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## NCAA v. N.J.: New Jersey Rolls the Dice on a Tenth Amendment Challenge to the Professional and Amateur Sports Protection Act

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NCAA V. N.J.: NEW JERSEY ROLLS THE DICE ON A  
TENTH AMENDMENT CHALLENGE TO THE  
PROFESSIONAL AND AMATEUR SPORTS  
PROTECTION ACT

I. INTRODUCTION

The National Football League (“NFL”), advertisers, and fans spend enormous amounts of money on the Super Bowl each year, which arguably has the effect of stimulating the economy on a national scale.<sup>1</sup> This claim may be true, given that Super Bowl XLVIII resulted in \$210 million in direct spending for the Greater New York City metropolitan area when MetLife Stadium in East Rutherford, New Jersey hosted the 2014 matchup.<sup>2</sup> One state in particular recognizes a yearly economic boost as a result of the Super Bowl despite never having hosted the event.<sup>3</sup> Nevada, notwithstanding federal legislation prohibiting sports wagering, has consistently benefitted from the Super Bowl because gambling and betting entities across the state are legally authorized to implement and carry out sports wagering schemes.<sup>4</sup> Nevada’s gambling regime enables individuals to place bets on the outcome of the Super Bowl and on any live sporting event taking place across the country both profes-

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1. See *Super Bowl by the Numbers: 2013 Edition*, DAVERAMSEY.COM, <http://www.daveramsey.com/blog/2013-super-bowl-by-the-numbers> (last visited Jan. 29, 2014) (discussing revenue generated by various entities during Super Bowl XLVII).

2. See *PwC US Anticipates Super Bowl XLVIII to Generate Over \$210 Million in Direct Spending for the New York/New Jersey Area*, PwC (Jan. 27, 2014), <http://www.pwc.com/us/en/press-releases/2014/pwc-super-bowl-press-release.jhtml> (projecting that Super Bowl XLVIII’s financial impact on New Jersey and New York area from direct spending will be about \$210 million).

3. See Frank Pingue, *Ravens’ Super Bowl Win a Boon For Vegas Profit*, REUTERS (Feb. 4, 2013, 7:50PM), <http://www.reuters.com/article/2013/02/05/us-nfl-super-bowl-vegas-idUSBRE91401N20130205> (“Nevada sports books kept a combined \$7.2 million from Super Bowl bets, or 7.3 percent of the total wagers placed, unaudited figures showed. That was up from the \$5 million they kept last year and the highest since pocketing nearly \$13 million in 2007.”); Hannah Dreier, *Super Bowl 2014: Football Betting More Popular Than Ever in Vegas*, THE DELAWARE COUNTY DAILY TIMES (Jan. 27, 2014, 3:38PM), <http://www.delcotimes.com/20140127/super-bowl-2014-football-betting-more-popular-than-ever-in-vegas> (stating that fans “bet an unprecedented \$99 million on the Super Bowl” in 2013).

4. See Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701-3704 (2006) [hereinafter “PASPA”]. PASPA currently provides for an exemption for the states of Nevada, Oregon, Montana, and Delaware. See *id.* § 3704 (listing states exempt from PASPA).

sionally and collegiately.<sup>5</sup> As a result, Nevada capitalizes on live sporting events by authorizing sports wagering, and in doing so, generates revenue for the state.<sup>6</sup> Sports fans wagered a record \$119.4 million on Super Bowl XLVIII and, as a result of the Seattle Seahawks' 43-8 surprising victory over the favored Denver Broncos, Nevada sportsbooks reaped a record \$19.7 million in profits from that event.<sup>7</sup>

Recognizing the impact sports wagering can have on a state's bottom lines, state legislators have introduced legislation that would reverse prior state prohibitions on sports betting.<sup>8</sup> Such attempts directly contravene the purpose of the Professional and Amateur Sports Protection Act ("PASPA"), a federal law that prohibits state-sanctioned sports wagering.<sup>9</sup> Nonetheless, state officials have continued to argue that the federal law is invalid.<sup>10</sup> Recently, however, the Federal Court of Appeals for the Third Circuit dealt a blow to challengers of the law in *NCAA v. Governor of New Jersey*.<sup>11</sup> In this case, the court upheld the constitutionality of PASPA and subsequently enjoined New Jersey from enacting a sports gambling li-

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5. See *Sports Wagering*, AMERICAN GAMING ASSOCIATION, <http://www.american-gaming.org/industry-resources/research/fact-sheets/sports-wagering> (last visited Jan. 30, 2014) ("More bets are placed on the Super Bowl than on any other single day sporting event of the year, however more is wagered during the first four days of the men's March Madness tournament.").

6. See *id.* (stating that in 2012 Nevada generated gross revenue of \$170 million directly from sports wagering). "The Las Vegas Convention and Visitors Authority estimated that the 2012 Super Bowl weekend produced \$106.2 million in non-gaming economic impact and attracted 310,000 visitors." *Id.*

7. See *Fans Bet Record \$119M on Super Bowl*, ESPN.COM (Feb. 4, 2014, 9:37AM), [http://espn.go.com/nfl/playoffs/2013/story/\\_/id/10399019/super-bowl-xlvihi-fans-bet-record-119m-game-nevada-casinos](http://espn.go.com/nfl/playoffs/2013/story/_/id/10399019/super-bowl-xlvihi-fans-bet-record-119m-game-nevada-casinos) (reporting record profits as a result wagering on Super Bowl XLVIII). "Denver Broncos were a 2.5-point favorite, but the Seattle Seahawks took the championship 43-8." *Id.* (suggesting record profits resulted from Seattle Seahawks upset over Denver Broncos).

8. See Patrick McGreevy, *California Legislators Again Consider Legalizing Sports Betting*, LOS ANGELES TIMES (Feb. 7, 2013, 8:00AM), <http://latimesblogs.latimes.com/california-politics/2013/02/california-lawmakers-again-consider-legalizing-sports-betting.html> (reporting state officials' discussions to draft legislations legalizing sports gambling in California); see also Melanie Batley, *More States Want In on Sports Betting to Close Budget Gaps*, NEWSMAX (Mar. 28, 2013, 12:13PM), <http://www.newsmax.com/Newsfront/states-sports-betting-budget/2013/03/28/id/496770> (describing attempts by Illinois, California, and New Jersey legislatures to legalize sports betting in effort to close budgets gaps).

9. See 28 U.S.C. §§ 3701-3704 (2006) (prohibiting states from licensing or authorizing sports gambling regimes).

10. For a further discussion of the various claims asserted by opponents regarding the constitutionality of PASPA, see *infra* notes 108 to 146 and accompanying text.

11. See generally *NCAA v. Governor of N.J.*, 730 F.3d 208, 240-41 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014) [hereinafter "*NCAA II*"].

censing scheme.<sup>12</sup> New Jersey appealed the decision to the Supreme Court; however, the Supreme Court denied New Jersey's Petition for writ of certiorari.<sup>13</sup> Consequently, the holding prevents any state within the jurisdiction of the Third Circuit from enacting any legislation that would legalize wagering on sports.<sup>14</sup> Thus, *NCAA* has potential broad implications for all states going forward as they seek to generate revenue in an effort to minimize budget shortfalls.<sup>15</sup>

This Casenote analyzes the Third Circuit's decision in *NCAA* and asserts that the court failed to consider how PASPA violates the Tenth Amendment, thereby ignoring a way in which the legislation is unconstitutional.<sup>16</sup> Part II describes the passage of the Sports Wagering Law in New Jersey and the events leading up to the civil action filed against the state.<sup>17</sup> Part III provides a background to sports gambling and the passage of PASPA.<sup>18</sup> Part IV summarizes the Third Circuit's decision in *NCAA* and focuses on the court's analysis of the anti-commandeering principle and issues pertaining to sovereignty of the states.<sup>19</sup> Part V provides an alternative interpretation of the constitutional challenges to PASPA asserted by New Jersey.<sup>20</sup> Finally, Part VI discusses the impact of *NCAA* on the ability of states to enact sports wagering laws.<sup>21</sup>

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12. See *NCAA II*, 134 S. Ct. at 240-41 (holding PASPA constitutional and enjoining New Jersey from implementing sports wagering scheme in the state).

13. See *Christie v. NCAA*, 134 S. Ct. 2866 (2014) (denying writ of certiorari); see *Christie v. NCAA*, 2014 WL 572929, *petition for cert. filed*, (U.S. Feb. 12, 2014) (No. 13-967) (requesting United States Supreme Court grant petition for certiorari). See also Ryan Hutchins, *Chris Christie Appeals Sports Betting Case to U.S. Supreme Court*, NJ.COM (Feb. 18, 2014, 8:37PM), [http://www.nj.com/politics/index.ssf/2014/02/chris\\_christie\\_appeals\\_sports\\_betting\\_case\\_to\\_us\\_supreme\\_court.html](http://www.nj.com/politics/index.ssf/2014/02/chris_christie_appeals_sports_betting_case_to_us_supreme_court.html) (reporting Governor Chris Christie appealed decision of Third Circuit to U.S. Supreme Court).

