American Bar Association
Forum on the Entertainment and Sports Industries
2016 Annual Meeting
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Sports Gambling
Friday, October 7, 2016
9:30am-11:00am

Moderator
Daniel Werly, Founder/Managing Editor, The White Bronco Sports Law Website; Professor of Arbitration in Sports, Charleston School of Law (Chicago, IL)

Panelists
Robert J. Caldwell, Shareholder, Kolesar & Leatham (Las Vegas, NV)
Hon. Philip M. Pro, JAMS Arbitration and Mediation Services; Member, Nevada Gaming Commission; Former U.S. District Judge (Las Vegas, NV)
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Table of Contents

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Nat’l Collegiate Athletic Ass’n v. Governor of N.J., Nos 14-4546, 14-4568, and 14-4569, (3d Cir. August 9, 2016) (en banc).
Explore the current status of sports betting with a particular emphasis on the New Jersey sports betting case currently pending in the Third Circuit Court of Appeals. Take a futuristic look at the gambling industry and what role fantasy sports betting will play moving forward.
How To Legalize Sports Betting

Daniel Wallach
Wednesday 4:30pm · Filed to: SPORTS BETTING

Millions of Americans are gearing up for their fantasy football drafts. And thanks to the scores of lobbyists and lawyers employed by the daily fantasy sports industry, DraftKings and FanDuel are back in business in New York and many other states, just in time for the start of the NFL season. For the price of an “entry fee,” you can win a valuable “prize,” not to mention “bragging rights” among your friends, family and co-workers. Just don’t call it “gambling” though.

While one form of sports gambling is being codified into law in various states, another continues to run into roadblocks. Traditional single-game sports betting, legal only in Nevada, remains stuck in a time-warp, thanks to
a 1992 federal law known as the Professional and Amateur Sports Protection Act ("PASPA"), which prohibits state governments from authorizing or licensing sports betting, except in those states where it was already legal before PASPA went into effect.

But one state—New Jersey—has been pushing back against the federal ban, engaging in a nearly five-year battle to legalize sports wagering. New Jersey has challenged the federal law in court, arguing it’s unconstitutional because it interferes with state autonomy and allows certain states (like Nevada) to offer sports betting, while prohibiting other states from doing so.

New Jersey may have reached the end of the line, however, when a federal appeals court recently shut down the state’s latest attempt to legalize sports betting: a “partial repeal” that would have decriminalized sports betting at the state’s casinos and racetracks. After the four major professional sports leagues, the NCAA, and the U.S. Department of Justice cried foul—asserting that this partial decriminalization amounted to a de facto “authorization” and “licensing” of sports betting in violation of PASPA—a Trenton federal district court judge entered an injunction preventing New Jersey from implementing its new law. Last month, a Philadelphia-based federal appeals court upheld the lower court’s injunction by a 9–3 vote, ruling that New Jersey’s plan violated PASPA and rejecting New Jersey’s argument that PASPA was unconstitutional.

**Shortening The Timeline Through Continued Court Challenges**

In the wake of New Jersey’s latest federal court setback, several commentators have urged a different approach to legalizing sports betting: lobbying Congress to repeal or alter PASPA. While lobbying efforts (such as those undertaken by the American Gaming Association) should continue to be deployed and can be effective, I believe the strategy that will best accelerate the path to expanded legal sports relies on continued litigation.

This is all about pressure and leverage. If a state succeeds in overturning PASPA—and it only takes one—it will open the floodgates to expanded legal sports betting nationwide. The first state to win in court will derive an instant
benefit: legal sports betting within its borders right away, and with a head start measured in years.

This will have an immediate channeling effect that will benefit all states. The professional sports leagues would likely respond to one state’s courtroom success by lobbying Congress to enact a uniform federal framework, which would allow all states to legalize sports betting, so as to avoid the inevitable confusing patchwork of state laws that would emerge. All it will take is just one successful court challenge to create this domino effect. But it requires continued persistence by the true stakeholders in this constitutional battle: not the sports leagues or the casinos, but the states themselves.

In the absence of a successful court challenge, we are likely on a much slower train to expanded legal sports betting. Most seasoned observers believe that a Congressional repeal of or amendment to PASPA to allow state-sponsored sports betting is at least three to five years away. Some are even more pessimistic, and believe the timeline is considerably longer. This timeline could be shortened considerably through additional litigation pressure—either through one state succeeding in court or by a group of states mounting legal challenges. The pendency of multiple cases could be enough to achieve the desired effect, e.g., the sports leagues urging Congress to act. It’s one thing for the leagues to litigate against a single state (as they successfully did with New Jersey), but it’s an entirely different animal to have to confront multiple legal challenges by pockets of insurgent states.

While the professional sports leagues have slowly begun to embrace the prospect of expanded legal sports betting, they are in no rush to do the states’ bidding. At this year’s South by Southwest, NBA Commissioner Adam Silver pointedly stated during his keynote address that the league would not be lobbying Congress to repeal PASPA. He clarified his earlier published remarks calling for the legalization of sports betting by explaining that he was just trying to “get people talking about it” without necessarily committing to a specific “timeline” on a broader legalization.
Without continued court challenges by states, sports leagues would have no sense of urgency to expedite the timeline for expanded legal sports betting. Actions speak louder than words, and so does inaction. It has been over 600 days since Silver sounded the clarion call on sports betting in a *New York Times* op-ed, and to date there has been no movement in Congress or action by the leagues in furtherance of this objective, other than their continued investment in daily fantasy sports. Additional court challenges plus continued lobbying by the American Gaming Association are the obvious antidotes for this institutional inaction.

**The Importance Of The New Jersey Case**

This is where New Jersey comes in. The Garden State’s relentless efforts to legalize sports betting provide the obvious template for other states to follow. New Jersey’s losing effort managed to expose, through several dissenting court opinions—and even in the majority rulings—significant cracks in PASPA’s armor that may have left PASPA susceptible to a knockout blow by another state, or even by Indian tribes, which are likewise constrained by PASPA and therefore also have standing to challenge the federal law.

In the first 20 years following PASPA’s enactment, no state governmental body had challenged the constitutionality of the federal statute. That all changed in 2012, when New Jersey passed a sports wagering law that would have permitted state authorities to license sports wagering in the state’s casinos and racetracks, teeing up the first court battle over the constitutionality of PASPA. New Jersey lost that one in the U.S. Court of Appeals for the Third Circuit by a 2-1 vote. Then, in 2014, New Jersey believed that it had another winning argument (based on language in the prior Third Circuit opinion) that a “partial repeal” of state laws prohibiting sports betting would not violate PASPA.

We all know how that ended. But the final result, with only a slim possibility of the Supreme Court hearing the case remaining, should not obscure the fact that New Jersey played a critical role in both framing and advancing the current debate on expanded legal sports betting. Without New Jersey, there likely is no Adam Silver op-ed, or any other acknowledgement by the NBA
and other sports leagues that expanded legal sports betting is “inevitable.” The pressure and vulnerability created by the New Jersey case—which spawned five court decisions, several stinging dissenting opinions, and the rarely invoked en banc rehearing process—made the sports leagues nervous and forced them to confront the possibility, and future, of expanded legal sports betting much earlier than they otherwise would have.

Silver’s op-ed was published shortly before a federal judge was scheduled to rule on the leagues’ latest effort to block New Jersey from legalizing sports betting. That was no coincidence. The leagues, and the NBA in particular, wanted to reinforce the notion that unregulated legal sports betting would be anathema to the integrity of their games. But in doing so, Silver also finally put his cards on the table: he called for the legalization and regulation of sports betting though a uniform federal framework.

The Third Circuit’s recent decision in NCAA v. Christie (usually called the “Christie II” case) did not sound the death knell for future court challenges by other states. A single decision from one federal appellate circuit—there are 11 federal appellate circuits, plus the D.C. Circuit and the Federal Circuit—cannot and should not be the final word on the constitutionality of PASPA, particularly when that circuit issued not one, not two, but three divided court opinions, and, even in a defeat for New Jersey, opened up a variety of pathways for states to legalize sports betting through the courts and otherwise.

**Other States Can Follow The New Jersey Roadmap**

As a result of the Third Circuit’s latest split decision, we now know that a state can legalize sports betting through a partial repeal of state laws, though perhaps one not nearly as targeted or selective as New Jersey’s unsuccessful attempt. While the court’s opinion didn’t provide specific examples of a partial repeal law that would not violate PASPA, Judge Marjorie Rendell, writing for a majority of the Court, nonetheless acknowledged that the ruling against New Jersey “does not preclude the possibility that other options may pass muster.” Additional court challenges by New Jersey or other states could potentially provide that clarity and open more avenues for states.
More importantly, the New Jersey case has provided other states with a ready-made template to follow in challenging PASPA on constitutional grounds. New Jersey’s constitutional arguments were grounded in basic “federalism” principles, namely, that the states should be able to operate with limited interference from the federal government, and that any federal regulations must treat the states equally. Along those lines, New Jersey argued that PASPA violates: (1) the Tenth Amendment’s “anti-commandeering” doctrine, which forbids Congress from commanding or dictating how a state regulates or governs its own citizens; and (2) the principle of “equal sovereignty,” which requires the federal government to respect the equal dignity of the states by regulating them on equal terms.

The anti-commandeering argument, in particular, found traction with three of the 12 judges on the Third Circuit’s en banc panel, with Judge Thomas Vanaskie concluding in his dissent that PASPA violates principles of federalism by “effectively command[ing] the States to maintain and enforce existing gambling prohibitions” and “dictating the manner in which States must enforce a federal law.” While this argument failed to persuade a majority of the Third Circuit judges, it could find greater success in a different federal judicial circuit, particularly in a more conservative court that would likely be more receptive to the type of federalism arguments that New Jersey advanced.

But it is the “equal sovereignty” argument, addressed in the first lawsuit between New Jersey and the professional sports leagues (the so-called “Christie I” case), which may ultimately prove to be the winning one. That argument is grounded in the notion that PASPA does not treat all states equally; instead, it affords uniquely favorable treatment to Nevada and three other states (Delaware, Montana, and Oregon) by allowing those four “grandfathered” states to offer sports betting to varying degrees, while banning the other 46 states (including New Jersey) from offering any form of sports gambling.

In Christie I, the Third Circuit held that the principle of equal sovereignty does not apply to legislation (such as PASPA) enacted pursuant to the Commerce Clause of the U.S. Constitution. The Third Circuit distinguished it from Shelby
County v. Holder, 133 U.S. 2612 (2013)—a voting rights act case that was decided on the basis of equal sovereignty—on the ground that PASPA involves the regulation of commerce, not elections. But nothing in Shelby County or any prior Supreme Court decisions appears to suggest that the principle of equal sovereignty is limited to voting rights cases. In her dissenting opinion in Shelby County, Justice Ruth Bader Ginsburg specifically referred to PASPA as an example of a federal statute that treats states differently, observing that such statutes are “hardly novelties,” but pointedly asking whether such statutes “remain safe given the Court’s expansion of equal sovereignty’s sway.”

While the Supreme Court declined to review Christie I despite the apparent inconsistency with Shelby County, a court in a different federal judicial circuit could part ways with the Third Circuit and conclude that the equal sovereignty principle applies to Commerce Clause legislation. If that were to occur, PASPA might not survive scrutiny under the Shelby County test, which looks to whether the statute’s disparate geographic coverage is “sufficiently related to the problem that it targets.” This is where PASPA is especially vulnerable, as the reason for the disparate treatment of Nevada, Oregon, Montana, and Delaware was to protect the economic interests of those states that had already legalized sports gaming prior to the enactment of PASPA. But such carve-outs do not appear to be “sufficiently related” to the targeted goals of PASPA, which are to stop the spread of legal sports betting and to protect the integrity of professional and amateur sports.

Thus, even in losing two battles, New Jersey might have shown how to ultimately win the war. Given the cracks in PASPA that New Jersey exposed, another state could be the beneficiary. New Jersey was ably represented by a cadre of preeminent lawyers, including renowned appellate attorney Ted Olson, a former United States Solicitor General, who crafted the intricate and complex constitutional arguments over a four-year period spanning two district court cases and three appellate oral arguments. These nuanced arguments have thus been “road-tested” and developed at the highest levels
of sophistication, and can be easily retrofitted by other states at a fraction of the reportedly more than $3 million in legal fees spent by New Jersey in litigating the two sports betting cases.

**The Cost Is Worth It**

A state that takes the baton from New Jersey would likely bear a much lower cost, since so much of the heavy lifting has already been done. While some argue that it would be a waste of taxpayer money to fund further legal challenges to PASPA, and that the focus going forward should be on lobbying Congress, that mindset presupposes that the lobbying and litigation paths are mutually exclusive. They are not. Both can and should be pursued. Moreover, it requires a tremendous leap of faith to assume that a Congressional repeal or alteration of PASPA will happen organically without countervailing pressure, especially with such a gridlocked Congress. Legalizing sports betting is just not high enough on the current list of priorities for Congress to expect action anytime soon, particularly when the sports leagues—the true gatekeepers of PASPA—are content to maintain the status quo while they reap substantial economic benefits from their alliance with daily fantasy sports, the closest thing to legalized nationwide sports gambling.

Could litigation get expensive? No doubt. But sports betting would benefit states in myriad ways: the creation of new jobs, increased tourism, additional tax revenues, and a boost to the state’s gaming and racing industries, while also putting a sizable dent in the black market for sports betting and dramatically lowering a state’s law enforcement costs in cracking down on illegal gambling. Should a state gamble a low-seven figure amount to reap a potential multi-billion dollar return on investment? To ask that question is to answer it.

**The Potential Challengers To PASPA**

So which states are likely to challenge PASPA? At least 40 states have commercial casinos, so the pool of potential challengers runs deep. Certainly, those states in more conservative-leaning federal judicial circuits, such as the Fifth Circuit (covering Texas, Louisiana, and Mississippi) and the Eighth Circuit (covering North Dakota, South Dakota, Minnesota, Iowa, Nebraska,
Missouri, and Arkansas), would be well positioned to challenge PASPA on constitutional grounds, based on the likely appeal of a federalism-based argument in those courts. Two states jump out to me: Mississippi and Minnesota. Both have previously expressed interest in legalizing sports betting, and, in recent years, introduced legislation (see here and here) aimed at accomplishing that objective.

Mississippi, in particular, is worth watching. With 28 commercial casinos, but declining gaming revenues, the Magnolia State may represent the perfect storm for a successful PASPA challenge. Recently, the American Gaming Association held a “Get to Know Gaming Event” in Biloxi, Mississippi, to argue for the positive economic and community impact that gaming has in Mississippi and the Gulf Coast, especially in the wake of recent major natural and man-made disasters that have affected the state.

The subject of sports betting was front and center at the Mississippi event, with AGA President Geoff Freeman declaring that “sports betting offers a tremendous opportunity to give Southern Mississippi sports fans what they want and ensures gaming continues to benefit Mississippi for years to come.” Echoing that same point, Larry Gregory, executive director of the Mississippi Gaming and Hospitality Association, told the audience that “sports betting may be the next step in the journey that gaming has made in Mississippi. It could add another level to this platform of revenue and bring even more income to the state and its economy.” Clearly, there is strong interest in bringing legal sports betting to Mississippi.

Other potential PASPA challengers would be states that have already enacted legislation to legalize daily fantasy sports. These states include New York, Mississippi, Indiana, Virginia, Colorado, Missouri, Massachusetts, and Tennessee. (One influential New York lawmaker, J. Gary Pretlow, recently told a gaming industry publication that New York will be “looking at challenging the feds” on PASPA and said not to be surprised “if you see a state like New York putting through legislation on this very shortly.”)
Recent state measures to legalize daily fantasy sports may prove to be the catalyst for legalizing sports betting. One unintended consequence of the new DFS laws is that they may have provided states that have enacted such laws with a “winning argument” in future PASPA cases.

Since PASPA, in my view (see here and here), also encompasses state-authorized wagering schemes on “athlete performance,” not just game-level outcomes, the recent state laws authorizing daily fantasy sports create a quandary for the professional sports leagues and the U.S. Department of Justice, the likely plaintiffs in any lawsuit to prohibit a state from legalizing sports betting.

A plausible argument can be made that the leagues and the DOJ are “selectively enforcing” PASPA by opposing state efforts to legalize traditional sports betting, as in the case of New Jersey, but “looking the other way” on state DFS laws (which presumably also violate PASPA). In the leagues’ case, this could be seen as entirely self-serving given their financial partnerships with FanDuel and DraftKings. I don’t believe they can have it both ways. Either PASPA applies to both DFS and more traditional sports gambling, or to neither.

At a minimum, this could serve to undermine the leagues’ argument in future cases that they would be “irreparably harmed” by expanded legal sports betting, when they have neither suffered nor asserted any such harm from other supposed violations of PASPA in the DFS context. The “DFS States” are thus perfectly situated to advance a selective enforcement, waiver, or other equitable defense against the sports leagues. These additional equitable arguments, if successfully advanced, could prevent the leagues from securing an injunction against states in future cases, thus serving as a possible tipping point for expanded legal sports betting. While such an argument is not guaranteed to succeed, it provides another possible arrow in the legal quiver to topple PASPA.

Lastly, one intriguing category of potential PASPA challengers would be Indian Tribes, which, through their tribal-state gaming compacts, might be allowed to offer sports betting if it were permitted under federal law. A tribe
with the authority to offer sports betting under a tribal-state compact but subject to the constraints of PASPA (such as in the case of the Sisseton-Wahpeton Sioux Tribe of South Dakota, to cite just one example) would likely have standing to challenge PASPA just as any state would. The advantages of a tribal challenge are two-fold: (1) the process of enacting a tribal ordinance would likely be more expeditious than enacting state legislation, which could take months or years; and (2) the lobbying efforts of the professional sports leagues would likely hold less sway with tribes than with elected state legislators. This possibility is not so far-fetched given the growing number of tribes that have expressed an interest in offering sports betting on their tribal lands, but are constrained by PASPA from doing so.

The Time Is Now

The end of the New Jersey case is a critical pivot point in the debate surrounding the legalization of sports betting. While New Jersey still has several long-shot legal options remaining—a Supreme Court review, another “partial repeal” law, a complete decriminalization of sports betting (the so-called “nuclear option,” which would be a difficult sell logistically and politically)—there is no reason for other states to continue remaining on the sidelines. It never made any sense during the pendency of the New Jersey litigation, and makes even less sense now.

PASPA is a failed law. Despite PASPA’s aim of limiting the spread of sports gambling in the United States, illegal sports betting has sharply risen since PASPA was enacted. Estimates of the scope of illegal sports betting in the United States range anywhere from $80 billion to $400 billion annually. As a result, a thriving black market operates outside the reach of law enforcement and of the IRS. Moreover, attitudes about sports betting (and gambling in general) have changed dramatically since PASPA was enacted. New research released by the American Gaming Association in February found that 80 percent of those planning to watch this year’s Super Bowl want to see the country’s current sports betting laws changed. Some 66 percent of those questioned believe individual states should have the ability to legalize sports betting.
But the “inevitability” of legal sports betting is not etched in stone. Since Adam Silver correctly observed that “times have changed” and that “sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated,” there has been zero movement on that front. During this time, the four major professional sports leagues have deepened their ties to the daily fantasy sports industry, and the NHL has placed a team in Las Vegas. Eight states have explicitly legalized fantasy sports despite potential legal impediments posed by PASPA and by various state constitutions. Yet, despite these seemingly positive developments, traditional sports betting remains the third rail of the professional sports industry, to be approached about but never touched.

If the leagues are unwilling to advance the discussion in a proactive way, the states can take it upon themselves to shorten the timeline. This can be accomplished through continued lobbying and educational efforts, and by further court challenges. One does not preclude the other. To the contrary, they would be synergistic, with the legal challenges placing pressure on the leagues and Congress to act sooner. The winning formula for expanded legal sports betting in the United States can thus be reduced to a simple equation: litigation + lobbying = accelerated timeline.

As the New Jersey case has shown, PASPA is hanging by a thread. All that’s needed now is one final snip.

Daniel Wallach is a lawyer and shareholder at Becker & Poliakoff. He is an expert on gaming law and sports law, and has counseled professional sports teams, fantasy sports operators, casinos, racetracks, sports betting companies, and other gaming industry participants on a wide spectrum of gaming-related matters. Go vote for his panel on sports betting to appear at South By Southwest.
Monday, January 11, 2016

No Question, PASPA Applies to Daily Fantasy Sports

The recent controversy surrounding daily fantasy sports (“DFS”) has highlighted both the need to regulate the industry and also to clarify its legal status. State legislatures are now attempting to shore up the legal status of DFS while proposing regulations aimed at protecting consumers. Since the beginning of 2015, nearly 20 states have weighed in with some form of proposed DFS legislation. These bills run the gamut: several of the bills “authorize” DFS as legal (one even proposes an amendment to that state’s constitution); some propose a “licensing” regime (whereby operators are required to pay substantial annual sums for the privilege of doing business in that state); others simply “regulate” DFS without explicitly authorizing or licensing the activity, whereas, at the other end of the spectrum, a few states “exempt” fantasy contests from the ambit of those states’ gambling codes.

While these are legislative proposals are laudable, and, perhaps, even necessary to protect consumers, they may be in violation of the Professional and Amateur Sports Protection Act (“PASPA”), a 1992 federal law which prohibits state-sponsored sports betting in every state except for those states (such as Nevada) that had conducted a sports wagering scheme at any time between January 1, 1976 and August 31, 1990.

A. The Plain Language of PASPA

While PASPA is commonly understood to prohibit state-sponsored sports betting on the “outcomes” of professional and amateur sporting events, it also contains language that is arguably (and perhaps inarguably) directed at fantasy sports. In its recently-released white paper, the Massachusetts Gaming Commission cautioned that PASPA "potentially presents the greatest constraint to state action to address DFS," adding that "at first glance, PASPA may constrain the Legislature from any legislation that directly or indirectly permits or regulates DFS."

Section 3702 of PASPA states in pertinent part:

“It shall be unlawful for –
Fantasy sports are inextricably tied to the individual “performances" of athletes in a game rather than on the final score of the game itself. Without the underlying performance statistics of the real-world professional or amateur athletes, there are no "winners" or "losers" in a DFS contest. As the Massachusetts Gaming Commission explained in its comprehensive white paper, "the success of the individual athletes that make up a participant's team, when filtered through the scoring rubric set up by the DFS operator, will result in the win or loss of the participant." While acknowledging that a DFS participant is not "betting" that a specific player will achieve a specific statistical milestone, such as scoring a certain number of touchdowns in a single game, the Massachusetts Gaming Commission observed that the DFS participant is nonetheless betting that "the aggregate performance of the individual athletes on his [fantasy] team will exceed the aggregate performance of the individual athletes on his opponents' [fantasy] teams." "Simply stated," as the MGC's white paper concludes, "if there were no underlying athletic performances, there would be no DFS."

Thus, a state legislature considering whether to expressly legalize daily fantasy sports must be cognizant of PASPA's prohibitions. As the statute makes plain, states may not "sponsor, operate, advertise, promote, license, or authorize by law or compact" any lottery, sweepstakes or other betting, gambling, or wagering scheme based directly or indirectly (through the use of geographic reference or otherwise) on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games."

28 U.S.C. § 3702 (emphasis added)

PASPA's ban on state-sponsored sports wagering also applies to private parties acting "pursuant to the law or compact of a governmental entity." See National Collegiate Association, Inc. v. Christie, 730 F.3d 208, 216 (3d Cir. 2013) (“The prohibition on private persons is limited to any such activity conducted ‘pursuant to the law or compact of a governmental entity.’”). These private persons would theoretically include DFS operators, professional sports leagues and teams, and media companies. To date, only two states (Kansas and Maryland) have expressly legalized
fantasy sports. However, this "private person" language may take on greater significance in 2016, as a number of other states move to legalize DFS.

Although PASPA has not yet surfaced as an obstacle to state legalization of DFS, it may emerge as an important issue in 2016 as new state legislative measures are introduced. Any analysis of a DFS legalization bill will undoubtedly center on two key issues: (1) whether DFS is a "lottery, sweepstakes or other betting, gambling, or wagering scheme" based, directly or indirectly, on "one or more performances" of amateur or professional athletes; and (2) whether a state’s explicit legalization of DFS rises to the level of "promoting," "authorizing," or "licensing" for purposes of PASPA.

B. PASPA’s Legislative History

Some might argue that DFS is not a "lottery, sweepstakes or other betting, gambling or wagering scheme" within the meaning of PASPA because DFS is a "contest of skill" (with skill predominating over chance), whereas traditional single-game sports betting (the main focus of PASPA) entails more “chance” than “skill." But PASPA’s legislative history suggests that the “skill vs. chance” distinction has no bearing on the applicability of PASPA.

To that point, the Report of the Senate Judiciary Committee (Senate Report 102-248) accompanying PASPA states as follows:

The prohibition of section 3702 applies regardless of whether the scheme is based on chance or skill, or a combination thereof. Moreover, the prohibition is intended to be broad enough to include all schemes involving an actual game or games, or actual performance therein, including schemes utilizing geographic references rather than formal team names (e.g., Washington vs. Philadelphia), or nicknames rather than formal names of players”


This language could not be any clearer. It states that PASPA is "broad enough to include "all schemes" involving an actual game or games, "or actual performance therein." The Massachusetts Gaming Commission similarly observed in its white paper that PASPA’s legislative history "clearly demonstrates that the statute was designed to have a broad scope applying to a wide swath of 'schemes' regardless of the balance between chance and skill." While there is no need to even resort to the statute's legislative history given that the plain language of PASPA is clear and unambiguous, the legislative history nonetheless belies any argument that PASPA is inapplicable to fantasy sports contests.
C. Does the Later-Enacted UIGEA Override PASPA?

Some have also posited that PASPA was “superseded” by the Unlawful Internet Gambling Enforcement Act ("UIGEA"), which was enacted nearly 15 years earlier. In fact, one DFS payment processing company (which shall remain nameless) specifically requires a legal opinion from operators on this point before it will agree to process DFS transactions. Presumably, lawyers drafting legal opinions for the use and benefit of DFS payment processors have opined that UIGEA "implicitly supersedes" PASPA. But any such conclusion or opinion would be a huge stretch, in my view.

UIGEA, which generally outlaws internet gambling, contains an exemption for fantasy sports contests that meet certain criteria. PASPA, on the other hand, prohibits states from authorizing sports gambling schemes based on the “performance” of athletes in amateur or professional sporting events.

Under the interpretive principle known as lex posterior derogat legi priori, "a later statute takes away the effect of the prior one." But, as the governing case-law makes clear, the later statute must either "expressly repeal", or be "manifestly repugnant to," the earlier one.

This rule of interpretation cuts against the notion that UIGEA supersedes PASPA. There are several reasons for this. First, UIGEA does not expressly repeal PASPA. Neither the UIGEA statute nor the legislative history preceding its enactment makes so much as even a passing reference to PASPA. Second, UIGEA is not "manifestly repugnant" to PASPA. The two federal statutes have entirely different aims: UIGEA targets the “recipients” of payments associated with unlawful internet gambling transactions, whereas PASPA simply forbids "governmental entities" (including states and recognized Indian tribes) from "authorizing" new sports gambling laws. They are simply not in conflict.

Further, UIGEA’s “Rule of Construction” makes clear that UIGEA does not supersede other federal or state laws:

> No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.

31 U.S.C. 5361(b)

This statutory language should put to rest any contention that UIGEA supersedes, altered or supplanted PASPA. Thus, state legislative bodies which are weighing whether to legalize daily fantasy sports need to be cognizant of the constraints imposed by PASPA. As I will explain in a future piece, several state legislatures (most notably, those in Florida, California, Minnesota,
Indiana and Pennsylvania, to name just a few) have not heeded this message and may unwittingly expose their prospective fantasy sports legislation to a future legal challenge under PASPA.

-- Posted by Daniel Wallach @ 1/11/2016 01:18:00 PM -- Comments (0) -- Post a Comment
New York Daily Fantasy Sports Court Case May Hinge On Meaning Of ‘Future Contingent Event’

Daniel Wallach, December 3, 2015 16:28 PDT  @WALLACHLEGAL

New York has always represented tricky terrain for the daily fantasy sports industry. Unlike many other states which define “gambling” by reference to the “predominant factor” test (that is, “chance” must predominate over “skill” before gambling will be said to exist), New York’s test sets a much lower bar for gambling.

What is gambling in New York?

Under New York Penal Law 225.00, “gambling” is defined as the staking or risking of something of value on the outcome of either (1) “a contest of chance,” or (2) “a future contingent event not under [that person’s] control or influence,” each with the agreement or understanding that the person will receive something of value in the event of a certain outcome. (At least eight other states employ the same test: Alabama, Alaska, Hawaii, Missouri, New Jersey, Oklahoma, Oregon and Washington.)

This definition sets forth two separate categories of gambling: (1) wagering on a “contest of chance,” and (2) wagering on the outcome of a “future contingent event” over which the bettor has no “control or influence.” The latter of these two categories is not dependent on a “skill vs. chance” assessment, but, rather, looks to whether an alleged bettor can “control” or “influence” the outcome of the “future contingent event.”

The statute, however, does not define these words. But the plain meaning of the words “control” and “influence” would seem to connote being able to have an “impact” or an “effect” on the event itself, which brings us back to the ultimate question: What is the “future contingent event” in a DFS contest? Is it the real-world sporting event or events on which scoring is based? Or is it the DFS contest itself?

Some guidance from NY commentary

http://www.legalsportsreport.com/6653/new-york-dfs-case-key-argument/
While there is no case that is directly on point, one possible source of guidance in answering this threshold question may come from the McKinney Supplemental Practice Commentary accompanying New York Penal Law 225.00. The author of that commentary, William C. Donnino (a New York State court judge), employs a hypothetical involving the game of chess to illustrate the definition of “gambling” under New York law:

One illustration of the definition of “gambling,” drawn from the commentaries of Judges Denzer and McQuillan is the chess game between A and B, with A and B betting against each other and X and Y making a side bet. Despite chess being a game of skill, X and Y are "gambling" because the outcome depends upon a future contingent event that neither has any control or influence over. The same is not true of A and B, who are pitting their skills against each other and thereby have a material influence over the outcome; they, therefore, are not "gambling." Thus the definition of “gambling” embraces not only a person who wagers or stakes something upon a game of chance but also one who wagers on ‘a future contingent event’ [whether involving chance or skill] not under his control or influence.” Denzer and McQuillan, Practice Commentary, McKinny’s Penal Law, § 225.00, pp. 23 (1967)

Deeper into the hypothetical

Now let’s expand that hypothetical even further, and, instead, of a single chess game, let’s assume there are eight tennis matches being played simultaneously, and, instead of wagering on the direct winner of the match between A and B, individuals X and Y each select five tennis players from among the eight tennis matches (involving a total of 16 players) and utilize a scoring system whereby two points are awarded for each “ace” and one point is subtracted for each “double-fault.” Can X and Y “control” or “influence” the outcome of this multi-player event any more than they can control or influence the outcome of a single tennis match? Probably not.

