunch of crooked players where the ways and means of throwing games are discussed, and does not promptly tell his club about it, will ever again play professional baseball.

*Id.* After the Black Sox scandal, no state legalized sports gambling in any form until

Prior to the introduction of Senate Bill 474,<sup>26</sup> the legislation that would eventually become PASPA, there were several notable precursor bills that laid the legislative foundation upon which PASPA was built. The first of these precursor versions was introduced two months after Rose's banishment was announced, and took aim at prohibiting state-sanctioned sports lotteries.<sup>27</sup> A second precursor version, introduced in 1990, also attempted to prohibit state-sanctioned sports lotteries.<sup>28</sup> Neither bill, however, amounted to the categorical prohibition sought by their sponsors.<sup>29</sup>

On February 22, 1991, Senate Bill 474 was introduced, and shortly thereafter, it "was referred to the Senate Subcommittee on Patents, Copyrights and Trademarks, which held a public hearing on the bill on June 26, 1991."<sup>30</sup> Testifying in favor of Senate Bill 474, Paul Tagliabue, then-commissioner of the NFL, stated that:

Sports gambling threatens the character of team sports. Our games embody our very finest traditions and values. They stand for clean, healthy competition. They stand for teamwork. And they stand for success through preparation and honest effort. With legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing. The spread of legalized sports gambling would change forever—and for the worse—what our games stand for and the way they are perceived.<sup>31</sup>

Tagliabue's testimony set out the perceived "harm" that Congress hoped to remedy with a broad, categorical prohibition. In the wake of

1955, when Nevada created a state gaming board and authorized sports wagering in standalone locations. See *Major Events in Nevada Gaming History*, THE WAGERING RESOURCE,

[http://www.wageringresource.com/index.php?option=com\\_content&view=article&id=163&Itemid=111](http://www.wageringresource.com/index.php?option=com_content&view=article&id=163&Itemid=111) (last updated May 28, 2013). It was not until 1975 that Nevada legalized sports wagering at race and sports books inside hotels. *Id.*

26. S. 474, 102nd Cong. (1992).

27. S. 1772, 101st Cong. (1989) (proposed legislation seeking to declare state-sponsored sports lotteries to be unlawful per se under the Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051-1127 (1988)). The proposed sports lottery ban was eventually dropped from the Copyright Amendments Act of 1990. See S. 198, 101st Cong. (1989).

28. H.R. 4843, 101st Cong. (1990) (adopted by the House Judiciary Committee, without dissent, in substance as an amendment to the Comprehensive Crime Control Act. H.R. 5269, 101st Cong. § 2202 (1990)). On October 5, 1990, the House passed the Comprehensive Crime Control Act, containing the sports lottery ban. H.R. 5269, § 2202 (amending 18 U.S.C. § 1307). According to the legislative history, however, "[i]n the last hours of Congress . . . the crime bill conferees could pass only a very limited version of the crime bill, which did not include the [sports] lottery ban." S. REP. NO. 102-248, at 4 (1991).

29. See *supra* notes 27-28 and accompanying text.

30. S. REP. NO. 102-248, at 4. Those testifying in favor of Senate Bill 474 included: Paul Tagliabue, commissioner of the NFL; Francis T. Vincent, Jr., commissioner of MLB; David Stern, commissioner of the NBA; and Gil Stein, general counsel and vice president of the NHL. *Id.*

31. *Id.* at 5.

the Rose scandal,<sup>32</sup> Congress adopted the position that state-sanctioned sports wagering schemes posed a definite threat to the integrity of professional and amateur sport.<sup>33</sup> Moreover, despite a purported absence of a “groundswell of popular opinion in favor of a ban on gambling,”<sup>34</sup> Congress concluded that the most optimal means of restoring public confidence in sport was to combat *legal* rather than *illegal* wagering schemes.<sup>35</sup> PASPA would serve as its legislative vehicle.

Prior to PASPA, Congress’s attempts to regulate interstate sports wagering did not infringe upon intrastate activity. Regulation of sports wagering had previously been left to the states.<sup>36</sup> However, in conjunction with a surge in the popularity of professional and collegiate sports during the 1920s came an increase in underground sports betting activity.<sup>37</sup> Large, multi-state organized crime syndicates controlled the majority of the underground sports books that profited from the surge in sports wagering.<sup>38</sup> These organized crime syndicates defied state gaming and wagering laws by using the telegraph and telephones to make and receive bets from across state lines.<sup>39</sup>

In 1961, in an attempt to regulate and curtail interstate bookmaking, Congress passed the Interstate Wire Act.<sup>40</sup> The

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32. Notably, Pete Rose was not accused of engaging in the legal, state-regulated sports wagering that PASPA curtailed.

33. *See id.* at 5 (“Sports gambling threatens the integrity of, and public confidence in, amateur and professional sports. Widespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think ‘the fix was in’ whenever their team failed to beat the point-spread.”).

34. *See* Andrew Beyer, *Betting Bill: File it Under Inexplicable*, WASH. POST, Nov. 16, 1991, at G9.

35. *See* S. Rep. No. 102-248, at 3-8.

36. *See* Woo, *supra* note 25, at 571.

37. This period during the 1920s is referred to by one author as being the “Golden Age of Sports.” *Id.* at 573.

38. *Id.* at 574.

39. Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 284 (2011) (citing DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 29-30 (William R. Eadington ed., 2005)).

40. Interstate Wire Act of 1961, Pub. L. No. 87-216, 75 Stat. 491 (codified at 18 U.S.C. § 1084 (1964)). The Interstate Wire Act was enacted as part of a series of federal antiracketeering criminal statutes, intended to complement other federal bookmaking statutes concurrently enacted, such as the Travel Act, Pub. L. 87-228, 75 Stat. 498 (1961) (codified at 18 U.S.C. § 1952 (1964)) (federal criminal statute prohibiting the use of the U.S. mail, or interstate or foreign travel, in aid of certain racketeering enterprises, including gambling), and the Interstate Transportation of Wagering Paraphernalia Act, Pub. L. 87-218, 75 Stat. 492 (1961) (codified at 18 U.S.C. § 1953) (federal criminal statute prohibiting the use of instrumentalities of interstate commerce to deliver a physical item that can be used in a gambling operation). Later, Congress enacted the Illegal Gambling Business Act, Pub. L. No. 91-452, § 803(a), 84 Stat. 922 (1970) (codified at 18 U.S.C. § 1955 (1972)), as part of the Organized Crime Act of 1970, Pub. L. No. 91-452 (codified at

legislation was intended to assist states in enforcing their respective gaming and wagering laws, and to suppress the interstate activities of organized crime syndicates.<sup>41</sup> The Wire Act imposed criminal sanction upon:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers . . . .<sup>42</sup>

However, while the Wire Act and accompanying legislation attempted to curb the interstate gambling activities of large criminal syndicates, Congress avoided legislation that regulated intrastate gambling activities.<sup>43</sup> For the time being, regulation of gambling remained within the domain of the states.

## II. THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

### A. *Textual Analysis of PASPA*

It was not until PASPA that Congress enacted legislation aimed at regulating purely intrastate gambling activity. According to U.S. Senator Bill Bradley — who, prior to serving in the Senate, had played in the NBA for ten seasons — at the same time that Senate Bill 474 was being debated in Congress, thirteen states were considering state-sponsored legislation that would permit sports wagering.<sup>44</sup> The Senate Judiciary Committee Report found that federal action was warranted

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§§ 1501-10, 1621-23, 1951-54, 1961-68, 3331-34, 3481-502, 6001-05), as a means of enabling the federal government to regulate large-scale, organized crime syndicates engaged in interstate gambling operations. See Jeffrey Rodefer, *Federal Wire Wager Act*, GAMBLING-LAW-US.COM, <http://www.gambling-law-us.com/Federal-Laws/wire-act.htm> (last visited Feb. 7, 2015).

41. See Rodefer, *supra* note 40 (citing *United States v. McDonough*, 835 F.2d 1103, 1105 n.7 (5th Cir. 1988); *Martin v. United States*, 389 F.2d 895, 898 n.6 (5th Cir. 1968), *cert. denied*, 391 U.S. 919 (1968) (quoting Letter from Robert F. Kennedy, Atty. Gen., to Samuel Rayburn, Speaker of the U.S. House of Representatives (April 6, 1961), *as reprinted in* H.R. Rep. No. 87-967 (1961), *as reprinted in* 1961 U.S.C.C.A.N 2631, 2633)).

42. 18 U.S.C. § 1084(a) (2012).

43. See Woo, *supra* note 25, at 574 (citing Rodefer, *supra* note 40; Jeffrey R. Rodefer, *Internet Gambling in Nevada: Overview of Federal Law*, 6 GAMING L. REV. 393, 394 (2002)).

44. Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 8 (1992). Senator Bradley characterized the thirteen states' initiatives as stemming from the "fallacious" perception that state-regulated wagering on sporting events was a "panacea to their mounting deficits," and concluded that "the harm that state-sponsored sports betting causes far outweighs the financial advantages received [by states]." *Id.*

to impede the spread of sports wagering to those thirteen states considering state-sponsored gambling schemes.<sup>45</sup> Congress found that sports wagering produced “moral erosion” that inflicts “harms . . . [that] are felt beyond the borders of those [s]tates that sanction it.”<sup>46</sup> Furthermore, Congress perceived the establishment of state-regulated sports wagering schemes as initiating a process that would inevitably cause a domino effect of moral erosion among the states.<sup>47</sup> Accordingly, Congress sought to enact legislation that provided for federal regulation of intrastate sports wagering by categorically prohibiting the states’ ability to regulate the activity.<sup>48</sup>

Section 3702 of PASPA provided Congress with the broad coverage that it required in order to prohibit intrastate sports regulation.<sup>49</sup> Section 3702 states that:

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.<sup>50</sup>

Senator Bradley’s aim in helping write PASPA, “to prohibit

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45. S. REP. NO. 102-248, at 5 (1991).

46. *Id.*

47. *Id.* (finding that “[t]he moral erosion [sports gambling] produces cannot be limited geographically. Once a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure”).

48. Bradley, *supra* note 44, at 9. Whether federal legislation that prohibits the states from regulating an activity traditionally within their domain is tantamount to a *command* from the federal government to refrain from regulating the activity, thereby implicating the Tenth Amendment’s prohibition on federal statutes that commandeer the states, is an issue that was raised by Judge Vanaskie in his dissenting opinion in *NCAA II*. *Cf. NCAA II*, 730 F.3d 208, 245, 251 (3d Cir. 2013) (Vanaskie, J., concurring in part and dissenting in part). This issue is explored further below. *See infra* notes 218-222 and accompanying text.

49. *See* 28 U.S.C. § 3702 (2012). In Section 3701 of PASPA, Congress defined “amateur sports organization” and “professional sports organization” broadly, to ensure that all amateur and professional sports activities would be captured within the scope of the legislation. *Id.* § 3701(1), (3). Furthermore, PASPA defined “governmental entity” with such language so as to ensure that state and local governments were expressly prohibited from legislating contrary to PASPA’s prohibitions. *See id.* § 3701(2).

50. *Id.* § 3702.

‘outright the sponsorship or authorization of sports gambling.’<sup>51</sup> was therefore achieved by rendering it unlawful for either “a governmental body or an individual to sponsor, operate, advertise, or promote a sports wagering scheme.”<sup>52</sup>

While Section 3702 succeeded in establishing a categorical prohibition on the states’ ability to regulate intrastate sports gambling, Section 3703 provided PASPA with its enforcement mechanism. Section 3703 states that:

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.<sup>53</sup>

Thus, to aid in the enforcement of PASPA’s prohibition, Section 3703 enables “the United States Attorney General and any affected sports organization to seek injunctive relief against an infringement” (i.e., a state-sponsored sports gambling scheme) of PASPA.<sup>54</sup>

Finally, Section 3704 of PASPA provides for the statute’s applicability. Section 3704 sets out, in relevant part that:

Section 3702 shall not apply to[:]

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

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—(A) such scheme was authorized by a statute as in effect on October 2, 1991; and (B) a scheme described in section 3702 . . . ;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that—(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and (B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State’s constitution and applicable

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51. Bradley, *supra* note 44, at 9 (quoting 137 Cong. Rec. 255-56 (statement of Rep. Bryant)).