14. For a further discussion of the impact of the ruling in *NCAA*, see *infra* notes 179 to 197 and accompanying text.

15. For a further discussion of the effects of *NCAA* on all states, see *infra* notes 179 to 197 and accompanying text.

16. For a discussion of the Third Circuit's decision, see *infra* notes 95 to 146 and accompanying text.

17. For discussion of the events leading up to the passage of the New Jersey Sports Gambling Law, which legalized sports gambling, and the suit filed against New Jersey, see *infra* notes 22 to 43 and accompanying text.

18. For a discussion on sports wagering and the passage of PASPA, see *infra* notes 44 to 59 and accompanying text.

19. For a detailed discussion of the court's decision in *NCAA*, see *infra* notes 95 to 146 and accompanying text.

20. For a discussion of the court's flawed reasoning regarding the anti-commandeering principle, see *infra* notes 147 to 178 and accompanying text.

21. For a further discussion of the impact of the ruling in *NCAA*, see *infra* notes 179 to 196 and accompanying text.

## II. FACTS

In 2010, the New Jersey legislature agreed to place a legislatively referred constitutional amendment regarding the legalization of sports gambling on the ballot for voter approval in the November 2011 election.<sup>22</sup> On November 9, 2011, over 60 percent of New Jersey voters approved the referendum, which granted the legislature the authority to amend the constitution to allow sports wagering.<sup>23</sup> Shortly after the referendum was approved, the legislature passed a bill granting the state authority to issue licenses to the state's casinos and racetracks, permitting gambling on live sporting events.<sup>24</sup> Governor Chris Christie immediately signed the bill into law, and it became known as the Sports Wagering Law.<sup>25</sup> On Octo-

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22. New Jersey's "Senate and Assembly guaranteed that a referendum [would] appear on the November ballot asking voters whether they want[ed] to amend New Jersey's constitution by legalizing sports betting in the state." See The Associated Press, *N.J. Legislature Approves Legalizing Sports Betting Question on Election Ballot*, NJ.COM (Dec. 13, 2010, 7:53PM), [http://www.nj.com/news/index.ssf/2010/12/nj\\_voters\\_to\\_decide\\_on\\_legaliz.html](http://www.nj.com/news/index.ssf/2010/12/nj_voters_to_decide_on_legaliz.html). In order to amend or add a new provision to a state constitution, state legislatures typically pass a legislative proposal, which is then placed on the ballot for approval by the state's electorate. See 16 AM. JUR. 2D *Constitutional Law* § 29 (2014). An amendment to New Jersey's constitution may be proposed in the Senate or the General Assembly. See N.J. CONST. art. 9, § 1. If the proposed amendment is approved by three-fifths of all the members of both the Senate and General Assembly, the proposal is submitted to the voters of New Jersey for approval. See *id.* If the amendment is approved by a majority of legally registered voters of New Jersey, the proposed amendment is added to the constitution within thirty days after the election, unless otherwise provided by the amendment. See N.J. CONST. art. 9, § 6.

23. See Donald Wittkowski, *New Jersey Voters Approve At Casino and Race Tracks by Wide Margin*, PRESS OF ATLANTIC CITY (Nov. 9, 2011, 9:54AM), [http://www.pressofatlanticcity.com/politics/new-jersey-voters-approve-sports-betting-at-casinos-and-race/article\\_ad60482c-0a86-11e1-a614-001cc4c03286.html](http://www.pressofatlanticcity.com/politics/new-jersey-voters-approve-sports-betting-at-casinos-and-race/article_ad60482c-0a86-11e1-a614-001cc4c03286.html) (reporting New Jersey voters, by margin of two-to-one, approved referendum to legalize sports betting at Atlantic City casinos and state's horse-racing tracks). The ballot measure stated the following:

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 racetracks, in-person or through an account wagering system, on the results of professional, certain college, or amateur sport or athletic events, be approved?

State of N.J., Assemb. Con. Res. No. 98, 214th Legislature, Proposed Feb. 8, 2010.

24. See 2011 N.J. Sess. Law Serv. Ch. 13 (Assembly No. 4385); *NJ Lawmakers Approve Sports Betting Bill*, NEW JERSEY 101.5 (Jan. 10, 2012, 1:15AM), <http://nj1015.com/nj-lawmakers-approve-sports-betting-bill/> (referencing passage of sports wagering bill by New Jersey legislature).

25. See Sports Wagering Law, N.J. Stat. Ann. §§ 5:12a-1 to 5:12a-6 (2013); see also Sarah Coffey, *N.J. Moves Towards Legal Sports Betting This Fall, in Time for NFL Season*, THE NATIONAL LAW REVIEW (May 25, 2012), <http://www.natlawreview.com/article/nj-moves-towards-legal-sports-betting-fall-time-nfl-season> (describing enactment of New Jersey's Sports Wagering Law).

ber 15, 2012, New Jersey promulgated sports wagering regulations, which enacted a scheme through which New Jersey could “sponsor, operate, advertise, promote, license and/or authorize sports gambling.”<sup>26</sup>

In August 2012, prior to the promulgation of the regulations, the National Collegiate Athletic Associations (“NCAA”), National Basketball Association (“NBA”), NFL, National Hockey League (“NHL”), and Office of the Commissioner of Baseball doing business as Major League Baseball (“MLB”) (collectively “the Leagues”) filed an action in the United States District Court for the District of New Jersey.<sup>27</sup> The Leagues sought to enjoin New Jersey from implementing the Sports Wagering Law.<sup>28</sup> The Leagues asserted the Sports Wagering Law violated PASPA, and was therefore, preempted by federal law.<sup>29</sup> Three days after filing the Complaint, the Leagues filed a Motion for Summary Judgment arguing PASPA was a permissible exercise of Congress’ powers pursuant to the Commerce Clause and that it did not violate the Equal Protection Clause or the Tenth Amendment.<sup>30</sup> In response, the defendants filed a Motion to Dismiss claiming the Leagues did not have standing as private entities to enforce PASPA.<sup>31</sup> On December 21, 2012, the District Court issued an opinion concluding that the Leagues had made an adequate showing of standing; accordingly, the court denied the defendants’ Motion to Dismiss.<sup>32</sup> In January 2013, the United States filed a Notice of Intervention, whereby the court

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26. See *NCAA v. Christie*, 926 F. Supp. 2d 551, 556 (D.N.J. 2013) [hereinafter *NCAA I*] (describing regulations promulgated by New Jersey).

27. See *NCAA I*, 926 F. Supp. at 554 (summarizing background of case).

28. See *id.* (discussing plaintiffs’ motives in filing action against New Jersey).

29. See Complaint for Declaratory and Injunctive Relief, *NCAA v. Christie*, 2012 WL 3171566 (D.N.J. 2012) (No. CV124947) (“In clear violation of PASPA, and in contravention of the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, Cl. 2, New Jersey has enacted the Sports Gambling Law.”).

30. See generally Brief in Support of Plaintiffs’ Motion for Summary Judgment and, If Necessary, to Preserve the Status Quo, a Preliminary Injunction at 7, *NCAA v. Christie*, 2012 WL 3964728, (D.N.J. 2012) (No. 12-CV-04947). See also U.S. CONST. amend. X.

31. The defendants’ brief stated the following:

But to establish their standing as private entities to enforce this federal law, the Leagues cannot merely point to a private right of action in the statute; they must also plausibly allege that they will suffer a concrete and imminent ‘injury-in-fact’ that is ‘fairly traceable to the challenged action of the defendant.’

Brief in Support of Defendants’ Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b) (1) at 1, *NCAA v. Christie*, 2012 WL 3964552 (D.N.J. 2012) (No. 3:12-cv-04947).