But the answer ultimately depends on how you define the “future contingent event”: is it the underlying real-world sporting event or events (as the New York AG would argue) or is it the fantasy contest itself (as DraftKings and FanDuel would argue)? The answer to this question could very well determine which side will obtain a preliminary injunction and ultimately prevail in the New York court case.

NY AG’s Argument

The task of identifying the “future contingent event” was at the crux of last week’s oral argument.

A ‘pure question of law’?

Kathleen McGee, the Assistant Attorney General who argued the case for the New York AG’s office, spent the majority of her 28-minute opening oral argument by focusing on this question, asserting that it represents a “pure question of law,” at least in contrast to the “chance vs. skill” assessment, which seems more heavily fact-dependent (a key consideration on a motion for a preliminary injunction, where one party is asking the court to essentially rule in its favor without a trial).

McGee argued that one’s skill in making predictions is “irrelevant to the question of whether she is betting on a future contingent event not under her control or influence.” Thus, from the vantage point of the New York AG’s office, the “control or influence” test represents the path of least resistance on a motion for a preliminary injunction: it is a pure question of law that is not dependent on the degree of chance to skill (and all the fact-finding that might necessarily entail).

Almost immediately, McGee honed in on the critical (and potentially outcome-determinative) question: “So what is the ‘future contingent event’ out of the control or influence of the bettor?” She answered that, in the DFS context, the “future contingent event” is “the performance of athletes in real world games which no daily fantasy sports bettor can control.” She explained that “if the athletes do not perform or the games are not held, there can be no daily fantasy sports winner or loser,” adding that “the winner of each daily fantasy sports contest is dependent on what happens in the real games.” McGee used the following illustration to make her point:

Bettors win or lose points based on how many yards are rushed or runs batted in, whether there was a touchdown, or a fumble at the goal, how many sacks there were, which players were benched, whether the game was suspended, and so on and so on.

Who has the control?

McGee stressed that each of these events “is out of the control of the bettor. There is absolutely nothing they could do to influence how many yards a player runs or how many goals he scores, what plays are run, or even whether he slips on the turf because it is wet from the rain.” She said
that once the “real games” start, the DFS player is reduced to a mere spectator: “in short, when I
play DraftKings or FanDuel, I place my bet, I pick my team, and then I watch TV. The rest is up to
the athletes, and all I can do is watch the event unfold before my eyes, perhaps, while yelling at the
TV a bit.”

McGee next addressed the DFS sites’ contention that, through this formulation, the Attorney
General “is criminalizing all types of activities: chess, investing, bingo, [and] spelling bees.” She
categorized this argument as a “red herring,” pointing out “the only game at issue here is daily
fantasy sports. No one is attacking bingo marathons, investing or spelling bees.”

The spelling bee example
Taking aim at the spelling bee example, McGee maintained that contestants could obviously
“influence” the outcome of such a competition simply “[by] spelling the . . . word [correctly].” She
then distinguished that example from the situation where “non-participants” are wagering on the
outcome of a spelling bee.

McGee explained that “if someone ran a website taking millions of dollars and bets placed on the
outcomes of spelling bees, that would be illegal gambling because the spelling bee is the ‘future
contingent event.’ ” McGee added that non-participant bettors would not be able to “control” or
“influence” the outcome of a spelling bee “even if [they] spent hours poring over the grammar school
educations of the spelling bee contestants and running algorithms to determine which words were
likely to be presented, and even if they could put together a fantasy team comprised of competitors
in various different spelling bees.”

[My take – the stock investing example would not seem to be an apt comparison either since that
activity is statutorily-authorized and subject to state and federal regulation. In other words, stock
market investing can be seen as an exception to the definition of gambling]

FanDuel’s argument
Not surprisingly, FanDuel’s outside counsel, John Kiernan, had a different take on this issue.

DFS = ‘true contest’
He referred to DFS contests as a “true contest” in the same vein as a “spelling bee, fishing contest,
hole-in-one contest, essay contest, beauty contest, marathon and other road races.” He called
these types of contests “a valued and recognized part of the American social fabric” and “a well-
recognized component of the American scene.” Kiernan described the characteristics of a “true
contest” as follows:

The analysis is, is there an entry fee, is there a preannounced prize and is there what the State calls
a “true contest,” that is a contest of skill. And those contests have been recognized [as legal] many,
many times. . . . In fact, the way the courts resolve it is that they say, in those contests, the payment
of an entry fee is not a wager, is not a bet, and, under New York formulations, is not staking or
risking something of value, which is the same thing as a wager or bet.

Kiernan then proceeded to explain why FanDuel’s contests possess the characteristics of a “true
contest,” i.e., one that is “skill-based.” He referred to the affidavit of one of his experts, a
professor at MIT, who conducted a “multi-year longitudinal study” of the performance of FanDuel
competitors and found that FanDuel competitors “consistently, overwhelmingly, consistently
outperform, not only random selections of competitive rosters, fantasy rosters, but also rosters that
have been adjusted to simulate some degree of skill.”

Replication of skill
According to Kiernan, the MIT professor’s study also showed “replication” among FanDuel players,
in that “the most skilled players remain the most skilled players over time, the middle players remain
generally middling, and the poor players remain poor players in a way that would be consistent with
a skill-based kind of contest.”

Kiernan also pointed to a third characteristic highlighted by the MIT professor’s study: player
improvement over time. That is, the study shows that “people who participate in these contests
longer and longer get better at it.”

[My take — but isn’t that inconsistent with the finding of “replication,” i.e., that middling players
remain middling over time, etc. ?]

The judge gives his take
At this point, Justice Mendez interjected (his first substantive comment during the nearly two-hour oral argument) to remind Mr. Kiernan that the New York AG's argument was centered primarily on the inability of the bettor to "control" or "influence" a future contingent event, rather than the amount of "skill" involved:

THE COURT: But I think what they are arguing is . . . the fact that you have the skill to pick the players, fine, you have that skill. But now you are relying on someone else's skill to play the game, and that is your contingency there, how that other person performs. . . .

Justice Mendez then used the example of the “hole-in-one” golf case [Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85 (Nev. 1961)], cited earlier by Mr. Kiernan, to make the point that the golfer who pays the entry fee to participate in a hole-in-one golf contest is relying entirely on his own skill and not someone else’s:

THE COURT: And I think that is what happened in the Gibson case you cited in your brief, where the golfer paid to enter, and then that golfer went and took the shot, whether he hits the hole-in-one [or not], but the golfer is doing it himself.

Well, the court says that’s skill. If you could put it in, fine; if not, you are betting on yourself basically, that’s your skill. You are not relying on someone else to do it.

Thinking quickly on his feet (since the Judge’s comment could be seen as agreeing with McGee’s argument), Kiernan responded that the judge had “gotten to exactly what is the central nub of our dispute,” which is “whether fantasy sports participants are mere observers of the contest being played or are actual participants in their very own contest that is separate and apart from the contest that is taking place on the field.” Kiernan maintained that there are “two characteristics” of DFS contests that “set it apart from all the analogies that the State offers about the person who is watching the spelling bee or betting on the chess game”:

The first is that there is a purposeful and elaborate detachment of fantasy sports from the actual outcomes of the games, and that happens in a couple of ways. First, the rules of fantasy sports say that when you are putting together your team, you are required to diversify your team, your roster across a bunch of different teams, so that your outcomes are “detached” from the outcomes of the individual games. But the roster that you select, obviously, those eight or ten people, whatever the number is in a particular contest, never step onto a field together. They never step onto a field against anybody else. They’re detached from those . . . contests.

And, of course, the outcomes of the underlying football game are really almost indifferent to the fantasy sports competitor, that is, the team could lose, but the selected roster person can perform fantastically, or the team can win and the selected person can perform terribly.

Now, the second element of fantasy sports that similarly sets it apart and makes it different from just somebody who is gambling on an event . . . Participants in competitions for fantasy sports feel like competitors. The evidence indicates they regularly work very hard to select their teams. They believe that their efforts make a difference. . . . And that is the fundamental thing that sets it apart. . . . [It’s] about accumulating this fantasy roster and competing against somebody else and enjoying that so much that that competition has really been a kind of engrained . . . piece of American culture over recent years, and that is the essence of what makes fantasy sports so different, Your Honor.

**Influencing the outcome**

Kiernan argued that DFS players “are influencing the outcome because the outcome they are focused on is the outcome of their [DFS] contest, and that is pivotally affected by their skill at selecting their roster.” As Kiernan put it, the DFS contestants “are actually the movers, the marionettiers of that outcome, and the fact that they aren’t participating in the underlying sporting event doesn’t alter their role as very active participants in this separate contest.” He explained that “the event that the fantasy sports contestant is engaged in is the contest over who selects the best roster, [and] that is something . . . over . . . which the contestant has enormous influence, control or influence.” Calling this issue “the heart of the case,” Kiernan described DFS players as “participants in their own competitions . . . whose actions influence the outcome of that contest within the meaning of the statute.”

Kiernan insisted that the fact that DFS players cannot control “all future events” (referring to the real-world games), was not fatal to his argument since no participant in any contest has that power. As he put it, “[a]ll the fisherman can do is throw his line out in the place that his skill has taught him is the place to throw the line out. There is still a role for the fish.”

**DraftKings’ argument**

Next up was litigator extraordinaire David Boies on behalf of DraftKings.
The Key Argument In New York Daily Fantasy Sports Case

9/6/2016

The distinction between season-long and daily fantasy

Mr. Boies seized on the AG’s statement that once the real games start, a DFS player can’t control what happens, observing that “if that’s true, [then] that’s [just] as true for seasonal sports as it is for daily fantasy sports.” Boies asserted that the AG’s concession that season-long fantasy contests are legal is “fatal” to the AG’s claim that DFS contests are illegal, saying “[t]hey cannot have it both ways. They cannot have that seasonal sports are lawful, not gambling, but that daily fantasy sports somehow are.”

Boies then favorably compared daily fantasy sports to season-long contests, asserting that DFS “actually requires more skill, not less skill” than the longer-duration contests and that players have even “more control” in a DFS contest since there is no draft. As Boies explained:

[In daily fantasy sports, every player gets to pick whatever players they want for their roster, they have complete control over them. Which, of course, is a sharp distinction between any card game, poker or otherwise. Because in poker, you play the hand that you’re dealt. It’s true, as they say, you can fold, raise, check, go all in. Those are all different bets. What you can’t do is change your cards. Those cards are random, that’s the chance element. In fantasy sports, you don’t get dealt a hand. You get to pick your own team. And that’s something you have complete control over.]

Controlling the contest

Boies next addressed head-on the AG’s contention that DFS contestants “can’t control the real world events that are going on” by asserting that this is “true in any contest that you have.”

Citing horse racing as one example, Boies pointed to the Belmont Stakes (sponsored by DraftKings!) and said that “once the bell rings, once the gate opens, the owner’s got no control over what happens in that race. The owner has picked a horse, picked a jockey, but once the gate opens, he’s got no control. Just like, once you picked your roster, . . . you don’t have any more control. You’re not out there actually throwing the pitch, shooting the basket. [And] that’s true for seasonal [fantasy] sports as well as daily [fantasy] sports.”

[My take – the horse racing comparison is not an apt one because thoroughbred racing is expressly permitted by the New York State Constitution and empowered by state legislation, and, moreover, is regulated by the New York State Gaming Commission]

Boies also disagreed with the AG’s contention that the real-world sporting events are the “future contingent event” for purposes of NYPL 225.00. “The problem” with the AG’s argument, Boies explained, “is that [the real-world sporting event] isn’t the ‘contest’ for which the prize is awarded. When you’re betting on sports, you’re getting a prize for what happens in that real-world sports contest. When you’re betting [he actually said ‘betting’] on fantasy sports, you’re getting a prize for what happens in your fantasy contest. And that fantasy contest is something that the players control.”

Thus, the “contest,” Boies concluded, is not the [real-world] sporting event. There’s no prize for any of those sporting events. The contest for which you’re getting a prize is the daily fantasy sports competition.”

[Note—the pertinent statutory language in NYPL 225.00 is “future contingent event,” not “contest.” Under Boies’ rationale, a fantasy contest centered around multiple spelling bee competitions scheduled on a single day would lead to the conclusion that the fantasy contest, not the underlying spelling bee competitions, is the “future contingent event.” Or, as Steve Ruddock tweeted a few weeks ago, “It would seem that by that logic my placing a sports bet is the event and not the game I’m betting on.”]

NY AG’s rebuttal

During her rebuttal, Assistant AG McGee took aim at FanDuel’s counsel’s argument that the results of a daily fantasy contest are “detached” from the actual outcomes of the real-world sporting events, and, therefore, are not comparable to betting on a spelling bee or chess match. She stressed that the “purposive detachment” test posited by FanDuel’s counsel is not recognized in the law and is certainly not part of the New York statutory framework. As she explained to Justice Mendez:

You’ve heard a lot of new tests being bandied about by the defense today. Frankly, I never heard of, nor has it been revealed in any of our case law, we have heard the true contest. . . . We have heard the purposive detachment test, the fully realized test—which I personally hope to attain some day—the more fun tests, none of these are in the law. They’re certainly not within the four corners of Penal Law Section 225.
Season-long vs. DFS misstep?

But McGee missed a golden opportunity to properly explain the rationale for the State’s distinction between season-long fantasy leagues (which it contends are legal) and daily fantasy sports contests (which it contends are illegal).

She offered only that traditional season-long fantasy leagues are "typically games among friends or coworkers and are about bragging rights" and that "the [main] difference is that there is no wager being controlled and operated and fronted by the management of that daily or traditionally fantasy sports enterprise."

[My take—what about CBS Sports and Yahoo?]

She continued that "[t]here is no wager that is happening within the four square corners of the event that is happening, whether it is through papers, whether it is through a website, no wager is happening through the website."

Justice Mendez appeared taken aback by McGee’s suggestion that there is no “entry fee” in season-long fantasy leagues (as would many of my co-workers who have been playing for years). He asked her whether there was an “entry fee” for season-long contests, to which McGee responded that "[t]here might be an administrative fee . . . [but] that in traditional fantasy leagues[,] operators don’t take a cut of the wagers."

She then characterized season-long fantasy contests as “a different animal,” and offered that if DraftKings and FanDuel “were to offer season-long bets, take a cut of the bets and offer cash prizes for winners, we, the State, would consider whether it was a gambling operation worthy of an enforcement action. [I’m] not saying we wouldn’t, that's not an issue here today. What is at issue today is what the daily fantasy sports operators are doing, and that falls clearly and really simply within the four corners of [New York Penal Law Section] 225.00.”

This eventually led to Justice Mendez’s next question: “I still don’t understand . . . why it is that traditional sports would be allowed whereas Daily Fantasy Sports wouldn’t? What is the difference? What is the core difference?” McGee responded in a similar vein by explaining (not entirely accurately) that while there is an entry fee in daily fantasy sports, “there is not always an entry fee in traditional Fantasy Sport [and, further], there is not always a prize in traditional Fantasy Sport."

As an illustration, McGee pointed to her husband’s participation in a season-long fantasy league involving soccer. She noted that in her husband’s league, “there is no prize but for bragging rights with his friends. There is no entry fee. That is a traditional Fantasy Sports game.” She reiterated that season-long fantasy sports contests are “a horse of a totally different color” because there are “no wagers, often no prizes, and certainly nothing that conforms to [New York Penal Law Section] 225.00.”

Given that Justice Mendez asked only two (maybe three) questions during a two-hour hearing, Ms. McGee’s misapprehension of season-long fantasy sports contests (which often involve both entry fees and prizes, as Mr. Boies was quick to point out later) may have very well snatched defeat from the jaws of victory.

Differentiation not made

In my opinion, there was a more effective way for the AG to differentiate between daily fantasy sports contests and season-long leagues: in the latter, players are able to “control” or “influence” the outcome of their contests through “in-season” trades, waiver claims and roster adjustments, a feature wholly lacking in daily fantasy sports (where the rosters are fixed before the game starts).

From the vantage of “control” and “influence,” daily contests and season-long contests are not close comparators: the contestant in a season-long contest arguably has greater control and influence by being able to select “new cards” (e.g., new players) midstream (e.g., between games), whereas the DFS contestant can only exercise control or influence through the application of skill in selecting his initial roster before the actual games start (after which he becomes a mere spectator).

That is the real difference between DFS and season-long contests, at least with respect to the cornerstone issue of whether contestants can “control” or “influence” the outcome. Whether this missed opportunity comes back to haunt the AG’s office remains to be seen.

The ‘balancing of the equities’ may forestall a preliminary injunction

Although the two-hour oral argument also addressed other issues, such as whether DFS is a
“contest of chance” under New York Penal Law 225.00, I decided to focus exclusively on the “control or influence” language of NYPL 225.00 because that is the basis on which a preliminary injunction is likely to be granted (for either side).

**Interpretation of the law**

The determination of whether DFS is a “contest of chance” (which is defined as “any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance”) is much more fact-intensive (as evidenced by the numerous affidavits submitted by both sides) than is identifying the “contest” and “future contingent event” at issue, which is purely a matter of statutory interpretation (and, thus, a question of law more suitable for early resolution).

In other words, if Justice Mendez were inclined to grant either side a preliminary injunction, he would likely do so based on an assessment of whether paying an entry fee to enter a DFS contest is tantamount to risking or staking money on the outcome of a “future contingent event” which cannot be controlled or influenced by the contestant.

This formulation, in my opinion, represents the more obvious and cleaner basis for preliminary injunctive relief, as underscored by the disproportionate amount of time devoted to this issue by counsel at oral argument.

**What will the verdict be?**

So how will Justice Mendez rule? Given his reticence at oral argument (he asked only two or three questions at most), it is difficult to get a read on this judge. But the few questions he did ask present obvious problems for both sides.

For DraftKings and FanDuel, I would be concerned about Justice Mendez’s apparent acknowledgement that DFS contestants rely, at least in part, on the skill of the real-world athletes whose performance cannot be controlled or influenced.

To counteract this early impression, DraftKings and FanDuel would have to persuade Justice Mendez that the “future contingent event” (and not just the “contest” in a purely colloquial sense) is the daily fantasy sports contest itself rather than the underlying professional sporting events to which the DFS point scoring is inextricably intertwined. This, in my view, is a tall order, especially at this early stage of the proceedings.

From the vantage point of the New York AG, the biggest concern lies in his office’s failure to adequately explain the basis for treating season-long fantasy contests differently than daily contests.

The AG’s office had better hope that one of the judge’s law clerks has a firmer understanding of what distinguishes season-long leagues from daily fantasy contests on the core issue of “control or influence.”

As stated earlier, the ability to make “in-season” roster adjustments differentiates season-long contests from daily contests, and that may have been the best way to explain the disparate treatment by the AG’s office. But the AG’s office did not make that point at oral argument, and its inability to cogently explain why one is legal and the other is not may have compromised its ability to obtain a preliminary injunction.

**The best guess: No preliminary injunction**

If I had to venture a guess (and with a “cold bench,” that’s all any of us really have), I suspect that Justice Mendez will deny the New York AG’s motion for a preliminary injunction based on a “balancing of the equities” (the third requirement for preliminary injunctive relief, with the first two being “a likelihood of success on the merits” and a showing of “irreparable harm”).

Under a “balancing of the equities,” the moving party is required to demonstrate that the harm it would suffer without a preliminary injunction is greater than the harm that would be suffered by its opponent if an injunction were entered. An injunction is typically denied where the harm to the non-moving party from being preliminarily enjoined “substantially outweighs” the harm to the moving party if an injunction were not entered.

This element would seem to heavily favor DraftKings and FanDuel, which would face the loss of their largest market (and the prospect of payment processors seeking to exit their contracts) should Justice Mendez grant the AG’s request for a preliminary injunction.

By contrast, the AG may be hard-pressed to successfully articulate a greater level of harm since DFS contests have operated openly and conspicuously in New York for several years. While the AG
may not be estopped or barred from pursuing an enforcement action as a matter of law, his delay in bringing suit nonetheless raises the issue of whether a “waiver” of irreparable harm has occurred.

While delay alone may not adversely impact the AG’s entitlement to a permanent injunction upon prevailing on the merits of the case following a trial, it could undermine his ability to obtain a preliminary injunction, which requires a showing of irreparable harm.

In commercial cases, even a delay as little as two months in filing suit could preclude the entry of a preliminary injunction based on a “waiver” of irreparable harm.

Whether that doctrine applies to government enforcement actions is not clear, but the fact that these contests have existed openly for several years would appear to undercut the AG’s contention that the harm to the people of New York through “no injunction” would be greater than the harm that would be suffered by DraftKings and FanDuel if they were forced to immediately exit their largest market.

Thus, with the actual merits of the case appearing to be a close call following last week’s oral argument, look for the “balancing of the equities” to emerge as a key component of the judge’s decision.
New Jersey’s long-standing attempt to legalize sports betting has hit yet another bump in the road. For the third time, the Third Circuit Court of Appeals, in an opinion supported by 10 of the 12 Judges, that includes two dissents, has ruled against New Jersey finding that the state's attempt to legalize sports betting violates federal law.

Read the Third Circuit’s full opinion here.

Background

Since this battle has been going on for years, a brief background is required to put today’s decision in context.

The federal law in question, the Professional and Amateur Sports Protection Act (PASPA) is a 24-year old federal statute prohibiting states from sanctioning or sponsoring sports gambling. PASPA specifically allows sports betting in Nevada and included a provision that allowed New Jersey to legalize sports gambling if it enacted legislation to permit sports betting within one year of the PASPA’s effective date (New Jersey failed to do so).

Seeking to revive its struggling casinos, New Jersey enacted the Sports Wagering Law in 2012 (the “2012 Law”) permitting New Jersey authorities to license sports gambling in casinos and racetracks, and casinos to operate “sports pools.” Before licensing occurred, the NBA, NFL, MLB, NHL, and NCAA (the “Leagues”) brought a lawsuit against New Jersey, seeking a ruling that found the 2012 Law in violation of PASPA. That case, commonly referred to as “Christie I,” made it all the way to the Third Circuit, which ruled in favor of the Leagues finding that: (1) the 2012 Law did violate PASPA; (2) Congress had the authority to regulate sports gambling because it affects interstate commerce; (3) PASPA did not commandeer the state’s rights by forcing them to enact and enforce a federal regulatory scheme.

While the Third Circuit’s Christie I ruling was a win for the Leagues, it did provide a potential roadmap for another challenge by the state:

"Under PASPA, a state may repeal its sports wagering ban, a move that will result in the expenditure of no resources or effort by any state official. On the other hand, a state may choose to keep a complete ban on sports gambling but it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be."

Because of this, New Jersey kept fighting and enacted another law in 2014 (the “2014 Law”), partially repealing all of its state law prohibitions on sports gambling (as opposed to the 2012 Law, which authorized New Jersey authorities to license sports betting). As expected, the Leagues again filed a lawsuit seeking for the court to find the 2014 Law in violation of PASPA. The district court agreed, New Jersey appealed, and the Third Circuit – for the second time – ruled in favor of the Leagues. Seemingly out of chances, New Jersey asked the entire Third Circuit to rehear the case, a request that is very rarely granted, and to the surprise of many, the court acquiesced. When the Third Circuit agreed to rehear the case, its previous ruling on the 2014 Law was completely wiped out. That brings us to today’s opinion.

The Third Circuit’s Opinion

After lauding New Jersey’s attempts to “revive its troubled casino and racetrack industries,” the Third Circuit abruptly ruled that the 2014 Law violates PASPA.

The key is whether or not the 2014 Law “authorizes” sports betting (which would violate
PASPA) or whether the act of repealing existing prohibitions on sports betting is not an “affirmative authorization” (which would not violate PASPA). The court sided with the Leagues in favor of the former.

The Third Circuit found that, even though the 2014 Law merely repeals existing New Jersey laws, it “provides authorization for conduct [sports betting] that is otherwise clearly and completely prohibited.” The court clarified its view on the repeal vs. authorize distinction and changed course from its earlier holding in Christie I:

In sum, even though the 2014 Law contains the word “repeal,” the actual impact of the law authorizes sports betting, thus violating PASPA.

Moreover, the Third Circuit found the exception in PASPA for New Jersey (that it did not take advantage of) particularly persuasive since it is “remarkably similar” to the 2014 Law, evidencing Congress’ intention that such a law would violate PASPA.

The Third Circuit was not persuaded by New Jersey’s argument that, in violation of the 10th Amendment, PASPA “commandeers” the states. In order for Congress to “commandeer” a state, it must impose a federal scheme on state officials and cannot merely invalidate contrary state laws. In Christie I, the court found that the anti-commandeering principle was not violated, because PASPA merely invalidates state laws attempting to regulate sports gambling and “does not require or coerce the states to lift a finger.” Here, the Third Circuit came to the same conclusion:

The Dissenting Opinions

As noted above, there are two dissenting opinions attacking different parts of the majority’s opinion.

First, Judge Fuentes disagreed with the majority’s interpretation that the 2014 Law is an “affirmative authorization by law.” In other words, Judge Fuentes believes that the 2014 Law strictly repeals New Jersey’s prohibition against sports betting and does not authorize the state to do anything, and therefore is not in violation of PASPA (which only prevents states from “authoriz[ing] by law” sports betting).

Second, Judge Vanaskie (who also dissented in Christie I) disagreed with the majority’s holding that PASPA does notcommandeer the states. Remember that Congress is prohibited from “commandeering” the states by forcing them to implement federal programs.
In his *Christie I* dissent, Judge Vanaskie disagreed with the majority's distinction and found no difference between “**compelling** state governments to exercise their sovereignty to enact or enforce laws on the one hand, and **restricting** state governments from exercising their sovereignty to enact or enforce laws on the other.” The majority in this decision, he says, confirmed his conclusion that such a distinction is “illusory”:

> Today’s majority makes it clear that PASPA does not leave a State “much room” at all. Indeed, it is evident that States must leave gambling prohibitions on the books to regulate their citizens. A review of the four Supreme Court

Hence, Judge Vanaskie again argues that the majority’s opinion does not give the states any option except to “maintain an anti-sports wagering scheme” directly in violation of the anti-commandeering principle.

### What Happens Next?

New Jersey and those attempting to overturn PASPA have a few options left on the table.

First, New Jersey will appeal this decision to the U.S. Supreme Court.

It has 90 days, or until November 11th, to ask SCOTUS to take the case. While all SCOTUS petitions face long odds, this opinion deals with constitutional issues – one thing that SCOTUS looks for – and contains multiple dissenting opinions, demonstrating a difference in opinion among federal appeals judges.

Second, as noted in the dissent by Judge Fuentes, New Jersey could pursue the nuclear option, and completely repeal all of its sports betting laws, setting up a completely unregulated environment:

> Suppose the State did exactly what the majority suggests it could have done: repeal completely its sports betting prohibitions. In that circumstance, sports betting could occur anywhere in the State and there would be no restrictions as to age, location, or whether a bettor could wager on games involving local teams. Would the State

Finally, as noted by Dan Wallach (who also broke the story), other states, follow New Jersey’s example, could partially repeal their sports gambling laws and test a different federal circuit:
Today's opinion does not foreclose possibility of other partial repeal laws passing muster under PASPA. Geographic repeal could work.

If another state is successful, it would set up a split in federal appellate courts, making a review by the U.S. Supreme Court much more likely. Of course, Congress could repeal PASPA and implement a new law legalizing and regulating sports gambling.

Thus, while today's decision slows down the fight for legalized sports gambling outside of Nevada, the fight is far from over.

More From The White Bronco:

- Reactions to the Third Circuit's Sports Betting Op...
- Assessing the Potential Wide-Ranging Impact of the...
- Law Professor Robert Blecker Files Brief in Deflat...

File Under: FEATURED, Uncategorized
Tagged With: appeal, Christie, sports betting, sports gambling, third circuit

Comments

David says
August 9, 2016 at 9:42 pm (Edit)

New Jersey could double down and completely and really repeal the State criminal law ban on sportsbetting.

Moving the needle on sportsbetting legalization will require a bold move. There probably is no better way to incite Congressional action to repeal PASPA, something the American Gaming Ass'n is urging, than for NJ to opt for a repeal of any ban under State law.
Legal and Corruption Issues in Sports Gambling

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October 2012

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I. **Introduction**

On April 15, 2011, the federal government shut down the three largest online poker sites servicing the American market – Full Tilt Poker, PokerStars, and Absolute Poker/Ultimate Bet. In addition to seizing the assets of each of the aforementioned online poker operators, each affiliated website included stern notices from the Department of Justice (DOJ) and Federal Bureau of Investigation (FBI) informing visitors that certain gambling is illegal under federal law. Less than two months later, the online sports gambling industry was also subject to a federal-level enforcement action dubbed **Blue Monday**.

The **Blue Monday** indictments, released May 23, 2011, targeted a number of individuals and entities involved, at least tangentially, to online sports gambling. Ten sports gambling websites were shut down as a result. The indictments resulted from a two year multi-agency state and federal investigation that involved the creation and operation of an undercover payment processing firm that allowed law enforcement agents to interact directly with gambling organizations. An affidavit filed in conjunction with the indictment detailed intricate aspects of...

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4 The following internet domain names were seized pursuant to court order: Bookmaker.com, 2Betsdi.com, Funtimebingo.com, Goldenarchcasino.com, Truepoker.com, Betmaker.com, Betgrandesports.com, Doylesroom.com, Betehorse.com, and Beted.com.
online sports betting and shed light on the lifeblood of internet-based sports gambling – payment processing, a prerequisite to any virtual portal accepting sports wagers from a remote location. Payment processing is a two-way street, with such processors collecting money from gamblers for their accounts and paying out winnings to gamblers upon request.

Citing cases dating back to the years following the Civil War, Major League Baseball’s anti-gambling stance has been described as a long-term crusade. A noted scholar described gambling as “the deadliest sin in sports.” The United States government’s move to criminalize operators servicing domestic sports gamblers wagering offshore highlights more than a century of tension between sports and gambling. Measuring the impact of gambling-related corruption on the integrity of sports has also been addressed. The unique role of gambling in the collegiate sports context has also been analyzed. From a lawmaking standpoint, a leading expert posited that “American policymakers have literally ceded sports betting to organized crime while the market continues to grow.” A near-apocalyptic view of gambling’s interaction with sports was summed up in a prominent 1986 *Sports Illustrated* article:

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8 John Grady & Annie Clement, *Gambling and Collegiate Sport*, 15 J. LEGAL ASPECTS OF SPORT 96 (2005) (summarizing efforts to render gambling on college sports illegal in Nevada and providing recommendations including a system of criminal sanctions similar to insider trading).