52. *Id.* (citing S. REP. NO. 102-248, at 2 (1991)).

53. 28 U.S.C. § 3703.

54. Bradley, *supra* note 44, at 9 (citing S. REP. NO. 102-248, at 2).

solely to such municipality . . . .<sup>55</sup>

According to Senator Bradley, neither he nor Senator Dennis Deconcini, who introduced Senate Bill 474, intended for PASPA to “work a harsh [economic] result” for those particular states that already had sports gambling schemes in place.<sup>56</sup> Consequently, Section 3704 exempted Nevada, Oregon, and Delaware from the applicability of PASPA.<sup>57</sup> Furthermore, Section 3704 contains an exemption from Section 3702 that allows sports wagering to continue in casinos if the betting scheme was in effect up to one year after the date of the new legislation.<sup>58</sup>

### *B. Legislative Challenges to Senate Bill 474*

Legislative challenges to Senate Bill 474 came primarily from two opponents: the U.S. Department of Justice and U.S. Senator Chuck Grassley.

The Department of Justice (the “DOJ”) raised two principal concerns. First, the DOJ stated in a letter addressed to the Senate Judiciary Committee that it had concerns regarding Senate Bill 474’s intrusion into states’ rights.<sup>59</sup> The DOJ noted that “determinations of how to raise revenue have typically been left to the States,” and that “to the extent [Senate Bill 474] can be read as anything more than a clarification of current law, it raises federalism issues.”<sup>60</sup> Second, the DOJ wrote that it had concerns with Section 3703, the provision allowing any affected sports organization to seek injunctive relief against an infringement of Senate Bill 474.<sup>61</sup> The Department of Justice found it “particularly troubling that [Senate Bill 474] would permit enforcement of its provisions by sports leagues.”<sup>62</sup>

Senator Chuck Grassley was the principal opponent of Senate Bill

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55. 28 U.S.C. § 3704 (2012).

56. Bradley, *supra* note 44, at 9 (citing 137 Cong. Rec. 4190 (1991) (statement of Sen. DeConcini)). Senator DeConcini, who introduced Senate Bill 474, stated:

Although I firmly believe that all sports gambling is harmful, I feel it unfair to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of this legislation. In addition, I have no intention of threatening the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry.

137 Cong. Rec. 4190 (statement of Sen. DeConcini).

57. *See* 28 U.S.C. § 3704 (2012).

58. This latter exemption was incorporated into PASPA by virtue of House Bill 74. *See* H.R. 74, 102d Cong. (1991); *Professional and Amateur Sports Protection Act: Hearing Before the Subcomm. on Econ. & Commercial Law of the H. Comm. on the Judiciary*, 102d Cong. 5 (1991); *see also* H.R. REP. NO. 102-405, at 178-79 (1991) (Conf. Rep.).

59. S. Rep. No. 102-248, at 12-13.

60. *Id.* at 13.

61. *See id.*

62. *Id.*

474 on the Senate floor, and set out his concerns about the legislation in the legislative history.<sup>63</sup> First, Senator Grassley expressed concern that Senate Bill 474 would be a substantial intrusion into states' rights.<sup>64</sup> Senator Grassley argued that the issues of lotteries and wagering have traditionally been issues for the states to resolve, and that "Congress should not be telling the states how they can or cannot raise revenue."<sup>65</sup> Furthermore, Senator Grassley argued that Congress's rationale for Senate Bill 474, that the legislation is warranted because "sports gambling is a national problem," and the "moral erosion it produces cannot be limited geographically," were arguments that could be made with respect to "any form of wagering and many other State revenue raising programs."<sup>66</sup> Of particular concern for Senator Grassley was that, if successfully enacted, Senate Bill 474 "would set the dangerous precedent that the Federal Government can prohibit any State revenue raising program, under the guise of 'interstate commerce,' at the behest of any special interest."<sup>67</sup>

Second, Senator Grassley argued that Senate Bill 474 "would blatantly discriminate between the [s]tates," namely, by permitting certain states, including Nevada, to be exempt from its applicability.<sup>68</sup> Senator Grassley expressed concern that, as a result of favorable treatment, "these . . . States would be granted a Federal monopoly on lawful sports wagering to the exclusion of the other . . . States."<sup>69</sup>

Third, Senator Grassley argued against the merits of Senate Bill 474 on the grounds that the legislation amounted to inexplicable policy.<sup>70</sup> Principally, Senator Grassley argued that Senate Bill 474 was harmful to the states because it would deprive state governments of legitimate revenue opportunities by restricting legal forms of gambling as a means of combating the \$40 billion illegal sports betting

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63. *See id.* at 12-17.

64. *See id.* at 12-13.

65. *Id.* at 12. In support of these positions, Senator Grassley pointed out that contemporary economic conditions had left states with "severe budget deficits," and that Congress had shifted increasing amounts of the burden for costly federally mandated programs to state and local governments. *Id.* Furthermore, Senator Grassley highlighted the immense economic benefits received by states from state-regulated lotteries: "[i]n 1990, State-run lotteries generated over \$20.7 billion in gross revenue, and some \$7.8 billion in net revenue for important State programs such as education, economic development and senior citizens' programs." *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 13.

69. *Id.* Senator Grassley also argued no rational basis existed for allowing the "grandfathering" provisions. In support, the Senator highlighted the inclusion of Delaware, which was "not [then] conducting any form of sports wagering and ha[d] not done so for the [prior] fifteen (15) years." *Id.*

70. *See id.*

industry.<sup>71</sup> Furthermore, Senator Grassley argued that state-sponsored sports pool lotteries, as opposed to “large wager, head-to-head betting in Las Vegas,”<sup>72</sup> do not present the harm alleged by the sponsors of Senate Bill 474. Senator Grassley observed that these sports pool lotteries,<sup>73</sup> where they were in effect, “limited [wagers] to no more than \$20,”<sup>74</sup> and awarded “parimutuel [prizes] . . . [whereby] all winners share the prize pool in proportion to their respective wagers.”<sup>75</sup> According to Senator Grassley, sports lotteries that existed in this form had a diminished risk of match-fixing relative to large wager, head-to-head match wagering.<sup>76</sup>

Finally, Senator Grassley pointed out the various benefits a state-sponsored sports lottery had brought to Oregon, the only state then conducting one.<sup>77</sup> According to the legislative history, in its first two years of operation, the Oregon Sports Action game had generated over \$14.5 million in gross revenue, resulting in more than \$4.5 million in net profit for the state.<sup>78</sup> Most crucially, Senator Grassley observed that Oregon had raised these funds despite not being a state with a “sports wagering tradition,” and had done so “without even the hint of scandal or ‘fixed’ games.”<sup>79</sup>

Despite both the Department of Justice’s and Senator Grassley’s objections, PASPA passed both the House and Senate, and went into effect on October 28, 1992.<sup>80</sup>

### III. LEGAL CHALLENGES TO PASPA PRIOR TO NCAA I

#### A. *Office of Comm’r of Baseball v. Markell*

For nearly two decades after its enactment, PASPA did not have to withstand judicial scrutiny. However, as was predicted in PASPA’s legislative history, the lure of raising revenue for revenue-deficient states through regulated sports wagering schemes proved too difficult for states to indefinitely resist.<sup>81</sup>

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71. See *id.* at 13-17; see also Beyer, *supra* note 34, at G9.

72. S. REP. NO. 102-248, at 13. As Senator Grassley correctly observed, Senate Bill 474 would expressly exclude this form of “large wager, head-to-head” sports wagering from its applicability because of Nevada’s exemption. *Id.*

73. The state-sponsored sports pool lotteries that then existed “required [players] to select multiple games against a point spread which is designed to equalize the probability that a wager on either team will be a winning wager.” *Id.*

74. *Id.*

75. *Id.*

76. See *id.*

77. See *id.* at 12-13.

78. *Id.*

79. *Id.*

80. Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1991) (codified as amended at 28 U.S.C. §§ 3701-04).

81. See S. REP. NO. 102-248, at 4-8 (1991).

The first challenge to PASPA came from the state of Delaware in 2009.<sup>82</sup> That year, the Governor of Delaware, Jack Markell, enacted the Sports Lottery Act,<sup>83</sup> legislation that authorized sports betting and table gaming at existing and future gaming facilities within the state.<sup>84</sup> Delaware sought to expand upon the gambling scheme which it was permitted to have pursuant to the “grandfathering” provision of PASPA,<sup>85</sup> and permit single-game and multi-game (“parlay”) betting “in which the winners [we]re determined based on the outcome of any professional or collegiate sporting event . . . held within or without the State, but excluding collegiate sporting events that involve a Delaware college or university, and amateur or professional sporting events that involve a Delaware team.”<sup>86</sup> Delaware sought to have its new sports gambling scheme in place for September 1, “in time for the start of the [2009] NFL regular season.”<sup>87</sup>

In July 2009, the NFL, NBA, NHL, the Office of the Commissioner of Baseball, and the NCAA filed a complaint seeking “to enjoin Delaware state officials from implementing certain elements of its Sports Lottery Act.”<sup>88</sup> In a case that required only a rudimentary analysis to support its disposition, the Third Circuit held, in relevant part, that: (1) Delaware’s sovereign status did not permit it to implement elements of its Sports Lottery Act that were barred by federal law pursuant to PASPA;<sup>89</sup> and (2) consequently, PASPA preempted provisions of Delaware’s Sports Lottery Act that permitted wagering on athletic contests beyond NFL games or single-game wagers, as the gambling scheme exempted pursuant to the “grandfathering” provision of PASPA was limited only to multi-game parlays involving only NFL teams.<sup>90</sup>

Delaware petitioned the Supreme Court for a writ of certiorari, arguing in relevant part that the Third Circuit had incorrectly concluded that Congress, through PASPA, had prohibited the State from adopting a sports lottery scheme that was narrowly tailored to serve its revenue-generating needs.<sup>91</sup> However, the Supreme Court

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82. See *Office of Comm’r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009).

83. DEL. CODE ANN. tit. 29, §§ 4801-4824 (West 2009) (permitting wagering at Delaware state-regulated agencies on athletic contests involving sports beyond the NFL or single-game betting).

84. See *id.*; see also *Markell*, 579 F.3d at 295.

85. 28 U.S.C. § 3704 (2012).

86. *Markell*, 579 F.3d at 296 (internal quotation marks omitted).

87. *Id.*

88. *Id.* at 295.

89. *Id.* at 303.

90. *Id.* at 304.

91. See *Petition for a Writ of Certiorari* at 2, *Markell v. Office of Comm’r of Baseball*, 559 U.S. 1106 (2010) (No. 09-914), 2010 WL 391264, at \*1, \*21 (arguing that the Third Circuit did not follow the applicable precedent set out in *Gregory v. Ashcroft*, which held that “[i]f Congress intends to alter the usual constitutional balance between the States

denied certiorari.<sup>92</sup>

*B. Interactive Media Entm't & Gaming Ass'n, Inc. v. Holder*

The second substantial challenge to the constitutionality of PASPA came in 2011 in *Interactive Media Entertainment and Gaming Association, Inc. v. Holder*.<sup>93</sup> In addition to the named plaintiff, the lawsuit was brought by a collection of New Jersey thoroughbred associations, as well as New Jersey State Senator Raymond Lesniak.<sup>94</sup> The *Interactive Media* plaintiffs raised three noteworthy arguments in their challenge to PASPA.

First, the *Interactive Media* plaintiffs alleged in their complaint that PASPA was unconstitutional on the grounds that, in enacting the legislation, Congress had exceeded the power vested in it through the Commerce Clause.<sup>95</sup> The plaintiffs claimed that “[o]ne of the purposes of the Constitutional Convention of 1787 was to unify the prevailing view among the States that Congress should be vested with the power to regulate matters involving interstate commerce so long as this power was uniformly applied throughout the United States.”<sup>96</sup> Accordingly, the plaintiffs claimed that Congress had violated its constitutional command under the Commerce Clause to “legislate uniformly amongst the several states” by enacting PASPA.<sup>97</sup>

Second, the plaintiffs alleged that PASPA was unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment.<sup>98</sup> The plaintiffs claimed that PASPA is violative of the Fourteenth Amendment because it permits “citizens from Nevada, Delaware, Oregon, and Montana to enjoy the privilege of engaging in multiple forms and platforms for [s]ports [b]etting and [s]ports [b]etting in general,”<sup>99</sup> and prohibits the citizens from the remaining forty-six states, including New Jersey, from enjoying the same privileges associated with engaging in sports wagering “based solely on their status as residents of different jurisdictions.”<sup>100</sup>

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and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Will v. Michigan Dep’t. of State Police*, 491 U.S. 58, 65 (1989)).