32. See *NCAA v. Christie*, No. 12-4947, 2012 WL 6698684, at \*9 (D.N.J. Dec. 21, 2012).

granted leave to the Department of Justice (“DOJ”) to file a brief regarding the constitutionality of PASPA.<sup>33</sup>

In late February of 2013, the District Court issued an opinion granting the plaintiffs’ Motion for Summary Judgment, thereby granting the Leagues and the United States a permanent injunction.<sup>34</sup> First, the court concluded that PASPA “is a rational expression of Congress’ powers under the Commerce Clause” and the presence of a grandfather clause granting exemptions to four states neither deprives the statute of constitutionality, nor undermines rational basis review.<sup>35</sup> Second, the court determined that PASPA did not violate the Tenth Amendment since the statute did not commandeer New Jersey into regulating private action, as it requires no affirmative action on the part of the state.<sup>36</sup> Third, the court held that PASPA does not violate the Due Process Clause and Equal Protection Principles because “PASPA [does] not offend rational basis review where Congress . . . has determined ‘that all such sports gambling is harmful,’ but ‘has no wish to apply [PASPA] retroactively.’”<sup>37</sup> Finally, the court rejected New Jersey’s challenge to PASPA on “Equal Footing” grounds since New Jersey “[was] inappropriately situated to make an argument that it is being treated differently than the original colonies pursuant to the Equal Footing Doctrine.”<sup>38</sup>

After the District Court issued its opinion, New Jersey filed an appeal with the United States Court of Appeals for the Third Cir-

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33. See *NCAA I*, 926 F. Supp. at 553 (detailing process whereby DOJ intervened and describing all other subsequent filings).

34. See *id.* at 579 (granting plaintiffs’ Motion for Summary Judgment and issuing permanent injunction).

35. See *id.* at 554-55 (determining PASPA does not violate Commerce Clause).

36. See *id.* at 561-73 (discussing anti-commandeering principles and its applicability to PASPA).

37. See *id.* at 573-76 (stating “[t]he reliance interests of the excepted states, coupled with the government’s legitimate interest in stemming the tide of legalized sports gambling, provide ample support for upholding PASPA pursuant to rational basis review.”).

38. See *id.* at 577 (describing rationale for concluding PASPA does not violate Equal Footing Doctrine).

Equal-Footing Doctrine is a principle of Constitutional law that mandates that new states be admitted to the Union as equals of the existing states, in terms of power, sovereignty, and freedom. States must be admitted on an equal footing in the sense that Congress may not exact conditions solely as a tribute for admission, but it may, in the enabling or admitting acts or subsequently impose requirements that would be or are valid and effectual if the subject of congressional legislation after admission.

Equal Footing Doctrine, USLEGAL, <http://definitions.uslegal.com/e/equal-footing-doctrine/> (last visited Jan. 31, 2014) (summarizing Equal Footing Doctrine).

cuit, challenging the District Court's decision.<sup>39</sup> In a two-to-one decision, the Third Circuit affirmed the District Court's judgment and concluded that PASPA was valid law, thus preempting New Jersey's Sports Wagering Law.<sup>40</sup> By holding PASPA constitutional, the court stated "[t]he law neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment or anywhere else in our Constitutional structure."<sup>41</sup> Judge Thomas Vanaskie concurred in part and dissented in part, stating, "PASPA prohibits states from authorizing sports gambling and thereby directs how *states* must treat such activity" and is a "congressional directive" that "violates the principles of federalism."<sup>42</sup> After the opinion was issued, New Jersey filed a petition for a rehearing before the full Third Circuit; the petition was denied.<sup>43</sup>

### III. LEGAL BACKGROUND

#### A. A Brief History of Sports Gambling in the United States

Different forms of gambling have been a part of American culture since the Revolutionary War.<sup>44</sup> Sports gambling, in particular,

39. See *NCAA II*, 730 F.3d 208, 208 (3d Cir. 2013) (appealing decision of District Court).

40. See *id.* at 240-41 (concluding PASPA is constitutional and holding Sports Wagering Law conflicts with federal law).

41. See *id.* at 240 (holding nothing in PASPA violates Constitution).

42. See *id.* at 241 (Vanaskie, J., dissenting) (detailing reasons for dissenting from opinion).

43. See Chris Sieroty, *U.S. Supreme Court is Last Option in New Jersey Sports Betting Case*, LAS VEGAS REVIEW-JOURNAL (Nov. 18, 2013, 5:24PM), <http://www.reviewjournal.com/business/us-supreme-court-last-option-new-jersey-sports-betting-case> (reporting that Third Circuit denied request for rehearing of case). The opinion in *NCAA* was issued by a three-judge panel sitting in the United States Court of Appeals for the Third Circuit. See *id.* When a party to a proceeding does not prevail, they have the option to file a petition for a rehearing before a panel or *en banc* within 14 days (45 days in civil cases in which the United States is a party). See Fed. R. App. P. 40(a)(1).

A petition for rehearing must specify: (a) the point(s) of law or fact that the panel overlooked or misapprehended and that affected the outcome of the appeal; (b) the pivotal effect of a new precedential decision or statute; or (c) the issue of exceptional importance that calls out for *en banc* attention.

The Bar Association for the Third Federal Circuit, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT PRACTICE GUIDE (2012), available at <http://thirdcircuitbar.org/documents/third-circuit-bar-practice-guide.pdf> (detailing rules and procedures that apply for cases filed in U.S. Court of Appeals for the Third Circuit).

44. See Chil Woo, *All Bets Are Off: Revisiting The Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 571-72 (2013) (discussing use of lotteries to finance Revolutionary War and colonial governments). During the Revolutionary War, the Board of Treasury established a national lottery to raise funds to support the Continental Army. See Richard McGowan, STATE LOTTERIES AND LEGALIZED GAMBLING: PAINLESS REVENUE OR PAINFUL MIRAGE 10 (Praeger ed.,



gained traction in the late nineteenth century as professional baseball became increasingly popular and as illegal activity flourished through organized networks of underground bookmakers, or “bookies.”<sup>45</sup> Although most religious institutions were predisposed to view gambling as immoral, the negative impacts of sports gambling did not become apparent to the general population until after the 1919 Black Sox scandal, when eight members of the Chicago White Sox were indicted for conspiring to fix and lose games during the 1919 World Series.<sup>46</sup> As a result, support for sports wagering quickly disappeared.<sup>47</sup>

In 1951, over thirty years after the Black Sox scandal, Congress passed legislation removing restrictions on sports betting and imposed a ten percent tax on all sports bets made within the United States.<sup>48</sup> In execution, this tax actually only affected Nevada, as it was the only state to have authorized sports gambling.<sup>49</sup> In 1961, Congress passed the Wire Act in an effort to prevent the proliferation of interstate gambling, “leaving states to regulate and control aspects of sports gambling as they saw fit within their borders.”<sup>50</sup>

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1994) (discussing Congress’s financing of Revolutionary War). Shortly after the establishment of a national lottery, almost every colony established their own lottery scheme to fund their soldiers in the war. *See id.* (stating Massachusetts, Rhode Island, New York, Vermont, Virginia, North Carolina, and South Carolina established lotteries to fund their troops).

45. *See Woo, supra* note 44, at 571-72 (detailing rise in illegal sports gambling in conjunction with rise of professional baseball).

46. *See Douglas Linder, The Black Sox Trial: An Account*, UMKC.EDU (2010), <http://law2.umkc.edu/faculty/projects/ftrials/blacksox/blacksoxaccount.html> (recounting price-fixing scandal associated with 1919 World Series).

47. *See Daniel A. Nathan, The Big Fix*, LEGAL AFFAIRS (Mar./Apr. 2004), available at [http://www.legalaffairs.org/issues/March-April-2004/review\\_nathan\\_marapr04.msp](http://www.legalaffairs.org/issues/March-April-2004/review_nathan_marapr04.msp) (“The Black Sox Scandal was the sports crime of the 20th century. . . . [n]o sports scandal has similarly shocked America or had such a lasting impact on its culture.”).

48. *See Eric Meer, Note, The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 287 (2011) (“Congress imposed an annual fifty-dollar excise tax on bookmakers and a ten-percent tax on all sports bets. The tax only impacted Nevada, the sole state to have any form of legalized sports betting.”).

49. *See History of Sports Betting*, THEBETTINGLINE.COM, <http://www.thebettingline.com/history-of-sports-betting.html> (last visited Feb. 1, 2014) (discussing regulations passed by Congress legalizing sports betting and imposing tax).

50. *See Woo, supra* note 44, at 574 (describing Congress’s efforts to reign in nation-wide effects of sports betting).