Nothing has done more to despoil the games Americans play and watch than widespread gambling on them. As fans cheer their bets rather than their favorite teams, dark clouds of cynicism and suspicion hang over games, and possibility of fixes is always in the air.\textsuperscript{10}

The purpose of this article was to analyze the legal and corruption-focused underpinnings of federal statutes that impact sports betting. One foci was on the Professional and Amateur Sports Protection Act (PASPA) in a post-internet world, where the scope and diversity of sports wagering differ markedly from the time PASPA was debated and enacted in the early 1990’s.\textsuperscript{11} The enforcement actions on \textit{Black Friday} and \textit{Blue Monday}, coupled with recent sports gambling-related litigation involving Delaware and New Jersey, have thrust PASPA and the other statutes back into the spotlight. The remainder of this article is organized as follows: Section II highlights relevant federal and state law, Section III focuses narrowly on PASPA, Section IV examines how corruption concerns have shaped federal legislation pertaining to sports gambling, Section V explains the resulting policy issues, and Section VI concludes with an outlook to the future.

II. Primer on Statutory Provisions

A. Federal

1. Wire Act of 1961


\textsuperscript{11} For the avoidance of doubt, this article will not address the important topic of societal costs stemming from gambling. For a detailed discussion of this topic, see Doug. M. Walker & A. H. Barnett, \textit{The Social Costs of Gambling: An Economics Perspective}, 15 J. GAMBLING STUD. 181 (1999).

Organized Crime in Interstate Commerce, also referred to historically as the Kefauver Committee. This committee held hearings that were occasionally publicly broadcasted. The public was made aware of a very broad network of illicit betting schemes, controlling information pertinent to betting activity, as well as the related corruption of police and public officials.13 One of the recommendations by the Kefauver Committee to the federal government was to legislate against any betting taking place over the radio, television, telegraph, and telephone. The seeds planted by the Kefauver Committee became federal law during the Kennedy administration, morphing into the Wire Act of 1961 (Wire Act).14 The Wire Act reads:

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, shall be fined under this title or imprisoned not more than two years, or both.15

In subsection (b), however, the Wire Act provides a safe harbor provision:

Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.16

Although its safe harbor provision protected considerable activity that had been traditionally inherent in sport betting transactions, the Wire Act has been utilized by federal authorities to prosecute illicit gambling. One of the most highly-publicized Wire Act cases was

13 DURHAM & HASHIMOTO, supra note 12, at 42-43; Gambling Proposals Lose in Four States, CHRISTIAN CENTURY, November 22, 1950, at 1380; Thomas Harris, Winner Take All: Expansion of the Gaming Industry, WESTERN WIRE, Fall 1994, at 18.
15 Id. § 1084(a).
16 Id. § 1084(b).
United States v. Cohen.\textsuperscript{17} Cohen, an American, was convicted on Wire Act violations emanating from his World Sports Exchange (WSEX) gambling portal that was established in and operating online from Antigua. After being indicted, Cohen voluntarily returned to the U.S. and prepared a full defense. To gather evidence, undercover federal agents maintained gambling accounts on Cohen’s website, transferred money to such accounts, and placed online and telephone bets.\textsuperscript{18} Eventually, Cohen was found guilty of administering an online sports book that accepted wagers from Americans over the phone and the internet, thus in violation of the Wire Act.\textsuperscript{19} The result of the Cohen case provided evidence that sports books accepting wagers from U.S. residents would not avoid prosecution by merely locating themselves offshore. The Cohen case clearly demonstrated that the Wire Act applied to online sports books, even though the statute preceded the advent of the Internet by almost four decades.

Despite the findings in Cohen, a retrospective analysis of relevant case law and policy statements indicates that the Wire Act cannot be used to prosecute individual bettors.\textsuperscript{20} In re MasterCard International was a case involving online casino gamblers who tried to get their credit card debts ruled unenforceable because their online casino gambling had been illegal.\textsuperscript{21} The U.S. Court of Appeals for the Fifth Circuit declared in 2002 that gambling losses were

\begin{flushleft}
\textsuperscript{17} United States v. Cohen, 260 F.3d 68 (2d Cir. 2001).
\textsuperscript{19} Cohen, supra note 17.
\textsuperscript{20} Arguably the first element of the Wire Act’s burden of proof (being engaged in the business of betting or wagering) would be absent; see generally CHARLES DOYLE, CONG. RESEARCH SERV., RS21984, INTERNET GAMBLING: OVERVIEW OF FEDERAL CRIMINAL LAW (2004); see also United States v. Baborian, 528 F.Supp. 324, 328 (D.R.I. 1981) (excluding individual bettors and social gamblers); United States v. Sellers, 483 F.2d 37, 45 (5th Cir. 1973) (delineating that individual bettors who are “professional gamblers” may be convicted of violating the Wire Act); Cohen v. United States, 378 F.2d 751, 756 (9th Cir. 1967) (remarking that Congress felt that the goal of stopping illegal gambling was better served by imposing duties on those who make gambling their day-to-day business, rather than imposing sanctions on the individual bettor).
\textsuperscript{21} In re MasterCard Int’l., 313 F.3d 257 (5th Cir. 2002).
\end{flushleft}
indeed enforceable because “the Wire Act does not prohibit non-sports Internet gambling,” a decision with which the DOJ disagreed. DOJ officials took the same position (supporting broader scope coverage of the Wire Act) when advising the U.S. Virgin Islands and the states of Nevada and North Dakota against regulating online gaming and when threatening to prosecute media companies advertising for online gambling with aiding and abetting an illegal activity in 2003. In an intriguing twist, however, the DOJ recently revisited its past positions and asserted that the Wire Act only applies to sports betting, as opposed to all forms of Internet-based gambling.

Indictments for Wire Act violations are usually accompanied by other charges, including conspiracy, money laundering, and violations of the Travel Act of 1961 (Travel Act). The Travel Act applies to anyone who travels across state borders or uses an interstate facility to promote, attempt, or perform an unlawful activity. Resembling the Wire Act, the Travel Act only applies to business enterprises engaging in gambling-related transactions, and not casual bettors. Also in 1961, the Interstate Transportation of Wagering Paraphernalia Act was

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22 Id. at 263.
25 Virginia Seitz, Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violates the Wire Act, 35 Op. O.L.C. ___ (2011), available at http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf; see also Nathan Vardi, Department of Justice Flip-Flops on Internet Gambling, FORBES, Dec. 23, 2011, http://www.forbes.com/sites/nathanvardi/2011/12/23/department-of-justice-flip-flops-on-internet-gambling. In a further fascinating aspect of this development, the public release of the DOJ opinion took place on December 23, 2011, presumably as a holiday present to industry stakeholders (or alternatively aspiring at less than broad scope publicity by mainstream media outlets in view of the holiday season). In any event, the industry constituents responded very positively (albeit definitely surprised) and remarked that this day would become known as White Friday.
27 Id. (a).
28 Id. (b).
enacted. Its purpose was to criminalize the interstate transportation and dissemination of any document, record, media, etc. to be utilized in connection with “bookmaking, wagering pools with respect to sporting events, or numbers… or similar game.”

2. Illegal Gambling Business Act of 1970

The Illegal Gambling Business Act (IGBA) was enacted in 1970, as part of the Organized Crime Control Act. The latter also included the Racketeer Influenced and Corrupt Organizations (RICO) Act. The IGBA was used by prosecutors in connection with the aforementioned Blue Monday online sports gambling website indictments, as well as others. The IGBA was particularly aimed at syndicated gambling, federal oversight directed at individuals operating “gambling businesses of major proportions.” In order to establish a case under the IGBA, the federal government must prove that the gambling operation is: (i) violating a state or local law; (ii) includes five or more people who finance, manage, supervise, direct, or

29 18 U.S.C. § 1953. See, e.g., United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) (affirming lower court’s conviction of defendants who conspired to transport and aided and abetted transportation of wagering paraphernalia by mailing floppy disks with a program entitled Sports Office Accounting Program (SOAP) to aid in bookmaking). But see United States v. Kelly, 328 F.2d 227 (6th Cir. 1964) (discharging defendants who published a newspaper with information on results of sports contests and horseracing, declaring that Congress did not intend to abridge individual rights to issue publications containing racing results and predictions, which were actually also included in existing sections of larger newspaper); United States v. Kish, 303 F. Supp. 1212 (N.D.Ind. 1969) (rendering a “scratch sheet” not enjoying the same protection publications such as newspapers enjoy, given a direct tie to gambling).


own all or part of the business; and (iii) in substantially continuous activity for more than 30 days or has gross revenue of $2,000 or more in any single day.35

3. **Racketeer Influenced and Corrupt Organizations Act**

The Organized Crime Control Act also included the Racketeer Influenced and Corrupt Organizations (RICO) Act.36 The RICO Act became law in 1970 as well, and its purpose was “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.”37 The statute is sufficiently broad enough to encompass illegal activities relating to any enterprise affecting interstate commerce. For a RICO case to be established, the government needs to prove that an enterprise existed and that it affected interstate or foreign commerce. Next, the accused has to be associated with the enterprise, and participate in the enterprise through a pattern of racketeering activity (including collection of unlawful debts).38 The U.S. Supreme Court has held that such a pattern does not require multiple illegal schemes; rather a pattern is interpreted as both a relationship between the offenses and the continuing threat of such activity.39 Lastly, the accused has to participate in the enterprise on his or her free volition.40

4. **Unlawful Internet Gambling Enforcement Act of 2006**

In the fall of 2006, Congress enacted the Unlawful Internet Gambling Enforcement Act (UIGEA),41 which makes it illegal for financial institutions to facilitate payment transactions

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35 United States v. Sacco, 491 F.2d 995, 998 (9th Cir. 1974).
38 United States v. Joseph, 781 F.2d 549, 555 (6th Cir. 1986) (noting that conspiracy to commit a violation of state gambling laws constitutes racketeering activity).
40 United States v. Darden, 70 F.3d 1507, 1518 (8th Cir. 1995); see also 31A AM. JUR. 2d Extortion, Blackmail, and Threats §128 (1989).
between offshore gambling operations and American customers. The UIGEA was hurriedly\textsuperscript{42} tacked onto the end of the Security and Accountability for Every Port Act (SAFE Port Act).\textsuperscript{43} The SAFE Port Act was passed by the United States Congress\textsuperscript{44} as the formal legislative response to preempt foreign interests from owning and/or operating American seaports as part of the Dubai Ports World controversy.\textsuperscript{45}

The UIGEA’s preamble explained that new ways to enforce gambling statutes on the Internet were necessary.\textsuperscript{46} The UIGEA states: “No person engaged in the business of betting or waging may knowingly accept [money drawn on U.S. financial institutions] in connection with the participation of another person in unlawful Internet gambling.”\textsuperscript{47} Prior to the passing of the UIGEA, a customer of an online betting site would be able to personally fund an account through credit cards. The UIGEA calls for regulations that mandate financial transaction providers to implement measures – with respect to certain payment systems that \textit{could be used} in connection with Internet gambling – to \textit{identify} such prohibited transactions and \textit{block} them.\textsuperscript{48} The UIGEA

\textsuperscript{44} The bill cleared both Houses with practically unanimous approval (unanimous in the Senate and 409-2 in the House, which also passed an earlier version of it by 421-2).
\textsuperscript{47} Id. § 5363.
\textsuperscript{48} Financial institutions, banks, and credit card companies would have to, for example, attempt to monitor check and credit card transactions, assign particular codes for unauthorized online gambling, and block such transactions. See generally Lisa Boikess, \textit{The Unlawful Internet Gambling Enforcement Act of 2006: The Pitfalls of Prohibition}, 12 LEGIS. & PUB. POL’y 151 (2008), available at http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website__journals__journal_of_legislation_and_public_policy/documents/documents/ecm_pro_062194.pdf (recapitulating the several unusual alliances formed in anticipation of UIGEA’s adoption and the several competing interests the new law posed for the many stakeholders, qt 167-170).
does not target individual bettors; instead, it targets the flow of funds to internet gambling operators.49

The UIGEA is silent about the actual use of internet gambling sites by U.S. residents being illegal. After considerable discourse, there were clarifications codified in November 2008, setting its effective date as June 1, 2010, and outlining the “prohibition on funding of unlawful internet gambling.”50 It should be noted that the revised UIGEA regulations did not clarify what constitutes unlawful Internet gambling. Rather, the regulations purposefully evaded the issue by stating, “a single, regulatory definition of ‘unlawful Internet gambling’ would not be practical.”51

The UIGEA includes several exemptions for online fantasy sports, intrastate gambling, interstate horseracing (discussed infra), and gambling governed by Native American gaming regulations.52 In addition to the nebulous state of federal gambling provisions, it is important to consider that compliance with federal laws such as UIGEA may still result in violations of state law.53 Further, UIGEA has rekindled the discourse for state regulation of internet gambling, given the intricacies and entanglements at the federal level.54

51 12 CFR § 233 at 4.
53 Jennifer W. Chiang, Don’t Bet on It: How Complying with Federal Internet Gambling Law is Not Enough, 4 SHIDLER J. L. COM. & TECH. 2 (2007) (observing that due to lack of cohesive federal oversight states passed internet gambling laws, which regulate making and taking bets online, transferring money between bettor and operator, and even extend to regulating speech and internet casino advertisements).
54 Nicholas M. Wajda, Over-playing a Weak Hand: Why Giving Individual States a Choice is a Better Bet for Internet Gambling in the United States, 29 T. JEFFERSON L. REV. 313 (2007) (suggesting that a “superior approach” would be to allow states to regulate internet gambling along the lines of Interstate Horseracing Act provisions, thus allowing states to run interstate gambling operations in conjunction with similarly situated states).
After going into effect in 2010, the UIGEA resulted in almost all of the online gambling industry’s publicly listed companies withdrawing from the American market. The first conviction in a case involving individuals associated with an offshore gambling business occurred on December 5, 2011. This was followed shortly thereafter by two guilty pleas in New York by individuals involved in UIGEA-related violations.

5. Other Federal Statutes

A federal statute that also needs to be considered when matters of online betting arise is the Interstate Horseracing Act of 1978, as amended in December of 2000. What is interesting from this statute is the definition of “interstate off-track wager:”

“[I]nterstate off-track wager” means a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State and includes pari-mutuel wagers, where lawful in each State involved, placed or transmitted by an individual in one State via telephone or other electronic media and accepted by an off-track betting system in the same or another State, as well as the combination of any pari-mutuel wagering pools…

The Interstate Horseracing Act contains explicit provisions on how one can accept an interstate off-track wager online. For example, the consent of the host racing association, host racing


60 Nonetheless there has been considerable controversy on whether this statute conflicts with the Wire Act. In his signing statement, President Clinton acknowledged the Justice Department’s objection to the amendment: “[S]ection 629 of the Act amends the Interstate Horseracing Act of 1978 to include within the definition of the term
regulatory body, and appropriate off-track racing commission are prerequisites to the acceptance of any wager. Other federal statutes that are utilized in the course of regulating and prosecuting unlawful gambling (and thus may apply in cases where sport betting is conducted) include the: (i) Indian Gaming Regulatory Act of 1988; (ii) Illegal Money Transmitting Business Act of 1992; (iii) Interstate Wagering Amendment of 1994; (iv) Transportation of Gambling Devices Act of 1951 as amended by the Gambling Devices Act of 1962; and (v) Sports Bribery Act of 1964.

B. Overview of State Laws

It is important to note that federal law does not address the hotly-debated “skill vs. luck” issue, which is especially relevant in fantasy sports and poker. In Humphrey v. Viacom, a plaintiff attempted to apply state qui tam statutes for the recovery of gambling proceeds from major media conglomerates operating pay-for-play fantasy sports leagues online. Qui tam laws,
when applied to gambling, are intended to protect gamblers’ families from becoming destitute due to one’s gambling addiction by allowing for recovery of gambling losses when such a situation can be proven. The plaintiff in Humphrey v. Viacom engaged in an educational effort on common law and New Jersey qui tam law’s application in gambling cases. However, his effort was unsuccessful in both the qui tam application and in arguing that fantasy sports were a form of gambling.

Iowa, second only to the efforts from New Jersey (analyzed in detail infra), featured legislation that would challenge the federal ban on sport betting. However, that state legislative effort failed in 2010. The District of Columbia and 47 states (Alaska, Hawaii, and Utah are the outliers) allow lotteries, casinos, and/or pari-mutuel gaming such as horse racing. Alaska allows charitable gaming, social gambling, and select other forms of gambling in the state’s casinos. Hawaii only allows social gambling. Utah does not allow any gambling as declared by the state’s Constitution in Article VI, Legislative Department Section 27, under the heading

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69 Humphrey v. Viacom, supra note 67, at 4. The broader meaning of qui tam laws is that a private party is allowed standing and may bring forth action on behalf of the government (e.g. via whistleblower statutes) and may even recover damages emanating from such action. A more complete description of the term in Latin is “qui tam pro domino rege quam pro se imposo sequitur”, interpreted as “one who brings the action for the king and for oneself.” Bass Anglers Sportsman’s Soc’y of Am. v. U.S. Plywood-Champion Papers, Inc., 324 F.Supp. 302, 305 (S.D. Tex. 1971).

70 The Iowa’s Senate bill was S.B. 2129. See Gambling Developments in the States, 2010, NAT’L CONF. ST. LEGISLATURES (NCSL), http://www.ncsl.org/issues-research/econ/gambling-developments-in-the-states-2010.aspx (last visited April 14, 2012); see also Intrastate Online Gambling Could Make Iowa up to $13 Million Yearly: Study, GAZETTE, http://thegazette.com/tag/iowa-racing-and-gaming-commission (last visited April 14, 2012) (SF 2129 and 2214, a successor bill to SF 2129, would have allowed sports betting to be legal in state licensed gambling venues if PASPA was overturned either through federal law or by a challenge in court. Amateur and professional sports betting would have been allowed under SF 2129 while only professional sports betting would be allowed under SF 2214. Both legislative bills passed out of the Iowa Senate State Government Committee).


“Games of Chance not authorized”, where one finds the most stringent U.S. state gambling policy. In a technology-specific move, the states of Illinois, Indiana, Louisiana, Montana, Nevada, Oregon, South Dakota, Wisconsin, and Washington State have all recently passed legislation that specifically prohibits unauthorized forms of Internet gambling.

Washington State in particular appears to be exceptionally harsh, as it characterizes someone who bets online as committing a class C felony, similarly to third degree statutory rape. Washington also featured a unique case, *Internet Community v. Washington*, in which an online business, Betcha.com, provided a stock exchange-like platform connecting individuals on a person-to-person basis. Bets therein included sporting bets, political results, and pop culture entertainment. The Betcha.com twist was that bettors who lost could have opted not to pay within 72 hours. If they selected to forego payment, the only repercussion was that they ran the risk of receiving a low online evaluation and score poorly in an “honor rating” system. The Washington State Supreme Court reversed a lower court decision holding that Betcha.com was not running a gambling business, as bettors “did not have an understanding that they ‘will’ receive something of value, only that they might, if the losing bettor decided to actually honor the bet.” The state Supreme Court held that:

“Betcha was engaged in professional gambling because it engaged in ‘bookmaking’ as that term is defined under the gambling act. Based on this conclusion... Betcha transmitted ‘gambling information’ and used ‘gambling records’ as part of its business.”

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74 Humphrey, *supra* note 72.
In general, owning an online gaming operation without proper licensing would be illegal, as no states are currently granting interstate online gaming licenses. Presumably, with the change of stance from the DOJ on the Wire Act’s scope and its inapplicability with online (non-sports) gambling, one can reasonably foresee more states riding the wave of online gambling regulation in the near future.

III. PASPA

A. Legislative History

Senate bill 474 was introduced in the 102nd session of Congress on February 22, 1991 by Senator Dennis DeConcini [D-AZ] and signed into law by President George H. W. Bush on October 28, 1992. PASPA’s intended purpose was to “prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity.” Congress concluded that sports wagering was: “…undermin[ing] public confidence in the character of professional and amateur sports,” as well as “…promot[ing] gambling among our Nation’s young people.”

Thus PASPA:

represents a judgment that sports gambling…is a problem of legitimate Federal concern for which a Federal solution is warranted… We must do everything we can to keep sports clean so that the fans, and especially young people, can continue to have complete confidence in the honesty of the players and the contests.

Prior to the passing of PASPA there was a considerable lobbying effort by Major League Baseball (MLB) and other professional and amateur sports’ stakeholders. Importantly, there

79 Wire Act, supra notes 14 and 20 and accompanying text.
80 Already several states have moved toward online gambling regulation. See generally SAFE AND SECURE INTERNET GAMBLING INITIATIVE, http://www.safeandsecureig.org/content/news (last visited April 16, 2012); Humphrey, supra note 72, and NCSL, supra note 71.
83 Id. at 4-7.
84 Id.
was a very strong constituency for PASPA led by former New Jersey U.S. Senator and professional basketball player Bill Bradley, a vocal critic of sports betting. After describing his first-hand observation regarding the negative impact of sport gambling, Senator Bradley proffered several reasons behind his support of PASPA:

Athletes are not roulette chips, but sports gambling treats them as such. If the dangers of state sponsored sports betting are not confronted, the character of sports and youngsters’ view of them could be seriously threatened...just as legalizing drugs would lead to increased drug addiction, legalizing sports gambling would aggravate the problems associated with gambling. As a society, we cannot afford this result, and...legalizing sports gambling would encourage young people to participate in sports to win money. They would no longer love the game for the purity of the experience.

There were a few important procedural developments around PASPA, which are certain to come to the fore in impending litigation challenging its constitutionality. First, a document referred to as a “smoking gun” by plaintiffs in recent PASPA’s challenges, was the DOJ’s letter to then-U.S. Senator Joe Biden. In this letter, Assistant Attorney General W. Lee Rawls generally posited that the Wire Act would serve as sufficient deterrent against interstate sports gambling, while also raising three major concerns about the draft legislation: (i) Congress generally defers to the states in respect to revenue generation; (ii) federalism; and (iii) a “particularly troubling” finding that sports organizations are permitted to enforce PASPA’s provisions.

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86 Bradley’s contention that he had witnessed fans cheering a seemingly irrelevant NBA end of game shot that resulted in a team covering the spread was not confirmed or pinpointed to a particular game by Bradley himself. See generally Larry Josephson, Rightsing a Wrong: A History in New Jersey Sports Betting, COVERS, http://www.covers.com/articles/articles.aspx?theArt=251825 (last visited April 16, 2012).
89 Letter from Assistant Att’y Gen. W. Lee Rawls to Sen. Joseph R. Biden, Jr. (Sept. 24, 1991), available at http://www.federalgaminglaw.com/page18/files/PASPAletters_DOJ_Senate91.pdf. The authors wish to thank an anonymous reviewer who pointed out the fact that then-Chairman of the Senate’s Judiciary Committee, Vice President Joe Biden, was previously a long-serving U.S. Senator from Delaware, one of the exempt states in the final version of PASPA in 1992.
90 Id.
PASPA contained some significant exemptions, by which certain states’ then-existing sport gambling systems would be grandfathered into the new legislative framework. Hence, the states of Delaware, Montana, Nevada, and Oregon were essentially granted preferential treatment. Relatedly, the statute granted New Jersey, and only New Jersey, the opportunity to enact sport betting within one year from PASPA’s effective date. However, the one-year window for New Jersey closed with no legislative action for a variety of reasons.

B. Statutory Text

PASPA’s text is concise:

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.

91 28 U.S.C. § 3704:
(a) Section 3702 shall not apply to--
(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;
(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both-- (A) such scheme was authorized by a statute as in effect on October 2, 1991; and
(B) a scheme described in section 3702 (other than one based on pari-mutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;
[The above exceptions applied to the four states grandfathered in, namely Delaware, Montana, Nevada, and Oregon. The exception below under (3) is the one that allowed New Jersey to consider being the fifth state to survive the new restrictive regulatory scheme after January 1993.]
(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 solely to such municipality; or
(4) pari-mutuel animal racing or jai-alai games.

92 See Josephson, supra note 86.
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.94

C. Litigation


PASPA included several exemptions for states with some form of sport betting regulated
before it was passed. Whereas Oregon felt compelled to discontinue its “Sports Action” sports
lottery under pressure from the NCAA,95 Montana and Nevada continued their regulated sport
gambling practices. However, the most entrepreneurial and corporate-friendly state, Delaware,96
engaged in a long history of legal battles with sport leagues over sport betting.97

In 2009, Delaware passed an act that would regulate single-game wagers on professional
and amateur sporting contests.98 In unison, the four major North American team sports leagues
[MLB, National Football League (NFL), National Basketball Association (NBA) and National
Hockey League (NHL)] and the National Collegiate Athletic Association promptly filed suit
seeking an injunction that would bar any such broadening of Delaware’s traditional football

94 Id. § 3703.
95 See John Hunt, Betting on March Madness Payoff, OREGONIAN (Feb. 25, 2009), available at
(documenting the state’s move to discontinue its sports lottery, an action that was criticized by economists as the
consistent revenue from the lottery was arguably being substituted by uncertain economic benefits through
occasional NCAA events; David D. Waddel & Douglas L. Minke, Why Doesn’t Every Casino Have a Sports Book?,
GLOBAL GAMING BUS. (July 9, 2008) available at http://www.ggbmagazine.com/articles/Why Doesn’t_Every
Casino Have a Sports -Book_ (summarizing federal and state law developments in view of PASPA challenges);
Thomas L. Skinner III, The Pendulum Swings: Commerce Clause and Tenth Amendment Challenges to PASPA, 2
UNLV GAMING L. J. 311, 312 (2011) (establishing unconstitutionality grounds and forecasting possible challenges
against PASPA’s alleged overreach in states’ affairs.
96 With more than 900,000 companies, two-thirds of the Fortune 500, and more than half of US publicly-traded
companies, Delaware is broadly acknowledged as the most desirable state to set-up a business. See generally
DELAWARE DEP’T ST., DIVISION OF CORP., http://corp.delaware.gov (last visited April 16, 2012); Lewis S. Black, Jr.,
result of the latter case, Delaware is restricted to offering football betting using multi-game parlay cards only.
98 MLB, 579 F.3d at 295-6.
parlay sport betting scheme. Delaware’s interpretation was arguably testing the limits of PASPA’s exemption under 28 U.S.C. § 3704(a)(1), by claiming that the plain language of PASPA allows the state to “reintroduce a sports lottery under State control because Delaware conducted such a scheme at some time between January 1, 1976, and August 31, 1990.” The Third Circuit focused the analysis on § 3704(a)(2), and agreed with the leagues’ contention that PASPA’s exemptions should be narrowly tailored to betting schemes that were actually conducted in the protected period. The Third Circuit also disagreed with Delaware’s somewhat tentative assertion that Congress meant to conflate “authorized” with “conducted.”

The Court also disagreed with Delaware’s alternative assertion, the application of another exemption in PASPA § 3704(a)(3), which dealt with casinos. Namely, the court held that the particular exception differs in subject matter, structure, and syntax from the language of § 3704(a)(1).

Interestingly, a key difference between the Delaware case and the litigation moved by New Jersey stakeholders and the Interactive Media Entertainment and Gaming Association (IMEGA), was that Delaware did not challenge PASPA’s constitutionality explicitly. As with Nevada’s monopoly-preservation interests arguably expressed through lobbying for New Jersey’s status quo in 1993, Delaware similarly would have some market share/potential to lose if surrounding states would be able to also offer some form of sport gambling in the near

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99 Id.
100 Id.
101 Id. at 301.
102 Id.
103 Id.
104 Id. at 302.
105 See Interactive Media Entm’t & Gaming Ass’n, 2011 WL 802106.
future.\textsuperscript{107} Hence, the U.S. Court of Appeals for the Third Circuit found “unpersuasive Delaware’s argument that its sovereign status requires that it be permitted to implement its proposed betting scheme.”\textsuperscript{108} Finally, Delaware also failed in attempting to convince the Third Circuit that narrowly interpreting PASPA’s exception and application to Delaware’s scheme would render PASPA’s exception a nullity. Therein, the Third Circuit assumed a somewhat common sense approach and allowed minor deviations, as long as the sport betting scheme was in the spirit and concept close to the originally exempt from PASPA coverage of the Delaware sport gambling system.\textsuperscript{109} On May 3, 2010 the case ended subsequent to the U.S. Supreme Court denying Delaware’s petition for writ of certiorari.\textsuperscript{110}

2. \textit{IMEGA v Holder} (2011 New Jersey case)

It would not appear surprising to the careful observer of sport gambling issues that the site where PASPA would come full circle to the state of New Jersey. After all, it was the state of New Jersey that could have been the fifth jurisdiction grandfathered in by PASPA as mentioned above. On March 23, 2009, IMEGA, a New Jersey-incorporated trade association representing several internet gambling and other online entertainment gaming properties, and several other interested parties\textsuperscript{111} filed suit again against U.S. Attorney General Eric Holder, U.S. Attorney for the District of New Jersey Ralph Marra, and an unidentified number of professional and amateur sport organizations.