92. *Markell*, 559 U.S. 1106.

93. *Interactive Media Entm’t & Gaming Ass’n v. Holder*, No. 3:09-cv-01301-GEB-TJB, 2011 WL 802106, at \*1 (D.N.J. Mar. 7, 2011).

94. *Id.* Notably, New Jersey Governor Chris Christie declined to intervene in the action. *See id.*

95. Complaint and Demand for Declaratory Relief at 18-21, *Interactive Media Entm’t & Gaming Ass’n v. Holder*, No. 3:09-cv-01301-GEB-TJB (D.N.J. Mar. 7, 2011), 2009 WL 4890878 [hereinafter Complaint]; *see also* U.S. CONST. art. I, § 8, cl. 3.

96. Complaint, *supra* note 95, at 18.

97. *Id.*

98. *Id.* at 22; *see also* U.S. CONST. amend. XIV, § 1.

99. Complaint, *supra* note 95, at 22.

100. *Id.*

Last, the plaintiffs alleged that PASPA does not pass constitutional muster because it violates the Tenth Amendment's reservation of rights to the states.<sup>101</sup> The plaintiffs claimed that “[r]aising revenue by means of state laws authorizing [s]ports [b]etting is a right reserved to the individual states.”<sup>102</sup> Accordingly, the plaintiffs alleged that PASPA violates the Tenth Amendment “by unconstitutionally arrogating to the United States . . . express and implied . . . powers [reserved] to the individual states to regulate matters affecting its citizens including the raising of revenue by means of a form of authorized [s]ports [b]etting.”<sup>103</sup>

Despite the *Interactive Media* plaintiffs' extensive substantive arguments, the United States District Court for the District of New Jersey dismissed the lawsuit for lack of standing.<sup>104</sup> The District Court held that none of the plaintiffs satisfied the injury and redressability requirements for standing.<sup>105</sup> Furthermore, the District Court held that all of the plaintiffs lacked standing on Tenth Amendment grounds, “because such a claim is reserved for the States, and the State of New Jersey [wa]s not a party to th[e] lawsuit.”<sup>106</sup> The District Court denied the plaintiffs' argument that they had standing by virtue of Senator Lesniak's involvement in the case as a plaintiff, holding that there was no precedent permitting state legislators to challenge a federal law,<sup>107</sup> and that “under New Jersey law, the proper party to bring such a claim would be New Jersey's attorney general.”<sup>108</sup> As the District Court noted, however, neither the attorney general nor the governor were involved in the lawsuit.<sup>109</sup>

While the *Interactive Media* litigation was pending, the New Jersey legislature agreed to propose to the electorate an amendment to the state constitution that would authorize the state to regulate sports wagering.<sup>110</sup> The proposed amendment would add to Article IV, Section VII, paragraph 2 of the state constitution<sup>111</sup> authority for the state legislature to “authorize by law wagering at casinos or gambling

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101. *Id.* at 26; *see also* U.S. CONST. amend. X.

102. Complaint, *supra* note 95, at 26.

103. *Id.*

104. *Interactive Media Entm't & Gaming Ass'n v. Holder*, No. 3:09-cv-01301-GEB-TJB, 2011 WL 802106, at \*1 (D.N.J. Mar. 7, 2011).

105. *Id.* at \*10.

106. *Id.* at \*8.

107. *Id.* at \*10.

108. *Id.* (citing N.J. STAT. ANN. § 52:17A-4(c) (West 2010)).

109. *Id.*

110. S. Con. Res. 132, 214th Leg., 1st Sess. (N.J. 2010); Soriano, *supra* note 3, at 24.

111. *See* N.J. CONST. art. IV, § 7, para. 2(D) (authorizing the Casino Control Act by allowing the legislature to establish “gambling houses or casinos [within Atlantic City],” and allowing the state legislature to determine the “type and number . . . of the gambling games” that could be conducted in the casinos).

houses in Atlantic City [and] at current or former running and harness horse racetracks on the results of professional, certain college, or amateur sport or athletic events.”<sup>112</sup>

### *C. New Jersey’s Sports Wagering Law*

The amendment was presented to the New Jersey electorate as a referendum item at the November 2011 general election,<sup>113</sup> where it was approved by sixty-four percent of New Jersey voters.<sup>114</sup> Shortly after the referendum was approved by the electorate, the state legislature amended the Casino Control Act to authorize the state to permit and regulate sports wagering at Atlantic City casinos and horse racetracks.<sup>115</sup> New Jersey’s sports wagering legislation permitted “the Division of Gaming Enforcement to approve a casino licensee’s application to operate” a sports wagering outfit on its premises.<sup>116</sup> In addition, the legislation permitted the New Jersey Racing Commission to jointly approve, with the Division of Gaming Enforcement, an eligible racetrack’s application to operate a sports wagering outfit on its premises.<sup>117</sup> To alleviate concerns that permitting sports wagering at licensed institutions would damage the integrity of collegiate athletics within the state, the legislature expressly prohibited licensed institutions from accepting wagers on any collegiate sporting events taking place within New Jersey, or on any New Jersey college team’s game, regardless of venue.<sup>118</sup>

## IV. CASE HISTORY: NCAA V. CHRISTIE/GOVERNOR OF N.J.

### *A. Overview*

In response to New Jersey’s sports wagering legislation, on August 7, 2012, the NFL, NBA, NHL, the Office of the Commissioner of Baseball, and the NCAA filed a complaint in the United States District Court for the District of New Jersey seeking to enjoin the implementation of New Jersey’s law, arguing that the law would violate PASPA.<sup>119</sup> The Leagues filed suit pursuant to the private right of action provision under PASPA.<sup>120</sup> The Leagues filed a motion for summary judgment three days after filing suit, arguing that New

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112. N.J. S. Con. Res. 132.

113. *See id.*

114. Soriano, *supra* note 3, at 24.

115. New Jersey Sports Wagering Law, 2011 N.J. Laws 1723 (2012) (codified at N.J. STAT. ANN. §§ 5:12A-1 to -6, -24, -194 (West 2012) (repealed 2014)).

116. Soriano, *supra* note 3, at 24 (citing § 5:12A-2).

117. § 5:12A-2.

118. § 5:12A-1.

119. *See* Complaint for Declaratory and Injunctive Relief at 10-11, *NCAA I*, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 3:12-cv-04947-MAS-LHG).

120. *See id.* at 6 (citing 28 U.S.C. § 3703 (2012)).

Jersey's sports wagering law was a facial violation of PASPA, which prohibited New Jersey from regulating sports wagering.<sup>121</sup> Accordingly, the Leagues claimed that New Jersey's sports wagering law is unconstitutional, pursuant to the Supremacy Clause.<sup>122</sup>

*B. NCAA I: Plaintiff's Arguments in Support of Summary Judgment and Injunction*

In their motion for summary judgment, the Leagues argued preemptively that PASPA is a constitutional exercise of Congress's enumerated powers.<sup>123</sup> First, the Leagues argued that PASPA is not violative of either the Commerce Clause or the Equal Protection Clause of the Constitution.<sup>124</sup> In support, the Leagues argued that the proper standard for the courts to apply in deciding a challenge to the constitutionality of PASPA is a rational basis test.<sup>125</sup> Second, the Leagues argued that PASPA does not violate the Tenth Amendment.<sup>126</sup> These arguments are explored in turn below.

In their Commerce Clause argument, the Leagues argued that: (1) the Supreme Court has already held gambling to be a form of commerce that Congress has the power to limit or eliminate entirely from interstate commerce;<sup>127</sup> (2) intrastate gambling is a commercial activity that substantially affects interstate commerce;<sup>128</sup> (3) enacting

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121. See Brief in Support of Plaintiffs' Motion for Summary Judgment and, if Necessary, to Preserve the Status Quo, a Preliminary Injunction at 6-7, *NCAA I*, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 3:12-cv-04947-MAS-LHG) [hereinafter Plaintiffs' Summ. J. Brief].

122. See *id.* (citing U.S. CONST. art. VI, cl. 2 (providing that "[the] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the *supreme* Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding") (emphasis added)).

123. See *id.* at 8 & n.6.

124. *Id.* at 8-13. In introducing these two arguments, the Leagues stated in their complaint that "because New Jersey does not appear to have any basis for arguing that its actions are consistent with PASPA, its defense will rest entirely on its ability to articulate a theory that PASPA itself is somehow unconstitutional." *Id.* at 7.

125. *Id.* at 9. In arguing for a rational basis standard to be applied, the Leagues effectively argued that any challenge to PASPA's constitutionality under the Commerce Clause or the Equal Protection Clause must be evaluated deferentially, with minimal judicial scrutiny applied. *Id.* In a rational basis inquiry, the challenged law is presumed valid, and accordingly, the court must uphold the law if it finds that it is rationally related to a legitimate government interest. See *NCAA I*, 926 F. Supp. 2d at 574-75 (citing *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993)). Since it is difficult to fail such a test, it is difficult for a challenger to defeat government action evaluated under rational basis scrutiny unless it can affirmatively demonstrate that the government action was arbitrary or irrational. See *id.*

126. Plaintiffs' Summ. J. Brief, *supra* note 121, at 13-15.

127. *Id.* at 9 (citing *Champion v. Ames*, 188 U.S. 321, 326-30 (1903)).

128. *Id.*

federal statutes prohibiting or otherwise regulating various forms of gambling are constitutional exercises of Congress's Commerce Clause power;<sup>129</sup> and (4) PASPA is not rendered unconstitutional because, in granting exceptions applicable to certain sports gambling schemes conducted in Nevada, Delaware, Montana, and Oregon, its regulation of sports betting is not uniform throughout the country.<sup>130</sup>

In their Equal Protection Clause argument, the Leagues argued that PASPA is not unlawfully violative of the Fifth Amendment<sup>131</sup> because "a state is not a person for purposes of the Fifth Amendment . . . and thus has no constitutional equal protection rights,"<sup>132</sup> and moreover, "social and economic legislation is valid unless the varying treatment of different groups . . . is so unrelated to the achievement of any combination of *legitimate* purposes that [a court] can only conclude that the legislature's actions were irrational."<sup>133</sup> The Leagues also argued that PASPA does not impermissibly interfere with states' sovereignty in violation of the Tenth Amendment because the statute is a valid exercise of Congress's Commerce Clause powers.<sup>134</sup>

In support of their claim for injunctive relief — and, by extension, to establish proper standing — the Leagues argued that New Jersey's sports wagering law threatened them with "imminent, irreparable injury."<sup>135</sup> In support of their claim of imminent injury, the Leagues pointed to the legislative history of PASPA,<sup>136</sup> as well as to New Jersey's continued prohibition against wagering on collegiate games

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129. *Id.* at 9-10 (citing *United States v. Vlanich*, 75 F. App'x 104, 106 (3d Cir. 2003) (noting that "[l]arge scale gambling obviously has commercial implications . . . [and a federal statute prohibiting illegal gambling businesses] continues to be valid under the Commerce Clause").

130. *Id.* at 11 (citing *Currin v. Wallace*, 306 U.S. 1, 14 (1939) ("There is no requirement of uniformity in connection with the commerce power.")).

131. The Fourteenth Amendment's Equal Protection Clause has been applied to the states through reverse-incorporation. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that racial discrimination in public schools violates due process, and reasoning that, although the Equal Protection Clause has no counterpart that is applicable to the federal government, grossly unreasonable discrimination by the federal government violates the Due Process Clause of the Fifth Amendment).

132. Plaintiffs' Summ. J. Brief, *supra* note 121, at 11-12 (citing *Delaware v. Cavazos*, 723 F. Supp. 234, 243-44 (D. Del. 1989), *aff'd mem.*, 919 F.2d 137 (3d Cir. 1990)).