## B. The Professional and Amateur Sports Protection Act ("PASPA")

As more states considered enacting sport-related gambling regimes, professional and collegiate sports leagues continued to put pressure on Congress to pass legislation to outlaw sports wagering.<sup>51</sup> Legislators quickly became concerned that "[s]ports gambling raises people's suspicions about point-shaving and game-fixing" and would threaten the integrity of the game.<sup>52</sup> In response, Congress enacted PASPA, which "prohibit[s] sports gambling conducted by, or authorized under the law of, any State or other governmental entity."<sup>53</sup> Specifically, PASPA makes it unlawful for any person or governmental entity to:

sponsor, operate, advertise, promote, license, or authorize by law or compact . . . lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>54</sup>

Moreover, PASPA grants the "Attorney General of the United States, or . . . professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of " a violation of PASPA, the ability to file a civil action in federal court to enjoin any person or government entity in violation of the Act.<sup>55</sup> Additionally, PASPA does not apply to "lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation . . . during the period beginning January 1, 1976, and ending August 31, 1990."<sup>56</sup> This provision has proven controversial, as it has ex-

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51. See Bill Bradley, *The Professional and Amateur Sports Protection Act-Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 8 (1992) (noting that in 1992 at least thirteen states were considering measures to legalize state-sponsored sports betting). See S. REP. NO. 102-248, at 3 (1991) (listing individuals who testified at public hearing voicing support for legislation prohibiting sports gambling including, but not limited to, commissioners of NFL, NBA, NHL, and MLB).

52. See Bradley, *supra* note 51, at 7-8 ("Where sports-gambling occurs, fans cannot help but wonder if a missed free throw, dropped fly ball, or a missed extra point was part of a player's scheme to fix the game. If sports betting is legalized, fans will question every coaching decision and official's call.")

53. See S. REP. NO. 102-248, *supra* note 51, at 3.

54. See 28 U.S.C. § 3702 (2006).

55. See 28 U.S.C. § 3703 (2006).

56. See 28 U.S.C. § 3704(a)(1) (2006).

empted Nevada, Oregon, Montana, and Delaware from PASPA.<sup>57</sup> Moreover, PASPA allows casinos that had a betting, gambling, or wagering scheme in place prior to October 2, 1991 to implement a legal sports-gambling regime within one year of the enactment of PASPA.<sup>58</sup> As a result, challengers of the law scrutinize the exemptions provided by PASPA, arguing that by providing these exemptions the law has undermined its own premise.<sup>59</sup>

### C. Prior Challenges to PASPA

#### 1. *A Statutory Interpretation of the Word "Scheme"*

Prior to the enactment of PASPA, Delaware conducted multi-game (parlay) betting on NFL games.<sup>60</sup> Consequently, PASPA afforded the state an exception with respect to the scheme in place at the time of the law's enactment.<sup>61</sup> In 2009, Delaware Governor Jack Markell signed the Sports Lottery Act into law.<sup>62</sup> The Act authorized a sports betting scheme that included "single-game betting in addition to multi-game" betting based on the "outcome of any professional or collegiate sports event including racing . . . excluding sporting events that involve a Delaware college or university, and amateur or professional sporting events that involve a Delaware team."<sup>63</sup> Two months after signing the Act into law, the NFL, NBA,

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57. See 28 U.S.C. § 3704(a)(1). See also Bradley, *supra* note 51, at 9-10 (suggesting certain states had sports-betting schemes in place prior to enactment of PASPA and "elimination of such schemes in these particular states would work a harsh result.").

58. See U.S.C. § 3704(a)(3). Any casino satisfying the criteria, and that had enacted a sports gambling scheme within one year of PASPA's enactment, was granted an exception to PASPA. See *id.*

59. See S. REP. NO. 102-248, *supra* note 51, at 4-5 (stating purpose of PASPA is "to maintain the integrity" of professional and amateur sports). For a further discussion of the arguments suggesting that PASPA is discriminatory and allowing certain states to carry out sports-betting schemes undermines the purpose for the enactment, see *infra* notes 129-137 and accompanying text.

60. See *Gambling in Delaware: Pass, punt, PASPA*, THE ECONOMIST, Sept. 24, 2009, available at <http://www.economist.com/node/14506468> (stating Delaware had three-game "parlay" betting regime in place in 1976).

61. See generally 28 U.S.C. § 3704. See also Office of the Comm'r of Baseball v. Markell, 579 F.3d 293, 296 (3d Cir. 2009) [hereinafter "*Markell*"] (describing sports gambling scheme conducted by Delaware since 1976). "A parlay is a single bet that links together two or more individual wagers and is dependent on all of those wagers winning together. . . . [i]f any of the bets in the parlay loses, the entire parlay loses." See *Parlay*, PREGAME.COM, <http://pregame.com/EN/main/sports-betting-basics/glossary/terms/parlay.html> (lasted visited Feb. 3, 2014) (defining parlay wagering).

62. See Sports Lottery Act, DEL. CODE ANN. tit. 29, §§ 4801-4824 (West 2012), *invalidated by Markell*, 579 F.3d 293 (3d Cir. 2009).

63. See DEL. CODE ANN. tit. 29, § 4801 (West 2012), *invalidated by Markell*, 579 F.3d 293 (3d Cir. 2009) (describing statement of purpose). See also *Markell*, 579

NHL, MLB, and NCAA sought to enjoin Delaware officials from implementing provisions of the Sports Lottery Act that included sports wagering beyond parlay betting on NFL games.<sup>64</sup> The Leagues claimed the sports betting schemes authorized by Delaware violated PASPA.<sup>65</sup> The District Court for the District of Delaware denied the plaintiffs' Motion for a Preliminary Injunction and stated the "Leagues had not shown a likelihood of success on the merits."<sup>66</sup> The court scheduled the case for trial and the plaintiffs filed an expedited appeal with the United States Court of Appeals for the Third Circuit.<sup>67</sup>

In *Office of Commissioner of Baseball v. Markell*, the Third Circuit reversed the District Court's decision to deny the plaintiffs' injunction.<sup>68</sup> Delaware argued the single-game wagers authorized by the Sports Lottery Act did not violate PASPA since the state conducted multi-game betting schemes on NFL games since 1976, and therefore qualified for an exception under PASPA.<sup>69</sup> PASPA does not apply to "lotter[ies], 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 . . . during the period beginning January 1, 1976, and ending August 31, 1990."<sup>70</sup> Delaware contended that the exception allowed it to conduct "any sports lottery under State control . . . because it did so in 1976" and that the word "scheme" refers to a "sports lottery under State control in which the winners of the lottery games were affiliated with the outcome of sporting events."<sup>71</sup> The Third Circuit disagreed with Delaware's broad interpretation and stated that PASPA re-

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F.3d at 296 (detailing sports betting scheme to be implemented by Sports Lottery Act and corresponding Regulations).

64. See *Markell*, 579 F.3d at 295 (noting that NFL, NBA, NHL, MLB, and NCAA sought to enjoin Delaware officials on September 1, 2009).

65. See *id.* at 297 (requesting that Delaware be enjoined "from commencing, instituting, operating and maintaining a proposed 'sports lottery' to the extent that such lottery permits (i) single-game sports betting, (ii) betting on sports other than professional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976.").

66. See *id.* (stating District Court's reason for denying Leagues' motion).

67. See *Office of the Comm'r of Baseball v. Markell*, C.A. No. 09-538, 2009 WL 2450284, at \*1 (D. Del. 2009). See also *Markell*, 579 F.3d at 297 (describing plaintiffs' efforts to receive expedited appeal).

68. See *Markell*, 579 F.3d at 304 (reversing District Court's decision).

69. See *id.* at 301 (discussing Delaware's argument).

70. See *Markell*, 579 F.3d at 301 (outlining scope of statute's application (quoting 28 U.S.C. § 3704(a))).

71. See *Markell*, 579 F.3d at 301 (citations omitted) (internal quotation marks omitted) (detailing Delaware's interpretation of PASPA's exemption provision as outlined in Delaware's brief).

quired the court “to determine ‘the extent’ – or degree – to which such lottery *was conducted*.”<sup>72</sup> Since Delaware conducted a betting scheme limited to multi-game wagering on only NFL teams between 1976 and 1990, the court determined that any effort to allow single-game betting or multi-game betting on sports contests beyond the NFL violated PASPA.<sup>73</sup>

## 2. *Two Failed Attempts at a Constitutional Challenge*

With the exception of *Markell*, PASPA has only been challenged on two other occasions, both arising out of the State of New Jersey.<sup>74</sup> First, in 2006, the plaintiffs in *Flagler v. U.S. Attorney* filed a federal civil action against the Attorney General of the United States and the United States Attorney for the District of New Jersey, alleging that PASPA did not fall under Congress’s Commerce Clause powers “because the activity it prohibits stays within borders of a single state,” and also violates the Tenth Amendment.<sup>75</sup> However, without addressing the merits, the District Court dismissed the case for lack of standing under the three-prong test established in *Lujan v. Defenders of Wildlife*.<sup>76</sup>

In 2010, PASPA was challenged on constitutional grounds for the second time in *Interactive Media Entm’t Gaming Ass’n v. Holder*.<sup>77</sup> In that case, the New Jersey Thoroughbred Horseman’s Association (“N.J. Horseman’s Association”) and New Jersey State Senator Ray-

72. *See id.* (rejecting Delaware’s broad interpretation of PASPA’s exemption provision).