\textsuperscript{107} See NFL, 435 F. Supp. 1372, and MLB, 579 F.3d 293.
\textsuperscript{108} MLB, 579 F.3d at 303.
\textsuperscript{109} Id. at 303-304.
\textsuperscript{110} Markell v. MLB, \textit{cert denied}, 130 S.Ct. 2403 (2010). It is useful to observe petitioners’ contentions and a slight shift in strategy preparing the U.S. Supreme Court case. The two reasons promulgated for granting review and reversing the Third Circuit’s decision were: (i) the Third Circuit erred in concluding that Congress has prohibited Delaware from adopting a sports lottery scheme that meets its revenue-generating needs and (ii) the Third Circuit erred in deciding on the merits whilst reviewing a preliminary injunction. Petition for writ of certiorari filed, Jan. 27, 2010 (No. 09-914), \textit{available at} http://www.scotusblog.com/wp-content/uploads/2010/04/09-914_pet.pdf.
\textsuperscript{111} A horse racing trade group and New Jersey State Senators Raymond Lesniak and Stephen Sweeney were co-plaintiffs.
The complaint was filed in the U.S. District Court for the District of New Jersey and sought to declare PASPA invalid and void. The plaintiffs utilized nine claims in their efforts to render PASPA illegal and unenforceable. These nine claims alleged that PASPA:

(1) Violated the U.S. Constitution’s Commerce Clause. Article I, Section 8, Clause 3 of the U.S. Constitution provides for Congress to regulate commerce with foreign nations, among the several states, and with Indian tribes. Under the Commerce Clause, Congress needs to pursue uniform legislation among the states, as opposed to PASPA allowing four states’ sport betting schemes; namely, the plaintiffs alleged that the four states exempt from PASPA’s prohibition of sport gambling were receiving preferential treatment in violation of the Commerce Clause;

(2) Violated the Fourteenth Amendment of the U.S. Constitution, upholding equal treatment of all citizens, by granting rights and privileges to residents of four states that the other forty six states’ citizens would be unable to enjoy. Thus, PASPA was argued to be unconstitutional, violating the Fourteenth Amendment;

(3) Was vague and overbroad, thus violating both the Fifth and Fourteenth Amendment of the U.S. Constitution, not granting certain states’ citizens rights of due process;

(4) Violated the Tenth Amendment to the U.S. Constitution, by which states reserve the right to regulate their affairs if they do not fall within the auspices of the enumerated powers of the federal government. As such, sport betting, whence revenue generation for each state may be pursued, is not among those enumerated powers, thus Congress should not abridge states’ constitutional rights;

(5) Violated the Eleventh Amendment to the U.S. Constitution, by which the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the states by citizens of another state or citizens or subjects of a foreign state. Specifically, the state of New Jersey did not waive its sovereign immunity. PASPA further violated the Eleventh Amendment according to the plaintiffs by allowing sport organizations to prosecute alleged PASPA violations;

(6) Violated Senator Lesniak’s First Amendment rights and particularly his right to legislate freely;

(7) Violated Plaintiffs’ rights to procedural due process under the Fourth, Fifth, and Fourteenth Amendments, as they would be unable to defend themselves, argue for their actions, and challenge PASPA’s enforcement and prosecution by sports organizations;

(8) Violated Plaintiffs’ rights to substantive due process under the Fourth, Fifth, and Fourteenth Amendments, once again by discriminating among residents of certain states

112 See Interactive Media Entm’t & Gaming Ass’n, 2011 WL 802106.
and denying certain states’ citizens’ rights to freely engage in sport betting activity and internet utilization activities; and

(9) Violated Plaintiffs’ constitutional rights to privacy by abridging their use of the internet and available sport betting services.113

On March 7, 2011, in a decision delivered by U.S. District Court Judge Garrett Brown, the plaintiffs’ complaint was dismissed for lack of standing. Because at the time of the decision there was no legislative output, neither actual inclusion of the Governor nor the people of New Jersey with evident interest (presumably subsequent to a referendum, and in view of legislative progress following such a policy direction as would have been expressed by the people of New Jersey), the court concluded that:

“…[T]hese Plaintiffs have not satisfied the injury and redressability requirements for standing. Beginning with Plaintiffs' argument that they have suffered an injury, because PASPA exposes them to liability for promoting sports betting ‘and its adoption in the State of New Jersey’… the Court finds that these Plaintiffs have not alleged an actual or imminent injury.”114

Moreover, “the threat of a civil enforcement action at this juncture is just as speculative as Plaintiffs’ forecast that the voters will pass SCR 132 and the legislature will subsequently authorize sports gambling through legislation.”115 Judge Brown declared: “If PASPA were found unconstitutional, New Jersey law would still prohibit the sports gambling activities Plaintiffs and their members seek to legalize”116 and “[b]ecause the State has not intervened in this suit, Plaintiffs lack standing to present a Tenth Amendment claim.”117

In essence, Judge Brown instructed the plaintiffs on the process by which New Jersey stakeholders and industry constituents (pursuant to state legislative action) would be found to have standing, based on his decision parameters. Indeed, this March 2011 decision commenced a

113 Id.
114 Id.
115 Id.
116 Id.
117 Id.
grassroots effort and state-wide preparation for a referendum to be included on the November
2011 election ballot. By this referendum, the New Jersey legislature would decide directions for
sport betting regulation, and thereafter rekindle the pertinent federal challenge against PASPA.
The text of the public question was as follows:

“Shall the amendment to Article IV, Section VII, paragraph 2 of the Constitution of the
State of New Jersey, agreed to by the Legislature, providing that it shall be lawful for the
Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City
and at current or former running and harness horse racetracks on the results of
professional, certain college, or amateur sport or athletic events, be approved?”118

The final result of the ballot measure election indicated New Jersey voters were in
support of the resolution, with 64% voting in favor.119 Shortly after the referendum results, the
New Jersey legislature proceeded with passing the pertinent legislative amendment.120 In 2012,
nineteen years after PASPA’s enactment, New Jersey Governor Christie signed bill S3113 into
law that would allow sport betting to take place in New Jersey casinos and racetracks.121 Thus, a
new round of litigation challenging PASPA in federal courts is almost certain in the immediate
future.

IV. Corruption Considerations

As discussed in detail supra, competitive integrity preservation and the prevention of
corruption in sporting contests were major tenets in furtherance of PASPA’s enactment in

http://www.njleg.state.nj.us/2010/Bills/SCR/49_I1.PDF.
119 For a full recap of the vote and related information, see New Jersey Sports Betting Amendment, Public Question
1, BALLOTPEfA (2011), available at
120 S. 3113, 214th Leg., Reg Sess., (N.J. 2011) available at
http://www.njleg.state.nj.us/2010/Bills/S3500/3113_I1.PDF.
121 Christie Signs NJ Sports Betting Bill Into Law, CBS NEWS MONEY WATCH (January 18, 2012),
http://www.cbsnews.com/8301-505245_162-57360885/christie-signs-nj-sports-betting-bill-into-law; see also Matt
Friedman, Gov. Christie Signs Bill Allowing Gamblers to Place Bets on Pro, College Sports Teams, NEW JERSEY
REAL-TIME NEWS (January 17, 2012), available at
An appeal to economics-based corruption research helps explain the impetus for PASPA and shapes the contemporary debate about PASPA’s continuing viability in an Internet-heavy environment. Anti-corruption efforts through policymaking have been studied in-depth in the non-sport economics literature, where the deleterious impact of corruption has been analyzed from both a macro- and micro-level. At the macro-level, empirical evidence has shown corruption to facilitate poverty-causing income inequality, decreased firm growth, and lower investment. Corruption has been modeled as a function of multiple equilibriums dependent on the number of honest and dishonest individuals, differences among cultures, uncertainty among actors, and regulatory institutions and procedures. Anti-corruption efforts in response have been shown to fail on the basis of vulnerabilities in the principal-agent model, the collective action problem, and gaps between reality and design.

The preceding summary culled from economic-based research outside of sports evidences why league governing bodies and lawmakers alike have expressed concern over the negative

122 The issue of corruption in sport is relevant outside the USA as well. For a comprehensive overview of such issues from a non-American perspective, see M. Morgan & S. Shevill, Integrity: Tackling Sporting Fraud, WORLD SPORTS LAW REPORT (forthcoming 2012).
123 Interestingly, early non-empirical research posited that corruption may enhance efficiency and provide “grease” to the wheels of commerce. See Nathaniel H. Leff, Economic Development through Bureaucratic Corruption, 8 AM. BEHAV. SCI. 8 (1964).
124 Sanjeev Gupta et al., Does Corruption Affect Income Inequality and Poverty, 3 ECON. GOVERNANCE 23 (2002).
128 Abigail Barr & Danila Serra, Corruption and Culture: An Experimental Analysis, 94 J. PUB. ECON. 862 (2010).
impact gambling-related corruption can have in competitive sports. The pernicious effect of corruption has, in turn, been examined in sports gambling markets, an industry with abundant data, making it a favorable context to test corruption-related theories empirically. Micro-focused corruption studies take a number of forms, including indirect forensic approaches that compare actual secondary data with predictions based on statistical models and economic theory. This approach has specifically been employed in a number of sports gambling-specific research papers. The most prominent example pertained to purported point shaving in men’s college basketball and received widespread media attention upon publication in 2006. Citing the incentives for gambling-related corruption that derive from the structure of basketball betting where heavy favorites can win the game outright but fail to cover the point spread in furtherance of wagers on the underdog team, the author concludes that there is a prima facie case of 6% of all games featuring a strong favorite to be corrupted by gambling-related point shaving. Although prominent, this illustrative example in the context of college basketball exposed the potential weaknesses of the “forensic” approach where findings are sensitive to assumptions and model specification, as the study has been refuted, distinguished, and alternatively explained. Nevertheless, the impact of gambling-related corruption on sport is

136 Wolfers describes heavy favorites as “those favored to win by more than 12 points.” Id. at 280.
137 This figure is equal to 500 games, or 1% of the entire sample culled over the course of the author’s 16 year data set. Id. at 283. Point shaving in college basketball was modeled generally as well. See Yang-Ming Chang & Shane Sanders, Corruption on the Court: Social Consequences of Point Shaving in College Basketball, 5 REV. L. & ECON. 269 (2009).
138 Neal Johnson, NCAA “Point Shaving” as an Artifact of the Regression Effect and the Lack of Tie Games, 10 J. SPORTS ECON. 59 (2009).
profound, meriting the attention of policymakers, sports leagues, bookmakers, and individual gamblers.

The technological shock of the internet, popularized shortly after PASPA enactment, has revolutionized the sports gambling industry. Prior to the Internet, the domestic market for American sports bettors was limited to two options – legal wagering in Nevada or illegal wagering with a neighborhood bookie. The Internet has largely removed geographic constraints. The landscape now includes regulated “brick and mortar” sports books like those throughout Nevada, thousands of illegal bookies operating around the country, Internet sports books physically located outside the United States. As a result, regulated betting exchanges such as Betfair seemingly operate like a stock exchange and offer a multitude of “real-time” options for sports bettors, and a seemingly novel vehicle that operates as a quasi-hedge fund. The breadth of options has given rise to price discrimination, dispersion of monopoly power, and significant market differentiation. Reduced barriers to entry and more transparent pricing have also emerged. The technologically-driven change has manifested itself in at least four discrete areas: (i) growth in the liquidity of the overall sports betting market; (ii) an increase in marketplace competition resulting in decreased margins among bookmakers; (iii) the emergence of in-game live betting and exponential growth in the volume of betting; and (iv) a wider variety

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142 For a detailed discussion of how technological changes have impacted sports gambling, see George Diemer & Ryan M. Rodenberg, Economics of Online Sports Gambling, in THE OXFORD HANDBOOK ON THE ECONOMICS OF GAMBLING (Leighton Vaughan Williams and Donald S. Siegel, eds., forthcoming 2012).
143 Costa Rica, Curacao, and Antigua are popular choices among the thousands of internet-based sports books currently operating globally.
144 One such example is Priomha Capital in Australia that has launched the CLONEY Multi-sport Fund, available at http://www.priomha.com (last visited April 17, 2012).
145 See Diemer & Rodenberg, supra note 142.
146 Pedro Raventos & Sandro Zolezzi, Sportsbooks and Politicians: Place your Bet!, 64 J. BUS. RESEARCH 299 (2011).
of so-called proposition or novelty bets that are not directly tied to the underlying game’s outcome.  

All of these technology-driven factors, especially when coupled with important integrity and corruption considerations, are germane when discussing PASPA’s utility moving forward.

V. Policy Implications

A. Government Regulation and Revenue Generation

Politically, efforts to regulate sport betting and online gambling in general have been very contentious and frequently entangled due to the interaction between political actors and lobbyists serving the gambling industry’s interests. An illustrative example was H.R. 3125, referred to as the Internet Gambling Prohibition Act of 2000. This was a bill to ban internet gambling and was defeated in great part due to the lobbying efforts of soon-to-be-convicted felon Jack Abramoff. Closely, since the turn of the millennium, there were several bills introduced in Congress to either regulate or ban gambling in sports. More often than not, these bills would not reach the vote stage and expire per sunset provisions at the conclusion of each session of Congress. Dating back to the 106th Congress (1999-2000), these bills are summarized in Table 1 below.

150 For an in-depth analysis of legislative progress and the shift toward more regulation by certain state and federal political actors, see Anastasios Kaburakis & Ryan M. Rodenberg, Gambling Sausage: Federal Legislation in the New Millennium, 16 GAMING L. REV. & ECON. 500 (2012).
Table 1: Internet/Sport Gambling bills introduced in Congress since 2000

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<tr>
<th>Congressional Session</th>
<th>Bills for internet/sport gambling ban</th>
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<td>H.R. 3125: Internet Gambling Prohibition Act of 2000</td>
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<td>H.R. 3575: Student Athlete Protection Act</td>
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<td>S. 2340: Amateur Sports Integrity Act</td>
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<td>H.R. 556: Leach-LaFalce Internet Gambling Enforcement Act</td>
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<td>H.R. 1110: Student Athlete Protection Act</td>
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<td>S. 718: Amateur Sports Integrity Act</td>
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<td>S. 338: National Collegiate and Amateur Athletic Protection Act of 2001</td>
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<td>S. 1002: Amateur Sports Integrity Act</td>
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<td>109th Congress (2005-2006)</td>
<td>H.R. 1422: Student Athlete Protection Act</td>
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<td>H.R. 4411: Internet Gambling Prohibition and Enforcement Act</td>
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<td>H.R. 6663: Unlawful Internet Gambling Enforcement Clarification and Implementation Act of 2008</td>
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<td>H.R. 2610: Skill Game Protection Act</td>
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<td>H.R. 2267: Internet Gambling Regulation, Consumer Protection, and Enforcement Act</td>
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<td>H.R. 2268: Internet Gambling Regulation and Tax Enforcement Act of 2009</td>
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<td>H.R. 2230: Internet Gambling Regulation and Tax Enforcement Act of 2011</td>
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<td>H.R. 2702: Wire Clarification Act of 2011</td>
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B. Sport League Policy

In a fascinating twist to the traditional stance American governing bodies have assumed against sports betting, NBA commissioner David Stern previously alluded to a future where professional leagues will have more interaction with gambling operators, and remarked that nationally regulated betting on NBA games would be “a possibility [and] maybe a huge opportunity” for the league.151 Perhaps there is no better expression of at least a slight shift toward sport leagues’ cooperation with the gaming industry than the NFL changing its policy on gambling advertisements. On April 12, 2012, the NFL’s business ventures committee unanimously decided to amend a long-standing ban against in-stadium gambling advertisements, and thus allowed NFL teams to form commercial relationships with casinos, pursuant to certain restrictions regarding content and placement.152 In the college sports context, the PAC-12 conference recently announced, in a multi-year agreement, that its conference championship basketball tournament would be moving to the MGM Grand Garden Arena, which is affiliated with the MGM Grand Casino in Las Vegas, Nevada.153 In addition, it is standard practice for U.S. leagues and professional sports organizations to partner with state lotteries, which frequently feature the most popular sports franchises on major revenue-producing scratch cards and related lottery products.154

VI. Conclusion

A host of federal-level statutes have shaped sports betting for the past 50+ years. For example, PASPA has served to limit state-sponsored sports gambling during the past two decades. Nonetheless, there appears to be a certain trend by which sports organizations are slowly entertaining more commercial partnerships with gaming operators, without at this time yielding completely to unfettered promotions of gambling products, and in particular sports betting services. Closely, the developments in New Jersey’s pursuit of PASPA’s repeal will determine a good deal in regard to sports gambling prospects in the future. With states’ budgets in near-constant search of additional revenue generation, and with continuous pressure from constituents, including interests well rooted in the gambling industry, it appears foreseeable that the recent wave of legislation toward internet gambling and possibly sport betting at the federal level may assume a conclusive law-making trajectory. One analogy at the state level is the progress from strict anti-scalping laws to ticket reselling regulation and the creation of tickets’ secondary market, from which considerable revenue in sales and income taxes is generated. There has been a considerable volume of both federal and state legislative bills introduced for regulation of internet gambling and sport betting, particularly subsequent to the New Jersey referendum in November 2011 and the state’s sport betting legislation signed into law by the governor. As of June 2012, New Jersey is on track to be the first new state to operationalize sport

156 See, e.g., Bill King, *Playing Politix: Ticketing companies guide the debate as politicians examine rules for selling, buying tickets*, SPORTS BUS. J. (June 4-10, 2012) at 15-20 (outlining TicketMaster’s and StubHub’s opposing sides of the discourse, summarizing legislative progress in five states with pending bills on ticket market regulation, and citing a May 2012 Turnkey Sports Poll of 1,100 senior-level sports industry executives from professional and college sports, which found that 64% felt there should not be federal legislation regulating the secondary ticketing market in sports and live entertainment, as opposed to 29% who believe there should be federal legislation); see also Myles Kaufman, *The Curious Case of US Ticket Resale Laws*, SEATGEEK.COM (April 30, 2012), available at http://seatgeek.com/blog/ticket-industry/ticket-resale-laws (summarizing states’ ticket resale laws); Chad Burgess, *The Expert Series: Guide to the Secondary Ticket Market*, SEATGEEK.COM (May 20, 2010), available at http://seatgeek.com/blog/ticket-industry/secondary-ticket-market-and-resellers (providing several examples of the new industry revolving around the resale of tickets to sport and entertainment events).
betting, despite such move being in direct conflict with PASPA.\textsuperscript{157} Combined with legislative action on online and mobile gaming applications,\textsuperscript{158} New Jersey is both on a collision course with the federal government, absent a repeal of PASPA, as well as being the state that others appear ready and eager to follow.\textsuperscript{159} In May and June 2012, California and New York state politicians introduced individual state bills to partially emulate New Jersey and introduce sport betting within their state borders if PASPA is no longer a barrier.\textsuperscript{160} This legislative commotion demonstrates a profound turn for potential gambling industry entrepreneurs and established global online gaming operators, who may return to the American market as swiftly as they departed upon the passage of UIGEA and numerous DOJ-led prosecutions.

\textsuperscript{157} Kenny Walter, \textit{Beck: State ready to take on feds over sports betting}, \textsc{The Hub} (June 7, 2012), available at http://hub.gmnews.com/news/2012-06-07/Front_Page/Beck_State_ready_to_take_on_feds_over_sports_betti.html (describing state legislators support of Governor Christie’s stance on sport betting and intentions to proceed with the new state law despite PASPA’s federal ban, a proposed course of action that will almost certainly be challenged in court by the Department of Justice and/or one or more sports leagues deputized under PASPA to enforce the statute).


\textsuperscript{160} Carl Campanile, \textit{They’re off! Pols push sports bets}, \textsc{N.Y. Post} (May 21, 2012), available at http://www.nypost.com/p/news/local/they_re_off_pols_push_sports_bets_vgQiPyFOPIXUhhUK3NUaBI (reporting that Democrat State Senator Tony Avella was preparing a sports betting bill, which had the support of Brooklyn District Attorney Charles Hynes, and that Avella cited research that points to a potential revenue generation upward of $2 billion for the state, in lieu of data projecting illegal sports betting in New York City alone between $15-30 billion per year); Patrick McGreevy, \textit{California Lawmakers Vote for Legalizing Sports Betting}, \textsc{L.A. Times} (May 29, 2012), available at http://latimesblogs.latimes.com/california-politics/2012/05/sports-in-california.html (summarizing the adoption by the California Senate of a bill (SB 1390, passed by a vote of 32-2) introduced by state Senator Roderick Wright).
PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-1713

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

UNITED STATES OF AMERICA (Intervenor in the District
Court)

v.

GOVERNOR OF THE STATE OF NEW JERSEY;
DAVID L. REBUCK, Director of the New Jersey Division of
Gaming Enforcement
and Assistant Attorney General of the State of New Jersey;
FRANK ZANZUCCKI, Executive Director of the New
Jersey Racing Commission
NEW JERSEY THOROUGHBRED HORSEMEN’S ASSOCIATION, INC.; STEPHEN M. SWEENEY; SHEILA Y. OLIVER (Intervenors in District Court)

Stephen M. Sweeney and Sheila Y. Oliver,
Appellants

No. 13-1714

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

UNITED STATES OF AMERICA (Intervenor in the District Court)

v.

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

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

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

No. 13-1715

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

UNITED STATES OF AMERICA (Intervenor in the District Court)
GOVERNOR OF THE STATE OF NEW JERSEY;
DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement
and Assistant Attorney General of the State of New Jersey;
FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission

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

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

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

Argued: June 26, 2013

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

(Opinion Filed: September 17, 2013)
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OPINION OF THE COURT

___________

FUENTES, Circuit Judge:

Betting on sports is an activity that has unarguably increased in popularity over the last several decades. Seeking to address instances of illegal sports wagering within its borders and to improve its economy, the State of New Jersey has sought to license gambling on certain professional and amateur sporting events. A conglomerate of sports leagues, displeased at the prospect of State-licensed gambling on their athletic contests, has sued to halt these efforts. They contend, alongside the United States as intervening plaintiff, that New Jersey’s proposed law violates a federal law that prohibits most states from licensing sports gambling, the Professional and Amateur Sports Protection Act of 1992 (PASPA), 28 U.S.C. § 3701 et seq.
In defense of its own sports wagering law, New Jersey counters that the leagues lack standing to bring this case because they suffer no injury from the State’s legalization of wagering on the outcomes of their games. In addition, alongside certain intervening defendants, New Jersey argues that PASPA is beyond Congress’ Commerce Clause powers to enact and that it violates two important principles that underlie our system of dual state and federal sovereignty: one known as the “anti-commandeering” doctrine, on the ground that PASPA impermissibly prohibits the states from enacting legislation to license sports gambling; the other known as the “equal sovereignty” principle, in that PASPA permits Nevada to license widespread sports gambling while banning other states from doing so. The District Court disagreed with each of these contentions, granted summary judgment to the leagues, and enjoined New Jersey from licensing sports betting.
On appeal, we conclude that the leagues have Article III standing to enforce PASPA and that PASPA is constitutional. As will be made clear, accepting New Jersey’s arguments on the merits would require us to take several extraordinary steps, including: invalidating for the first time in our Circuit’s jurisprudence a law under the anti-commandeering principle, a move even the United States Supreme Court has only twice made; expanding that principle to suspend commonplace operations of the Supremacy Clause over state activity contrary to federal laws; and making it harder for Congress to enact laws pursuant to the Commerce Clause if such laws affect some states differently than others.

We are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games’ integrity and whether states should be permitted to license and profit from the activity—engender strong views. But we are not asked to judge the wisdom of PASPA or of
New Jersey’s law, or of the desirability of the activities they seek to regulate. We speak only to the legality of these measures as a matter of constitutional law. Although this “case is made difficult by [Appellants’] strong arguments” in support of New Jersey’s law as a policy matter, see Gonzales v. Raich, 545 U.S. 1, 9 (2005), our duty is to “say what the law is,” Marbury v. Madison, 1 Cranch 137, 177 (1803). “If two laws conflict with each other, the courts must decide on the operation of each.” Id. New Jersey’s sports wagering law conflicts with PASPA and, under our Constitution, must yield. We will affirm the District Court’s judgment.

I. LEGAL FRAMEWORK

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

However, despite its pervasiveness, few states have ever licensed gambling on sporting events. Nevada alone began permitting widespread betting on sporting events in 1949 and just three other states—Delaware, Oregon, and Montana—have on occasion permitted limited types of lotteries tied to the outcome of sporting events, but never single-game betting. Sports wagering in all forms, particularly State-licensed wagering, is and has been illegal

A. The Professional and Amateur Sports Protection Act of 1992

PASPA’s key provision applies for the most part identically to “States” and “persons,” providing that neither may sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. The prohibition on private persons is limited to any such activity conducted “pursuant to the law or compact of a governmental entity,” id. § 3702(2), while the
states are subject to an additional restriction: they may not “license[] or authorize by law or compact” any such gambling activities, id. §§ 3702(1), 3701.

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

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

The Act’s legislative history is sparse but mostly consistent with the foregoing. The Report of the Senate Judiciary Committee makes clear that PASPA’s purpose is to “prohibit sports gambling conducted by, or authorized under the law of, any State or governmental entity” and to “stop the spread of State-sponsored sports gambling.” Sen. Rep. 102-248, at 4, reprinted in 1992 U.S.C.C.A.N. 3553, 3555 (“Senate Report”). The Senate Report specifically notes legislators’ concern with “State-sponsored” and “State-sanctioned” sports gambling. Id. at 3555.
The Senate Report catalogues what the Committee believed were some of the problems arising from sports gambling. Importantly, the Committee noted its concern for “the integrity of, and public confidence in, amateur and professional sports” and its concern that “[w]idespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think ‘the fix was in’ whenever their team failed to beat the point-spread.” *Id.* at 3556. The Senate Report also stated its concurrence with the then-director of New Jersey’s Division of Gaming Enforcement’s statement that “most law enforcement professionals agree that legalization has a negligible impact on, and in some ways enhances, illegal markets.” *Id.* at 3558. This is so because “many new gamblers will . . . inevitably . . . seek to move beyond lotteries to wagers with higher stakes and more serious consequences.” *Id.*
The Senate Report also explains the Committee’s conclusion that “[s]ports gambling is a national problem” because “[t]he moral erosion it produces cannot be limited geographically” given the thousands who earn a livelihood from professional sports and the millions who are fans of them, and because “[o]nce a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure.” Id. at 3556. Finally, it notes that PASPA exempts Nevada because the Committee did not wish to “threaten [Nevada’s] economy,” or of the three other states that had chosen in the past to enact limited forms of sports gambling. Id. at 3559.

B. Sports Gambling in New Jersey Since PASPA Was Enacted

Although New Jersey in its discretion chose not to avail itself of PASPA’s exemption within the one-year window, “[o]ver the course of the next two decades . . . the
views of the New Jersey voters regarding sports wagering evolved.” Br. of Appellants Sweeney, et al. 4. In 2010, the New Jersey Legislature held public hearings during which it heard testimony that regulated sports gambling would generate much-needed revenues for the State’s casinos and racetracks, and during which legislators expressed a desire to “to stanch the sports-wagering black market flourishing within [New Jersey’s] borders.” Br. of Appellants Christie, et al. 13 (“N.J. Br.”). The Legislature ultimately decided to hold a referendum which would result in an amendment to the State’s Constitution permitting the Legislature to “authorize by law wagering. . . on the results of any professional, college, or amateur sport or athletic event.” N.J. Const. Art. IV, § VII, ¶ 2 (D), (F). The measure was approved by the voters, and the Legislature later enacted the law that is now asserted to be in violation of PASPA—the “Sports Wagering Law,” which permits State authorities to license sports
gambling in casinos and racetracks and casinos to operate
“sports pools.” N.J.S.A. 5:12A-1 et seq.; see also N.J.A.C.
§ 13:69N-1.1 et seq. (regulations implementing the law).

II. PROCEDURAL HISTORY

The NBA, MLB, the National Collegiate Athletic
Association (“NCAA”), the National Football League
(“NFL”), and the National Hockey League (“NHL”)
(collectively, the “Leagues”), sued New Jersey Governor
Chris Christie, New Jersey’s Racing Commissioner, and New
Jersey’s Director of Gaming Enforcement (the “State” or
“New Jersey”), under 28 U.S.C. § 2703, asserting that the
Sports Wagering Law is invalidated by PASPA. The New
Jersey Senate Majority Leader Stephen Sweeney and House
Speaker Sheila Oliver intervened as defendants, alongside the
New Jersey Thoroughbred Horsemen’s Association, the
owner of the Monmouth Park Racetrack, a business where
sports gambling would occur under the Sports Wagering Law (the “NJTHA”) (collectively, “Appellants”).

The State moved to dismiss for lack of standing and the District Court ordered expedited discovery on that question. After the completion of discovery and oral arguments, the District Court concluded that the Leagues have standing. *Nat’l Collegiate Athletic Ass’n v. Christie*, No. 12-4947, 2012 WL 6698684 (D.N.J. Dec. 21, 2012) (“NCAA I”).

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

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331, and we have appellate jurisdiction over its final judgment under § 1291. Our jurisdiction, however, is limited by the Constitution’s “cases” and “controversies” requirement. U.S. CONST., art. III, § 2.

To satisfy this jurisdictional limitation, the party invoking federal court authority must demonstrate that he or she has standing to bring the case.¹

The Leagues argue they have standing because their own games are the subject of the Sports Wagering Law. They also contend that the law will increase the total amount

¹ The United States notes there may be questions as to whether the District Court’s injunction is an appealable final order because it does not specify what steps the State must undertake to comply with the injunction, but we conclude that the injunction is an appealable final order because the merits opinion describes what the State must do—refrain from licensing sports gambling. See NCAA II, 2013 WL 772679, at *25.
of gambling on sports available, thereby souring the public’s perception of the Leagues as people suspect that games are affected by individuals with a perhaps competing hidden monetary stake in their outcome. Appellants counter that the Leagues cannot show a concrete, non-speculative injury from any potential increase in legal gambling.

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

Markell, like this case, was a lawsuit by the Leagues to stop a state from licensing single-game betting on the outcome of sporting events. In Markell we “beg[a]n [our analysis], as always, by considering whether we ha[d] jurisdiction to hear [the] appeal,” and later concluded that we did have jurisdiction. 579 F.3d at 297, 300. But, contrary to the Leagues’ suggestion, our analysis was limited to whether we had appellate jurisdiction under 28 U.S.C. § 1292(a). See id. We did not explicitly consider Article III standing, and a “drive-by jurisdictional ruling, in which jurisdiction has been assumed by the parties . . . does not create binding precedent.” United States v. Stoerr, 695 F.3d 271, 277 n.5 (3d Cir. 2012) (internal quotation marks and alterations omitted). Therefore, we will not rely on Markell for our standing analysis.

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

Causation and redressability may be met when “a party . . . challenge[s] government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government’s action.” *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 940-41 (D.C. Cir. 2004). Here, the Leagues do not purport to enjoin third parties from attempting to fix games. The Leagues have sued to block the Sports Wagering Law, which they assert will result in a taint upon their games, and is a law that by
definition constitutes state action to license conduct that
would not otherwise occur. Under the reasoning of National
Wrestling Coaches, causation and redressability are thus
satisfied, and all arguments implicitly aimed at those two
prongs are suspect.

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

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

As noted, the Leagues offer two independent bases for standing: that the Sports Wagering Law makes the Leagues’ games the object of state-licensed gambling and that they will suffer reputational harm if such activity expands. We address each in turn.

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

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

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

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

2. Reputational Harm as Injury In Fact

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

(a) Reputation Harm Is a Legally Cognizable Injury

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

The Leagues’ claim of injury is identical to that of the
plaintiffs in Keene and Doe: they are harmed by their
unwanted association with an activity they (and large portions
of the public) disapprove of—gambling. Appellants do not
dispute this legal premise, but attack the strength of the
evidence that the Leagues have proffered to tie the Sports
Wagering Law to the reputational harm they assert. These
arguments overstate what the Leagues must show to
demonstrate reputational harm in this context and, in any
case, ignore the strength of the proffered evidence.
(b) The Evidence In the Record Supports the District Court’s Conclusion that Reputational Harm Will Occur

To be sure, at the summary judgment stage, mere allegations of harm are insufficient and specific facts are required. See Lujan, 504 U.S. at 561. And a plaintiff’s claim of fear of reputational harm must always be “based in reality.” Doe, 199 F.3d at 153. But the “nature and extent of facts that must be averred” depends on the nature of the asserted injury. Lujan, 504 U.S. at 561-62. No one would doubt, for example, that an individual forced to wear a scarlet “A” on her clothing has standing to challenge that action based on reputational harm. Indeed, that was the import of our holding in Doe where, after discounting all of the evidence presented to prove that others’ perception of the plaintiff as disabled could harm him, we concluded that his fear of reputational harm based on an unwanted and stigmatizing label was nevertheless based “in reality.” 199
F.3d at 153. In *Keene*, by contrast, where the reputational harm from being associated with “foreign political propaganda” was not as intuitive, the Supreme Court held that an undisputed expert opinion that such labels may stigmatize individuals was sufficient to make the required injury-in-fact showing. 481 U.S. at 490. This suggests a spectrum wherein the sufficiency of the showing that must be made to establish reputational harm depends on the circumstances of each case. Here, the reputational harm that results from increasingly associating the Leagues’ games with gambling is fairly intuitive.