133. *Id.* at 12 (second alteration in original) (emphasis added) (internal quotation marks omitted) (quoting *Hodel v. Indiana*, 452 U.S. 314, 332 (1981)).

134. *Id.* at 14 (citing *United States v. Barrow*, 363 F.2d 62, 65 (3d Cir. 1966) (holding that the Tenth Amendment "does not operate as a limitation upon the powers delegated to the Congress by the Commerce Clause"); *United States v. Parker*, 108 F.3d 28, 31 (3d Cir. 1997) ("If Congress acts under one of its enumerated powers — here its power under the Commerce Clause — there can be no violation of the Tenth Amendment.")).

135. *Id.* at 17.

136. *See supra* Parts I-II.

held in the state or games involving New Jersey colleges.<sup>137</sup> To demonstrate irreparable harm, the Leagues argued that the harms caused by sports wagering — particularly harm to reputation and goodwill — have been consistently recognized by courts to constitute irreparable injury, and that a constitutional violation alone, such as New Jersey’s facial infringement of the Supremacy Clause, can suffice to show irreparable harm.<sup>138</sup>

*C. NCAA I: New Jersey’s Arguments in Support of Dismissal*

In response to the Leagues’ motion for summary judgment, New Jersey filed a motion to dismiss for lack of standing.<sup>139</sup> The State argued that the Leagues’ complaint failed to assert facts that, if true, would plausibly suggest that they would “imminently . . . suffer a concrete and particularized injury that is fairly traceable to New Jersey’s legalization of sports wagering,” and therefore lacked standing.<sup>140</sup> In particular, New Jersey argued that the Leagues’ claim of reputational injury was based on implausible conjecture and not particularized to any plaintiff,<sup>141</sup> and that the Leagues had not sufficiently alleged that any injury would be “fairly traceable” to the State’s sports wagering law.<sup>142</sup>

In December 2012, the District Court rejected New Jersey’s arguments for dismissal for lack of standing.<sup>143</sup> In support of its holding, the District Court found that the Leagues had met their burden of demonstrating an injury in fact by articulating a particularized injury “based upon the negative effect the Sports Wagering Law would have upon perception of the integrity of the Leagues’ games and their relationship with their fans.”<sup>144</sup> This holding

137. See N.J. STAT. ANN § 5:12A-1.

138. Plaintiffs’ Summ. J. Brief, *supra* note 121, at 18-19 (citing *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990) (“[P]ermitting states to regulate . . . would violate the Supremacy Clause, causing irreparable injury.”), *aff’d*, 504 U.S. 374 (1992)).

139. See Brief in Support of Defendants’ Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1), *NCAA I*, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 3:12-cv-04947-MAS-LHG) [hereinafter Brief in Support of Defendants’ Motion to Dismiss].

140. *Id.* at 6. In order to establish standing for a claim seeking injunctive relief: [A] plaintiff must show that he/[she] is under threat of suffering an “injury in fact” that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

*Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

141. Brief in Support of Defendants’ Motion to Dismiss, *supra* note 139, at 7-14.

142. *Id.* at 14-20.

143. *Nat’l Collegiate Athletic Ass’n v. Christie*, No. 3:12-cv-04947-MAS-LHG, 2012 WL 6698684, at \*1 (D.N.J. Dec. 21, 2012).

144. *Id.* at \*4-5 (noting that “Plaintiffs’ interest in protecting how they are perceived by their fans is sufficient to create the identifiable trifle of injury necessary for purposes

effectively established that the Leagues have standing to bring suit to enjoin New Jersey's sports wagering law.

*D. NCAA I: New Jersey's Arguments in Support of Summary Judgment*

Before the District Court issued its opinion on New Jersey's motion to dismiss, New Jersey cross-moved for summary judgment, arguing that PASPA is unconstitutional and focusing on two positions:<sup>145</sup> (1) that PASPA violates the Tenth Amendment's anti-commandeering principle set out in *New York v. United States*;<sup>146</sup> and (2) that PASPA's discrimination between the states exceeds the power of the Commerce Clause and violates the principle of equal sovereignty among the states.<sup>147</sup>

New Jersey's Tenth Amendment position rested upon two principal arguments. The State first argued that PASPA violates the anti-commandeering principle of *New York* by effectively "freezing" preexisting state bans on sports wagering.<sup>148</sup> PASPA, New Jersey argued, violates the Tenth Amendment's prohibition on Congress's "ability to require the States to govern according to Congress' instructions."<sup>149</sup> New Jersey framed the central mandate of PASPA as being "that no covered state may 'authorize,' or legalize, sports wagering."<sup>150</sup> PASPA's mandate that states maintain a ban on sports betting, New Jersey argued, "is indistinguishable from a federal law requiring States to enact laws prohibiting sports betting."<sup>151</sup> New Jersey argued that unless a state was expressly favored by Congress in PASPA, it "*must* continue to prohibit sports wagering on threat of injunction and accompanying contempt sanctions,"<sup>152</sup> therefore making PASPA an unequivocal example of legislative

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of standing").

145. Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 22-38, *NCAA I*, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 3:12-cv-04947-MAS-LHG) [hereinafter Defendants' Summ. J. Brief].

146. *Id.* at 23-32; *see also* *New York v. United States*, 505 U.S. 144, 166 (1992) ("[The Supreme Court] ha[s] always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program").

147. Defendants' Summ. J. Brief, *supra* note 145, at 33-36.

148. *Id.* at 23-30.

149. *Id.* at 24 (quoting *New York*, 505 U.S. at 162).

150. *Id.* (emphasis removed); *see* 28 U.S.C. § 3702(1) (2012).

151. Defendants' Summ. J. Brief, *supra* note 145, at 24.

152. *Id.* at 25 (bolding removed).

commandeering.<sup>153</sup> Second, the State argued that PASPA violates the Tenth Amendment because it forces New Jersey to invalidate its “extremely popular Sports Gambling Law,” but leaves State officials to “bear the brunt of public disapproval, while the federal officials who devised the regulatory program . . . remain insulated from the electoral ramifications of their decision.”<sup>154</sup> Last, the State argued that the Leagues’ relied on “inapposite Third Circuit precedent, [which] provid[ed] that ‘there can be no violation of the Tenth Amendment’ where Congress acts pursuant to one of its enumerated powers, such as the Commerce Clause.”<sup>155</sup> The applicable precedent, the State argued, is the Supreme Court’s decision in *New York*, which concluded “that the anti-commandeering principle is an independent limit on Congress’s enumerated powers,” including the Commerce Clause.<sup>156</sup>

In addition, New Jersey argued that PASPA’s facial discrimination among the states violates both the Commerce Clause and the principle of equal sovereignty among the states.<sup>157</sup>

While the State acknowledged that the Commerce Clause is silent as to whether regulations adopted pursuant to the Clause must treat states uniformly,<sup>158</sup> it argued that “the Supreme Court has long recognized that a purpose of the [Commerce] [C]lause is to ‘insure [sic] uniformity in regulation’ across the States.”<sup>159</sup> New Jersey cited to nineteenth century jurisprudence for its argument that “the want of uniformity in commercial regulations[] was one of the grievances of the citizens under the [Articles of] Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system.”<sup>160</sup> Accordingly, New Jersey argued for the

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153. *Id.*

154. *Id.* at 26 (quoting *New York*, 505 U.S. at 169); *see also* *Nat’l Fed’n of Int’l Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (plurality opinion) (quoting *New York*, 505 U.S. at 169) (“Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. ‘Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.’”).

155. Defendants’ Summ. J. Brief, *supra* note 145, at 27 (quoting Plaintiffs’ Summ. J. Brief, *supra* note 121, at 14 (quoting *United States v. Parker*, 108 F.3d 28, 31 (3d Cir. 1997))).

156. *Id.* (citing *New York*, 505 U.S. at 166 (“The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”)).

157. *See id.* at 33-36.

158. *See id.* at 33.

159. *Id.* (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923)).

160. *Id.* (quoting *Ward v. Maryland*, 79 U.S. 418, 431 (1871)). For a discussion about the uniformity constraint on the Commerce Clause power, *see* Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV.

District Court to hold that PASPA's intentional discrimination<sup>161</sup> under the Commerce Clause is an unconstitutional infringement of the uniformity requirement embedded within that enumerated power.<sup>162</sup>

Next, New Jersey argued that the "uniformity requirement" inherent in the Commerce Clause, "as applied to the States themselves, is further mandated by the broader and more fundamental principle that 'all the States enjoy equal sovereignty.'"<sup>163</sup> Any infringement of the fundamental principle of equal sovereignty, New Jersey argued, "requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."<sup>164</sup> Congress's sole rationale for PASPA's intentional discrimination, New Jersey argued, was the "presence or absence of pre-enactment sports gambling activity."<sup>165</sup> The State argued that this kind of "permanent grandfathering is insufficient to justify" the

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249, 253 (2005). Colby highlights the historical basis for the Commerce Clause in arguing that implied within the Commerce Clause power is a fundamental requirement of uniformity, akin to the uniformity requirement manifested in the Taxing Power:

The desire for uniform regulation of commerce was perhaps the single biggest catalyst for the Constitutional Convention. The states were unable to coordinate their trade policies to counter the protectionist actions of foreign nations; instead, they undercut each other's efforts and bickered incessantly among themselves, to the virtual ruin of American shipping . . . .  
 . . . [T]he need for uniformity was not simply the precipitating factor in the creation of the federal commerce power; it was also considered to be a *fundamental limitation* upon that power.

*Id.* (emphasis added).

161. See 28 U.S.C. § 3704(a)(1)-(2) (2012) (PASPA's "grandfathering" clause, which partially exempts Oregon, Delaware, and Montana, and wholly exempts Nevada, from the application of PASPA).

162. Defendants' Summ. J. Brief, *supra* note 145, at 33 (citing *Ward*, 79 U.S. at 431 ("Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations.")).

163. *Id.* (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)). The Supreme Court's reference to the existence of a "fundamental principle of equal sovereignty" of the states has been met with criticism. See, e.g., Richard A. Posner, *The Voting Rights Act Ruling is About the Conservative Imagination*, SLATE (Jun. 26, 2013, 12:16 AM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/the\\_supreme\\_court\\_and\\_the\\_voting\\_rights\\_act\\_striking\\_down\\_the\\_law\\_is\\_all.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html) ("[The fundamental principle of equal sovereignty of the states] is a principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no such principle."); Eric Posner, *John Roberts' Opinion on the Voting Rights Act is Really Lame*, SLATE (Jun. 25, 2013, 1:44 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/supreme\\_court\\_on\\_the\\_voting\\_rights\\_act\\_chief\\_justice\\_john\\_roberts\\_struck.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_on_the_voting_rights_act_chief_justice_john_roberts_struck.html).

164. Defendants' Summ. J. Brief, *supra* note 145, at 34 (citing *Nw. Austin*, 557 U.S. at 203 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966))).

165. *Id.* at 35 (citing S. REP. NO. 102-248 (1991)).

statute's discriminatory treatment of non-exempt states.<sup>166</sup> If PASPA's discrimination were permitted, New Jersey argued, the implication would be the permission of "the very evil" that Framers feared in establishing the Commerce Clause: "no principled basis would exist to deny Congress the right to similarly limit car manufacturing to Michigan, cigarette manufacturing to Virginia, or fish processing to Alaska."<sup>167</sup> Accordingly, New Jersey argued for the District Court to hold that PASPA is an unconstitutional infringement of the fundamental principle of equal sovereignty, pursuant to its discriminatory "grandfathering provision."<sup>168</sup>

*E. NCAA I: District Court Decision*<sup>169</sup>

On February 28, 2013, the District Court issued a decision,<sup>170</sup> holding that PASPA falls within Congress's powers under the Commerce Clause,<sup>171</sup> does not violate the Tenth Amendment,<sup>172</sup> and preempts New Jersey's sports wagering law.<sup>173</sup> The court therefore granted the Leagues' motions for summary judgment and permanent enjoinder of New Jersey's sports wagering law, and denied the State's cross-motion for summary judgment.<sup>174</sup>

In holding that PASPA is a lawful expression of Congress's Commerce Clause powers, the District Court found that Congress had a rational basis in concluding that legalized sports gambling would impact interstate commerce.<sup>175</sup> After examining PASPA's legislative history, the court found that Congress rationally believed that all sports gambling is harmful, and that without federal legislation, "sports gambling is likely to spread . . . and ultimately develop irreversible momentum."<sup>176</sup> Accordingly, the District Court concluded that Congress had a rational basis in advancing its legitimate interest — stopping the spread of legalized sports wagering and protecting the integrity of athletic competition — by a rationally related means, i.e., prohibiting states from authorizing gambling on professional or

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166. *Id.* (citing *Del. River Basin Comm'n v. Bucks Cnty. Water & Sewer Auth.*, 641 F.2d 1087, 1098-99 (3d Cir. 1981)).