73. *See Markell*, 579 F.3d at 304. The Third Circuit held as follows: [N]o single-game betting was ‘conducted’ by Delaware in 1976, or at any other time during the time period that triggers the PASPA exception” and “single-game betting was not ‘conducted’ by Delaware between 1976 and 1990, such betting is beyond the scope of the exception in §3704(a)(1) of PASPA and thus prohibited under the statute’s plain language.

*Markell*, 579 F.3d at 304.

74. *See Flagler v. U.S. Attorney*, No. 06-3699 (JAG), 2007 WL 2814657 (D.N.J. Sept. 25, 2007) (challenging constitutionality of PASPA). *See also Interactive Media Entm’t & Gaming Ass’n v. Holder*, No. 09-1301 (GEB), 2011 WL 802106 (D.N.J. Mar. 7, 2011) (challenging constitutionality of PASPA).

75. *See Flagler*, 2007 WL 2814657, at \*1 (listing claims asserted in plaintiff’s complaint).

76. *See Flagler*, 2007 WL 2814657, at \*2-3 (dismissing case for lack of subject-matter jurisdiction). *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 555 (1992) (holding that in order for plaintiff to maintain standing, they must show (1) concrete and particularized injury that is either actual or imminent; (2) injury that is fairly traceable to defendant; and (3) likelihood that favorable decision will redress injury).

77. *See Holder*, 2011 WL 802106, at \* 1 (involving constitutional challenges to PASPA).

mond Lesniak filed an action in federal District Court against United States Attorney General Eric Holder challenging the constitutionality of PASPA and seeking declaratory judgment.<sup>78</sup> The President of the New Jersey Senate, Stephen Sweeney, later filed an Intervener Complaint.<sup>79</sup> Plaintiffs asserted that PASPA was a violation of several laws, including: the Commerce Clause; the First Amendment freedoms of expression and assembly; the Tenth Amendment; the Eleventh Amendment; the substantive and procedural protections of the Due Process Clause of the Fifth and Fourteenth Amendments; and the Equal Protection Clause.<sup>80</sup>

The court ultimately determined that the plaintiffs failed to demonstrate injury-in-fact and redressability and, as a result, failed to establish proper standing to mount a constitutional challenge against PASPA.<sup>81</sup> The District Court acknowledged the New Jersey legislature's efforts to place a voter referendum on the ballot, enabling the State to amend its constitution to authorize sports wagering, but noted that Senators Sweeney and Lesniak were prospectively attempting "to bypass PASPA's preemptive force."<sup>82</sup> Nonetheless, the court stated, "[t]o the extent that PASPA diminishes state authority over sports gambling, it injures state sovereignty, not legislative sovereignty."<sup>83</sup> The plaintiffs lacked standing to challenge the constitutionality of PASPA on Tenth Amendment grounds because such claims are reserved only for States and New Jersey was not a party to the action.<sup>84</sup>

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78. *See id.* (listing organizations and individuals involved in case asserting constitutional challenge to PASPA). iMEGA is a "New Jersey non-profit corporation that disseminates information regarding electronic gaming via the Internet, and has members that provide Internet gambling services." *See id.*

79. *See id.* at \*3 (detailing filing of Intervener Complaint by New Jersey Senator Stephen Sweeney).

80. *See id.* at \*5 (requesting Court find PASPA unconstitutional and permanently enjoin its enforcement).

81. *See id.* at \*3-6 (holding alleged injuries and redressability were speculative).

82. *See id.* at \*10 (stating Senators Sweeney and Lesniak were not defending enacted state law). At the time of the lawsuit, the New Jersey legislature agreed to place a legislative-referred constitutional amendment regarding the legalization of sports gambling on the ballot for voter approval in the November 2011 election. *See The Associated Press, supra* note 22 (discussing proposed voter referendum).

83. *See Holder*, 2011 WL 802106, at \*10 (describing reasons for plaintiffs' lack of standing).

84. *See id.* at \*8 (disagreeing with plaintiffs' argument). Plaintiffs argued that private party standing for Tenth Amendment claims are not foreclosed "where a federal law denies access to local political processes, and . . . that Senators Sweeney and Lesniak have standing . . . to challenge the constitutionality of a statute where the Governor or his representatives have declined to do so." *See id.*

### D. The Anti-Commandeering Doctrine

Challengers in both *Markell* and *Holder* claimed PASPA violated the Tenth Amendment.<sup>85</sup> Parties challenging federal statutes and regulatory programs on Tenth Amendment grounds often invoke the anti-commandeering doctrine, which the Supreme Court announced in *New York v. United States* and *Printz v. United States*.<sup>86</sup> This doctrine prevents Congress from commandeering the states into performing the work of federal officials.<sup>87</sup>

In *New York*, the challenged law was the the Low-Level Radioactive Waste Policy Amendments Act, which required the states to provide for the disposal of radioactive waste generated within their borders.<sup>88</sup> This statute included incentives for the states and also included a controversial provision that required states to “take title” to waste that was not properly disposed of by a certain date set by Congress.<sup>89</sup> Further, the state would be “liable for all damages directly or indirectly incurred . . . as a consequence of the failure of the State to take possession of the waste.”<sup>90</sup> The Court held that the “take title” provision was unconstitutional since it impermissibly “commandeer[ed] the legislative processes of the States by directly

85. See *Flagler v. U.S. Attorney*, No. 06-3699 (JAG), 2007 WL 2814657 (D.N.J. Sept. 25, 2007) (challenging constitutionality of PASPA on Tenth Amendment grounds). See also *Interactive Media Entm’t & Gaming Ass’n v. Holder*, No. 09-1301 (GEB), 2011 WL 802106 (D.N.J. Mar. 7, 2011) (challenging constitutionality of PASPA on Tenth Amendment grounds).

86. See Matthew D. Adler and Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71, 76-77 (1998) (discussing anti-commandeering doctrine). A federal law or regulatory scheme violates anti-commandeering principles if:

[T]he requirement commandeers state officials, rather than merely preempting state law; it does so directly rather than as a condition for federal spending, or for nonpreemption of state law; the requirement is targeted at state officials, rather than being generally applicable to state officials and private persons alike; the officials commandeered are exercising legislative or executive rather than judicial functions; and the requirement is grounded in the Commerce Clause or Congress’s other Article I powers, rather than in the grants of power to Congress in the Reconstruction Amendments.

See *id.*

87. See generally *New York v. U.S.*, 505 U.S. 144, 144 (1992) (striking down take-title provision of federal waste law because law required States to enact regulatory program and expend resources in taking title to waste). See generally *Printz v. U.S.*, 521 U.S. 898, 898 (1997) (holding that “Congress cannot . . . conscript[t] the State’s officers directly”). In *Printz*, the Court invalidated the provision of the Brady Act that required local authorities to run background checks on persons seeking to purchase guns. See *id.* at 935.

88. See *New York*, 505 U.S. at 151-52 (discussing Low-Level Radioactive Waste Policy Amendments Act).

89. See *id.*

90. See *id.* at 153-54 (discussing “take title” provision imposed on states).

compelling them to enact and enforce a federal regulatory program.”<sup>91</sup>

In *Printz*, the federal Brady Handgun Violence Prevention Act compelled state and local law enforcement officers to conduct background checks on prospective handgun purchasers.<sup>92</sup> Relying on anti-commandeering principles, the Court invalidated the statute because it impermissibly required state executive officials “to administer a federally enacted regulatory scheme.”<sup>93</sup> The Court emphasized that “Congress cannot circumvent that prohibition by conscripting the State’s officers directly.”<sup>94</sup>

#### IV. NARRATIVE ANALYSIS

##### A. Standing Issues

New Jersey asserted Congress exceeded its powers under the Commerce Clause and the Tenth Amendment and, accordingly, requested that the United States Court of Appeals for the Third Circuit find PASPA unconstitutional.<sup>95</sup> Before the Third Circuit ruled on the merits, the court first reviewed whether the Leagues had standing to bring the action.<sup>96</sup> New Jersey averred the Leagues could not “show a concrete, non-speculative injury from any potential increase in *legal* gambling.”<sup>97</sup> Unlike the District Court, the Third Circuit did not rely on *Markell* for its standing analysis since the Third Circuit did not explicitly consider Article III standing in that case.<sup>98</sup> Thus, the Circuit Court applied the following three-part test to establish standing:

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91. *See id.* at 176 (holding “take title” provision unconstitutional because it required states to implement federal regulatory program (citing *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981))).