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

It is, indeed, the specific conclusion reached by the Congress that enacted PASPA, as reflected by the statutory cause of action conferred to the Leagues to enforce the law when their individual games are the target of state-licensed sports wagering. See 28 U.S.C. § 3703. And, presumably, it has also been at least part of the conclusions of the various state legislatures that have blocked the practice throughout our history.

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

Although the Leagues could end their injury in fact proffer there, they also set forth evidence establishing a clear link between the Sports Wagering Law and increased incentives for game-rigging. First, the State’s own expert noted that state-licensing of sports gambling will result in an increase in the total amount of (legal plus illegal) gambling
on sports. [App. 325]. Second, a report by the National Gambling Impact Study Commission, prepared at the behest of Congress in 1999, explains that athletes are “often tempted to bet on contests in which they participate, undermining the integrity of sporting contests.” App. 743. Third, there has been at least one instance of match-fixing for NCAA games as a result of wagers placed through legitimate channels, and several as a result of wagers placed in illegal markets for most of the Leagues, and NCAA players have affected or have been asked to affect the outcome of games “because of gambling debt.” App. 2245. Thus, more legal gambling leads to more total gambling, which in turn leads to an increased incentive to fix or attempt to fix the Leagues’ matches.

This evidence, together, permits the factual conclusion that being associated with gambling is a stigmatizing label and that, to the extent that the Sports Wagering Law will
increase the total amount of gambling as New Jersey’s expert expects, it will increase some fans’ “negative perceptions [of the Leagues] attributed to game fixing and gambling.” *NCAA I, 2013 WL 6698684*, at *6. We discern no clear error in the District Court’s factual conclusions as derived from these surveys and reports.²

3. **Appellants’ Counterarguments**

Appellants posit that the Leagues cannot establish injury based on any stigma that may attach to wagering, because fans would not think negatively of the Leagues given

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² More fundamentally, it is clear to us that gambling and match-fixing scandals tend to tarnish the Leagues’ reputations. Media reports to that effect abound. To take but one, after the Tim Donaghy NBA gambling and game-fixing scandal, commentators noted that “the integrity of the [NBA’s] games just took a major hit.” J.A. Adande, *Ref investigation only adds to bad perception of NBA*, ESPN.com, July 19, 2007, http://sports.espn.go.com/nba/columns/story?id=2943704. It is simply untenable to hold that the Leagues have not identified a trifle of reputational harm from an increase in even legal or licensed sports gambling.
that it is the State that is licensing the activity against the
Leagues’ wishes. But as then-Circuit Judge Scalia explained,
an argument that the “public reaction [to] the alleged harm . . .
is an irrational one . . . is irrelevant to the question of core,
constitutional injury-in-fact, which requires no more than \textit{de facto} causality.” \textit{Block v. Meese}, 793 F.2d 1303, 1309 (D.C. Cir. 1986).

We also find unpersuasive the contention that the
increase in incentives to rig the outcome of the Leagues’
games cannot give rise to standing because they depend on
unknown actions of third parties. The Leagues do not seek to
enjoin individuals from rigging games; they seek to enjoin
New Jersey’s law. That a third party’s action may be
necessary to complete the complained-of harm does not
negate the existence of an injury in fact from the Sports
Wagering Law or negate causation and redressability. “It is
impossible to maintain . . . that there is no standing to sue
regarding action of a defendant which harms the plaintiff only through the reaction of third persons. If that principle were true, it is difficult to see how libel actions or suits for inducing breach of contract could be brought in federal court.

..." Id. Thus, “the traceability requirement [may be] met even where the conduct in question might not have been a proximate cause of the harm.” Edmonson v. Lincoln Nat’l Life Ins. Co., __ F.3d __, No. 12-1581, 2013 WL 4007553, *7 (3d Cir. Aug. 7, 2013) (citing The Pitt News, 215 F.3d at 360-61).³

³ Appellants rely almost exclusively on Simon v. East Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), for the proposition that the reputational injury at issue here is insufficient because it “result[s] ‘from the independent action of some third party not before the court.’” N.J. Br. at 23 (quoting Simon, 426 U.S. at 41-42). This argument greatly overstates the effect of Simon. There, a group of indigent individuals brought suit against the IRS, asserting that the IRS’s tax designation of certain hospitals harmed them by making it less likely that the hospitals would provide them free services. The Supreme Court concluded that the plaintiffs lacked standing because it was “purely speculative
Appellants also assert that granting summary judgment to the Leagues was improper because the effect of the studies and opinion polls was disputed by Appellants’ own evidence. In particular, they point to evidence that (1) the Leagues have been economically prospering despite pervasive unregulated sports gambling and state-licensed sports gambling in Nevada; and (2) some individuals would have no interest in the Leagues’ product unless they had a monetary interest in the outcome of games. But these arguments, which sound more like an appeal to commonsense with which, no doubt, many will agree as a policy matter, do not legally deprive the
Leagues of standing and are insufficient to raise a genuine issue of material fact.

A plaintiff does not lose standing to challenge an otherwise injurious action simply because he may also derive some benefit from it. Our standing analysis is not an accounting exercise and it does not require a decision on the merits. See, e.g., Denney v. Deutsche Bank AG, 443 F.3d 253, 265 (2d Cir. 2006) (noting that “the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing”); see also 13A CHARLES A. WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. JURIS. 3d § 3531.4, 147 (3d ed. 2008). Nor must the Leagues construct counterfactuals analyzing whether they would have done better if PASPA had instituted a complete ban of state-licensed sports gambling or, conversely, worse if PASPA had not existed. And that fans may still buy tickets is not inconsistent with the notion that
the Leagues’ esteem suffers in the eyes of fans, which requires the Leagues to take efforts to rehabilitate their image. That alone establishes injury in fact; that the Leagues may have been successful at rehabilitating their images does not deprive them of standing. See, e.g., Keene, 481 U.S. at 475 (“[T]he need to take . . . affirmative steps to avoid the risk of harm to [one’s] reputation constitutes a cognizable injury.”).

As a last resort, Appellants question the Leagues’ commitment to their own argument that state-licensed sports wagering harms them, noting that the Leagues hold events in jurisdictions, such as Canada and England, where gambling on sports is licensed, and that they promote and profit from products that are akin to gambling on sports, such as pay-to-play fantasy leagues. But standing is not defeated by a plaintiff’s alleged unclean hands and does not require balancing the equities. That the Leagues may believe that holding events in Canada and England is not injurious to
them does not negate that harm may arise from an expansion of sports wagering to the entire country. The same can be said of the Leagues’ promotion of fantasy sports, even if we accept that these activities are akin to head-to-head gambling. And, as even Appellants recognize, it is not the Leagues’ subjective beliefs that control. See Lujan, 504 U.S. at 564.

* * *

That the Leagues have standing to enforce a prohibition on state-licensed gambling on their athletic contests seems to us a straightforward conclusion, particularly

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4 We note, however, the legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the Sports Wagering Law. See Humphrey v. Viacom, Inc., No. 06-2768 (DMC), 2007 WL 1797648, at *9 (D.N.J. June 20, 2007) (holding that fantasy leagues that require an entry fee are not subject to anti-betting and wagering laws); Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85, 86-87 (Nev. 1961) (holding that a “hole-in-one” contest that required an entry fee was a prize contest, not a wager).
given the proven stigmatizing effect of having sporting contests associated with gambling, a link that is confirmed by commonsense and Congress’ own conclusions.  

**IV. THE MERITS**

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

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5 We also note that, although the United States’ intervention does not always give us jurisdiction, a court may treat intervention as a separate suit over which it has jurisdiction, if the intervenor has standing, particularly when the intervenor enters the proceedings at an early stage. See, e.g., *Disability Advocates, Inc. v. New York Coal. For Assisted Living, Inc.*, 675 F.3d 149, 161 (2d Cir. 2012); *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965). Thus, the United States’ intervention independently supports our jurisdiction.
whether, in exercising its affirmative powers, Congress exceed a limitation imposed in the Constitution, such as by the anti-commandeering and equal sovereignty principles.

See, e.g., Reno v. Condon, 528 U.S. 141, 148-49 (2000) (asking, first, whether a law was within Commerce Clause powers and, second, whether the law violated the Tenth Amendment).6

A. Whether PASPA is Within Congress’ Commerce Clause Power

1. Modern Commerce Clause Law

Among Congress’ enumerated powers in Article I is the ability to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S.

6 We review de novo a determination regarding PASPA’s constitutionality, Gov’t of V.I. v. Steven, 134 F.3d 526, 527 (3d Cir. 1998), and begin with the “time-honored presumption that [an act of Congress] is a constitutional exercise of legislative power.” Reno, 528 U.S. at 148 (internal quotation marks omitted) (quoting Close v. Glenwood Cemetery, 107 U.S. 446, 475 (1883)).
CONST., Art. I., § 8, cl. 3. As is well-known, since *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937), the Commerce Clause has been construed to give Congress “considerable . . . latitude in regulating conduct and transactions.” *United States v. Morrison*, 529 U.S. 598, 608 (2000). For one, Congress may regulate an activity that “substantially affects interstate commerce” if it “arise[s] out of or [is] connected with a commercial transaction.” *United States v. Lopez*, 514 U.S. 549, 559 (1995). By contrast, regulations of non-economic activity are disfavored. *Id.* at 567 (striking down a law regulating possession of weapons near schools); *see also Morrison*, 529 U.S. at 613 (invalidating a law regulating gender-motivated violence).

2. **Gambling and the Leagues’ Contests, Considered Separately or Together, Substantially Affect Interstate Commerce**
Guided by these principles, it is self-evident that the activity PASPA targets, state-licensed wagering on sports, may be regulated consistent with the Commerce Clause.

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

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

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

At bottom, it is clear that PASPA is aimed at an
activity that is “quintessentially economic” and that has
substantial effects on interstate commerce. See Raich, 545
U.S. at 19-20. Prohibiting the state licensing of this activity
is thus a “rational . . . means of regulating commerce” in this
area and within Congress’ power under the Commerce
Clause. Id. at 26.7

3. PASPA Does Not Unconstitutionally
Regulate Purely Local Activities

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7 But see Federal Baseball Club of Balt. v. Nat’l League
of Prof’l Base Ball Clubs, 259 U.S. 200, 208-09 (1922)
describing MLB’s business as “giving exhibitions of base
ball, which are purely state affairs,” and concluding that
baseball is not in interstate commerce for purposes of the
Sherman Antitrust Act).
Appellants nevertheless assert that PASPA is unconstitutional because it “reaches unlimited betting activity . . . that cannot possibly affect interstate commerce . . . [such as] a casual bet on a Giants-Jets football game between family members.” Br. of NJTHA at 34. Parsing words from the statute, they insist PASPA reaches these activities because it prohibits betting in “competitive games” involving “amateur or professional athletes.” 28 U.S.C. § 3702. This argument is meritless.

For one, PASPA on its face does not reach the intrastate activities that Appellants contend it does. PASPA prohibits only gambling “schemes” and only those carried out “pursuant to law or compact.” 28 U.S.C. § 3702. The activities described in Appellants’ examples are nor carried out pursuant to state law, or pursuant to “a systemic plan; a connected or orderly arrangement . . . [or] [a]n artful plot or

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

Appellants finally seek support in the Supreme Court’s holding that the “individual mandate” of the Affordable Care

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8 Moreover, if PASPA reaching activities that are purely intrastate in nature were constitutionally problematic, we would construe its language as not reaching such acts. After all, “[t]he cardinal principle of statutory construction is to save and not to destroy . . . [A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.” *Jones & Laughlin Steel*, 301 U.S. at 30. Appellants’ reading of PASPA to reach casual bets between friends steamrolls that principle. At the very worst, we would leave for another day the question of whether PASPA may constitutionally be applied to such a local wager. Appellants today have not shown that “no set of circumstances exists under which the [challenged] Act would be valid.” *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 623 (3d Cir. 2013) (alteration in original).
Act is beyond Congress’ power under the Commerce Clause. 

See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). But the problem in Sebelius was that the method chosen to regulate (forcing into economic activity individuals previously not in the market for health insurance) was beyond Congress’ power. Here, the method of regulation, banning an activity altogether (in this case the expansion of State-sponsored sports betting), is neither novel nor problematic. 

See, e.g., Raich, 545 U.S. at 27.

B. Whether PASPA Impermissibly Commandeers the States

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

As noted, PASPA makes it “unlawful for a governmental entity to . . . authorize by law or compact” gambling on sports. 28 U.S.C. § 3702. This is classic
preemption language that operates, via the Constitution’s Supremacy Clause, see U.S. CONST., art. VI, cl. 2, to invalidate state laws that are contrary to the federal statute. See, e.g., Am. Trucking Ass’ns v. City of Los Angeles, 133 S. Ct. 2096, 2100-01, 2102 (2013) (explaining that the provision of the Federal Aviation Administration Authorization Act of 1994 (“FAAAA”) that states a “‘State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property’ . . . preempts State laws related to a price, route, or service of any motor carrier with respect to the transportation of property” (quoting 49 U.S.C. § 14501(c)(1)). The Sports Wagering Law is precisely what PASPA says the states may not do—a purported authorization by law of sports wagering. It is therefore invalidated by PASPA. 9

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

1. The Anti-Commandeering Principle

“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.” Gregory v. Ashcroft, 501 U.S. 452, 457 (1991). And it is well-known that all powers not

stand-alone federal provision, is not to be confused with field preemption of sports wagering, a topic we discuss at part IV.B.2.d below.
explicitly conferred to the federal government are reserved to
the states, a maxim reflected in the text of the Tenth
Amendment. U.S. CONST., amdt. X; see also United States v.
Darby, 312 U.S. 100, 123-24 (1941) (describing this as a
“truism” embodied by the Tenth Amendment).

Among the important corollaries that flow from the
foregoing is that any law that “commandeers the legislative
processes of the States by directly compelling them to enact
and enforce a federal regulatory program” is beyond the
inherent limitations on federal power within our dual system.
Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S.
264, 283, 288 (1981). Stated differently, Congress “lacks the
power directly to compel the States to require or prohibit”
acts which Congress itself may require or prohibit. New York
v. United States, 505 U.S. 144, 166, 180 (1992). The
Supreme Court has struck down laws based on these
principles on only two occasions, both distinguishable from PASPA.

(a) Permissible regulation in a pre-emptible field: *Hodel and FERC*

The first modern, relevant incarnation of the anti-commandeering principle appeared in *Hodel v. Virginia Surface Mining & Reclamation Ass’n*. The law at issue there imposed federal standards for coal mining on certain surfaces and required any state that wished to “assume permanent regulatory authority over . . . surface coal mining operations” to “submit a proposed permanent program” to the Federal Government, which, among other things, required the “state legislature [to] enact[] laws implementing the environmental protection standards established by the [a]ct.” *Hodel*, 452 U.S. at 271. If a particular state did *not* wish to implement the federal standards, the federal government would step in to do so. *Id.* at 272. The Supreme Court upheld the provisions,
noting that they neither compelled the states to adopt the federal standards, nor required them “to expend any state funds,” nor coerced them into “participat[ing] in the federal regulatory program in any manner whatsoever.” *Id.* at 288.

The Court further concluded that Congress could have chosen to completely preempt the field by simply assuming oversight of the regulations itself. *Id.* It thus held that the Tenth Amendment posed no obstacle to a system by which Congress “chose to allow the States a regulatory role.” *Id.* at 290. As the Court later characterized *Hodel*, the scheme there did not violate the anti-commandeering principle because it “merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field.” *Printz v. United States*, 521 U.S. 898, 926 (1997).

The next year, in *F.E.R.C. v. Mississippi*, the Court upheld a provision requiring state utility regulatory
commissions to “consider” whether to enact certain standards for energy efficiency but leaving to the states the ultimate choice of whether to adopt those standards or not. 456 U.S. 742, 746, 769-70 (1982). The Court upheld the law despite its outright commandeering of the state resources needed to consider and study the federal standards, because the law did not definitely require the enactment or implementation of federal standards. Id. at 764. The Court, noting that Congress had simply regulated where it could have “pre-empt[ed] the States entirely” but instead chose to leave some room for the states to maneuver, saw the case as “only one step beyond Hodel.” Id.

(b) Permissible Prohibitions on State Action

Action: Baker and Reno

In a different pair of anti-commandeering cases, the Court upheld affirmative prohibitions on state action that effectively invalidated contrary state laws and even required
the states to enact new measures. First, in *South Carolina v. Baker*, the Supreme Court upheld the validity of laws that “directly regulated the States by prohibiting outright the issuance of bearer bonds.” 485 U.S. 505, 511 (1988). These rules, which also applied to private debt issuers, required the states to “amend a substantial number of statutes in order to [comply].” *Id.* at 514. The Court concluded this result did not run afoul the Tenth Amendment because it did not “seek to control or influence the manner in which States regulate private parties” but was simply “an inevitable consequence of regulating a state activity,” *id.* In subsequent cases, the Court explained that the regulation in *Baker* was permissible because it simply “subjected a State to the same legislation applicable to private parties.” *New York*, 505 U.S. at 160.

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

New York and Printz

In contrast to the foregoing, the Court has twice struck down portions of a federal law on anti-commandeering grounds. The first was in New York v. United States, which dealt with a law meant to regulate and encourage the orderly disposal of low-level radioactive waste by the states. 505 U.S. at 149-54. The “most severe” aspect of the complex system of measures established by the law, referred to as the “take-title” provision, provided that if a particular state had not been able to arrange for the disposal of the radioactive waste by a specified date, then that state would have to take title to the waste at the request of the waste’s generator. Id. at 153-54 (citing 42 U.S.C. § 2021e(d)(2)(C)). The Court, based on the notion that “Congress may not simply ‘commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal
regulatory program,’”” id. at 161 (quoting Hodel, 452 U.S. at 288) (alterations omitted), struck down the take-title provision because it did just that: compel the states to either enact a regulatory program, or expend resources in taking title to the waste. Id. at 176. The Court noted that Congress may enact measures to encourage the states to act and may “have[e] state law pre-empted by federal regulation” but concluded that the take-title provision “crossed the line distinguishing encouragement from coercion.” Id. at 167, 175. The Court also emphasized that the anti-commandeering principle was designed, in part, to stop Congress from blurring the line of accountability between federal and state officials and from skirting responsibility for its choices by foisting them on the states. Id. at 168.

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

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

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10 Three other cases complete the constellation of the Supreme Court’s modern anti-commandeering jurisprudence but deal with the applicability of federal labor laws to certain State employees. See Nat’l League of Cities, 426 U.S. at 883; Garcia, 469 U.S. at 528; Gregory, 501 U.S. at 452. These cases are of marginal relevance, so we do not elaborate on
2. Whether PASPA Violates the Anti-Commandeering Principle

(a) Anti-Commandeering and the Supremacy Clause

Appellants’ arguments that PASPA violates anti-commandeering principles run into an immediate problem: not a single case that we have reviewed involved a federal law that, like PASPA, simply operated to invalidate contrary state laws. It has thus never been the case that applying the Supremacy Clause to invalidate a state law contrary to federal proscriptions is tantamount to direct regulation over the states, to an invasion of their sovereignty, or to commandeering. Most of the foregoing cases involved Congress attempting to directly impose a federal scheme on state officials. If anything, the federal laws in Reno and

them at length. See also Markell, 579 F.3d at 303 (rejecting an argument that PASPA violates the sovereignty principles set forth in Gregory).
Baker had the effect of invalidating certain contrary state laws by prohibiting state action, and both survived. Indeed, the Justices in both New York and Printz disclaimed any notion that the anti-commandeering principle somehow suspends the operation of the Supremacy Clause on otherwise valid laws. For example, in Printz the Court explained that our Constitutional structure requires “all state officials . . . to enact, enforce, and interpret state law in such a fashion as not to obstruct the operation of federal law, and the attendant reality [is] that all state actions constituting such obstruction, even legislative Acts, are ipso facto invalid.” 521 U.S. at 913; see also New York, 505 U.S. at 162 (noting that the Commerce Clause permits Congress to “hav[e] state law pre-empted by federal [law]”).

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

And it is not hard to see why invalidating contrary state law does not implicate a state’s sovereignty or otherwise commandeer the states. When Congress passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do, it is barring them from doing something they want to do. Anti-commandeering
challenges to statutes worded like PASPA have thus consistently failed. See, e.g., Kelley v. United States, 69 F.3d 1503, 1510 (10th Cir. 1995) (upholding constitutionality of intrastate motor carrier statute, noting that it preempted state law and in doing so did not “compel[] the states to voluntarily act by enacting or administering a federal regulatory program”); California Dump Truck Owners Ass’n v. Davis, 172 F. Supp. 2d 1298, 1304 (E.D. Cal. 2001) (upholding constitutionality of FAAAA provision against an anti-commandeering challenge, noting that, unlike the laws in New York and Printz, the FAAAA provision, insofar as it merely preempts state law, “tell[s] states what not to do”).

As the Leagues note, numerous federal laws are framed to prohibit States from enacting or enforcing laws contrary to federal standards, and these regulations all enjoy different preemptive qualities. See, e.g., Farina v. Nokia, 625 F.3d 97, 130 (3d Cir. 2010) (noting that statute which provides that “no State . . . shall have any authority to regulate the entry of or the rates charged by any commercial mobile service” is an express preemption provision);
To be sure, the Supremacy Clause elevates only laws that are otherwise within Congress’ power to enact. See, e.g., New York, 504 U.S. at 166 (noting that Congress may not, consistent with the Commerce Clause, “regulate state governments’ regulation of interstate commerce”). But we have held that Congress may prohibit state-licensed gambling consistent with the Commerce Clause. The argument that PASPA is beyond Congress’ authority thus hinges on the notion that the invalidation of a state law pursuant to the Commerce Clause has the same “commandeering” effect as the federal laws struck down in New York and Printz. We turn now to this contention.

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MacDonald v. Monsanto, 27 F.3d 1021, 1024 (5th Cir. 1994) (noting that law stating that a “State shall not impose or continue in effect any requirement for labeling or packing” pesticides is a preemption provision). The operation of these and other provisions is called into question by Appellants’ view that the everyday operation of the Supremacy Clause raises anti-commandeering concerns.
(b) PASPA is Unlike the Laws Struck Down

in New York and Printz

Appellants’ efforts to analogize PASPA to the provisions struck down in New York and Printz are unavailing. Unlike the problematic “take title” provision and the background check requirements, PASPA does not require or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law. They are not even required, like the states were in F.E.R.C., to expend resources considering federal regulatory regimes, let alone to adopt them. Simply put, we discern in PASPA no “directives requiring the States to address particular problems” and no “command[s] to the States’ officers . . . to administer or enforce a federal regulatory program.” Printz, 521 U.S. at 935.
As the District Court correctly reasoned, the fact that PASPA sets forth a prohibition, while the New York/Printz regulations required affirmative action(s) on the part of the states, is of significance. Again, it is hard to see how Congress can “commandeer” a state, or how it can be found to regulate how a state regulates, if it does not require it to do anything at all. The distinction is palpable from the Supreme Court’s anti-commandeering cases themselves. State laws requiring affirmative acts may or may not be constitutional, compare *F.E.R.C.*, 456 U.S. at 761-63 (upholding statute because requirement that states expend resources considering federal standards was not commandeering) with *Printz*, 521 U.S. at 904-05 (finding requirement that states perform background checks unconstitutional). On the other hand, statutes prohibiting the states from taking certain actions have never been struck down even if they require the expenditure of some time and effort or the modification or invalidation of
contrary state laws, see Baker, 485 U.S. at 515; Reno, 528 U.S. at 150. As the District Court carefully demonstrated, in all its anti-commandeering cases, the Supreme Court has been concerned with conscripting the states into affirmative action. See NCAA II, 2013 WL 772679, at *17.12

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

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12 The circuits that have considered anti-commandeering challenges, although addressing laws that are fundamentally different from PASPA, have similarly found this distinction significant. See, e.g., Connecticut v. Physicians Health Servs. of Conn., 287 F.3d 110, 122 (2d Cir. 2002) (holding that a provision “limit[ing] states’ power to sue as parens patriae . . . does not commandeer any branch of state government because it imposes no affirmative duty of any kind on them”); Fraternal Order of Police v. United States, 173 F.3d 898, 906 (D.C. Cir. 1999) (rejecting a commandeering challenge to a statute that did “not force state officials to do anything affirmative to implement” the statutory provision).
wagering provisions.\textsuperscript{13} We agree with Appellants that the affirmative act requirement, if not properly applied, may permit Congress to “accomplish exactly what the commandeering doctrine prohibits” by stopping the states from “repealing an existing law.” \textit{Conant v. Walters}, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). But we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.

\textsuperscript{13} Appellants also rely on \textit{Coyle v. Smith}, where the Supreme Court struck down a law requiring Oklahoma to not change the location of its capital within seven years of its admission into the Union, 221 U.S. 559, 567 (1911), to lessen the significance of the “affirmative act” requirement we distill from the anti-commandeering cases. N.J. Br. 42, 44. But, despite the Supreme Court’s citation to \textit{Coyle} in \textit{New York}, \textit{see} 505 U.S. at 162, \textit{Coyle} did not turn on impermissible commandeering. Instead, the Court struck down the statute as being traceable to no power granted by Congress in the Constitution, pertaining “purely to the internal polic[ies] of the state,” and in violation of the principle that all states are admitted on equal footing into the Union. \textit{Coyle}, 221 U.S. at 565, 579. PASPA does not raise any of these concerns, and neither do the modern anti-commandeering cases.
Under PASPA, “[i]t shall be unlawful for . . . a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact” a sports wagering scheme. 28 U.S.C. § 3702(1) (emphasis added). Nothing in these words requires that the states keep any law in place. All that is prohibited is the issuance of gambling “license[s]” or the affirmative “authoriz[ation] by law” of gambling schemes. Appellants contend that to the extent a state may choose to repeal an affirmative prohibition of sports gambling, that is the same as “authorizing” that activity, and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it. This argument is problematic in numerous respects. Most basically, it ignores that PASPA speaks only of “authorizing by law” a sports gambling scheme. We do not see how having no law in place governing sports wagering is the same as authorizing it by law. Second, the argument ignores that,
in reality, the lack of an affirmative prohibition of an activity does not mean it is affirmatively authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people. Indeed, that the Legislature needed to enact the Sports Wagering Law itself belies any contention that the mere repeal of New Jersey’s ban on sports gambling was sufficient to “authorize [it] by law.” The amendment to New Jersey’s Constitution itself did not purport to affirmatively authorize sports wagering but indeed only gave the Legislature the power to “authorize by law” such activities. N.J. Const. Art. IV, § VII, ¶ 2 (D), (F). Thus, the New Jersey Legislature itself saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering—the Sports Wagering Law was required. Cf. Hernandez v. Robles,
855 N.E.2d 1, 5-6 (N.Y. 2006) (rejecting as “untenable” a construction of a domestic relation law, silent on the matter of the legality of same-sex marriages, as permitting such unions). Congress in PASPA itself saw a difference between general sports gambling activity and that which occurs under the auspices of state approval and authorization, and chose to reach private activity only to the extent that it is conducted “pursuant to State law.”

In short, Appellants’ attempt to read into PASPA a requirement that the states must affirmatively keep a ban on sports gambling in their books rests on a false equivalence between repeal and authorization and reads the term “by law” out of the statute, ignoring the fundamental canon that, as between two plausible statutory constructions, we ought to prefer the one that does not raise a series of constitutional problems. See Clark v. Martinez, 543 U.S. 371, 380-81 (2005).
To be sure, we take seriously the argument that many affirmative commands can be easily recast as prohibitions. For example, the background check rule of Printz could be recast as a requirement that the states refrain from issuing handgun permits unless background checks are conducted by their officials. The anti-commandeering principle may not be circumvented so easily. But the distinction between PASPA’s blanket ban and Printz’s command, even if the latter is recast as a prohibition, remains. PASPA does not say to states “you may only license sports gambling if you conscript your officials into policing federal regulations” or otherwise impose any condition that the states carry out an affirmative act or implement a federal scheme before they may regulate or issue a license. It simply bars certain acts under any and all circumstances. And if affirmative commands may always be recast as prohibitions, then the prohibitions in myriads of routine federal laws may always be
rephrased as affirmative commands. This shows that
Appellants’ argument proves too much—the anti-commandeering cases, under that view, imperil a plethora of acts currently termed as prohibitions on the states.

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

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

Sebelius, 132 S. Ct. at 2581.

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

(c) **PASPA as Regulating State Conduct**—

*Baker and Reno*

Additionally, PASPA is remarkably similar to the prohibitions on state action upheld in *Baker* and *Reno*. *Baker’s* regulations prohibited the states from issuing bearer bonds, which in turn required states to issue new regulations and invalidated old ones; *Reno’s* anti-disclosure provisions prohibited the states from disseminating certain information, necessitating the expenditure of resources to comply with the federally imposed prohibitions. To the extent PASPA makes it unattractive for states to repeal their anti-sports wagering laws, which in turn requires enforcement by states, the effort PASPA requires is simply that the states enforce the laws they choose to maintain, and is therefore plainly less intrusive than the laws in *Baker* and *Reno*. PASPA also has the effect,
like the laws in those two cases, of rendering inoperative any contrary state laws.

We are not persuaded by Appellants’ arguments that Baker and Reno are inapposite. They contend, first, that Reno is different because it involved regulation of the states in the same way as private parties. But that overstates the regulations at issue in Reno, which were directed at state DMVs and only incidentally prohibited private persons from further disseminating data they may obtain from the DMVs. See 528 U.S. at 144. Indeed, the Reno Court did “not address the question whether general applicability is a constitutional requirement for federal regulation of the States.” Id. at 151.