167. *Id.* (citing *United States v. Ptasynski*, 462 U.S. 74, 81 (1983) (quoting 1 JOSEPH STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES § 957 (T. Cooley ed. 1873))).

168. *See supra* note 161 and accompanying text.

169. *NCAA I*, 926 F. Supp. 2d 551 (D.N.J. 2013).

170. *Id.*

171. *Id.* at 560.

172. *Id.* at 573.

173. *Id.* at 577.

174. *Id.* at 579.

175. *Id.* at 559-60.

176. *Id.* at 560 (internal quotation marks omitted) (quoting S. REP. NO. 102-248, at 5 (1991)).

amateur sports.<sup>177</sup>

In holding that PASPA does not violate the Tenth Amendment, the District Court rejected New Jersey's argument that a negative prohibition is in essence an affirmative command to act (by commanding a state to refrain from taking action), and therefore violates the anti-commandeering principle.<sup>178</sup> The court wrote that "the power to *restrict*, rather than *compel*, the actions of States in preempted spheres [of regulation] . . . remains[] a settled issue."<sup>179</sup>

The District Court rejected New Jersey's argument that PASPA violated the fundamental principle of equal sovereignty, and held that "the State of New Jersey, as a governmental entity, is not a 'person' and therefore is not afforded the protections of the Due Process Clause."<sup>180</sup> Accordingly, the court held that the Due Process and Equal Protection claims alleged by New Jersey were subject to rational basis review.<sup>181</sup> Applying this deferential standard of review, the court found that Congress had a rational basis for its intentionally discriminatory grandfathering provision: protecting and preserving the grandfathered states' substantial reliance on the legality of sports gambling within their borders.<sup>182</sup>

After determining that PASPA was a constitutional exercise of Congress's Commerce Clause power, and that it conflicted with New Jersey's sports wagering law, the District Court held that New Jersey's law was preempted by PASPA pursuant to the Supremacy Clause.<sup>183</sup>

Ultimately, the District Court held that a permanent injunction

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177. *See id.* at 575-76.

178. *Id.* at 570-71 ("The difference between an affirmative command and a prohibition on action is not merely academic or insubstantial. Simply stated, Defendants request that the Court read *New York* and *Printz* to displace the long held understanding that an otherwise permissible congressional action violates the Tenth Amendment because it excludes a State from enacting legislation in an area in which Congress had made its will clear. Such an expansive construction of these cases cannot be adopted by the Court, especially in light of the rule that Congressional statutes are presumptively constitutional and should be construed accordingly." (internal citations omitted)).

179. *Id.* at 571 (citing *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 759 (1982); *Hodel v. Va. Surface Min. & Reclamation Ass'n*, 452 U.S. 264, 289-90 (1981); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

180. *Id.* at 574.

181. *Id.* at 575 ("Since PASPA's classification neither involves fundamental rights, nor proceeds along suspect lines, it is accorded a presumption of validity.").

182. *Id.* at 560 (footnote omitted) ("In addition, the presence of a grandfathering clause does not undermine rational basis review. The Congressional findings demonstrate that Congress had a rational basis to exempt pre-existing sports gambling systems. The findings also reflect that Congress desired to protect the reliance interests of the few states that had legalized gambling operations.").

183. *Id.* at 577.

against New Jersey's sports wagering law was warranted.<sup>184</sup> In support, the court concluded that New Jersey's enactment of its sports wagering law, in violation of federal law, was sufficient to constitute irreparable harm to the Leagues — one for which the Leagues had no adequate legal remedy because New Jersey could not be forced to pay retroactive money damages.<sup>185</sup> The court also found that a permanent injunction would require nothing more from New Jersey than its compliance with federal law, and that protecting federal law from infringement by the State is in the public's best interest.<sup>186</sup>

*F. Equal Sovereignty Doctrine: Intervening Case Law*

Following the District Court decision, New Jersey appealed to the United States Court of Appeals for the Third Circuit,<sup>187</sup> but before oral argument was heard on June 26, 2013,<sup>188</sup> the Supreme Court issued its controversial opinion in *Shelby County v. Holder*.<sup>189</sup> In *Shelby County*, the Supreme Court revisited the constitutionality of Section 5 of the Voting Rights Act of 1965 ("VRA"),<sup>190</sup> which the Court had previously discussed in dictum in *Northwest Austin Municipal Utility District Number One v. Holder*.<sup>191</sup>

In *Northwest Austin*, a small utility district asked the Supreme Court to rule on the constitutionality of Section 5, which required the district to obtain preclearance from federal authorities before it could make changes to the manner in which its board was elected.<sup>192</sup> The district had sought an exemption from preclearance, but the District Court held that only states are eligible for "bailouts" of the kind sought by the district under the VRA.<sup>193</sup> The Supreme Court, on direct appeal, stated that Section 5 raised "federalism concerns . . . [because] it differentiates between the States."<sup>194</sup> However, the Court did not ultimately decide whether Section 5 violated the equal sovereignty principle.<sup>195</sup>

Revisiting the issue in *Shelby County*, the Court reiterated the "basic principles" of equal sovereignty that it had set out in *Northwest Austin*, and invalidated Section 4(b) of the VRA, which set out the

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184. *Id.* at 578-79.

185. *Id.* at 578.

186. *Id.*

187. *See NCAA II*, 730 F.3d 208 (3d Cir. 2013).

188. Joshua Winneker et al., *Sports Gambling and the Expanded Sovereignty Doctrine*, 13 VA. SPORTS & ENT. L.J. 38, 48 (2013).

189. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

190. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2012).

191. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

192. *Id.* at 196.

193. *Id.* at 197.

194. *Id.* at 203.

195. *See id.* at 197, 205.

formula used to determine which jurisdictions were covered by Section 5's preclearance provision.<sup>196</sup> While Section 5 was not struck down by the Court, the Court held that "[n]ot only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States."<sup>197</sup>

*G. NCAA II: Third Circuit Decision*<sup>198</sup>

New Jersey's arguments on appeal to the Third Circuit were built upon the same foundation as its arguments before the District Court.<sup>199</sup> However, the State additionally argued that PASPA's facial infringement of the fundamental principle of equal sovereignty among the states made the statute unconstitutional pursuant to the Supreme Court's decision in *Shelby County*.<sup>200</sup>

In September 2013, the Third Circuit issued a two-to-one opinion affirming the District Court's decision in full.<sup>201</sup> Reviewing the District Court's decision de novo, the Circuit Court held that the Leagues had standing to enjoin New Jersey's sports wagering law because they established injury-in-fact,<sup>202</sup> and that PASPA is a valid exercise of Congress's Commerce Clause power.<sup>203</sup> The court then held that PASPA does not violate the anti-commandeering principle of the Tenth Amendment,<sup>204</sup> and does not violate the doctrine of equal

196. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622-24 (2013).

197. *Id.* at 2623 (quoting *Nw. Austin*, 557 U.S. at 203). For a discussion criticizing the equal sovereignty doctrine, see sources cited *supra* note 163.

198. *NCAA II*, 730 F.3d 208 (3d Cir. 2013).

199. *Compare* Defendants' Summ. J. Brief, *supra* note 145, at i, *with* Brief for Appellants Christopher J. Christie, David L. Rebeck, and Frank Zanzuccki at i-ii, *NCAA II*, 730 F.3d 208 (3d Cir. 2013) (No. 13-1715) [hereinafter Appellants' Brief].

200. *NCAA II*, 730 F.3d at 237-38.

201. *Id.* at 215.

202. *Id.* at 219-24. The court found that the Leagues satisfied the injury-in-fact requirement because the State's sports wagering law was directed at them and they would suffer reputational harm as a result. *Id.*

203. *Id.* at 224-26. Evaluating the State's Commerce Clause claims, the court concluded that the Clause permits Congress to regulate "activity that 'substantially affects interstate commerce' if it 'arise[s] out of or [is] connected with a commercial transaction,'" and that both "wagering and national sports are economic activities" that substantially affect interstate commerce. *Id.* at 224 (alterations in original) (quoting *United States v. Lopez*, 514 U.S. 549, 559 (1995)). The court also concluded that PASPA does not unconstitutionally regulate purely local activities because it prohibits only those gambling schemes "carried out 'pursuant to law or compact.'" *Id.* at 225 (quoting 28 U.S.C. § 3702 (2012)).

204. *Id.* at 226-38. Evaluating the State's Tenth Amendment arguments, the court found that the supremacy of federal law alone does not violate the anti-commandeering principle, and that, even where they require states to modify or invalidate their contrary laws, federal statutes prohibiting states from certain actions are permissible. *Id.* at 227, 231. The court compared PASPA with the laws struck down in *New York* and *Printz*, and found that PASPA neither commands affirmative action on the part of the states, nor requires or coerces the states to enforce federal law in any way. *Id.* at 231.

sovereignty set out in *Shelby County*.<sup>205</sup>

While the Third Circuit’s affirmance of the first three issues echoed the District Court’s reasoning, the Circuit Court’s disposition as to the final issue—the doctrine of equal sovereignty—is particularly noteworthy because of the doctrine’s evolution in the period after the District Court’s decision. The Third Circuit rejected New Jersey’s argument that PASPA’s facial infringement of the fundamental principle of equal sovereignty among the states made the statute unconstitutional pursuant to *Shelby County* for five reasons that merit discussion.<sup>206</sup>

First, the court reasoned that “the VRA is fundamentally different from PASPA.”<sup>207</sup> The court noted that while the VRA represents “‘an uncommon exercise of congressional power’ in an area ‘the Framers of the Constitution intended the States to keep for themselves[,] the power to regulate elections,’”<sup>208</sup> the “regulation of gambling via the Commerce Clause is . . . not of the same nature as the regulation of elections pursuant to the Reconstruction Amendments.”<sup>209</sup> In addition, the Circuit Court rejected New Jersey’s argument that the Commerce Clause requires geographic uniformity.<sup>210</sup>

Second, the Circuit Court concluded that laws which treat states differently to remedy “local evils” are “but *one* of the types of cases in which a departure from the equal sovereignty principle is permitted.”<sup>211</sup> In other words, “there is no ‘one-size-fits-all’ test for Equal Sovereignty.”<sup>212</sup>

Third, the court reasoned that nothing in *Shelby County* suggests that the equal sovereignty principle “appl[ies] with the same force outside the context of ‘sensitive areas of state and local policymaking.’”<sup>213</sup>

Fourth, accepting that the equal sovereignty doctrine applies to laws passed pursuant to the Commerce Clause, the court concluded

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Ultimately, the court concluded that New Jersey’s sports wagering law conflicts with federal law (PASPA) with respect to sports gambling, an activity that Congress is permitted to regulate, and is therefore preempted. *Id.* at 235-237.

205. *Id.* at 237-40.

206. *See id.*

207. *Id.* at 238.

208. *Id.* (quoting *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623-24 (2013)).

209. *Id.*

210. *Id.* (“[W]hile the guarantee of uniformity in treatment amongst the states cabins some of Congress’s powers, see, e.g., U.S. CONST., art. I, § 8, cl. 1 (requiring uniformity in duties and imposts); *id.* § 9, cl. 6 (requiring uniformity in regulation of state ports), no such guarantee limits the Commerce Clause . . . Congress’s exercises of Commerce Clause authority are aimed at matters of national concern and finding national solutions will necessarily affect states differently . . .”).

211. *Id.* at 239.