92. *See Printz*, 521 U.S. at 903 (describing requirements imposed on state “chief law enforcement officers”).

93. *See id.* at 935 (holding law unconstitutional since Congress cannot “command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program”).

94. *Id.* (reaffirming that Congress cannot commandeer states into performing its own work).

95. *See NCAA II*, 730 F.3d at 214-15 (addressing claims asserted by New Jersey in its appeal to Third Circuit).

96. *See id.* at 217-24 (reviewing whether leagues demonstrated proper standing).

97. *See id.* at 218 (discussing New Jersey’s counterarguments to Leagues’ claims that they satisfied standing requirements).

98. *See id.* (“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 . . . . But, contrary to the Leagues’ suggestion, our analysis was limited to whether we had appellate jurisdiction.” (fifth alteration added)).



[A] plaintiff must show (1) an ‘injury in fact,’ i.e., an actually 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.<sup>99</sup>

Relying on *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*,<sup>100</sup> the court determined the Leagues satisfied the causation and redressability requirements.<sup>101</sup> The court accepted the Leagues’ concern that the law “[would] 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.”<sup>102</sup>

Next, the court focused on the injury-in-fact requirement.<sup>103</sup> The Third Circuit agreed with the Leagues’ claims “that the Sports Wagering Law makes the Leagues’ games the object of state-licensed gambling and they will suffer reputational harm if such activity expands.”<sup>104</sup> The circuit court acknowledged the Leagues’ claims were “not a generalized grievance,” and the Sports Wagering Law “aim[ed] to license private individuals to cultivate the fruits of the Leagues’ labor.”<sup>105</sup> Since the law threatened to cause the Leagues reputational harm, the Circuit Court determined that such “reputational harm is a cognizable injury in fact.”<sup>106</sup>

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99. *See id.* (discussing three-part test to establish standing (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009))).

100. *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 930 (D.C. Cir. 2004).

101. *See NCAA II*, 730 F.3d at 218-19 (finding Leagues established causation and redressability (citing *Nat’l Wrestling Coaches Ass’n*, 366 F.3d at 940-41)).

102. *See id.* at 218 (discussing reasoning for finding causation and redressability prongs were satisfied).

103. *See id.* at 219 (analyzing legal components required to establish injury-in-fact).

104. *See id.* (addressing Leagues’ claims).

105. *See id.* (discussing Leagues’ claims).

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.

*Id.* The court also highlighted that “[i]njury-in-fact may be established when the plaintiff himself is the object of the action at issue.” *See id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

106. *See NCAA II*, 730 F.3d at 220-22 (suggesting evidence in record supports conclusion that reputational harm will occur). The Circuit Court asserted that the law threatened to cause the Leagues reputational harm due to the “unwanted and stigmatizing label” resulting from the Leagues’ unwelcome association with gambling. *See id.* at 221.

## B. PASPA is Within Congress' Commerce Clause Power

After establishing the Leagues satisfied the requirements for standing, the Third Circuit addressed the merits of the case.<sup>107</sup> However, before the Circuit Court addressed anti-commandeering and equal sovereignty principles, it first examined whether Congress could even regulate sports gambling under the Commerce Clause.<sup>108</sup> Relying on *United States v. Lopez*,<sup>109</sup> the Circuit Court concluded that Congress did not exceed its powers under the Commerce Clause in its regulation of sports gambling because sports wagering and the sporting events carried out by the Leagues, considered separately or together, substantially affect interstate commerce.<sup>110</sup> The Circuit Court made three determinations in accordance with this finding: first, “both wagering and national sports are economic activities;” second, “the professional and amateur sporting events at the heart of the Leagues’ operations ‘substantially affect’ interstate commerce;” and third, “it immediately follows that placing wagers on sporting events also substantially affects interstate commerce” since the effects of gambling on sporting events “will plainly transcend state boundaries and affect a fundamentally national industry.”<sup>111</sup> Further, the Circuit Court relied on *Gonzales v. Raich*,<sup>112</sup> and held that PASPA does not unconstitutionally regulate purely local activities because Congress had a rational

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107. For a discussion of the merits of the case, see *infra* notes 108 to 146 and accompanying text.

108. See *NCAA II*, 730 F.3d at 224 (“Only after concluding that Congress may [regulate sports wagering] can we consider whether, in exercising its affirmative powers, Congress exceed[ed] a limitation imposed in the Constitution, such as by the anti-commandeering and equal sovereignty principles.”).

109. *United States v. Lopez*, 514 U.S. 549, 549 (1995).

110. See *NCAA II*, 730 F.3d at 224-26 (“Congress may regulate an activity that ‘substantially affects interstate commerce’ if [the activity] ‘arise[s] out of or [is] connected with a commercial transaction.’” (second and third alterations in original) (quoting *Lopez*, 514 U.S. at 559)).

111. See *id.* at 224-25 (listing three reasons why sports gambling and sporting events substantially affect interstate commerce). “A wager is simply a contingent contract involving ‘two or more . . . parties, having mutual rights in respect to the money or other thing wagered.’” *Id.* (alteration in original) (quoting *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 86 (Nev. 1961)). “[T]he operations of the Leagues are economic activities, as they preside essentially over for-profit entertainment.” *Id.* at 225 (describing economic activities engaged in by Leagues). “The Leagues are associations comprised of thousands of clubs and members, which in turn govern the operations of thousands of sports teams organized across the United States, competing for fans and revenue across the country.” *Id.* Americans gamble up to \$500 billion on sports each year. *Id.* (discussing report provided by New Jersey).

112. *Gonzales v. Raich*, 545 U.S. 1, 1 (2005).

basis to conclude that sports gambling regimes, while effectuated within state borders, substantially affect interstate commerce.<sup>113</sup>

### C. PASPA Does Not Commandeer the States

Next, the Third Circuit addressed New Jersey's argument that PASPA violates the anti-commandeering principle, which prohibits Congress from forcing the states "into doing the work of federal officials."<sup>114</sup> First, the Circuit Court addressed situations where Congress passed laws granting the States the choice to adopt federal standards or to participate in a federal regulatory program.<sup>115</sup> Thus, when the law does not coerce the States into enacting or implementing federal standards, there is no Tenth Amendment violation.<sup>116</sup> Referencing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,<sup>117</sup> the court stated the Tenth Amendment does not pose any obstacles "to a system by which Congress 'chose to allow the States a regulatory role'" in what is "an otherwise pre-empt[ible] field."<sup>118</sup>

Second, the Circuit Court addressed circumstances where the Supreme Court upheld affirmative prohibitions on state action, which had the effect of invalidating contrary state laws.<sup>119</sup> The court referenced *South Carolina v. Baker*,<sup>120</sup> where the Supreme Court upheld a law that directly regulated the States by prohibiting the issuance of bearer bonds.<sup>121</sup> The Circuit Court noted the law in *Baker* did not "seek to control or influence the manner in which

113. See *NCAA II*, 730 F.3d at 226 (citing *Raich*, 545 U.S. at 22) (concluding New Jersey's argument that PASPA unlawfully regulates purely local activities is meritless).

114. See *id.* at 227 (addressing New Jersey's argument that PASPA impermissibly commandeers state governments and officials). For a detailed discussion of the anti-commandeering doctrine and its application to federal laws and regulations violating state sovereignty, see *supra* notes 85 to 94 and accompanying text.

115. See *id.* at 227-28 (outlining cases upholding laws as permissible regulations in a pre-emptible field).

116. See *id.* at 228 (citing *F.E.R.C. v. Mississippi*, 456 U.S. 742, 764 (1982)) (noting Congress can entirely pre-empt certain fields, yet leave room for States to "maneuver").

117. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 264 (1981).

118. See *NCAA II*, 730 F.3d at 228 (citing *Hodel*, 452 U.S. at 290; *United States v. Printz*, 521 U.S. 898, 926 (1997)).

119. See *id.* at 228-29 (analyzing cases upholding permissible prohibitions on state action).

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

121. See *NCAA II*, 730 F.3d at 228 (noting law where Congress prohibited state action and private action (citing *Baker*, 485 U.S. at 511)).