And, as mentioned, PASPA does operate on private individuals insofar as it prohibits them from engaging in state-sponsored gambling. But private individuals cannot be prohibited from issuing gambling licenses, because they have never been able to do so. Second, we find no basis to
distinguish PASPA from the laws in *Reno* and *Baker* on the ground that the latter regulate the states solely as participants in the market. DMVs are uniquely state institutions; states thus obtain information through the DMVs not as participants in the market, but in their unique role as authorizers of commercial activity. PASPA is no different: it regulates the states’ permit-issuing activities by prohibiting the issuance of the license altogether, as in *Baker*, where the state was essentially prohibited from issuing the bearer bond. Third, we decline to draw a distinction between PASPA and the laws at issue in *Reno* and *Baker* on the ground that PASPA involves a regulation of the states as states. The Supreme Court’s anti-commandeering cases do not contemplate such distinction.\(^\text{14}\)

\(^\text{14}\) And, arguably, the Supreme Court’s Tenth Amendment jurisprudence cautions against drawing lines between activities that are “traditional” to state government
Despite the fact that PASPA is very similar to the prohibition on state activity upheld unanimously in *Reno*, Appellants insist that certain statements in that opinion support its view that PASPA is unconstitutional. Appellants insist that under *Reno* a law is unconstitutional if it requires the states to govern according to Congress’ instructions or if it “influences” the ways in which the states regulate their own citizens. *See* N.J. Br. at 3, 18, 40, 42, 43, 45-46, 52. But no one contends that PASPA requires the states to enact any laws, and we have held that it also does not require states to maintain existing laws. And one line from *Reno*, that the law upheld there did not “control or influence the manner in which States regulated private parties,” 528 U.S. at 142, cannot possibly bear the great weight that Appellants would hoist upon it. Most federal regulation inevitably influences and those that are not. *See* Garcia, 469 U.S. at 546 (calling such distinctions “unworkable”).
the manner in which states regulate private parties. If that were enough to violate the anti-commandeering principle, then *Hodel* and *F.E.R.C.* were wrongly decided. Indeed, nowhere in *Reno* (or *Baker*, from where that line was quoted, *see id.* (quoting *Baker*, 485 U.S. at 514)), did the Court suggest that the absence of an attempt to influence how states regulate private parties was *required* to avoid violating the anti-commandeering principle.\(^{15}\)

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

\(^{15}\) The parties spar over how the accountability concerns of anti-commandeering cases weigh here. But *New York* and *Printz* make clear that they are not implicated when Congress does not enlist the States in the implementation of a federal regulatory program. To strike down any law that may cause confusion as to whether a prohibition comes from the federal government or from a State’s choice, before considering whether that law actually commandeers the States, is to put the cart before the horse. Indeed, the Supreme Court in *Reno* rejected the notion that simply raising the specter of accountability problems is enough to find an anti-commandeering violation. *See* 528 U.S. at 150-51.
Alternatively, to the extent PASPA coerces the states into keeping in place their sports-wagering bans, that coercion may be upheld as fitting into the exception drawn in anti-commandeering cases for laws that impose federal standards over conflicting state rules, in areas where Congress may otherwise preempt the field. Under this view, PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field as per the federal standard. In *Hodel*, for example, the choice was implementing certain minimum-safety regulations or living in a world where the federal government enforced them.

PASPA makes clear that the federal policy with respect to sports gambling is that such activity should not occur under the auspices of a state license. As noted, PASPA prohibits individuals from engaging in a sports gambling scheme “pursuant to” state law. 28 U.S.C. § 3702(2). In
other words, even if the provision that offends New Jersey, § 3702(1), were excised from PASPA, § 3702(2) would still plainly render the Sports Wagering Law inoperative by prohibiting private parties from engaging in gambling schemes pursuant to that authority. Thus, the federal policy with respect to sports wagering that § 3702(2) evinces is clear: to stop private parties from resorting to state law as a cover for gambling on sports. The Sports Wagering Law, in purporting to permit individuals to skirt § 3702(2), “authorizes [private parties] to engage in conduct that the federal [Act] forbids, [and therefore] it ‘stands as an obstacle to the[] accomplishment and execution of the full purposes and objectives of Congress,’” and accordingly conflicts with PASPA and is preempted. See Mich. Canners & Freezers Ass’n, Inc. v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984).  

16 New Jersey asks that we ignore this argument because
And there are other provisions in federal law, outside of PASPA, aimed at protecting the integrity of sports from the pall of wagering and that further demonstrate the federal policy of disfavoring sports-gambling. Indeed, in enacting PASPA, Congress explicitly noted that the law was “complementary to and consistent with [then] current Federal law” with respect to sports wagering. Senate Report at 3557.

Congress has, for example, criminalized attempts to fix the outcome of a sporting event, 18 U.S.C. § 224, barred the placement of a sports gambling bet through wire

It was not raised by the United States below. But it is axiomatic that we may affirm on any ground apparent on the record, particularly when considering de novo the constitutionally of a Congressional enactment. The United States may decide not to advance particular arguments, but we may not, consistent with our duty to “save and not to destroy,” Jones & Laughlin Steel, 301 U.S. at 30, use that choice to declare unconstitutional an act of Congress. The same may be said of arguments that the United States and the Leagues’ reading of PASPA has changed throughout the litigation and should therefore be discounted, see, e.g., Oral Arg. Tr. 71:14-19 (June 26, 2013).
communications to or from a place where such bets are illegal, 18 U.S.C. § 1084, and proscribed interstate transportation of means for carrying out sports lotteries, 18 U.S.C. §§ 1301, 1307(d).  

Appellants contend that Congress has not preempted state law but instead incorporated it to the extent certain prohibitions are tied to whatever is legal under state law. But PASPA itself is not tied to state law. Rather, PASPA

17 Appellants point to a statement in the Senate Report wherein the Committee notes that, according to the Congressional Budget Office, there would be “no cost to the federal government . . . from enactment of this bill,” Senate Report at 3561, as proof that PASPA seeks to foist upon the states the responsibility for banning sports wagering. But this statement is taken out of context. The import of it was that PASPA would require no “direct spending or receipts” of funds, id., but the Senate Report itself makes clear that the Justice Department would use already-earmarked funds to permit it to “enforce the law without utilizing criminal prosecutions of State officials,” id. at 3557. For a report issued well before the opinions in New York and Printz delineated the contours of modern anti-commandeering jurisprudence, the Senate Report is remarkably clear in that it seeks to increase the federal government’s role in policing sports wagering, not pass that obligation along to the states.
prohibits engaging in schemes *pursuant to* state law. 28
U.S.C. § 3702(2). To be sure, some of the other cited
provisions tie themselves to state law—but the Tenth
Amendment does not require that Congress leave *less* room
for the states to govern. *Cf. F.E.R.C.*, 456 U.S. at 764 (noting
that there is no Tenth Amendment problem if Congress
“allow[s] the States to enter the field if they promulgate[]
regulations consistent with federal standards”).

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

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We hold that PASPA does not violate the anti-commandeering doctrine. Although many of the principles set forth in anti-commandeering cases may abstractly be used to support Appellants’ position, doing so would result in an undue expansion of the anti-commandeering doctrine. If attempting to influence the way states govern private parties,
or requiring the expenditure of resources, or giving the states hard choices, were enough to violate anti-commandeering principles, then what of *Hodel, F.E.R.C., Baker, and Reno*? The overriding of contrary state law via the Supremacy Clause may result in influencing or changing state policies, but there is nothing in the anti-commandeering cases to suggest that the principle is meant to apply when a law merely operates via the Supremacy Clause to invalidate contrary state action. Missing here is an affirmative command that the states enact or carry out a federal scheme and PASPA is simply nothing like the only two laws struck down under the anti-commandeering principle. Several important points buttress our conclusion: first, PASPA operates simply as a law of pre-emption, via the Supremacy Clause; second, PASPA thus only *stops* the states from doing something; and, finally, PASPA’s policy of stopping state-sanctioned sports gambling is confirmed by the independent
prohibition on private activity pursuant to any such law.

When so understood, it is clear that PASPA does not commandeer the states.

C. Whether PASPA Violates the Equal Sovereignty of the States

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

1. Equal Sovereignty Cases—Northwest Austin and Shelby County

The centerpiece of Appellants’ equal sovereignty argument is the Supreme Court’s analysis of the Voting Rights Act of 1965 (“VRA”) in Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009), and Shelby County, Alabama v. Holder, 133 S. Ct. 2612
(2013). In *Northwest Austin*, the Supreme Court was asked by a small utility district to rule on the constitutionality of § 5 of the VRA, which required the district to obtain preclearance from federal authorities before it could make changes to the manner in which its board was elected. The district had sought an exemption from the preclearance requirement, but the district court held that only states are eligible for such “bailouts” under the Act. *Nw. Austin*, 557 U.S. at 196-97. On direct appeal, the Supreme Court stated that § 5 raises “federalism concerns” because it “differentiates between the States.” *Id.* at 203. The Court also explained that “[d]istinctions [between the states] can be justified in some cases” such as when Congress enacts “remedies for local evils which have subsequently appeared.” *Id.* (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966)). However, the Court did not ultimately decide whether § 5 violated the equal sovereignty principle, invoking instead the
canon of constitutional avoidance to construe the VRA’s bailout provision to permit the district to obtain an exemption.

*Id.* at 205.

In *Shelby County*, when asked to revisit the constitutionality of § 5, the Court reiterated the “basic principles” of equal sovereignty set forth in *Northwest Austin* and invalidated § 4(b) of the VRA, which set forth a formula used to determine what jurisdictions are covered by § 5 preclearance. 133 S. Ct. at 2622, 2630-31. Nevertheless, § 5 once more survived despite the expressed equal sovereignty concerns. *Id.* at 2631.

Appellants ask that we leverage these statements to strike down all of PASPA because it permits Nevada to license sports gambling. We decline to do so. First, the VRA is fundamentally different from PASPA. It represents, as the Supreme Court explained, “an uncommon exercise of congressional power” in an area “the Framers of the
Constitution intended the States to keep for themselves . . .
the power to regulate elections.” *Shelby County*, 133 S. Ct. at
2623, 2624. The regulation of gambling via the Commerce
Clause is thus not of the same nature as the regulation of
elections pursuant to the Reconstruction Amendments.
Indeed, while the guarantee of uniformity in treatment
amongst the states cabins some of Congress’ powers, see,
e.g., U.S. CONST., art. I., § 8, cl. 1 (requiring uniformity in
duties and imposts); *id.* § 9, cl. 6 (requiring uniformity in
regulation of state ports), no such guarantee limits the
Commerce Clause. This only makes sense: Congress’
exercises of Commerce Clause authority are aimed at matters
of national concern and finding national solutions will
necessarily affect states differently; accordingly, the
Commerce Clause, “[u]nlike other powers of [C]ongress[.] . .
. does not require geographic uniformity.” *Morgan v.*
Second, New Jersey would have us hold that laws treating states differently can “only” survive if they are meant to “remedy local evils” in a manner that is “sufficiently related to the problem that it targets.” N.J. Br. at 55. This position is overly broad in that it requires the existence of a one-size-fits-all test for equal sovereignty analysis, which, as the foregoing shows, is a perilous proposition in the context of the Commerce Clause. And *Northwest Austin*’s statement that equal sovereignty may yield when local evils appear was made immediately after the statement that regulatory “[d]istinctions can be justified in *some* cases.” 557 U.S. at 203 (emphasis added). Thus, local evils appear to be but *one* of the types of cases in which a departure from the equal sovereignty principle is permitted.
Third, there is nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of “sensitive areas of state and local policymaking.” *Shelby County*, 133 S. Ct. at 2624. We “had best respect what the [Court’s] majority says rather than read between the lines. . . . If the Justices are pulling our leg, let them say so.” *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437, 448 (7th Cir. 1992).

Fourth, even accepting that the equal sovereignty principle applies in the same manner in the context of Commerce Clause legislation, we have no trouble concluding that PASPA passes muster. Appellants’ argument that PASPA’s exemption does not properly remedy local evils because it “target[ed] the States in which legal sports wagering was absent,” N.J. Br. at 56 (emphasis omitted), again distorts PASPA’s purpose as being to wipe out sports gambling altogether. When the true purpose is considered—
to stop the *spread* of *state-sanctioned* sports gambling—it is clear that regulating states in which sports-wagering already existed would have been irrational. Targeting only states where the practice did not exist is thus more than sufficiently related to the problem, it is *precisely tailored* to address the problem. If anything, Appellants’ quarrel seems to be with PASPA’s actual goal rather than with the manner in which it operates.

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

2. **Grandfathering Clause Cases**

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

Two cases upholding economic ordinances aimed at private parties have little to say about state sovereignty. While Appellants contend that *Dukes* and *Clover Leaf Creamery* support their position because they upheld *temporary* grandfathering clauses, there was no indication in either case that the clauses upheld were indeed temporary, that the legislatures were obligated to rescind them in the future, or even that the supposedly temporal quality of the laws was the basis of the Court’s holdings, other than a statement in passing in *Dukes* that the legislature had chosen
to “initially” target only a particular class of products. 427 U.S. at 305. 18

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

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

19 Appellants also rely on the so-called “equal footing” principle, the notion that Congress may not burden a new state’s entry into the Union by disfavoring them over other states in support of their attack on Nevada’s exemption. See, e.g., Escanaba & Lake Mich. Transp. v. Chicago, 107 U.S. 678, 689 (1883) (explaining that whatever restriction may
V. CONCLUSION

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

have been imposed over Illinois’ ability to regulate the operation of bridges over the Chicago River, such restrictions disappeared once Illinois was admitted into the Union as a state); *Coyle*, 221 U.S. at 567 (holding that Congress may not require Oklahoma to not change its capital as a condition of admission into the Union). But PASPA does not speak to conditions of admission into the Union.
Having examined the difficult legal issues raised by the parties, we hold that nothing in PASPA violates the U.S. Constitution. The law neither exceeds Congress’ enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment or anywhere else in our Constitutional structure. The heart of Appellants’ constitutional attack on PASPA is their reliance on two doctrines that—while of undeniable importance—have each only been used to strike down notably intrusive and, indeed, extraordinary federal laws. Extending these principles as Appellants propose would result in significant changes to the day-to-day operation of the Supremacy Clause in our constitutional structure. Moreover, we see much daylight between the exceedingly intrusive statutes invalidated in the anti-commandeering cases and PASPA’s much more straightforward mechanism of stopping the states from lending their imprimatur to gambling on sports.
New Jersey and any other state that may wish to legalize gambling on sports within their borders are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again choose to do so or, more broadly, may choose to undo PASPA altogether. It is not our place to usurp Congress’ role simply because PASPA may have become an unpopular law. The forty-nine states that do not enjoy PASPA’s solicitude may easily invoke Congress’ authority should they so desire.

The District Court’s judgment is AFFIRMED.
I agree with my colleagues that the Leagues have standing to challenge New Jersey’s Sports Wagering Law, N.J. Stat. Ann. § 5:12A-2, and that the Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. § 3702, does not violate the principle of “equal sovereignty.” I therefore join parts III and IV.C of the majority’s decision in full. I also agree that, ordinarily, Congress has the authority to regulate gambling pursuant to the Commerce Clause, and thus I join part IV.A of the majority opinion as well. Yet, PASPA is no ordinary federal statute that directly regulates interstate commerce or activities substantially affecting such commerce. Instead, PASPA prohibits states from authorizing sports gambling and thereby directs how states must treat such activity. Indeed, according to my colleagues, PASPA essentially gives the states the choice of allowing totally unregulated betting on sporting events or prohibiting all such gambling. Because this congressional directive violates the principles of federalism as articulated by the Supreme Court in United States v. New York, 505 U.S. 142 (1992), and Printz v. United States, 521 U.S. 898 (1997), I respectfully dissent from that part of the majority’s opinion that upholds PASPA as a constitutional exercise of congressional authority.

I.

I agree with my colleagues that an appropriate starting point for addressing Appellants’ claims is Hodel v. Virginia Surface Mining & Reclamation Ass’n, 452 U.S.
264 (1981). In *Hodel*, the Court reviewed the constitutionality of the federal Surface Mining Control and Reclamation Act, a comprehensive statutory scheme designed to regulate against the harmful effects of surface coal mining. *Id.* at 268. The act permitted states that wished to exercise permanent regulatory authority over surface coal mining to submit plans that met federal standards for federal approval. *Id.* at 271. In addition, the federal government created a federal enforcement program for states that did not obtain federal approval for state plans. *Id.* at 272. Applying the framework set forth in the since-overruled case, *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), the Court concluded that the act did not regulate “‘States as States’” because the challenged provisions governed only private individuals’ and business’ activities and because “the States are not compelled to enforce the . . . standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever.” *Id.* at 287-88. The Court further explained that

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

*Id.* at 288. Even post-*Garcia*, the Court has explained that the act at issue in *Hodel* presented no Tenth Amendment problem “because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field.” *Printz*, 521 U.S. at 926.
As the majority points out, a year later, in *FERC v. Mississippi*, 456 U.S. 742 (1982), the Court upheld the constitutionality of two titles of the Public Utility Regulatory Policies Act ("PURPA"), which directed state regulatory authorities to “consider” certain standards and approaches to regulate energy and prescribed certain procedures, but did not require the state authorities to adopt or implement specified standards. *Id.* at 745-50. As in *Hodel*, the Court observed that Congress had authority to preempt the field at issue—in *FERC’s* case, energy regulation. *Id.* at 765. The Court explained:

PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards. While the condition here is affirmative in nature—that is, it directs the States to entertain proposals—nothing in this Court’s cases suggests that the nature of the condition makes it a constitutionally improper one. There is nothing in PURPA “directly compelling” the States to enact a legislative program. In short, because the two challenged Titles simply condition continued state involvement in a pre-emptible area on the consideration of federal proposals, they do not threaten the States’ “separate and independent existence,” *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869); *Coyle v. Oklahoma*, 221 U.S. 559, 580, 31 S.Ct. 688, 695, 55 L.Ed. 853 (1911), and do not impair the ability of the States “to function effectively in a federal system.” *Fry v. United States*, 421 U.S., at 547, n.7, 95 S.Ct., at 1795, n.7; *National League of Cities v. Usery*, 426 U.S., at 852, 96 S.Ct., at 2474. To the contrary, they offer the States a vehicle for remaining active in an area of overriding concern.

*Id.* at 765-66.

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

The Court in New York held the “take title” provision unconstitutional because it “’commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program’” in violation of the principles of federalism. Id. at 176 (quoting Hodel, 452 U.S. at 288). The Court explained that “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.” Id. at 166 (emphasis added). It further elaborated that “[t]he allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.” Id. (emphasis added).

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

Later, in *Reno v. Condon*, 528 U.S. 141 (2000), a case the majority regards as “remarkably similar” to the matter *sub judice*, (Maj. Op. 43), a unanimous Court held that the Driver’s Privacy Protection Act (“DPPA”), a generally applicable law which regulates the disclosure and resale by states and private persons of personal information contained in state department of motor vehicle records, “did not run afoul of the federalism principles enunciated in *New York* . . . and *Printz*.” *Id.* at 143, 146, 151. After first determining that the DPPA was a proper exercise of congressional authority under the Commerce Clause, the Court rejected South Carolina’s argument that the act violated federalism principles because it would “require time and effort on the part of state employees.” *Id.* at 148, 150. Finding *New York* and *Printz* inapplicable, the Court relied instead on *South Carolina v. Baker*, 485 U.S. 505 (1988),¹ which “upheld a statute that prohibited States from issuing unregistered bonds because the law ‘regulate[d] state

¹ The majority also characterizes *Baker* as “remarkably similar” to PASPA’s prohibition of state action. (Maj. Op. 43.)
activities,’ rather than ‘seeking[ing] to control or influence the manner in which States

The Court further explained:

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

*Id.* at 151.

Most recently, in *National Federation of Independent Business v. Sebelius*, 132 S.

Ct. 2566 (2012), the Court struck down, as violative of the Spending Clause, a provision
in the Patient Protection and Affordable Care Act (“ACA”) that would have withheld
federal Medicaid grants to states unless they expanded their Medicaid eligibility
requirements in accordance with conditions in the ACA. *Id.* at 2581-82, 2606-07

2 In *Baker*, the Court observed:

The [intervenor] nonetheless contends that § 310 has
commandeered the state legislative and administrative
process because many state legislatures had to amend a
substantial number of statutes in order to issue bonds in
registered form and because state officials had to devote
substantial effort to determine how best to implement a
registered bond system. Such “commandeering” is, however,
an inevitable consequence of regulating a state activity. Any
federal regulation demands compliance. That a State wishing
to engage in certain activity must take administrative and
sometimes legislative action to comply with federal standards
regulating that activity is a commonplace that presents no
constitutional defect.

(plurality). Quoting New York, Chief Justice Roberts, writing for a three-justice plurality, observed that “‘the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.’” Id. at 2602 (quoting New York, 505 U.S. at 162). The plurality then explained that, based on that principle, New York and Printz had struck down federal statutes that “commandeer[ed] a State’s legislative or administrative apparatus for federal purposes.” Id. The plurality also noted that, within the authority of the Spending Clause, Congress may not create “inducements to exert a power akin to undue influence” where “pressure [would] turn[] into compulsion.” Id. (internal quotations omitted). Recognizing that “[t]he Constitution simply does not give Congress the authority to require the States to regulate,” the plurality observed that “[t]hat is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system of its own.” Id. (quoting New York, 505 U.S. at 178). The plurality ultimately concluded that the Medicaid conditions were unduly coercive and reiterated that “Congress may not simply ‘conscript state [agencies] into the national bureaucratic army.’” Id. at 2604, 2606-07 (quoting FERC, 456 U.S. at 775 (O’Connor, J., concurring in judgment in part and dissenting in part)).

While Chief Justice Roberts’ opinion concerning the Medicaid expansion provisions in Sebelius garnered the signatures of only three justices, the four dissenting justices also invoked the federalism principles of New York in concluding that the funding conditions in the Medicaid expansion impermissibly compelled states to govern as directed by Congress by coercing states’ participation in the expanded program. Id. at
2660-62 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Thus, seven justices
found the Medicaid expansion unconstitutional, citing the federalism principles
articulated in New York as part of the basis for their conclusion. Importantly, the seven-
justice rejection of the Medicaid expansion based, in part, on New York, represents a clear
signal from the Court that the principles enunciated in New York are not limited to a
narrow class of cases in which Congress specifically directs a state legislature to
affirmatively enact legislation. Cf. United States v. Richardson, 658 F.3d 333, 340 (3d
Cir. 2011) (observing that even if not binding due to the votes of a splintered Court, “the
collective view of [a majority of] justices is, of course, persuasive authority”).

II.

New York and Printz clearly established that the federal government cannot direct
state legislatures to enact legislation and state officials to implement federal policy. It is
ture that the two particular statutes under review in those cases involved congressional
commands that states affirmatively enact legislation, see New York, 505 U.S. at 176-77,
or affirmatively enforce a federal regulatory scheme, see Printz, 521 U.S. at 935.
Nothing in New York or Printz, however, limited the principles of federalism upon which
those cases relied to situations in which Congress directed affirmative activity on the part
of the states. Rather, the general principle articulated by the Court in New York was that
even where Congress has the authority under the Constitution
to pass laws requiring or prohibiting certain acts, it lacks the
power directly to compel the States to require or prohibit
those acts. The allocation of power contained in the
Commerce Clause, for example, authorizes Congress to
regulate interstate commerce directly; it does not authorize
Congress to regulate state governments’ regulation of interstate commerce.

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

If the objective of the federal government is to require states to regulate in a manner that effectuates federal policy, any distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty is illusory. Whether stated as a command to engage in specific action or as a prohibition against specific action, the federal government’s interference with a state’s sovereign autonomy is the same. Moreover, the recognition of such a distinction is untenable, as affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct. Surely the structure of Our Federalism does not turn on the phraseology used by Congress in commanding the states how to

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3 I agree with my colleagues that Congress has the authority under the Commerce Clause to ban gambling on sporting events, and that such a ban could include state-licensed gambling. I part company with my colleagues because that is not what PASPA does. Instead, PASPA conscripts the states as foot soldiers to implement a congressional policy choice that wagering on sporting events should be prohibited to the greatest extent practicable. Contrary to the majority’s view, the Supremacy Clause simply does not give Congress the power to tell the states what they can and cannot do in the absence of a validly-enacted federal regulatory or deregulatory scheme. As explained at pages 13-14, _infra_, there is no federal regulatory or deregulatory scheme on the matter of sports wagering. Instead, there is the congressional directive that states not allow it.
regulate. An interpretation of federalism principles that permits congressional negative commands to state governments will eviscerate the constitutional lines drawn in *New York* and *Printz* that recognized the limit to Congress’s power to compel state instrumentalities to carry out federal policy.

In addition, PASPA implicates the political accountability concerns voiced by the Supreme Court in *New York* and *Printz*. In *New York*, the Court observed that when the federal government preempts an area with a federal law to impose its view on an issue, it “makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.” *New York*, 505 U.S. at 168. In contrast, the Court explained, “where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” *Id.* at 169. The Court also recognized in *Printz* that in situations where Congress compels state officials to “implement[] a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes” and that states “are . . . put in the position of taking the blame for [the federal program’s] burdensomeness and for its defects.” *Printz*, 521 U.S. at 930.

Although PASPA does not “direct[] the States to regulate,” *New York*, 505 U.S. at 169, or “implement[] a federal regulatory program,” *Printz*, 521 U.S. at 930, its prohibition on state authorization and licensing of sports gambling similarly diminishes the accountability of federal officials at the expense of state officials. Instead of directly
regulating or banning sports gambling, Congress passed the responsibility to the states, which, under PASPA, may not authorize or issue state licenses for such activities. New Jersey law regulates games of chance, see N.J. Stat. Ann. § 5:8-1, et seq., state lotteries, see id. § 5:9-1, et seq., and casino gambling within the state, see id. § 5:12-1, et seq. As a result, it would be natural for New Jersey citizens to believe that state law governs sports gambling as well. That belief would be further supported by the fact that the voters of New Jersey recently passed a state constitutional amendment permitting sports gambling and their representatives in the state legislature subsequently enacted the Sports Wagering Law, at issue here, to regulate such activity. When New Jersey fails to authorize or license sports gambling, its citizens will understandably blame state officials even though state regulation of gambling has become a puppet of the federal government, whose strings are in reality pulled (or cut) by PASPA. States can authorize and regulate some forms of gambling, e.g., lotteries and casinos, but not other forms of gambling to implement policy choices made by Congress. Thus, accountability concerns arising from PASPA’s restraint on state regulation also counsel in favor of concluding that it violates principles of federalism.

I do not suggest that the federal government may not prohibit certain actions by state governments—indeed it can. If Congress identifies a problem that falls within its realm of authority, it may provide a federal solution directly itself or properly incentivize states to regulate or comply with federal standards. For example, if Congress chooses to regulate (or deregulate) directly, it may require states to refrain from enacting their own regulations that, in Congress’s judgment, would thwart its policy objectives. Illustrating
this point, the Supreme Court held in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), that the federal Airline Deregulation Act, which “prohibit[ed] the States from enforcing any law ‘relating to rates, routes, or services’ of any air carrier” preempted guidelines regarding fair advertising set forth by an organization of state attorneys general. *Id.* at 378-79, 391. There, as the Court explained, the purpose of the federal prohibition against further state regulation was “[t]o ensure that the States would not undo federal deregulation with regulation of their own.” *Id.* at 378. Thus, a state law contrary to a federal regulatory or deregulatory scheme is void under the Supremacy Clause.4

Unlike in *Morales* and other preemption cases in which federal legislation limits the actions of state governments, in this case, there is no federal scheme regulating or deregulating sports gambling by which to preempt state regulation. PASPA provides no federal regulatory standards or requirements of its own. Instead, it simply prohibits states from “sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing]” gambling on sports. 28 U.S.C. § 3702(1). And, PASPA certainly cannot be said to be a deregulatory measure, as its purpose was to stem the spread of state-sponsored sports gambling, not let it go unregulated.5 *See* S. Rep. No. 102-248, at 3 (1991) (“The purpose

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

5 The majority reasons that PASPA does not commandeer the states in battling sports gambling because the states retain the choice of repealing their laws outlawing
of S. 474 is to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity.”); id. at 4 (“Senate bill 474 serves an important public purpose, to stop the spread of State-sponsored sports gambling . . . .”).

Moreover, contrary to the majority opinion’s suggestion, other federal statutes relating to sports gambling do not aggregate to form the foundation of a federal regulatory scheme that can be interpreted as preempts state regulation of sports gambling. First, Section 1084 of Title 18 of the United States Code makes it a federal crime to use wire communications to transmit sports bets in interstate commerce unless the transmission is from and to a state where sports betting is legal. See 18 U.S.C. § 1084(a)-(b). Thus, under that section, state law, rather than federal law, determines whether the specified conduct falls within the criminal statute. Second, another federal law prohibits any “scheme . . . to influence . . . by bribery any sporting contest.” Id. § 224(a). But, that same section expressly indicates that it “shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operations to the exclusion of any State,” and further disavows any attempt to preempt otherwise valid state laws. Id. § 224(b). A third federal statute carves out an exception to the general federal prohibition against transporting or mailing material and broadcasting information relating to lotteries for those conducted or authorized by states. Id. §

such activity, observing that PASPA does not “require[] that the states keep any law in place.” (Maj. Op. at 39.) Contrary to the majority’s supposition, it certainly is open to debate whether a state’s repeal of a ban on sports gambling would be akin to that state’s “authorizing” gambling on sporting events, action that PASPA explicitly forecloses.

Accordingly, if a state repealed an existing ban on wagering on sporting events, federal law would not be implicated.
1307(a)-(b). That exception, however, does not pertain to the transportation or mailing of “equipment, tickets, or material” for sports lotteries. *Id.* § 1307(b), (d). Thus, while state sports lotteries violate § 1307, that section does not provide a basis for inferring that it, together with PAPSA, provides a federal regulatory scheme that preempts state regulation of sports gambling by private parties.\(^7\) Further indicating federal deference to state laws on the subject, a fourth federal statute makes it a crime to transport wagering paraphernalia in interstate commerce but does not apply to betting materials to be used on sporting events in states where such betting is legal. *Id.* § 1953(a)-(b). As a result, the federal prohibition of state-authorized sports gambling does not emanate from a federal regulatory scheme that expressly or implicitly preempts state regulation that would conflict with federal policy. Instead, PASPA attempts to implement federal policy by telling the states that they may not regulate an otherwise unregulated activity. The Constitution affords Congress no such power. *See New York*, 505 U.S. at 178 (“The Constitution . . . gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly . . . ”).