212. Winneker et al., *supra* note 188, at 50.

213. *NCAA II*, 730 F.3d at 239 (quoting *Shelby Cnty.*, 133 S. Ct. at 2624).

that PASPA's targeting of states that did not have sports gambling at the time of its enactment is consistent with its purpose to stop the spread of state-regulated sports wagering.<sup>214</sup>

Finally, the court found that New Jersey ignored an important distinction between PASPA and the VRA in the context of equal sovereignty: "far from singling out a handful of states for disfavored treatment, PASPA treats *more favorably* a *single* state"—Nevada.<sup>215</sup> The Third Circuit noted that New Jersey did not claim that Section 3704(a)(2)—the Nevada grandfathering provision—was invalid, but instead asked the court to strike down Section 3702, PASPA's general prohibition on state-regulated sports wagering.<sup>216</sup> In the court's opinion, New Jersey's request for the same preferential treatment enjoyed by Nevada, and not a categorical ban on preferential grandfathering, "undermine[d] [the State's] invocation of the equal sovereignty doctrine."<sup>217</sup>

Dissenting in part, Circuit Judge Vanaskie argued that PASPA is unconstitutional because it violates the Tenth Amendment's anti-commandeering principle.<sup>218</sup> In support, Judge Vanaskie argued that the distinction between negative prohibitions and affirmative commands is illusory for purposes of a Tenth Amendment anti-commandeering analysis—the federal government's infringement upon state sovereignty is the same.<sup>219</sup> Accordingly, Judge Vanaskie argued, PASPA impermissibly commandeers states to implement federal policy prohibiting state-authorized gambling,<sup>220</sup> and that, by expressly prohibiting sports wagering, PASPA fails to meet the constitutional requirement of providing a *direct* federal regulatory scheme preempting state regulation.<sup>221</sup> In connection with this

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214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 245-46 (Vanaskie, J., concurring in part and dissenting in part).

219. *Id.* at 245 ("If the objective of the federal government is to require states to regulate in a manner that effectuates federal policy, any distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty is illusory. Whether stated as a command to engage in specific action or as a prohibition against specific action, the federal government's interference with a state's sovereign autonomy is the same . . . [T]he recognition of such a distinction is untenable, as affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct.")

220. *Id.* at 245, 251 (arguing that PASPA violates the principle that emerged from *New York*: "The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; *it does not authorize Congress to regulate state governments' regulation of interstate commerce.*" (quoting *New York v. United States*, 505 U.S. 144, 166 (1992))).

221. *Id.* at 245-51 ("If Congress identifies a problem involving or affecting interstate commerce and wishes to provide a policy solution, it may regulate the commercial activity itself, and may even regulate state activity that involves interstate commerce .

argument, Judge Vanaskie argued that PASPA impermissibly diminishes the accountability of federal government officials at the expense of state government officials.<sup>222</sup>

*H. NCAA II: Petition for Certiorari*

In February 2014, New Jersey petitioned the U.S. Supreme Court for a writ of certiorari.<sup>223</sup> New Jersey’s petition for certiorari presented two questions for review: (1) whether PASPA’s prohibition on state-regulation of “sports wagering commandeered[s] the regulatory authority of the states, in violation of the Tenth Amendment”; and (2) whether PASPA’s intentional discrimination favoring Nevada, Delaware, Montana and Oregon violates the principle of equal sovereignty.<sup>224</sup> In support of its petition, New Jersey argued that PASPA “impermissibly trenches on the States’ authority to regulate their own citizens, and it does so in a manner that discriminates among the States.”<sup>225</sup>

In support of its Tenth Amendment position, New Jersey raised many of the same arguments that it raised at both the District Court and Circuit Court. First, New Jersey again argued that PASPA impermissibly violates the anti-commandeering principle set out in *New York* and in *Printz* by “regulat[ing] state governments’ regulation of interstate commerce,”<sup>226</sup> and undermines the representative function that underlies the anti-commandeering doctrine by diminishing the accountability of federal government officials at the expense of state government officials.<sup>227</sup> Second, New Jersey argued that the Third Circuit’s construction of Tenth Amendment jurisprudence to require an affirmative command rather than a negative prohibition in order to violate the anti-commandeering principle contradicts applicable precedent.<sup>228</sup> Third, New Jersey

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... But, what Congress may not do is ‘regulate state governments’ regulation.’” (citations omitted) (quoting *New York*, 505 U.S. at 166) (citing *Reno v. Condon*, 528 U.S. 141, 150-51 (2000))).

222. *Id.* at 246 (“Instead of directly regulating or banning sports gambling, Congress passed the responsibility to the states, which, under PASPA, may not authorize or issue state licenses for such activities. New Jersey law regulates games of chance, state lotteries, and casino gambling within the state. As a result, it would be natural for New Jersey citizens to believe that state law governs sports gambling as well.” (citations omitted)).

223. *See* Petition for Certiorari, *supra* note 11, at 1.

224. *Id.* at i.

225. *Id.* at 12.

226. *Id.* at 16 (internal quotation marks omitted) (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

227. *Id.* at 18-19.

228. *Id.* at 20 (citing *Coyle v. Smith*, 221 U.S. 559, 564 (1911) (applying the anti-commandeering principle to invalidate a federal law providing, as a condition of admission to the union, that the location of Oklahoma’s capital “shall not be changed”

argued that the Third Circuit's decision threatens to "eviscerate" the anti-commandeering principle and allow federal control of state regulation,<sup>229</sup> "because virtually any affirmative command may be phrased as a prohibition."<sup>230</sup>

In support of its equal sovereignty position, New Jersey again argued that PASPA's discrimination between states violates the equal sovereignty doctrine.<sup>231</sup> In particular, New Jersey correctly noted that "nothing in [the Supreme] Court's decisions suggest[] that the principle of equal sovereignty is limited to the election context."<sup>232</sup>

The combination of the two alleged constitutional errors, New Jersey argued, would be "fatal to [America's] federalist system."<sup>233</sup> New Jersey argued that, left undisturbed, the Third Circuit opinion would give Congress "the power and authority to micromanage state governance, as well as to carve up the national economy into fifty distinct monopolies."<sup>234</sup> Under such a brand of federalism, the State argued that the principle of the separation of powers "would not long survive if the federal government could tell the States how and when to exercise their core regulatory prerogatives."<sup>235</sup>

#### *I. NCAA II: Prospects for Eventual Reversal*

In June 2014, the Court denied New Jersey's petition for certiorari,<sup>236</sup> declining the opportunity to clarify its precedent concerning the equal sovereignty doctrine,<sup>237</sup> or the principles that

before 1913)).

229. *See id.* at 27-29.

230. *Id.* at 28 (stating that, if the Third Circuit's reasoning is upheld, "any area of state regulation could be subjected to federal commandeering, so long as Congress phrased its command as 'thou shalt not,' rather than 'thou shall'").

231. *Id.* at 31-34.

232. *Id.* at 31; *see also* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Coyle*, 221 U.S. at 559.

233. Petition for Certiorari, *supra* note 11, at 34.

234. *Id.* For example, New Jersey argued, "Congress could impose separate prohibitions on the governance of the several States, either to confer a monopoly on favored states (*e.g.*, no State other than Florida may 'license or authorize' production of orange juice), to restrict conduct in disfavored States (*e.g.*, the State of Delaware may not 'license or authorize' conduct of business in the corporate form), or to respond to local preferences not shared by the nation as a whole (*e.g.*, the State of Oregon may not 'license or authorize' sale of fur coats)." *Id.*

235. *Id.*

236. 134 S. Ct. 2866 (2014).

237. *See supra* note 163 and accompanying text; Winneker et al., *supra* note 188, at 52-53; Daniel Wallach, *Third Circuit Denies Rehearing in N.J. Sports Betting Case – Analyzing the Supreme Court Possibilities and Timeframes*, KOZ ON GAMING (Nov. 15, 2013, 2:35 PM), <http://kozongaming.blogspot.com/2013/11/third-circuit-denies-rehearing-in-nj.html> (noting that "[t]he Supreme Court has never addressed the constitutionality of PASPA").

govern the anti-commandeering doctrine.<sup>238</sup> As a result, the Court's precedent remains confused for each of the case's two foundational issues: "(1) whether Congress can 'preempt' state law in an area where there is no federal scheme to protect; and (2) whether the doctrine of equal sovereignty applies in all areas where Congress treats the states differently, and not just in limited cases."<sup>239</sup>

Without instructive guidance from the Supreme Court, jurisprudential issues remain concerning the relationship between principles of Tenth Amendment preemption and the Supremacy Clause. In support of reversal of *NCAA II*, West Virginia, Georgia, Kansas, and Virginia filed an amicus brief in which they argued that "[t]he critical prerequisite to preemption [under the Supremacy Clause] is that the federal government have established a 'preempted sphere' [or uniform national policy] for which it is clearly accountable."<sup>240</sup> Furthermore, the states argued that "when Congress has adopted no federal scheme, there is no basis for preempting State law."<sup>241</sup> Thus, the states argued "[p]rohibiting state laws [without establishing a federal scheme] is not preemption to preserve an existing federal scheme; it is the forcing of States to create a *de facto* federal regime, and it shifts political accountability entirely to the States."<sup>242</sup> According to the states' amicus brief, such a preemptive maneuver by the federal government constitutes commandeering in violation of the Tenth Amendment.<sup>243</sup> Thus, the states argued that because Congress did not enact a federal regulatory scheme in PASPA to trigger preemption, PASPA does not preempt state law pursuant to the Supremacy Clause.<sup>244</sup>

As for the equal sovereignty doctrine, at the moment there is a lack of clear understanding among the lower federal courts as to whether: (1) the equal sovereignty doctrine applied in *Shelby County* is limited to the facts of that case;<sup>245</sup> (2) the equal sovereignty doctrine is to be applied with a "sliding scale depending upon the importance of the issue";<sup>246</sup> and (3) the language of *Shelby County*, which stated that

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238. Wallach, *supra* note 237 (noting that the case may have presented the "perfect vehicle for the high court to clarify the muddled principles surrounding the anti-commandeering doctrine, and, in particular, whether it turns on the 'affirmative action/negative prohibition' dichotomy").

239. *Id.*

240. Brief of the States of West Virginia, Georgia, and Kansas, and the Commonwealth of Virginia as Amici Curiae in Support of Reversal at 21, *NCAA II*, 730 F.3d 208 (3d Cir. 2013) (No. 13-1715), 2013 WL 2391144, at \*21 [hereinafter States' Amicus Brief].

241. *Id.* at 22.

242. *Id.*

243. *See id.*

244. *See id.* at 23-27.

245. *See* Wallach, *supra* note 237.

246. *Id.*

“the fundamental principle of equal sovereignty [among the States] remains highly pertinent in assessing subsequent disparate treatment of States,”<sup>247</sup> indicates that the doctrine is not intended to be cabined to the facts of *Shelby County* and that broad application is required.<sup>248</sup>

Accordingly, while PASPA raises important questions of federal and constitutional law, it seems likely that the Supreme Court will await decisions from the other federal circuit courts before deciding PASPA’s constitutionality.<sup>249</sup>

Under current jurisprudence, however, it seems probable that the Court would hold that PASPA does not violate the Tenth Amendment’s anti-commandeering principle. While Judge Vanaskie’s analysis of the anti-commandeering principle, and his accompanying belief that lawful legislation should not turn on “phraseology used by Congress in commanding the states how to regulate,”<sup>250</sup> makes for a compelling academic discussion, it has not yet translated into a successful legal argument. At both the District Court and Circuit Court levels, New Jersey’s Tenth Amendment argument—the essence of which is that the distinction between an affirmative command and a negative prohibition is illusory in an anti-commandeering analysis—was soundly rejected.<sup>251</sup> Accordingly, at this juncture it is difficult to envision that the Supreme Court would grant a state’s request to vastly extend Tenth Amendment jurisprudence to encapsulate an entirely new subset of statutes, wherein the “affirmative command” to regulate is instead phrased in the form of a negative prohibition. Such a holding would set forth a more rigorous standard of judicial scrutiny for constitutional challenges to statutes,<sup>252</sup> and more particularly, mark a drastic alteration of existing Tenth Amendment jurisprudence.<sup>253</sup>

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247. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2624 (2013) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

248. Wallach, *supra* note 237.

249. *See id.* (noting that “several other states (California and Minnesota, being the most prominent) have recently introduced bills which would legalize sports wagering in those states”). Although Circuit Judge Vanaskie dissented in the Third Circuit’s judgment, it is not surprising that the Supreme Court denied certiorari. As Justice Harlan famously opined, intra-circuit conflicts are not appropriate candidates for Supreme Court review because “such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.” John M. Harlan, *Manning the Dikes*, 13 REC. ASS’N B. N.Y.C. 541, 552 (1958).