States regulate private parties,” but “simply ‘subjected a State to the same legislation applicable to private parties.’”<sup>122</sup>

Further, the Circuit Court noted *Reno v. Condon*,<sup>123</sup> where the Supreme Court rejected an anti-commandeering challenge to the Driver’s Privacy Protection Act (“DPPA”), which prevented States from disclosing any “personal information obtained by state departments of motor vehicles.”<sup>124</sup> In *Reno*, the Supreme Court held the DPPA was constitutional since it did not “require States in their sovereign capacity to regulate their own citizens.”<sup>125</sup> The Circuit Court acknowledged PASPA was similar to the prohibitions on state action in *Baker* and *Reno*.<sup>126</sup> However, the court suggested the following reasoning:

[T]o 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*.<sup>127</sup>

Moreover, the Circuit Court rejected New Jersey’s claims that *Reno* and *Baker* are inapposite, concluding that PASPA “prohibits the issuance of [sports wagering] licenses all together, as in *Baker*, where the state was essentially prohibited from issuing bearer bonds.”<sup>128</sup>

Third, the court addressed the two occasions where the Supreme Court invalidated laws as a result of impermissible commandeering.<sup>129</sup> In order for a state to prevail on an anti-commandeering challenge, the state must show that Congress has “commandeered the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,” which may come in the form of forcing the States to expend

122. See *id.* (citing *New York*, 505 U.S. at 160).

123. *Reno v. Condon*, 528 U.S. 141, 141 (2000).

124. See *NCAA II*, 730 F.3d at 228 (drawing comparison to PASPA since provisions in PASPA prohibit States from taking action (citing *Reno*, 528 U.S. at 150)).

125. See *Reno*, 528 U.S. at 151 (suggesting “DPPA regulates the States as the owners of data bases” and “does not require state officials to . . . enforce [ ] . . . federal statutes regulating private individuals”).

126. See *NCAA II*, 730 F.3d at 234 (suggesting similarities among laws).

127. See *id.* (stating PASPA is less intrusive than laws at issue in *Baker* and *Reno*).

128. See *id.* at 235 (concluding PASPA is no different than legislative scheme imposed in *Baker*).

129. See *id.* at 229 (contrasting PASPA with two cases where Supreme Court invalidated laws based on anti-commandeering claims).

resources in carrying out a program or requiring state officials to administer federal law.<sup>130</sup> The Circuit Court ultimately rejected New Jersey's anti-commandeering claims, noting only two occasions where the Supreme Court invalidated laws under the doctrine, both distinguishable from PASPA.<sup>131</sup> Specifically, "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."<sup>132</sup> As a result, the court emphasized that, by enacting PASPA, Congress did not impose affirmative requirements on the states to act, but rather set forth a mere prohibition.<sup>133</sup>

Last, the court addressed New Jersey's claim that PASPA imposes an affirmative requirement on the states by forcing them to act, specifically by preventing the states from repealing state bans on sports wagering.<sup>134</sup> The Circuit Court again rejected New Jersey's claim since PASPA does not require the states to maintain their current sports wagering bans, but rather, "all that is prohibited is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] by law' of gambling schemes."<sup>135</sup> Additionally, the court noted the New Jersey Legislature had to propose a constitutional amendment repealing a ban on sports wagering and have it subsequently authorized by law.<sup>136</sup> This, the court explained, would undermine New Jersey's claim "that the amendment alone was sufficient to affirmatively authorize sports wagering."<sup>137</sup>

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130. See *NCAA II*, 730 F.3d at 227 (quoting *Hodel*, 452 U.S. at 283, 288). See generally *New York*, 505 U.S. at 144 (striking down take-title provision of federal waste law because law required States to enact regulatory program and expend resources in taking title to waste); *Printz*, 521 U.S. at 898 (invalidating provision of Brady Act requiring local authorities to run background checks on persons seeking to purchase guns).

131. See *NCAA II*, 730 F.3d at 227 (distinguishing PASPA from two laws previously struck down under anti-commandeering principles (citing *New York*, 505 U.S. at 144, 166, 180)).

132. See *id.* at 231 (stating PASPA is "[u]nlike the problematic 'take title' provision and the background check requirements" invalidated under anti-commandeering principles).

133. See *id.* at 231-32 (distinguishing between prohibition and conscripting States to take affirmative actions).

134. See *id.* at 232 (recognizing New Jersey's attempt to draw distinction between affirmative and negative commands).

135. See *id.* (alterations in original) ("PASPA speaks only of 'authorizing by law' a sport gambling scheme.").

136. See *id.* (noting enactment of Sports Wagering Law, in addition to constitutional amendment, was crucial to authorizing sports wagering).

137. See *NCAA II*, 730 F.3d at 232-33 (suggesting Court must adhere to statutory construction "that does not raise a series of constitutional problems"). Congress, through the passage of PASPA, sought to "reach private activity only to the

#### D. PASPA Does Not Violate Equal Sovereignty of the States

Finally, the Third Circuit addressed New Jersey's claim 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."<sup>138</sup> New Jersey directed the Circuit Court's attention to two cases analyzing Section 5 of the Voting Rights Act of 1965 ("VRA").<sup>139</sup> In response, the Circuit Court distinguished the VRA from PASPA by pointing out fundamental differences; specifically that, regulating gambling and voting are "not of the same nature" since elections, as intended by the Framers, are to be regulated by the states.<sup>140</sup> Moreover, the court noted the equal sovereignty principle does not apply "outside the context of 'sensitive areas of state and local policymaking.'"<sup>141</sup>

Additionally, the Circuit Court concluded Congress enacted PASPA to stop the spread of state-sanctioned sports gambling.<sup>142</sup> Consequently, the court explained that PASPA sufficiently addressed that problem by targeting states where sports gambling did not exist.<sup>143</sup> Unlike the VRA, PASPA does not "singl[e] out a handful of states for disfavored treatment," but rather "treats *more favorably a single state*."<sup>144</sup> As a result, the Circuit Court noted that New Jersey was not seeking an invalidation of only PASPA's grandfather

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extent that it is conducted 'pursuant to state law.'" *Id.* at 233 (stating Congress acknowledged difference between sports gambling by private parties and sports gambling "which occurs under the auspices of state approval and authorization").

138. *See id.* at 237 (addressing New Jersey's equal sovereignty claims.)

139. *See id.* at 237-38 (stating that "centerpiece of Appellants' equal sovereignty argument is the Supreme Court's analysis of the Voting Rights Act of 1965"). *See* 42 U.S.C.A. § 1973c (2006) (prohibiting certain jurisdictions from making changes to practices and procedures affecting voting laws without first getting preclearance). Currently, eight states are "covered" jurisdictions under Section 5 of the Voting Rights Act. *See Section 5 Covered Jurisdictions*, JUSTICE.GOV, [http://www.justice.gov/crt/about/vot/sec\\_5/covered.php](http://www.justice.gov/crt/about/vot/sec_5/covered.php) (last visited Feb. 23, 2013) (listing Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia as subject to Section 5 requirements).

140. *See NCAA II*, 730 F.3d at 238 (stating "VRA is fundamentally different from PASPA").

141. *See id.* at 239 (claiming equal sovereignty principle does not apply to regulation of gambling (citing *Shelby County v. Holder*, 133 S. Ct. 2612, 2624 (2013))).

142. *See NCAA II*, 730 F.3d at 239 (stating "true purpose" of PASPA is "to stop the spread of state-sanctioned sports gambling"). *See also* S. Rep. No. 102-248, *supra* note 51, at 5 (suggesting PASPA was enacted to prevent the proliferation of sports gambling).

143. *See NCAA II*, 730 F.3d at 239 (concluding PASPA is "precisely tailored to address" an increase in state-sanctioned sports gambling).

144. *See id.* (distinguishing VRA from PASPA).

provision, but that the state sought Nevada's favorable treatment.<sup>145</sup> This finding ultimately "undermine[d] [New Jersey]'[s] invocation of the equal sovereignty doctrine."<sup>146</sup>

## V. CRITICAL ANALYSIS

As a result of finding PASPA did not violate the Tenth Amendment, the Third Circuit construed the legal authority too narrowly, specifically in its interpretation of the legal principles set forth in *New York* and *Printz*.<sup>147</sup> In its analysis, the Third Circuit narrowly relied on the affirmative requirements implicated in the statutes at issue in *New York* and *Printz*.<sup>148</sup> As a result, the court found that Congress did not infringe on the states' sovereignty since PASPA does not impose affirmative requirements on the States.<sup>149</sup> However, as Judge Vanaskie noted in his dissent, "[n]othing in *New York* or *Printz* . . . limited the principles of federalism . . . to situations in which Congress directed affirmative activity on part of the states."<sup>150</sup> In *New York*, for example, the Court stated, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."<sup>151</sup> Furthermore, the Court reiterated the following:

[W]here 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* . . . . [T]he allocation of power contained in the Commerce Clause . . . authorizes Congress to regulate in-

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145. See *id.* (suggesting New Jersey, under its equal sovereignty claim, sought to obtain same treatment as Nevada).

146. See *id.* (noting "[t]hat New Jersey seeks Nevada's preferential treatment, and not a complete ban on preferences, undermines Appellants' invocation of the equal sovereignty doctrine.").