In addition to preempts state regulation with federal regulation, in some circumstances, Congress may regulate states directly as part of a generally applicable law. *See, e.g., New York*, 505 U.S. at 160 (collecting cases). That is what Congress did

\(^7\) PASPA only extends its prohibition to private persons to the extent persons “sponsor, operate, advertise, or promote [sports gambling] pursuant to the law or compact of a governmental entity.” 28 U.S.C. § 3702(2). Because the federal statute applies only to persons who act pursuant to state law, it cannot be said to directly regulate persons.
with the DPPA, which the Court expressly found in *Reno* to be generally applicable. See *Reno*, 528 U.S. at 151 (“[W]e need not address the question whether general applicability is a constitutional requirement for federal regulation of the States, because the DPPA is generally applicable. The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information . . . .”). Yet, unlike the DPPA in *Reno*, but like the act in *New York*, PASPA is not an example of a generally applicable law that subjects states to the same federal regulation as private parties. See *New York*, 505 U.S. at 160 (“This litigation presents no occasion to apply or revisit the holdings of . . . cases [concerning generally applicable laws], as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties.”). In addition to its restrictions on actions by state governments relating to sports gambling, PASPA also forbids “a person to sponsor, operate, advertise, or promote” sports gambling if done “pursuant to the law or compact of a governmental entity.” 18 U.S.C. § 3702(2) (emphasis added); see also supra note 2. Thus, PASPA’s reach to private parties is predicated on a state’s authorization of sponsorship, operation, advertisement, or promotion of sports gambling pursuant to state law.\(^8\) Accordingly, PASPA cannot be said to “subject[] . . . States[s] to the same legislation applicable to private parties,” *New York*, 505 U.S. at 160, for state law determines whether § 3702(2) reaches any particular individual.

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\(^8\) According to the majority, a state would presumably not run afoul of PASPA if it merely refused to prohibit sports gambling. The resulting unregulated market, however, portends grave consequences for which state officials would be held accountable, even though it would be federal policy that prohibits the states from taking effective measures to regulate and police this activity. In this sense, PASPA is indeed coercive.
Nor does *Reno* stand more generally for the proposition that a violation of “anti-commandeering” federalism principles occurs only when Congress requires affirmative activity by state governments. It is true that in upholding the DPPA, the Court noted that it “d[id] not require the South Carolina Legislature to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals.” *Reno*, 528 U.S. at 151. Read in context, however, that statement does not suggest that the principles of federalism articulated in *New York* and *Printz* are limited only to situations in which Congress compels states to enact laws or enforce federal regulation. The two sentences preceding that statement make that clear. First, the Court recognized that “the DPPA d[id] not require the States in their sovereign capacity to regulate their own citizens.” *Id.* But here, PASPA *does* “require states in their sovereign capacity to regulate their own citizens,” *id.*, because it dictates how they must regulate sports gambling. Pursuant to PASPA, states may not “sponsor, operate, advertise, promote, license, or authorize” such activity, 28 U.S.C. § 3702(1). Thus, states must govern accordingly, even if that means by refraining from providing a regulatory scheme that governs sports gambling.

Second, the Court explained in *Reno* that, “[t]he DPPA regulates the States as *owners* of data bases” of personal information in motor vehicle records. *Reno*, 528 U.S. at 151 (emphasis added). The fact that the DPPA regulated states as “suppliers to the market for motor vehicle information,” *id.*, clearly indicates that the Court viewed the DPPA as direct congressional regulation of interstate commerce, *id.* at 148 (recognizing that motor vehicle information, in the context of the DPPA, is “an article of commerce”).
rather than a federal requirement for the states to regulate such activity, see *New York*, 505 U.S. at 166 ("The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce."). Although the Court declined to find that *New York* and *Printz* governed the DPPA merely because it would “require time and effort on the part of state employees,” it clarified that federally mandated action by states to comply with federal regulations is not necessarily fatal to a federal law that "‘regulate[s] state activities,’ rather than ‘seek[ing] to control or influence the manner in which States regulate private parties.’" *Reno*, 528 U.S. at 150 (quoting *Baker*, 485 U.S. at 514-15) (second alteration in original).

The direct federal regulation of interstate commerce under the DPPA obviously distinguishes *Reno* from *New York* and *Printz*, where the federal statutes at issue in those cases required states to enact legislation and enforce federal policy, respectively. But it also distinguishes *Reno* from this case. As the Court recognized, "[t]he DPPA establishes[d] a regulatory scheme." *Reno*, 528 U.S. at 144, 148, 151. As discussed above, however, PASPA is not itself a regulatory scheme, nor does it combine with several other scattered statutes in the criminal code to create a federal regulatory scheme. And while Congress could have regulated sports gambling directly under the Commerce Clause, just as it regulated motor vehicle information under the DPPA, it did not. Instead, it chose to set federal parameters as to how states may regulate sports gambling. As a result, any reliance on *Reno* to uphold PASPA is misplaced.
Hodel and FERC also provide no support for upholding PASPA. In Hodel, the statute at issue permitted states to submit a state regulatory plan for federal approval if they wished to regulate surface coal mining; if states did not seek or obtain approval, then a federal enforcement program would take effect. Hodel, 452 U.S. at 271-72. The Court determined that the federal statute did not “commandeer[] the legislative process of the States” because states had a choice about whether to implement regulation that conformed to federal standards or let the federal government bear the burden of regulation. Id. at 288; see also Printz, 521 U.S. at 925-26 (“In Hodel . . . we concluded that the Surface Mining Control and Reclamation Act of 1977 did not present [a Tenth Amendment] problem . . . because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field.” (citation omitted)). If PASPA provided a similar choice to states—to either implement state regulation of sports gambling that met federal standards or allow federal regulation to take effect—then perhaps it would pass constitutional muster. But it does not. Therefore Hodel is inapplicable to the case at hand.

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

Finally, as recognized by the majority, our decision in *Office of the Commissioner of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009), does not bind us to reject a challenge to PASPA on federalism grounds. In that case, we determined that a statutory phrase concerning the extent to which states grandfathered under PASPA could operate certain types of sports gambling was unambiguous. *Id.* at 302-03. As a result of the unambiguous language in PASPA, “we f[ou]nd unpersuasive Delaware’s argument that its sovereign status requires that it be permitted to implement its proposed betting scheme.” *Id.* at 303. That finding, however, related to our conclusion that PASPA gave clear notice of its “‘alter[ation] [of] the usual constitutional balance’ with respect to sports wagering,” and thus satisfied the requirement of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). *See Markell*, 579 F.3d at 303. Yet, here, we are not dealing with a question of

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* The majority asserts that the two “choices” presented to a state by PASPA – to “repeal its sports wagering ban [or] to keep a complete ban on sports wagering” – “leave much room for the states to make their own policy.” (Maj. Op. at 41.) Even if the majority’s reading of PASPA as affording these choices is correct, I fail to discern the “room” that is accorded the states to make their own policy on sports wagering. It seems to me that the only choice is to allow for completely unregulated sports wagering (a result that Congress certainly did not intend to foster), or to ban sports wagering completely.
which sovereign—state or federal—has the authority under either the “usual” or “altered” constitutional balance to regulate sports gambling. Congress does have the authority to regulate sports gambling when it does so itself. In this case, however, we are faced with the issue of whether Congress has the authority to regulate how states regulate sports gambling. Thus, our rejection of Delaware’s “sovereign status” argument has no bearing on the issue before us. Furthermore, Markell provides no guidance in this case, because there we addressed only the meaning of the statutory exception to PASPA relating to grandfathered states found at 28 U.S.C. § 3704(a)(1). Markell, 579 F.3d at 300-01. We did not pass upon the issue of whether Congress may constitutionally restrict how states can regulate under § 3702(1).

In sum, no case law supports permitting Congress to achieve federal policy objectives by dictating how states regulate sports gambling. Instead of directly regulating state activities or interstate commerce, PASPA “seek[s] to control or influence the manner in which States regulate private parties,” a distinction the Supreme Court has recognized as significant. See Reno, 528 U.S. at 150 (internal quotation marks omitted) (“In Baker, we upheld a statute that prohibited States from issuing unregistered bonds because the law ‘regulate[d] state activities,’ rather than ‘seek[ing] to control or influence the manner in which States regulate private parties.’” (quoting Baker, 485 U.S. at 514-15)); see also New York, 505 U.S at 166 (“The allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”).
Moreover, no legal principle exists for finding a distinction between the federal government compelling state governments to exercise their sovereignty to enact or enforce laws on the one hand, and restricting state governments from exercising their sovereignty to enact or enforce laws on the other. In both scenarios the federal government is regulating how states regulate. If Congress identifies a problem involving or affecting interstate commerce and wishes to provide a policy solution, it may regulate the commercial activity itself, see New York, 505 U.S. at 166, and may even regulate state activity that involves interstate commerce, see Reno, 528 U.S. at 150-51; Baker, 485 U.S. at 514. In addition, Congress may provide states a choice about whether to implement state regulations consistent with federal standards or let federal regulation preempt state law, see Hodel, 452 U.S. at 288, and may require states to “consider” federal standards or approaches to regulation in deciding how to regulate in a preemptible area, see FERC, 456 U.S. at 765-66. Furthermore, Congress may “encourage a State to regulate in a particular way,” New York, 505 U.S. at 166,—even in areas outside the scope of Congress’s Article I, § 8 powers—by “attach[ing] conditions on the receipt of federal funds,” South Dakota v. Dole, 483 U.S. 203, 206-07 (1987). But, what Congress may not do is “regulate state governments’ regulation.” See New York, 505 U.S. at 166. Whether commanding the use of state machinery to regulate or commanding the nonuse of state machinery to regulate, the Supreme Court “has been explicit” that “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” Id. at 162. Because that is exactly what PASPA does here, I conclude it violates the principles of federalism articulated in New York and
Printz. Therefore, I would reverse the District Court’s order granting summary judgment for Plaintiffs and vacate the permanent injunction.
PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-4546, 14-4568, and 14-4569

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

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN’S ASSOCIATION, INC; NEW JERSEY SPORTS & EXPOSITION AUTHORITY

STEPHEN M. SWEENEY, President of the New Jersey Senate; VINCENT PRIETO, Speaker of the New Jersey General Assembly (Intervenors in District Court)
Appellants in 14-4568

Governor of New Jersey; David L. Re buck; Frank Zan zuck i, Appellants in 14-4546

New Jersey Thoroughbred Horsemen’s Association, Inc., Appellant in 14-4569

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On Appeal from the United States District Court for the District of New Jersey (District Court No.: 3-14-cv-06450) District Judge: Honorable Michael A. Shipp

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Argued on March 17, 2015 before Merits Panel Court Ordered Rehearing En Banc on October 14, 2015 Argued En Banc on February 17, 2016

Before: AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN, GREENAWAY JR., VANASKIE, KRAUSE, RESTREPO, RENDELL, and BARRY, Circuit Judges
(Opinion filed: August 9, 2016)

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RENDELL, Circuit Judge:

The issue presented before the en banc court is whether SB 2460, which the New Jersey Legislature enacted in 2014 to partially repeal certain prohibitions on sports gambling (the “2014 Law”), violates federal law. 2014 N.J. Sess. Law Serv. Ch. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9. The District Court held that the 2014 Law violates the Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. §§ 3701-3704. A panel of this Court affirmed this ruling in a divided opinion which was subsequently vacated upon the grant of the Petition for Rehearing en banc. We now hold that the District Court correctly ruled that because PASPA, by its terms, prohibits states from authorizing by law sports gambling, and because the 2014 Law does exactly that, the 2014 Law violates federal
law. We also hold that we correctly ruled in Christie I that PASPA does not commandeer the states in a way that runs afoul of the Constitution.

I. Background

Congress passed PASPA in 1992 to prohibit state-sanctioned sports gambling. PASPA provides:

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... on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702 (emphasis added). PASPA defines “governmental entity” to include states and their political subdivisions. Id. § 3701(2). It includes a remedial provision that permits any sports league whose games are or will be the subject of sports gambling to bring an action to enjoin the gambling. Id. § 3703.
Congress included in PASPA exceptions for state-sponsored sports wagering in Nevada and sports lotteries in Oregon and Delaware, and also an exception for New Jersey but only if New Jersey were to enact a sports gambling scheme within one year of PASPA’s enactment. *Id.* § 3704(a). New Jersey did not do so, and thus the PASPA exception expired. Notably, sports gambling was prohibited in New Jersey for many years by statute and by the New Jersey Constitution. *See, e.g.*, N.J. Const. Art. IV § VII ¶ 2; N.J. Stat. Ann. § 2C:37-2; N.J. Stat. Ann. § 2A:40-1. In 2010, however, the New Jersey Legislature held public hearings on the advisability of allowing sports gambling. These hearings included testimony that sports gambling would generate revenues for New Jersey’s struggling casinos and racetracks. In 2011, the Legislature held a referendum asking New Jersey voters whether sports gambling should be permitted, and sixty-four percent voted in favor of amending the New Jersey Constitution to permit sports gambling. The constitutional amendment provided:

It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place . . . .
The amendment thus permitted the New Jersey Legislature to “authorize by law” sports “wagering at casinos or gambling houses in Atlantic City,” except that wagering was not permitted on New Jersey college teams or on any collegiate event occurring in New Jersey. An additional section of the amendment permitted the Legislature to “authorize by law” sports “wagering at current or former running and harness horse racetracks,” subject to the same restrictions regarding New Jersey college teams and collegiate events occurring in New Jersey. *Id. ¶ 2(F).*

After voters approved the sports-wagering constitutional amendment, the New Jersey Legislature enacted the Sports Wagering Act in 2012 (“2012 Law”), which provided for regulated sports wagering at New Jersey’s casinos and racetracks. *N.J. Stat. Ann. §§ 5:12A-1 et seq.* (2012). The 2012 Law established a comprehensive regulatory scheme, requiring licenses for operators and individual employees, extensive documentation, minimum cash reserves, and Division of Gaming Enforcement access to security and surveillance systems.

Five sports leagues1 sued to enjoin the 2012 Law as violative of PASPA.2 The New Jersey Parties did not dispute

1 The sports leagues were the National Collegiate Athletic Association, National Football League, National Basketball Association, National Hockey League, and the Office of the Commissioner of Baseball, doing business as Major League Baseball (collectively, the “Leagues”).

2 The Leagues named as defendants Christopher J. Christie, the Governor of the State of New Jersey; David L.
that the 2012 Law violated PASPA, but urged instead that PASPA was unconstitutional under the anti-commandeering doctrine. The District Court held that PASPA was constitutional and enjoined implementation of the 2012 Law. The New Jersey Parties appealed, and we affirmed in *National Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) (*Christie I*).

In *Christie I*, we rejected the New Jersey Parties’ argument that PASPA was unconstitutional by commandeering New Jersey’s legislative process. In doing so, we stated that “[n]othing in [PASPA’s] words requires that the states keep any law in place. All that is prohibited is the issuance of gambling ‘license[s]’ or the affirmative ‘authoriz[ation] by law’ of gambling schemes.” *Id.* at 232

Rebuck, the Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission. The New Jersey Thoroughbred Horsemen’s Association, Inc. (“NJTHA”) intervened as a defendant, as did Stephen M. Sweeney, President of the New Jersey Senate, and Sheila Y. Oliver, Speaker of the New Jersey General Assembly (“State Legislators”). We collectively refer to these parties as the “New Jersey Parties.” In the present case, the New Jersey Parties are the same, with some exceptions. NJTHA was named as a defendant (i.e., it did not intervene), as was the New Jersey Sports and Exposition Authority; the latter is not participating in this appeal. Additionally, Vincent Prieto, not Sheila Y. Oliver, is now the Speaker of the General Assembly.
The New Jersey Parties had urged that PASPA commandeered the state because it prohibited the repeal of New Jersey’s prohibitions on sports gambling; they reasoned that repealing a statute barring an activity would be equivalent to authorizing the activity, and “authorizing” was not allowed by PASPA. We rejected that argument, observing that “PASPA speaks only of ‘authorizing by law’ a sports gambling scheme,” and “[w]e [did] not see how having no law in place governing sports wagering is the same as authorizing it by law.” Id. (emphasis in original). We further emphasized that “the lack of an affirmative prohibition of an activity does not mean it is affirmatively authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people.” Id. (emphasis in original). In short, we concluded that the New Jersey Parties’ argument rested on a “false equivalence between repeal and authorization.” Id. at 233.

The New Jersey Parties appealed to the Supreme Court of the United States, which denied certiorari.

Undeterred, in 2014, the Legislature passed the 2014 Law, SB 2460, which provided in part:

[A]ny rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may
be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events.

N.J. Stat. Ann. § 5:12A-7. The 2014 Law specifically prohibited wagering on New Jersey college teams’ competitions and on any collegiate competition occurring in New Jersey, and it limited sports wagering to “persons 21 years of age or older situated at such location[s],” namely casinos and racetracks. Id.

II. Procedural History and Parties’ Arguments

The Leagues filed suit to enjoin the New Jersey Parties from giving effect to the 2014 Law. The District Court held that the 2014 Law violates PASPA, granted summary judgment in favor of the Leagues, and issued a permanent injunction against the Governor of New Jersey, the Director of the New Jersey Division of Gaming Enforcement, and the Executive Director of the New Jersey Racing Commission (collectively, the “New Jersey Enjoined Parties”). The

3 In the District Court, the New Jersey Enjoined Parties urged that the Eleventh Amendment gave them immunity such that they could not be sued in an action challenging the 2014 Law. The District Court rejected this argument, as do we, and we note that, while the issue was briefed, the New Jersey Enjoined Parties did not press—or even mention—this issue at oral argument before either the merits panel or the en banc court. They contend that, because the 2014 Law is a
self-executing repeal that requires no action from them or any other state official, they are immune from suit. This argument fails. The New Jersey Enjoined Parties are subject to suit under the Ex parte Young exception to Eleventh Amendment immunity, which “permit[s] the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’” Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (quoting Ex parte Young, 209 U.S. 123, 160 (1908)). The contrary argument of the New Jersey Enjoined Parties relies on a false premise that execution of the 2014 Law involves no affirmative ultra vires act by state officials. But the 2014 Law is far from passive. As we conclude at length, the 2014 Law establishes a regulatory regime that authorizes wagering on sports in limited locations for particular persons, so it is an affirmative act by New Jersey state officials to authorize by law sports betting, in violation of PASPA. As such, implementation of the law falls squarely within the Ex parte Young exception to sovereign immunity because it is “simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because” it is contrary to federal law. 209 U.S. at 159. “In determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.” Verizon Maryland, Inc. v. Pub. Serv. Comm’n of Maryland, 535 U.S. 635, 645 (2002) (internal quotation marks and alterations omitted). That is precisely the situation we face in this case. We therefore need not address the unsettled question of whether an Ex parte Young exception must exist
District Court interpreted *Christie I* as holding that PASPA offers two choices to states: maintaining prohibitions on sports gambling or completely repealing them. It reasoned that the 2014 Law runs afoul of PASPA because the 2014 Law is a partial repeal that necessarily results in sports wagering with the State’s imprimatur. The New Jersey Parties appealed.

On appeal, the New Jersey Parties argue that the 2014 Law does not constitute an authorization in violation of PASPA and it is consistent with *Christie I* because the New Jersey Legislature effected a repealer as *Christie I* specifically permitted.

The Leagues urge that the 2014 Law violates PASPA because it “authorizes by law” sports wagering and also impermissibly “licenses” the activity by confining the repeal of gambling prohibitions to licensed gambling facilities and thus, in effect, enlarging the terms of existing gaming licenses. The United States submitted an amicus brief in support of the Leagues.

A panel of this Court affirmed in a divided opinion, which was subsequently vacated. Because we, sitting en banc, essentially agree with the reasoning of the panel majority’s opinion, we incorporate much of it verbatim in this opinion.

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in the case of a truly self-executing law because the 2014 Law is not one.
III. Analysis  

A. The 2014 Law Violates PASPA

As a preliminary matter, we acknowledge the 2014 Law’s salutary purpose in attempting to legalize sports gambling to revive its troubled casino and racetrack industries. The New Jersey Assembly Gaming and Tourism Committee chairman stated, in regard to the 2014 Law, that “[w]e want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey, which has been under tremendous duress . . . .” (App. 91.) New Jersey State Senator Ray Lesniak, a sponsor of the law, has likewise stated that “[s]ports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry.” (App. 94.) And New Jersey State Senator Joseph Kyrillos stated that “New Jersey’s continued prohibition on sports betting at our casinos and racetracks is contrary to our interest of supporting employers that provide tens of thousands of jobs and add billions to our state’s economy” and that “[s]ports betting will help set New Jersey’s wagering facilities apart from the competition and strengthen Monmouth Park and our struggling casino industry.” (App. 138.) PASPA has clearly stymied New Jersey’s attempts to

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revive its casinos and racetracks and provide jobs for its workforce.

Moreover, PASPA is not without its critics, even aside from its economic impact. It has been criticized for prohibiting an activity, i.e., sports gambling, that its critics view as neither immoral nor dangerous. It has also been criticized for encouraging the spread of illegal sports gambling and for making it easier to fix games, since it precludes the transparency that accompanies legal activities. Simply put, “[w]e are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games’ integrity and whether states should be permitted to license and profit from the activity—engender strong views.” Christie I, 730 F.3d at 215. While PASPA’s provisions and its reach are controversial (and, some might say, unwise), “we are not asked to judge the wisdom of PASPA” and “[i]t is not our place to usurp Congress’ role simply because PASPA may have become an unpopular law.” Id. at 215, 241. We echo Christie I in noting that “New Jersey and any other state that may wish to legalize gambling on sports . . . are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again choose to do so or . . . may choose to undo PASPA altogether.” Id. at 240-41. Unless that happens, however, we are duty-bound to interpret the text of the law as Congress wrote it.

We now turn to the primary question before us: whether the 2014 Law violates PASPA. We hold that it does. Under PASPA, it shall be unlawful for “a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact” sports gambling. 28 U.S.C. § 3702(1).
We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.

First, the 2014 Law authorizes casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities. Without the 2014 Law, the sports gambling prohibitions would apply to casinos and racetracks. Appellants urge that the 2014 Law does not provide authority for sports gambling because we previously held that “[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people” and that “[w]e do not see how having no law in place governing sports wagering is the same as authorizing it by law.” Christie I, 730 F.3d at 232. But this is not a situation where there are no laws governing sports gambling in New Jersey. Absent the 2014 Law, New Jersey’s myriad laws prohibiting sports gambling would apply to the casinos and racetracks. Thus, the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited.

Second, the 2014 Law authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling. Under the 2014 Law, New Jersey’s sports gambling prohibitions are specifically removed from casinos, gambling houses, and horse racetracks as long as the bettors are people age 21 or over, and as long as there are no bets on either New Jersey college teams or collegiate competitions occurring in New Jersey. The word “authorize” means, inter alia, “[t]o empower; to give a right or authority to act,” or “[t]o permit a thing to be done in the future.” Black’s Law Dictionary 133
The 2014 Law allows casinos and racetracks and their patrons to engage, under enumerated circumstances, in conduct that other businesses and their patrons cannot do. That selectiveness constitutes specific permission and empowerment.

Appellants urge that because the 2014 Law is only a “repeal” removing prohibitions against sports gambling, it is not an “affirmative authorization” under Christie I. To the extent that in Christie I we took the position that a repeal cannot constitute an authorization, we now reject that reasoning. Moreover, we do not adopt the District Court’s view that the options available to a state are limited to two. Neither of these propositions were necessary to their respective rulings and were, in essence, dicta. Furthermore, our discussion of partial versus total repeals is similarly unnecessary to determining the 2014 Law’s legality because the question presented here is straightforward—i.e., what does the law do—and does not turn on the way in which the state has enacted its directive.

The presence of the word “repeal” does not prevent us from examining what the provision actually does, and the Legislature’s use of the term does not change that the 2014 Law selectively grants permission to certain entities to engage in sports gambling. New Jersey’s sports gambling prohibitions remain, and no one may engage in such conduct except those singled out in the 2014 Law. While artfully couched in terms of a repealer, the 2014 Law essentially

\[\text{We cite the version of Black’s Law Dictionary that was current in 1992, the year PASPA was passed.}\]
provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is an authorization.

Third, the exception in PASPA for New Jersey, which the State did not take advantage of before the one-year time limit expired, is remarkably similar to the 2014 Law. The exception states that PASPA does not apply to “a betting, gambling, or wagering scheme . . . conducted exclusively in casinos . . . , but only to the extent that . . . any commercial casino gaming scheme was in operation . . . throughout the 10-year period” before PASPA was enacted. 28 U.S.C. § 3704(a)(3)(B). The exception would have permitted sports gambling at New Jersey’s casinos, which is just what the 2014 Law does. We can easily infer that, by explicitly excepting a scheme of sports gambling in New Jersey’s casinos from PASPA’s prohibitions, Congress intended that such a scheme would violate PASPA. If Congress had not perceived that sports gambling in New Jersey’s casinos would violate PASPA, then it would not have needed to insert the New Jersey exception. In other words, if sports gambling in New Jersey’s casinos does not violate PASPA, then PASPA’s one-year exception for New Jersey would have been superfluous. We will not read statutory provisions to be surplusage. See Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1178 (2013) (“[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”). In order to avoid rendering the New Jersey exception surplusage, we
must read the 2014 Law as authorizing a scheme that clearly violates PASPA.\(^6\)

As support for their argument that the 2014 Law does not violate PASPA, Appellants cite the 2014 Law’s construction provision, which provides that “[t]he provisions of this act . . . are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact” sports wagering. N.J. Stat. Ann. § 5:12A-8. This conveniently mirrors PASPA’s language providing that states may not “sponsor, operate, advertise, promote, license, or authorize by law or compact” sports wagering. 28 U.S.C. § 3702(1).

The construction provision does not save the 2014 Law. States may not use clever drafting or mandatory construction provisions to escape the supremacy of federal law. Cf. Haywood v. Drown, 556 U.S. 729, 742 (2009) (“[T]he Supremacy Clause cannot be evaded by formalism.”); Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 382-83 (1990) (“[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of” a particular word). In the same vein, the New Jersey Legislature cannot use a targeted construction provision to limit the reach of PASPA or to dictate to a court a construction that would limit that reach.

\(^6\) Granted, the 2014 Law applies to horse racetracks as well as casinos, while the PASPA exception for New Jersey refers only to casinos, but that does not change the significance of the New Jersey exception because it refers to gambling in places that already allow gambling, and the racetracks fall within that rubric.
The 2014 Law violates PASPA, and the construction provision cannot alter that fact.

Appellants also draw a comparison between the 2014 Law and the 2012 Law, which involved a broad regulatory scheme, as evidence that the 2014 Law does not violate PASPA. It is true that the 2014 Law does not set forth a comprehensive scheme or provide for a state regulatory role, as the 2012 Law did. However, PASPA does not limit its reach to active state involvement or extensive regulation of sports gambling. It prohibits a range of state activity, the least intrusive of which is “authorization” by law of sports gambling.

We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling. 7

7 Because we conclude that the 2014 Law authorizes by law sports gambling, we need not address the argument made by Appellees and Amicus that the 2014 Law also licenses sports gambling by permitting only those entities that already have gambling licenses or recently had such licenses to conduct sports gambling operations. We also reject the argument of the State Legislators and the NJTHA that, to the extent that any aspect of the 2014 Law violates PASPA, we should apply the 2014 Law’s severability clause. Citing the broadly-worded severability provision of N.J. Stat. Ann. § 5:12A-9, they argue that the District Court should have saved the 2014 Law by severing the most objectionable parts. For example, the NJTHA urges that, “if the Court . . . concludes that a state decision to prohibit persons under 21 from making sports bets is [an] authorization by law for that activity by persons over 21, the age limitation could be severed, leaving
it to the sports gambling operators . . . to impose a reasonable age limit.” NJTHA’s Reply Br. at 23. It also argues that, “if the Court concludes that a state decision to prohibit . . . sports betting on some games is [an] authorization by law as to betting on all other games, this limitation could be severed,” and that “the Court can sever the Law’s provision dealing with casinos from its provision dealing with racetracks.” Id. at 24. Lifting the age limitation, permitting betting on New Jersey schools’ games, or limiting the authorization to an even narrower category of venues, however, would not alter our conclusion that the 2014 Law authorizes by law sports betting. “The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.” Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (internal quotation marks omitted). Because New Jersey’s legislature, in both the 2012 Law and the 2014 Law, was loath to permit sports betting outside of gambling establishments, we cannot reasonably say that it would have enacted a repeal of its gambling laws without the age restriction, without the restriction on gambling on New Jersey-based college sports, and without the geographic restriction to casinos and racetracks. We thus need not speculate about other possible forms that severance might take.
B. PASPA Does Not Improperly Commandeer the States

Appellants expend significant effort in this appeal revisiting our conclusion in Christie I that PASPA does not unconstitutionally commandeer the states. They root this effort in the District Court’s erroneous conclusion that PASPA presents states with a binary choice—either maintain a complete prohibition on sports wagering or wholly repeal state prohibitions. In Christie I, we engaged in a lengthy discussion to rebut Appellants’ assertion that if we conclude that New Jersey’s repeal of its prohibition is not permitted by PASPA, then it has unconstitutionally commandeered New Jersey. In so doing, we discussed the Supreme Court’s clear case law on commandeering. Our prior conclusion that PASPA does not run afoul of anti-commandeering principles remains sound despite Appellants’ attempt to call it into question using the 2014 Law as an exemplar.

1. Anti-Commandeering Jurisprudence

As we noted in Christie I, the Supreme Court’s anti-commandeering principle rests on the conclusion that “Congress ‘lacks the power directly to compel the States to require or prohibit’ acts which Congress itself may require or prohibit.” Christie I, 730 F.3d at 227 (quoting New York v. United States, 505 U.S. 144, 166 (1992)). In our prior survey of the anti-commandeering case law in Christie I, we grouped four commandeering cases upholding the federal laws at issue into two categories: (1) permissible regulation in a pre-emptible field, Hodel v. Virginia Surface Min. & Reclamation Ass’n, Inc., 452 U.S. 264 (1981), and F.E.R.C. v. Mississippi, 456 U.S. 742 (1982); and (2) prohibitions on state action,

First, congressional action in passing laws in otherwise pre-emptible fields has withstood attack in cases where the states were not compelled to enact laws or implement federal statutes or regulatory programs themselves. In Hodel, the Supreme Court upheld the constitutionality of a law that imposed federal standards for coal mining. The law left states a choice. A state could “assume permanent regulatory authority over . . . surface coal mining operations” and “submit a proposed permanent program” that “demonstrate[s] that the state legislature has enacted laws implementing the environmental protection standards . . . and that the State has the administrative and technical ability to enforce the[] standards.” Hodel, 452 U.S. at 271. However, if a state chose not to assume regulatory authority, the federal government would “administer[] the Act within that State and continue[] as such unless and until a ‘state program’ [wa]s approved.” Id. at 272. As we described in Christie I:

The Supreme Court upheld the provisions, noting that they neither compelled the states to adopt the federal standards, nor required them “to expend any state funds,” nor coerced them into “participat[ing] in the federal regulatory program in any manner whatsoever.” [Hodel, 452 U.S.] at 288. The Court further concluded
that Congress could have chosen to completely preempt the field by simply assuming oversight of the regulations itself. *Id.* It thus held that the Tenth Amendment posed no obstacle to a system by which Congress “chose to allow the States a regulatory role.” *Id.* at 290. As the Court later characterized *Hodel*, the scheme there did not violate the anti-commandeering principle because it “merely made compliance with federal standards a precondition to continued state regulation in an otherwise preempted field.” *Printz v. United States*, 521 U.S. 898, 926 (1997).