250. *NCAA II*, 730 F.3d 208, 245 (3d Cir. 2013) (Vanaskie, J., concurring in part and dissenting in part).

251. *See supra* notes 178, 204 and accompanying text.

252. *See NCAA I*, 926 F. Supp. 2d 551, 570-71 (D.N.J. 2013) (holding that “[s]uch an expansive construction of these cases cannot be adopted by the Court, especially in light of the rule that Congressional statutes are presumptively constitutional and should be construed accordingly” (citing *Nat’l Fed’n of Int’l Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (plurality opinion))).

253. *See supra* notes 178, 204 and accompanying text.

On the other hand, prognosticating how the Court might decide the issue of PASPA's infringement of equal sovereignty is a much more speculative exercise. To date, the scope and application of the new jurisprudential standard<sup>254</sup> remains unclear. In applying its equal sovereignty analysis, the Third Circuit reached the conclusion that "there is nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of 'sensitive areas of state and local policymaking.'"<sup>255</sup> Yet, in examining the plain language of the standard set forth in *Shelby County*, there is no expressed indication that the Court announced an intention for lower courts to cabin the application of the equal sovereignty doctrine; rather, the Court merely held that "the fundamental principle of equal sovereignty [among the States] remains highly pertinent in assessing subsequent disparate treatment of States."<sup>256</sup> Accordingly, it will eventually fall back upon the Court to provide clarity and guidance for this ambiguous new<sup>257</sup> area of constitutional jurisprudence. Until then, predicting how the Court might hold – and more importantly, how it might reason – as to the equal sovereignty issue is an exercise in futility. At the moment, it seems clear that the "Justices are pulling our leg."<sup>258</sup> What remains unclear is where this new jurisprudential doctrine will lead.

*J. Circumventing PASPA: New Jersey's September 2014 Directive*

In September 2014, in apparent circumvention of PASPA, Governor Christie's administration issued a directive allowing the State's casinos and racetracks to offer sports betting.<sup>259</sup> In a step taken to support Atlantic City's struggling casino industry,<sup>260</sup> Christie's directive argued that casinos and racetracks could operate lawful sports pools within New Jersey—and, in turn, that the State would not violate PASPA—if the State removed its prohibitions against sports wagering and completely deregulated private sports wagering.<sup>261</sup> In

254. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2624 (2013).

255. *NCAA II*, 730 F. 3d at 239 (quoting *Shelby Cnty.*, 133 S. Ct. at 2624); see *supra* note 213 and accompanying text.

256. *Shelby Cnty.*, 133 S. Ct. at 2624.

257. See Posner, *supra* note 163.

258. See *Sherman v. Cmty. Consol. Sch. Dist.* 21, 980 F.2d 437, 448 (7th Cir. 1992) ("[Lower courts] had best respect what the [Supreme Court's] majority says rather than read between the lines . . . . If the Justices just are pulling our leg, let them say so.")

259. See OFFICE OF THE ATTY GEN., FORMAL OPINION 1-2014, LAW ENFORCEMENT DIRECTIVE 2014-1 (2014) [hereinafter LAW ENFORCEMENT DIRECTIVE 2014-1], available at [http://www.nj.gov/governor/news/news/552014/pdf/20140908a\\_dir.pdf](http://www.nj.gov/governor/news/news/552014/pdf/20140908a_dir.pdf); see also *New Jersey Allows Sports Betting*, ESPN (Sept. 8, 2014, 7:20 PM), [http://espn.go.com/espn/chalk/story/\\_id/11488609/casinos-tracks-offer-sports-betting](http://espn.go.com/espn/chalk/story/_id/11488609/casinos-tracks-offer-sports-betting).

260. During the first nine months of 2014, four Atlantic City casinos closed and 8,000 casino workers lost their jobs. See *New Jersey Allows Sports Betting*, *supra* note 259.

261. LAW ENFORCEMENT DIRECTIVE 2014-1, *supra* note 259, at 3; see also Press

addition to the directive, the State filed a motion in federal district court asking for clarification or modification of the February 2013 order permanently enjoining New Jersey's Sports Wagering Law,<sup>262</sup> so as to allow casinos and racetracks to offer sports betting "without fear of criminal or civil liability."<sup>263</sup>

Predictably, the Leagues challenged the State's apparent effort to circumvent PASPA.<sup>264</sup> While the Leagues conceded that PASPA does not prohibit states from repealing existing prohibitions and "completely deregulating" sports betting, the Leagues stated in its brief that New Jersey had not met those stipulations.<sup>265</sup> The Leagues argued that New Jersey's sports wagering law explicitly treated sports wagering as being a state-regulated industry, and that because New Jersey's casinos and racetracks are heavily regulated, offering sports wagering at those locations is tantamount to having the activity regulated by the State as well, in clear violation of PASPA.<sup>266</sup>

In November 2014, the District of New Jersey granted the Leagues' request to permanently enjoin the State's Directive.<sup>267</sup> Citing to PASPA's legislative history, which the court found to prohibit "sports wagering pursuant to a state scheme,"<sup>268</sup> the court held that the Directive was preempted by PASPA.<sup>269</sup> The court reasoned that:

New Jersey's attempt to allow sport wagering in only a limited number of places, most of which currently house some type of highly regulated gambling by the State, coupled with New Jersey's history of attempts to circumvent PASPA, leads to the conclusion that the 2014 [Directive] is in direct conflict with the purpose and goal of PASPA.<sup>270</sup>

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Release, Office of the Governor, Christie Administration Takes Action to Allow Legal Sports Wagering in New Jersey (Sept. 8, 2014), *available at* <http://www.nj.gov/governor/news/news/552014/approved/20140908a.html> [hereinafter *Christie Administration Press Release*].

262. See Memorandum in Support of Defendants' Motion for Clarification and/or Modification of the District Court's February 28, 2013 Injunction, *NCAA I*, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 3:12-cv-04947-MAS-LHG).

263. *Christie Administration Press Release*, *supra* note 261.

264. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Clarification and/or Modification of Injunction, *NCAA I*, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 3:12-cv-04947-MAS-LHG) [hereinafter Plaintiffs' Memorandum of Law].

265. *Id.* at 13 (quoting *NCAA II*, 730 F.3d 208, 235 (2013)); see also David Purdum, *Professional Leagues File to Bar New Jersey Sports Betting*, ESPN (Sept. 30, 2014, 12:36 AM), [http://espn.go.com/espn/chalk/story/\\_/id/11615274/professional-leagues-file-bar-new-jersey-sports-betting](http://espn.go.com/espn/chalk/story/_/id/11615274/professional-leagues-file-bar-new-jersey-sports-betting).

266. See Plaintiffs' Memorandum of Law, *supra* note 264, at 8-12.

267. Nat'l Collegiate Athletic Ass'n v. Christie (*NCAA III*), Nos. 3:12-cv-04947-MAS-LHG, 3:14-cv-06450, 2014 WL 6611529, at \*1 (D.N.J. Nov. 21, 2014), *appeal docketed*, Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Dec. 5 2014).

268. *Id.* at \*14.

269. *Id.* at \*15.

270. *Id.* at \*14.

New Jersey has appealed the District Court's ruling,<sup>271</sup> but as of this note's submission the appeal remains pending, though oral arguments have been scheduled for March 17, 2015.<sup>272</sup> However, in its current form—for instance, limiting sports wagering to gambling outfits that are already heavily regulated—it seems unlikely that the State's Directive can avoid preemption.<sup>273</sup>

In any event, New Jersey's Directive amounts to bad policy. Loosened regulation may actually encourage an increase in illegal, underground sports wagering activity within the State. Most importantly, however, the Directive alienates potential partners—the Leagues—whose support is likely to be crucial to the success of any initiative undertaken to reform the existing federal law.<sup>274</sup>

#### V. POLICY BENEFITS OF STATE-REGULATED SPORTS WAGERING

While predicting the outcome of a hypothetical Supreme Court review of PASPA with any sort of precision is a speculative exercise, concrete data exist which demonstrate that PASPA's *raison d'être*, to deter the spread of “immoral” wagering activity and to protect the integrity of sport, does not enjoy the support of Americans.<sup>275</sup> In addition, recent developments suggest that the Leagues' support for PASPA is declining<sup>276</sup> as awareness about the benefits of regulated

271. See Notice of Appeal, Nat'l Collegiate Athletic Ass'n v. Christie, No. 14-4546 (3d Cir. Dec. 5 2014); Brent Johnson, *Judge Rules Against N.J. Sports Betting, But State Plans To Appeal*, NJ.COM (Nov. 22, 2014, 1:45 AM), [http://www.nj.com/politics/index.ssf/2014/11/judge\\_rules\\_against\\_njs\\_plan\\_to\\_legalize\\_sports\\_betting\\_but\\_appeal\\_is\\_expected.html](http://www.nj.com/politics/index.ssf/2014/11/judge_rules_against_njs_plan_to_legalize_sports_betting_but_appeal_is_expected.html).

272. Notification of Oral Argument for Tuesday, March 17, 2015, Nat'l Collegiate Athletic Ass'n v. Christie, No. 14-4546 (3d Cir. Dec. 5 2014).

273. See *NCAA III*, 2014 WL 6611529, at \*14 (“In the context of a preemption analysis, federal courts have been unwilling to allow states to do indirectly what they may not do directly.”).

274. Recent developments suggest that support for such a partnership may exist. In December 2014, NBA commissioner Adam Silver reached out to Governor Christie to join him in lobbying Congress to rewrite existing sports wagering laws, rather than attempting to circumvent them. See Adam Silver, Op-Ed., *Legalize Sports Betting*, N.Y. TIMES, Nov. 14, 2014, at A27; Rick Klein, *NBA Commissioner to Chris Christie: Join Me to Expand Sports Betting*, ABC NEWS (Dec. 22, 2014, 1:21 PM), <http://abcnews.go.com/Politics/nba-commissioner-chris-christie-join-expand-sports-betting/story?id=27765627>.

275. See *supra* notes 3, 249 and accompanying text. Furthermore, it is unclear whether PASPA *ever did* enjoy the support of American electorate. See Beyer, *supra* note 34, at G9 (noting an absence in the purported “groundswell of popular opinion” for PASPA at the time of its enactment).

276. David Stern, the former commissioner of the NBA and one of PASPA's original proponents, see S. REP. NO. 102-248, at 3 (1991), stated in a 2009 interview with *Sports Illustrated* that:

Considering the fact that so many state governments . . . don't consider [sports wagering] immoral, I don't think that anyone [else] should . . . It may be a little immoral because it really is a tax on the poor . . . . But having said

sports wagering continues to grow.<sup>277</sup>

At this juncture, PASPA's burdens outweigh its perceived benefits. The statute's prohibition on state-regulated wagering programs presents an obstacle to states looking to raise revenue and reduce deficits. In New Jersey, the legalization of sports wagering would: (1) increase direct revenue from licensing fees and casino revenue taxes; (2) increase indirect revenue from increases in taxes from travel and tourism-related industries; (3) attract more visitors to Atlantic City; and (4) enable the State to compete with and gain a foothold in the growing online gaming industry.<sup>278</sup>

In addition, PASPA has been ineffective at impeding the spread of internet sportsbooks, which has significantly increased the amount of illegal sports wagering in the United States.<sup>279</sup> According to a 2003 estimate, between \$80 billion and \$380 billion in wagers are illegally placed in the United States annually, much of it from internet

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that, it's now a matter of national policy: Gambling is good.

Ian Thomsen, *Weekly Countdown: Stern Open to Legalized Betting, Rule Changes*, SPORTS ILLUSTRATED (Dec. 11, 2009), <http://www.si.com/more-sports/2009/12/11/weekly-countdown>. In light of evolving circumstances, Stern admitted that "it's fair enough that [the NBA] ha[s] moved to a point where that leap [to permitting legalized wagering on NBA games] is a possibility." *Id.*

Stern's successor, current commissioner Adam Silver, has become a vocal advocate for state-regulated sports wagering. In November 2014, Silver authored an op-ed in the *New York Times* lobbying Congress to "adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technical safeguards." Silver, *supra* note 274, at A27. In the past, Silver has argued that it is "inevitable" that legalized gambling would expand within the United States, and that he intends for the NBA to eventually participate in such an expansion. Adam Silver, Comm'r, Nat'l Basketball Ass'n, Interview at the Bloomberg Sports Business Summit (Sept. 4, 2014), *available at* <http://www.bloomberglive.com/events/sports-2014/#agenda>; Mason Levinson, *NBA's Silver Says Legal Sports Gambling in U.S. Is Inevitable*, BLOOMBERG (Sept. 4, 2014, 11:06 AM), <http://www.bloomberg.com/news/articles/2014-09-04/nba-s-silver-says-legal-sports-gambling-in-u-s-is-inevitable>.

277. To express his belief that regulated sports wagering would benefit professional sports leagues, Adam Silver explained that:

If you have a gentleman's bet or a small wager on any kind of sports contest, it makes you that much more engaged in it . . . . That's where we're going to see it pay dividends. If people are watching a game and clicking to bet on their smartphones, which is what people are doing in the United Kingdom right now, then it's much more likely you're going to stay tuned for a long time.

Silver, *supra* note 274; Levinson, *supra* note 276.

278. Michael Levinson, *A Sure Bet: Why New Jersey Would Benefit from Legalized Sports Wagering*, 13 SPORTS LAW. J. 143, 152-57 (2006); *see also* Joseph M. Kelly, *U.S. Land-Based and Internet Gambling: Would You Bet on a Rosy Future?*, 17 VILL. SPORTS & ENT. L.J. 339 (2010) (setting out various proposals explaining how states may raise gambling revenues, including authorizing intrastate internet gambling and attempting to change federal law to legalize sports betting).

279. Woo, *supra* note 25, at 589.

sportsbooks.<sup>280</sup> Notably, this figure exponentially exceeds the amount in lawful sports wagers that were placed in the entire state of Nevada seven years later, in 2010.<sup>281</sup> Unfortunately, due to PASPA and the Wire Act, lawful American gambling operators have been unable to gain entry into the online sportsbook industry.<sup>282</sup> Criminal syndicates have not rushed in to fill the vacuum, however; instead, large, publicly traded corporations operated overseas dominate the market.<sup>283</sup>

As a related matter, PASPA has similarly failed in its aim of diminishing the accessibility of sports wagering to teenagers and youth, as many internet sportsbooks “make little to no effort to exclude underage gamblers.”<sup>284</sup> Yet, the rise in sports wagering has not been accompanied by an attendant decline in the “integrity of professional and amateur sports.”<sup>285</sup> In addition, as Chil Woo notes, the rise in the popularity of sports wagering has resulted in mainstream acceptance of the activity.<sup>286</sup>

Accordingly, a repeal of PASPA and introduction of state-regulation for sports wagering comports with contemporary sensibilities, as well as fiscal realities.<sup>287</sup>

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280. *Id.* (citing Ari Weinberg, *The Case for Legal Sports Gambling*, FORBES (Jan. 27, 2003, 11:55 AM), [http://www.forbes.com/2003/01/27/cx\\_aw\\_0127gambling.html](http://www.forbes.com/2003/01/27/cx_aw_0127gambling.html)). As Chil Woo notes, this estimate is for the total amount of wagers placed, not the gross revenue from illegal gambling. *Id.*

281. *Id.* Chil Woo estimates that the amount of sports wagers in Nevada is just \$275 million, a fraction of the total amount in illegal gambling that occurs annually. *Id.*

282. See Edward Wyatt, *Web Gambling Given a Boost in Justice Dept. Ruling*, N.Y. TIMES, Dec. 25, 2011, at A1 (reporting on a United States Justice Department legal opinion that stated the federal Wire Act prohibits only online sports betting, and not online casino games). In February 2013, as part of a revenue-raising measure, New Jersey Governor Chris Christie signed into law a bill permitting internet gambling operated from Atlantic City’s eleven casinos. Ryan Hutchins, *Gov. Christie Signs Internet Gambling into Law*, NJ.COM (Feb. 27, 2013, 1:43 PM), [http://www.nj.com/politics/index.ssf/2013/02/gov\\_christie\\_signs\\_internet\\_ga.html](http://www.nj.com/politics/index.ssf/2013/02/gov_christie_signs_internet_ga.html).

283. Woo, *supra* note 25, at 590 n.123 (offering William Hill, which has a market value of over £1 billion and is traded on the London Stock Exchange, as being one such online sportsbook). These organizations are tightly regulated, have little to no incentive to promote scandal and corruption, and through self-policing, have actually proven to be superior at discovering gambling “scandals” than traditional law enforcement. *Id.* at 591, 593-94.

284. *Id.* at 590 (quoting David O. Stewart, *Online Gambling Five Years After UIGEA* (Am. Gaming Ass’n 2011)).

285. *Id.* at 590-91.

286. *Id.* at 589 n.116 (noting that many major newspapers and sports websites now offer sports betting information, statistics, and advice).

287. See Phil Oliff et al., *States Continue to Feel Recession’s Impact*, CTR. ON BUDGET AND POLICY PRIORITIES 1 (2012), available at <http://www.cbpp.org/files/2-8-08sfp.pdf> (citing statistics which state that for the fiscal year 2013, thirty-one states were experiencing budget shortfalls, totaling \$55 billion, an amount that is “very large by historical standards”).

## VI. MOVING PAST PASPA: A BLUEPRINT FOR STATES TO FOLLOW

In designing a government-regulated sports wagering regime that serves the public interest, states searching for a practical blueprint would be best advised to look to our neighbors to the North. For purposes of this analysis, the sports wagering regime established in the Canadian province of Ontario provides the most logical and workable model for states to adopt in a post-PASPA United States.

First, and most importantly, the enacting legislation for Ontario's sports wagering law makes it unmistakably clear that the provincially-regulated sports wagering regime exists strictly to serve the public interest. As set out in its legislative agenda, Ontario's sports wagering law serves to: (1) promote economic development; (2) raise revenue; and (3) promote responsible gaming.<sup>288</sup>

Second, Ontario's Gaming Control Act<sup>289</sup> provides a sensible logistical model for states to follow. Inherent in the statute are regulatory measures which simultaneously protect the integrity of sport and enable provinces to raise revenue from sports wagering. Ontario's Gaming Control Act regulates sports wagers in a similar manner to its regulation of lottery tickets, making it easy for patrons to place bets; sports wagers must be placed at provincially-licensed outlets, where patrons make selections (i.e., pick "winners") just as they would select numbers for a lottery ticket. The legal basis for the Gaming Control Act emanates from the Canada Criminal Code, which takes measures to prevent match-fixing or the optics of impropriety. The Criminal Code provides that it is legal "for the government of a province . . . to conduct and manage a *lottery scheme* in that province . . . in accordance with any law enacted by the legislature of that province."<sup>290</sup> However, the Criminal Code limits the definition of a lawful "lottery scheme" to exclude any gaming or gambling scheme that engages in "bookmaking, pool selling or the making or recording of bets . . . on a *single* sport event or athletic contest."<sup>291</sup> Accordingly, provincially-licensed sports gambling operators within Ontario may only permit wagers which bet on the outcome of *multiple* matches (i.e., a "parlay"), since it is illegal to bet on a single sport event or athletic contest. The purpose of prohibiting single-match wagers is to minimize the likelihood of, and incentive for, match-fixing. Thus, Ontario's model strikes a proper balance between (1) preserving the optics of integrity in sport, and (2) enabling provinces to raise revenue through the lucrative sports wagering market.

Third, the Government of Ontario will soon begin to profit from

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288. Ontario Lottery and Gaming Corporation Act, S.O. 1999, c. 12, sched. L, sec 0.1 (Can.).

289. Gaming Control Act, S.O. 1992, c. 24, sec. 1 (Can.).

290. Criminal Code, R.S.C. 1985, c. C-46, sec. 207(1)(b) (Can.) (emphasis added).

291. *Id.* at sec. 207(4)(c) (emphasis added).

the immense internet gaming market upon the Ontario Lottery and Gaming Corporation's (the "OLG") planned launch of the provincially-regulated "iGaming" website, which will include internet sports wagering and gaming.<sup>292</sup> By making all forms of lottery and gaming more efficient and accessible online, Ontario estimates that its online gaming website, PlayOLG.ca, will deliver a cumulative return of CA\$375 million in its first five years of operation, with all of the proceeds to be reinvested in the local and provincial communities of Ontario.<sup>293</sup>

Last, sports wagering has proven to be nothing short of a windfall for Ontario. During the 2012-13 fiscal year, the OLG reported that it generated CA\$3.3 billion in economic activity within Ontario.<sup>294</sup> Of that total, CA\$1.8 billion of gaming proceeds were given to the "[o]peration of hospitals and other provincial priorities," CA\$873.3 million was used for payroll for 16,000 provincial employees, and CA\$115 million was distributed to local and provincial charities.<sup>295</sup> Furthermore, as set out above, these figures are expected to become even greater upon OLG's planned launch of the provincially-regulated "iGaming" website.

Ontario's sports wagering law has achieved a proper balance between protecting the integrity of sport and protecting the interests of its citizens. The province has employed its sports wagering law as a revenue-raising mechanism to serve the public interest, whether it is using funds to support health care services, infrastructure projects, or various other social programs that provide the province with the flexibility to respond to its citizens' evolving needs. Accordingly, Ontario's pragmatic approach offers a workable blueprint for states to adopt in a hypothetical, post-PASPA United States.

#### CONCLUSION

Although PASPA very clearly does not continue to serve the legislative objectives for which it was enacted,<sup>296</sup> at this moment it seems unlikely that it is an unconstitutional statute. Most crucially, if and when the Supreme Court decides its constitutionality, under current jurisprudential standards it seems likely that the Court would hold that PASPA's negative prohibition against state action is not equivalent to a demand to affirmatively act, in violation of the Tenth

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292. *PlayOLG: All the Fun. All the Thrills. All Online.*, ONT. LOTTERY & GAMING CORP., <http://www.modernolg.ca/igaming/> (last visited Feb. 23, 2015).

293. Anthony Huber, *First Comments After the Launch of PlayOLG.ca*, CASINO NEWS DAILY (Jan. 9, 2015, 4:32 AM), <http://http://www.casinonewsdaily.com/2015/01/09/first-comments-launch-playolg-ca/>.

294. *OLG Gives Back: Ever Wonder Where the Money Goes?*, ONT. LOTTERY & GAMING CORP., [http://www.olg.ca/about/economic\\_benefits/index.jsp](http://www.olg.ca/about/economic_benefits/index.jsp) (last visited Feb. 7, 2015).

295. *Id.*

296. *See supra* Part V.

Amendment's anti-commandeering principle. As set out in Part IV.I, New Jersey's proffered argument to this effect has been soundly rejected by the federal judiciary. Furthermore, a holding granting reversal pursuant Judge Vanaskie's belief that lawful legislation should not turn on Congress's "phraseology . . . in commanding the states how to regulate"<sup>297</sup> would drastically alter the standard of judicial presumption of constitutional validity applied in Tenth Amendment challenges to federal statutes.<sup>298</sup>

Yet, there is currently a wild card governing the constitutionality of PASPA: the equal sovereignty doctrine. As discussed in Part IV.I, the scope and application of the new jurisprudential standard remain unclear. Accordingly, the Supreme Court will eventually have to draw bright lines to provide clarity and guidance for this presently murky area of the law.<sup>299</sup>

Given the fact that, as of 2013, thirty-one states were experiencing budget shortfalls that totaled \$55 billion,<sup>300</sup> PASPA has become a prohibition that the United States can no longer afford. Proffered morality must give way to pragmatism; the United States must repeal PASPA, and allow states to replace its punitive prohibitions with policy that can actually benefit Americans.

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297. *NCAA II*, 730 F.3d 208, 245 (3d Cir. 2013) (Vanaskie, J., concurring in part and dissenting in part); *see also supra* note 250 and accompanying text.

298. *See supra* notes 252-253 and accompanying text.

299. *See supra* Part IV.I.

300. Oliff, *supra* note 287, at 1.