*Christie I*, 730 F.3d at 227–28. The Supreme Court’s opinion in *F.E.R.C. v. Mississippi* the following year confirmed its view that a law does not unconstitutionally commandeering the states when the law does not impose federal requirements on the states, but leaves states the choice to decline to implement federal standards. 456 U.S. 742, 767–68 (upholding a provision that required state utility companies to expend state resources to “consider” enacting federal standards, but did not require states to enact those standards).

Second, the Supreme Court has found Congress’s prohibition of certain state actions to not constitute unconstitutional commandeering. In *South Carolina v. Baker*, the Court upheld federal laws that prohibited the issuance of bearer bonds, which required states to amend legislation to be in compliance. 485 U.S. at 511, 514 (1988). As we characterized this case in *Christie I*:
The Court concluded this result did not run afoul [of] the Tenth Amendment because it did not seek to control or influence the manner in which States regulate private parties but was simply an inevitable consequence of regulating a state activity. In subsequent cases, the Court explained that the regulation in *Baker* was permissible because it simply subjected a State to the same legislation applicable to private parties.

*Christie I*, 730 F.3d at 228 (internal quotation marks and citations omitted). Later, in *Reno v. Condon*, the Court upheld the constitutionality of a law that prohibited states from releasing information gathered by state departments of motor vehicles. The Court ultimately concluded that the law at issue “d[id] not require the States in their sovereign capacity to regulate their own citizens[,] . . . d[id] not require the [State] Legislature[s] to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals.” *Reno*, 528 U.S. at 151 (as altered in *Christie I*, 730 F.3d at 228).

As noted above, the Supreme Court has invalidated laws on anti-commandeering grounds on only two occasions. In *New York*, the Supreme Court struck down a “take-title” provision whereby states were required to take title to radioactive waste by a specific date, at the waste generator’s request, if they did not adopt a federal program. As we stated in *Christie I*, the provision “compel[led] the states to either enact a regulatory program, or expend resources in taking title to the waste.” *Christie I*, 730 F.3d at 229. The Supreme Court ultimately concluded in *New York* that the take-title
provision “crossed the line distinguishing encouragement from coercion.” 505 U.S. at 175. Similarly in Printz v. United States, the Supreme Court concluded that Congress “may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program.” 521 U.S. at 935 (finding a federal law requiring state officers to conduct background checks on prospective gun owners to commandeer the states in violation of the Tenth Amendment).

2. PASPA Does Not Violate Anti-Commandeering Principles

We continue to view PASPA’s prohibition as more akin to those laws upheld in Hodel, F.E.R.C., Baker, and Reno, and distinguishable from those struck down by the Supreme Court in New York and Printz. Our articulation of the way in which PASPA does not violate anti-commandeering principles warrants refinement, however, given the way in which the 2014 Law attempted to skirt PASPA and the thrust of Appellants’ arguments in this appeal.

In an attempt to reopen the anti-commandeering question we previously decided, Appellants creatively rely on certain language that was used in Christie I. In pressing for a declaration that PASPA unconstitutionally commandeered the states in Christie I, Appellants characterized PASPA as requiring the states to affirmatively keep a prohibition against sports wagering on their books, lest they be found to have authorized sports gambling by law by repealing the prohibition. In response, we opined that Appellants’ position “rest[ed] on a false equivalence between repeal and
authorization,” implying that a repeal is not an authorization. 730 F.3d at 233. Before us now Appellants urge that “[t]his Court held [in Christie I] that PASPA is constitutional precisely because it permits States to elect not to prohibit sports wagering, even if affirmatively authorizing it would be unlawful.” Appellants’ Br. 22 (emphasis in original). Appellants are saying, in effect, “We told you so”—if the legislature cannot repeal New Jersey’s prohibition as it attempted to do in the 2014 Law, then it is required to affirmatively keep the prohibition on the books, and PASPA unconstitutionally commandeers the states. We reject this argument.

That said, we view our discussion in Christie I regarding the relationship between a “repeal” and an “authorization” to have been too facile. While we considered whether repeal and authorization are interchangeable, our decision did not rest on that discussion. Today, we choose to excise that discussion from our prior opinion as unnecessary dicta. To be clear, a state’s decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, “authorization” under PASPA. However, our determination that such a selective repeal of certain prohibitions amounts to authorization under PASPA does not mean that states are not afforded sufficient room under PASPA to craft their own policies.

Appellants urge that our conclusion in Christie I that PASPA does not unconstitutionally commandeer the states rested on our view that PASPA allows states to “choos[e] among many different potential policies on sports wagering that do not include licensing or affirmative authorization by
the State.” Appellants’ Br. 29. This is correct. PASPA does not command states to take affirmative actions, and it does not present a coercive binary choice. Our reasoning in Christie I that PASPA does not commandeer the states remains unshaken.

Appellants characterize the 2014 Law as a lawful exercise in the space PASPA affords states to create their own policy. They argue that without options beyond a complete repeal or a complete ban on sports wagering, such as the partial repeal New Jersey pursued, PASPA runs afoul of anti-commandeering principles. This argument sweeps too broadly. That a specific partial repeal which New Jersey chose to pursue in its 2014 Law is not valid under PASPA does not preclude the possibility that other options may pass muster. The issue of the extent to which a given repeal would constitute an authorization, in a vacuum, is not before us, as it was not specifically before us in Christie I. However, as the Leagues noted at oral argument before the en banc court, not all partial repeals are created equal. For instance, a state’s partial repeal of a sports wagering ban to allow de minimis wagers between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law. We need not, however, articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, if indeed such a line could be drawn. It is sufficient to conclude that the 2014 Law overstepped it.

Appellants seize on the District Court’s erroneous interpretation of Christie I’s anti-commandeering analysis—namely, that PASPA presents states with a strict binary choice between total repeal and keeping a complete ban on their books—to once again urge that if PASPA commands
such a choice, then it is comparable to the challenged law in New York. First, unlike the take-title provision included in the statute at issue in New York, PASPA’s text does not present states with a coercive choice to adopt a federal program. To interpret PASPA to require such a coercive choice is to read something into the statute that simply is not there.

Second, PASPA is further distinguishable from the law at issue in New York because it does not require states to take any action. In New York, the Supreme Court held that a federal law that required states to enact a federal regulatory program or take title to radioactive waste at the behest of generators “crossed the line distinguishing encouragement from coercion.” 505 U.S. at 175. Unlike the law at issue in New York, PASPA includes no coercive direction by the federal government. As we previously concluded in Christie I, PASPA does not command states to take any affirmative steps:

PASPA does not require or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law. They are not even required, like the states were in F.E.R.C., to expend resources considering federal regulatory regimes, let alone to adopt them. Simply put, we discern in PASPA no directives requiring the States to address particular problems and no commands to the States’ officers to administer or enforce a federal regulatory program.
730 F.3d at 231 (internal quotation marks and alterations omitted) (emphasis in original). Put simply, PASPA does not impose a coercive either-or requirement or affirmative command.

We will not allow Appellants to bootstrap already decided questions of PASPA’s constitutionality onto our determination that the 2014 Law violates PASPA. We reject the notion that PASPA presents states with a coercive binary choice or affirmative command and conclude, as we did in Christie I, that it does not unconstitutionally commandeer the states.

IV. Conclusion

The 2014 Law violates PASPA because it authorizes by law sports gambling. We continue to find PASPA constitutional. We will affirm.
FUENTES, Circuit Judge, dissenting:

In November 2011, the question of whether to allow sports betting in New Jersey went before the electorate. By a 2-1 margin, New Jersey voters passed a referendum to amend the New Jersey Constitution to allow the New Jersey Legislature to “authorize by law” sports betting. Accordingly, the Legislature enacted the 2012 Sports Wagering Act (“2012 Law”). The Sports Leagues challenged this Law, claiming that it violated the Professional and Amateur Sports Protection Act’s (“PASPA”) prohibition on states “authoriz[ing] by law” sports betting. In Christie I, we agreed with the Sports Leagues and held that the 2012 Law violated and thus was preempted by PASPA. We explained, however, that New Jersey was free to repeal the sports betting prohibitions it already had in place. We rejected the argument that a repeal of prohibitions on sports betting was equivalent to authorizing by law sports betting. When the matter was brought to the Supreme Court, the Solicitor General echoed that same sentiment, stating that, “PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA’s enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part.”

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1 N.J. Const. art. IV, § 7, ¶ 2(D).
So New Jersey did just that. In 2014, the New Jersey Legislature repealed certain sports betting prohibitions at casinos and gambling houses in Atlantic City and at horse racetracks in the State (“2014 Repeal”). In addition to repealing the 2012 Law in full, the 2014 Repeal stripped New Jersey of any involvement in sports betting, regulatory or otherwise. In essence, the 2014 Repeal rendered previous prohibitions on sports betting non-existent.

But the majority today concludes that the New Jersey Legislature’s efforts to satisfy its constituents while adhering to our decision in Christie I are still in violation of PASPA. According to the majority, the “selective” nature of the 2014 Repeal amounts to “authorizing by law” a sports wagering scheme. That is, because the State retained certain restrictions on sports betting, the majority infers the authorization by law. I cannot agree with this interpretation of PASPA.

PASPA restricts the states in six ways – a state cannot “sponsor, operate, advertise, promote, license, or authorize by law or compact” sports betting. The only one of these six restrictions that includes “by law” is “authorize.” None of the other restrictions say anything about how the states are restricted. Thus, I believe that Congress gave this restriction a special meaning—that a state’s “authorization by law” of sports betting cannot merely be inferred, but rather requires a specific legislative enactment that affirmatively allows the people of the state to bet on sports. Any other interpretation would be reading the phrase “by law” out of the statute.

Indeed, we stated exactly this in *Christie I*—that all PASPA prohibits is “the affirmative ‘authoriz[ation] by law’ of gambling schemes.”\(^5\) Thus, we explained, nothing prevented New Jersey from repealing its sports betting prohibitions, since, “in reality, the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law.”\(^6\) As we noted, “that the Legislature needed to enact the [2012 Law] itself belies any contention that the mere repeal of New Jersey’s ban on sports gambling was sufficient to ‘authorize [it] by law.’”\(^7\) The Legislature itself “saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering—the [2012 Law] was required.”\(^8\) In short, we explained that there was a false equivalence between repeal and authorization.

With the 2014 Repeal, the New Jersey Legislature did what it thought it was permitted to do under our reading of PASPA in *Christie I*. The majority, however, maintains that the 2014 Repeal “authorizes” sports wagering at casinos, gambling houses, and horse racetracks simply because other sports betting prohibitions remain in place.\(^9\) According to the

\(^5\) *Christie I*, 730 F.3d at 232 (alteration in original).
\(^6\) Id.
\(^7\) Id. (alteration in original).
\(^8\) Id.
\(^9\) I refer to the repeal of prohibitions as applying to casinos, gambling houses, and horse racetracks, with the understanding that the repeal applies to casinos and gambling houses in Atlantic City and horse racetracks in New Jersey.
majority, “[a]bsent the 2014 Law, New Jersey’s myriad laws prohibiting sports gambling would apply to the casinos and racetracks,” and thus “the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited.” But I believe the majority is mistaken as to the impact of a partial repeal.

A repeal is defined as an “abrogation of an existing law by legislative act.” When a statute is repealed, “the repealed statute, in regard to its operative effect, is considered as if it had never existed.” If a repealed statute is treated as if it never existed, a partially repealed statute is treated as if the repealed sections never existed. The 2014 Repeal, then, simply returns New Jersey to the state it was in before it first

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12 73 Am. Jur. 2d Statutes § 264.
13 See, e.g., Ex parte McCrdle, 74 U.S. 506, 514 (1868) (“[W]hen an act of the legislature is repealed, it must be considered . . . as if it never existed.”); Anderson v. USAir, Inc., 818 F.2d 49, 55 (D.C. Cir. 1987) (“Common sense dictates that repeal means a deletion. This court would engage in pure speculation were it to hold otherwise.”); Kemp by Wright v. State, Cty. of Burlington, 687 A.2d 715, 723 (N.J. 1997) (“In this State it is the general rule that where a statute is repealed and there is no saving[s] clause or a general statute limiting the effect of the repeal, the repealed statute, in regard to its operative effect, is considered as though it had never existed, except as to matters and transactions passed and closed.”).
enacted those prohibitions on sports gambling. In other words, after the repeal, it is as if New Jersey never prohibited sports wagering at casinos, gambling houses, and horse racetracks. Therefore, with respect to those locations, there are no laws governing sports wagering. Contrary to the majority’s position, the permission to engage in such an activity is not affirmatively granted by virtue of it being prohibited elsewhere.

To bolster its position, the majority rejects our reasoning in Christie I, stating that “[t]o the extent that in Christie I we took the position that a repeal cannot constitute an authorization, we now reject that reasoning.”14 I continue to maintain, however, that the 2014 Repeal is not an affirmative authorization by law. It is merely a repeal – it does not, and cannot, authorize by law anything.

In my view, the majority’s position that the 2014 Repeal “selectively grants permission to certain entities to engage in sports gambling”15 is simply incorrect. There is no explicit grant of permission in the 2014 Repeal for any person or entity to engage in sports gambling. Rather, the 2014 Repeal is a self-executing deregulatory measure that repeals existing prohibitions and regulations for sports betting and requires the State to abdicate any control or involvement in sports betting.16 The majority fails to explain why a partial

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15 Id.
16 For example, under the 2014 Repeal, “[the Division of Gaming Enforcement (“DGE”)] now considers sports wagering to be ‘non-gambling activity’ . . . that is beyond
repeal is equivalent to a grant of permission (by law) to engage in sports betting.

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

The majority also fails to illustrate how the 2014 Repeal results in sports wagering pursuant to state law when there is effectively no law in place as to several locations, no scheme created, and no state involvement. A careful comparison with the 2012 Law is instructive. The 2012 Law lifted New Jersey’s ban on sports wagering and created a licensing scheme for sports wagering pools at casinos and racetracks in the State. This comprehensive regime required close State supervision and regulation of those sports wagering pools. For instance, the 2012 Law required any entity that wished to operate a “sports pool lounge” to acquire a “sports pool license.” To do so, a prospective operator was required to pay a $50,000 application fee, secure Division of Gaming Enforcement (“DGE”) approval of all internal controls, and ensure that any of its employees who were to be

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DGE’s control and outside of DGE’s regulatory authority.” App. 416.
directly involved in sports wagering obtained individual licenses from the DGE and the Casino Control Commission (“CCC”). In addition, the betting regime required entities to, among other things, submit extensive documentation to the DGE, adopt new “house” rules subject to DGE approval, and conform to DGE standards. This, of course, violated PASPA in the most basic way: New Jersey developed an intricate scheme that both “authorize[d] by law” and “license[d]” sports gambling. The 2014 Repeal eliminated this entire scheme. Moreover, all state agencies with jurisdiction over state casinos and racetracks, such as the DGE and the CCC, were stripped of any sports betting oversight.

The majority likewise falters when it analogizes the 2014 Repeal to the exception Congress originally offered to New Jersey in 1992. The exception stated that PASPA did not apply to “a betting, gambling, or wagering scheme . . . conducted exclusively in casinos[,] . . . but only to the extent that . . . any commercial casino gaming scheme was in operation . . . throughout the 10-year period” before PASPA was enacted. Setting aside the most obvious distinction between the 2014 Repeal and the 1992 exception—that it contemplated a scheme that the 2014 Repeal does not authorize—the majority misses the mark when it states: “If Congress had not perceived that sports gambling in New Jersey’s casinos would violate PASPA, then it would not have needed to insert the New Jersey exception.” Congress did not, however, perceive, or intend for, private sports wagering in casinos to violate PASPA. Instead, Congress prohibited sports wagering undertaken pursuant to state law.

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That the 2014 Repeal might bring about an increase in the amount of private, legal sports wagering in New Jersey is of no moment, and the majority’s reliance on such a possibility is misplaced. The majority is also wrong in a more fundamental way. The exception Congress offered to New Jersey was exactly that: an exception to the ordinary prohibitions of PASPA. That is to say, with this exception, New Jersey could have “sponsor[ed], operate[d], advertise[d], promote[d], license[d], or authorize[d] by law or compact” sports wagering. Under the 2014 Repeal, of course, New Jersey cannot and does not aim to do any of these things.

Because I do not see how a partial repeal of prohibitions is tantamount to authorizing by law a sports wagering scheme in violation of PASPA, I respectfully dissent.
NCAA v. Governor of the State of New Jersey, et al., Nos. 14-4546, 14-4568, 14-4659

VANASKIE, Circuit Judge, dissenting.

While 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.” New York v. United States, 505 U.S. 144, 166 (1992) (emphasis added). Concluding that the Professional and Amateur Sports Protection Act (“PASPA”), 28 U.S.C. § 3701 et seq., was a congressional command that States must prohibit wagering on sporting events because it forbids the States from “authoriz[ing] by law” such activity, I dissented from the holding in Christie I that PASPA was a valid exercise of congressional authority. National Collegiate Athletic Ass’n v. Governor of New Jersey (Christie I), 730 F.3d 208, 241–51 (3d Cir. 2013) (Vanaskie, J., dissenting). My colleagues in the majority in Christie I disagreed with my conclusion because they believed that States had the option of repealing existing bans on sports betting. Id. at 232. In upholding PASPA, Christie I rejected New Jersey’s argument that a repeal of its ban on sports betting would be viewed as effectively “authoriz[ing] by law” this activity. Christie I declared that New Jersey’s “attempt to read into PASPA a requirement that the states must affirmatively keep a ban on sports gambling in their books rests on a false equivalence between repeal and authorization.” Id. at 233. I viewed that “false equivalence” assertion with considerable skepticism. Id. at 247 n. 5 (“[I]t certainly is open to debate whether a state’s repeal of a ban on sports gambling would be akin to that state’s ‘authorizing’ gambling on sporting events . . . .”). My skepticism is validated by today’s majority opinion. The majority dodges the inevitable conclusion that PASPA
conscripts the States to prohibit wagering on sports by suggesting that some partial repeal of the ban on sports gambling would not be tantamount to authorization of gambling.

Implicit in today’s majority opinion and Christie I is the premise that Congress lacks the authority to decree that States must prohibit sports wagering, and so both majorities find some undefined room for States to enact partial repeals of existing bans on sports gambling. While the author of Christie I finds that New Jersey’s partial repeal at issue here is not the equivalent of authorizing by law wagering on sporting events, today’s majority concludes otherwise. This shifting line approach to a State’s exercise of its sovereign authority is untenable. The bedrock principle of federalism that Congress may not compel the States to require or prohibit certain activities cannot be evaded by the false assertion that PASPA affords the States some undefined options when it comes to sports wagering. Because I believe that PASPA was intended to compel the States to prohibit wagering on sporting events, it cannot survive constitutional scrutiny. Accordingly, as I did in Christie I, I dissent.

I.

According to the majority, “a state’s decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, ‘authorization’ under PASPA.” Maj. Op., at 28. The majority also claims “a state’s partial repeal of a sports wagering ban to allow de minimis wagers between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law.” Id. at 29. Thus, according to the majority, the 2014
Law is a partial repeal that is foreclosed by PASPA, but “other options may pass muster” because “not all partial repeals are created equal.” *Id.*

Noticeably, the majority does not explain why all partial repeals are not created equal or explain what distinguishes the 2014 Law from those partial repeals that pass muster. To further complicate matters, the majority continues to rely on *Christie I*, which did “not read PASPA to prohibit New Jersey from repealing its ban on sports wagering” and informed New Jersey that “[n]othing in [PASPA’s] words requires that the states keep any law in place.” 730 F.3d at 232.

A.

*Christie I* “[r]ecogniz[ed] the importance of the affirmative/negative command distinction,” and “agree[d] with [New Jersey] that the affirmative act requirement, if not properly applied, may permit Congress to ‘accomplish exactly what the commandeering doctrine prohibits’ by stopping the states from ‘repealing an existing law.’” 730 F.3d at 232 (quoting *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring)). *Christie I*, however, discounted concerns regarding PASPA’s affirmative act requirement because *Christie I* “d[id] not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.” *Id.* According to *Christie I*, PASPA is constitutional because “[n]othing in [PASPA’s] words requires that the states keep any law in place.” *Id.* This conclusion formed the premise for the conclusion in *Christie I* that PASPA passed constitutional muster.
Remarkably, the majority chooses to “excise that discussion from our prior opinion as unnecessary dicta.” Maj. Op., at 28. This cannot be the case, however, because that discussion was the cornerstone of the holding in *Christie I*. See *In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000) (“Chief Judge Posner has aptly defined dictum as ‘a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it.’”) (quoting *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986)).

Indeed, to rationalize its conclusion in *Christie I*, the *Christie I* majority had to expressly reject the notion that when a state “choose[s] to repeal an affirmative prohibition of sports gambling, that is the same as ‘authorizing’ that activity, and therefore PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it.” 730 F.3d at 232. This aspect of *Christie I* was not peripheral to the ultimate holding because *Christie I* specifically “agree[d] with [New Jersey] that the affirmative act requirement, if not properly applied, may permit Congress to ‘accomplish exactly what the commandeering doctrine prohibits’ by stopping the states from ‘repealing an existing law.’” *Id.* (quoting *Conant*, 309 F.3d at 646 (Kozinski, J., concurring)). Thus, to resolve the issue before it, *Christie I* necessarily had to give this issue the “full and careful consideration of the court.” *In re McDonald*, 205 F.3d at 612 (quoting *Sarnoff*, 798 F.2d at 1084).

In giving the issue its full and careful consideration, *Christie I* explained that the notion that a “repeal” could be the same as an “authorization” was “problematic in numerous
respects.” 730 F.3d at 232; see also id. (“Most basically, it ignores that PASPA speaks only of ‘authorizing by law’ a sports gambling scheme.”). Christie I did “not see how having no law in place governing sports wagering is the same as authorizing it by law.” Id. Christie I recognized a distinction between affirmative commands for actions and prohibitions, and explained that there was “a false equivalence between repeal and authorization.” Id. at 233. Thus, as a matter of statutory construction, and to avoid “a series of constitutional problems,” Christie I specifically held that if the Court did not distinguish between “repeals” (affirmative commands) and “authorizations” (affirmative prohibitions), the Court would “read[] the term ‘by law’ out of [PASPA].” Id. at 233.

I dissented from that opinion because “any distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty is illusory.” 730 F.3d at 245 (Vanaskie, J., concurring in part and dissenting in part). The decision to base Christie I on a distinction between affirmative commands for action and affirmative prohibitions was “untenable,” because “affirmative commands to engage in certain conduct can be rephrased as a prohibition against not engaging in that conduct.” Id. As I explained, basing Christie I on such an illusory distinction raises constitutional concerns because “[a]n interpretation of federalism principles that permits congressional negative commands to state governments will eviscerate the constitutional lines drawn” by the Supreme Court. Id.
B.

After Christie I, a state like New Jersey at least had the choice to either “repeal its sports wagering ban,” or, “[o]n the other hand . . . keep a complete ban on sports gambling.” Id. at 233 (majority opinion). The Christie I majority found that this choice was not too coercive because it left “much room for the states to make their own policy” and left it to a State “to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be.” Id.

Today’s majority makes it clear that PASPA does not leave a State “much room” at all. Indeed, it is evident that States must leave gambling prohibitions on the books to regulate their citizens. A review of the four Supreme Court anti-commandeering cases referenced by the majority is illuminating.

1.

The first two anti-commandeering cases that the majority reviews are Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc., 452 U.S. 264 (1981), and F.E.R.C. v. Mississippi, 456 U.S. 742 (1982). As the majority points out, these cases address “permissible regulation in a pre-emptible field.” Maj. Op., at 23. In analyzing these cases, however, the majority overlooks the main rule announced by the Supreme Court in situations where there is an exercise of legislative authority under the Commerce Clause or where Congress preempts an area with federal legislation within its legislative power. In such situations, States have a choice: they may either comply with the federal legislation or the Federal Government will carry the legislation into effect.
This rule was announced in *Hodel*, where the Supreme Court explained that “[i]f a State does not wish to . . . comply with the Act and implementing regulations, *the full regulatory burden will be borne by the Federal Government.*” 452 U.S. at 288 (emphasis added). The same theme repeated itself in *F.E.R.C.*, as the Supreme Court focused on “*the choice put to the States*—that of either abandoning regulation of the field altogether or considering the federal standards.” 456 U.S. at 766 (emphasis added). In both cases, the Supreme Court was clear that there must be some choice for the states to make because without it “the accountability of both state and federal officials is diminished.” *New York v. United States*, 505 U.S. 144, 168 (1992).

Indeed, in *New York v. United States*, the Court explained that a State’s view on legislation “can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case . . . it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.” *Id.* at 168. The Supreme Court reiterated this point *Printz v. United States*, explaining that, “[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes.” 521 U.S. 898, 930 (1997). Thus, States must be given a choice because the Supreme Court is concerned that “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.” *New York*, 505 U.S. at 169.
As the majority explains, while “PASPA’s provisions and its reach are controversial (and, some might say, unwise)
. . . . we are duty-bound to interpret the text of the law as Congress wrote it.” Maj. Op., at 16. Because the majority has excised the distinction between a repeal and an authorization, the majority makes it clear that under PASPA as written, no repeal of any kind will evade the command that no State “shall . . . authorize by law” sports gambling. 28 U.S.C. § 3702. In the face of such a congressional directive, “no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.” Printz, 521 U.S. at 935.

2.

This leads to the other two anti-commandeering cases reviewed by the majority: South Carolina v. Baker, 485 U.S. 505 (1988), and Reno v. Condon, 528 U.S. 141 (2000). The majority explains that these cases address permissible “prohibitions on state action.” Maj. Op., at 23. Again, however, the majority seems to overlook the animating factor for each of these opinions. In both Baker and Reno the Supreme Court explained that permissible prohibitions regulated State activities. The Supreme Court has never sanctioned statutes or regulations that sought to control or influence the manner in which States regulate private parties.

For example, in Baker, the Supreme Court reviewed a challenge to the Internal Revenue Code’s enactment of § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, which prohibited States from issuing unregistered bearer bonds. Notably, when reviewing the case, the Court specifically found that it did not need to address “the
possibility that the Tenth Amendment might set some limits on Congress’ power to compel States to regulate on behalf of federal interests” because the Court found that the commandeering concerns “in FERC [were] inapplicable to § 310.” Baker, 485 U.S. at 513. Importantly, the Court distinguished § 310 from the statute in F.E.R.C. because the Court found that “Section 310 regulates state activities; it does not, as did the statute in FERC, seek to control or influence the manner in which States regulate private parties.” Id. at 514. Similarly, in Reno, the Court addressed a statute that did not require (1) “the States in their sovereign capacity to regulate their own citizens,” (2) “the . . . Legislature to enact any laws or regulations,” or (3) “state officials to assist in the enforcement of federal statutes regulating private individuals.” 528 U.S. at 151. It was only on these bases that the Supreme Court found the statute at issue in Reno was “consistent with the constitutional principles enunciated in New York and Printz.” Id.

Unlike the statutes at issue in Baker and Reno, however, PASPA seeks to control and influence the manner in which States regulate private parties. Through PASPA, Congress unambiguously commands that “[i]t shall be unlawful for . . . a governmental entity to . . . authorize by law” sports gambling. 28 U.S.C. § 3702. By issuing this command, Congress has set an impermissible “mandatory agenda to be considered in all events by state legislative or administrative decisionmakers.” F.E.R.C., 456 U.S. at 769.

3.

The logical extension of the majority is that PASPA prevents States from passing any laws to repeal existing gambling laws. As the majority correctly notes, “[t]he word
‘authorize’ means, inter alia, ‘[t]o empower; to give a right or authority to act,’ or ‘[t]o permit a thing to be done in the future.’” Maj. Op., at 17 (quoting Black’s Law Dictionary 133 (6th Ed. 1990)) (footnote omitted). Because authorization includes permitting a thing to be done, it follows that PASPA also prevents state officials from stopping enforcement of existing gambling laws. States must regulate conduct prioritized by Congress. Cf. Conant, 309 F.3d at 646 (Kozinski, J., concurring) (“[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated.”).

It is true that civil actions to enjoin a violation of PASPA “may be commenced in an appropriate district court of the United States by the Attorney General of the United States.” 28 U.S.C. § 3703. But it can hardly be said that the United States Attorney General bears the full regulatory burden because, through PASPA, Congress effectively commands the States to maintain and enforce existing gambling prohibitions.1

PASPA is a statute that directs States to maintain gambling laws by dictating the manner in which States must enforce a federal law. The Supreme Court has never considered Congress’ legislative power to be so expansive. See Prigg v. Com. of Pennsylvania, 41 U.S. 539, 541 (1842) (“It might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to

1 A refusal to enforce existing laws would be the same as a repeal of existing laws: the States would be authorizing sports wagering.
provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the constitution’); F.E.R.C., 456 U.S. at 761–62 (“[T]his Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations ”) (citing E.P.A. v. Brown, 431 U.S. 99 (1977)); New York, 505 U.S. at 178 (“Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.”); Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (plurality opinion) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” (quoting New York, 505 U.S. at 162)).

II.

It is now apparent that Christie I was incorrect in finding that “nothing in [PASPA’s] words requires that the states keep any law in place.” 730 F.3d at 232 (first and third emphasis added). With respect to the doctrinal anchors of Christie I, the cornerstone of its holding has been eroded by the majority, which has excised Christie I’s discussion regarding “a false equivalence between repeal and an authorization.” Id. at 233. Notably, that discussion was included in Christie I to avoid “a series of constitutional problems.” Id. Today’s majority makes it clear that passing a law so that there is no law in place governing sports wagering is the same as authorizing it by law. See Maj. Op., at 17 (“The word ‘authorize’ means, inter alia, ‘[t]o empower; to give a right or authority to act,’ or ‘[t]o permit a thing to be done in the future.’”) (citation and footnote omitted).
I dissented in *Christie I* because the distinction between repeal and authorization is unworkable. Today’s majority opinion validates my position: PASPA leaves the States with no choice. While *Christie I* at least gave the States the option of repealing, in whole or in part, existing bans on gambling on sporting events, today’s decision tells the States that they must maintain an anti-sports wagering scheme. The anti-commandeering doctrine, essential to protect State sovereignty, prohibits Congress from compelling States to prohibit such private activity. Accordingly, I dissent.