147. For a discussion of the Third Circuit's analysis of whether PASPA violates the Tenth Amendment, see *supra* notes 114 to 137 and accompanying text.

148. For a discussion of the Third Circuit's analysis of *New York* and *Printz*, see *supra* notes 129 to 130 and accompanying text.

149. For a discussion of the Third Circuit's analysis regarding the lack of affirmative requirements in PASPA, see *supra* notes 134 to 137 and accompanying text.

150. See *NCAA II*, 730 F.3d at 245 (Vanaskie, J., dissenting) (stating statutes under review in *New York* and *Printz* imposed affirmative requirements on states, but anti-commandeering principle is not limited to only those types of statutes).

151. See *New York*, 505 U.S. at 166.

terstate commerce directly; *it does not authorize Congress to regulate state governments' regulation of interstate commerce.*<sup>152</sup>

The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”<sup>153</sup> Lotteries, gaming, and sweepstakes have traditionally been left to the States to regulate.<sup>154</sup> Currently, forty-four states, the District of Columbia, and Puerto Rico have lotteries, and each state’s regulation of those lotteries varies widely.<sup>155</sup> Since PASPA prohibits states from “licens[ing], or authoriz[ing] by law or compact . . . [a] lottery, sweepstakes, or other betting, gambling, or wagering scheme based” on a sports competition, it has the effect of prescribing how states must regulate their gambling schemes, and thus, interstate commerce.<sup>156</sup> Broadly interpreted, PASPA conflicts with the anti-commandeering principles set forth in *New York* and *Printz*.<sup>157</sup>

Moreover, in *New York*, the Court stressed that when Congress is allowed to commandeer the states, state governments and officials would be held politically accountable for decisions and actions

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152. See *NCAA II*, 730 F.3d at 245 (Vanaskie, J., dissenting) (arguing federalism principles must include Congress’ ability to compel States to prohibit acts (citing *New York*, 505 U.S. at 166)).

153. U.S. CONST. amend. X.

154. See S. Rep. No. 102-248, *supra* note 51, at 12 (addressing concerns over federalism issues implicated by enacting PASPA); Woo, *supra* note 44, at 578 (stating that virtually all forms of gambling, outside of sports wagering, “are solely state-regulated” in the United States). See generally About the New York State Gaming Commission, NYS GAMING COMMISSION, <http://www.gaming.ny.gov/about/> (last visited Feb. 25, 2014) (stating “New York State Gaming Commission regulates all aspects of gaming and gambling activity in the state, including horse racing and pari-mutuel wagering, Class III Indian Gaming, the state lottery (including video lottery terminals) and charitable gaming.”); Expanded Gaming Act, MASSACHUSETTS GAMING COMMISSION, <http://massgaming.com/about/expanded-gaming-act/> (last visited Feb. 25, 2014) (outlining measures implemented by Massachusetts’s Expanded Gaming Act).

155. See Lotteries and Sweepstakes, ANSWER.USA.GOV, <http://www.usa.gov/Topics/Lottery-Results.shtml> (last visited Feb. 25, 2015) (providing information on state lotteries and state gambling laws).

156. See 28 U.S.C. § 3702 (2006); *NCAA II*, 730 F.3d at 245 (Vanaskie, J., dissenting) (suggesting “PASPA dictates the manner in which states must regulate interstate commerce”). See also Woo, *supra* note 44, at 578 (noting “[g]iven this state tradition of self-regulating gambling activity within their borders, a statute like PASPA appears to intrude upon a right protected under the Tenth Amendment.”).

157. See *NCAA II*, 730 F.3d at 245 (Vanaskie, J., dissenting) (stating “PASPA contravenes the principles of federalism set forth in *New York* and *Printz*,” and “[w]hether stated as a command to engage in specific action or a prohibition against specific action, the federal government’s interference with a state’s sovereign autonomy is the same.”).



not within their control.<sup>158</sup> Thus, there are instances where Congress could escape accountability by forcing policy decisions onto the states for which state governments, officials, and citizens have no responsibility and might even oppose.<sup>159</sup> Congress made the decision not to directly regulate or ban sports gambling altogether, but “passed the responsibility to the states . . . which . . . may not authorize or issue state licenses for such activities.”<sup>160</sup> Thus, PASPA has the effect of blurring the lines of political accountability.<sup>161</sup>

A majority of the states have lotteries and have legalized various forms of gambling.<sup>162</sup> As a result, these states have also implemented their own gambling regulatory schemes.<sup>163</sup> Citizens of these states are aware of not only the various gambling regulations existing in their respective states, but also of the benefits gambling regimes provide since revenues generated from such regimes finance a variety of state programs.<sup>164</sup> As more Americans are aware of the existence of sports gambling, especially due to the media attention surrounding widespread betting on the Super Bowl, citizens of the forty-six other states (those not granted an exemption under PASPA) may misplace blame on their state officials for not enacting a state-sanctioned sports gambling scheme.<sup>165</sup> Moreover, New Jersey citizens who voted to repeal a constitutional ban on sports wagering are likely to place blame on New Jersey officials

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158. See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 330 (Wolters Kluwer Law & Business, 4th ed. 2011) (explaining “states would take the political heat” for decisions made by Congress and not the states themselves).

159. See *id.* at 330-31 (suggesting Congress undermines government accountability when Congress is allowed to commandeer states).

160. See *NCAA II*, 730 F.3d at 246 (Vanaskie, J., dissenting) (stating Congress has shifted accountability of federal officials to state officials).

161. See Brief for States of West Virginia as Amici Curiae in Support of Reversal, *NCAA v. N.J.*, 730 F.3d 280 (2013) (No. 13-1713) (suggesting “Supreme Court has stressed that maintaining clear lines of political accountability is the touchstone of the anti-commandeering doctrine.”).

162. See Lotteries and Sweepstakes, *supra* note 155 (noting 44 states, D.C., Puerto Rico, and U.S. Virgin Islands have lotteries and providing links to those lotteries).

163. See Woo, *supra* note 44, at 578 (declaring “[s]tates have the power to conduct their own lotteries, create racetracks, and establish commercial casinos free from federal intervention.”).

164. See The Associated Press, *Powerball, Mega Millions Give State Budgets a Lift*, CBS dfw (Feb. 24, 2014, 4:39PM), <http://dfw.cbslocal.com/2014/02/24/powerball-mega-millions-give-state-budgets-a-lift/> (“For every \$2 ticket, 50 cents or more might end up paying for police officers in Massachusetts, services for the elderly in Pennsylvania, or education in rural school districts in Idaho, lottery directors say.”); Lotteries and Sweepstakes, *supra* note 155 (listing lottery laws for each state).

165. See The Associated Press, *supra* note 7 (reporting record profits as result of wagering on Super Bowl XLVIII).

when sports gambling licenses are not issued.<sup>166</sup> Ultimately, however, Congress is the legislative body responsible for the lack of an existing sports gambling regime in New Jersey.<sup>167</sup>

Additionally, the Third Circuit's anti-commandeering analysis presents a significant flaw since PASPA does not specifically set forth a federal regulatory framework.<sup>168</sup> Judge Vanaskie noted in his dissent, "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."<sup>169</sup> The Third Circuit drew a comparison between PASPA and the DPPA at issue in *Reno*, suggesting that there were similarities between Congress' direct regulations of interstate commerce inherent in the laws.<sup>170</sup> However, unlike in *Reno*, PASPA is not itself a regulatory scheme, but rather dictates *how* "States in their sovereign capacity . . . must regulate sports gambling."<sup>171</sup> The States cannot provide a regulatory scheme altogether.<sup>172</sup> Moreover, the "DPPA regulates the States as

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166. See Wittkowski, *supra* note 23 (reporting New Jersey voters, by a margin of 2-to-1, approved referendum to legalize sports betting at Atlantic City casinos and state's horse-racing tracks).

167. See 28 U.S.C. §§ 3701-3704 (2006).

168. See 28 U.S.C. § 3702 (2006) (making it illegal for individuals and states to engage in state-sanctioned sports gambling). Rather than create a regulatory scheme to enforce PASPA, Congress built in a provision granting standing to the "Attorney General of the United States, or . . . professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of" a violation of PASPA to enforce PASPA and enjoy a potential violator. See 28 U.S.C. § 3703 (2006) (setting forth standing requirements to file civil action).

169. See *NCAA II*, 730 F.3d at 246 (Vanaskie, J., dissenting) (suggesting "[i]f 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.").

170. For a discussion of the comparison made between PASPA and the federal regulatory scheme implicated in *Reno*, see *supra* notes 124 to 127 and accompanying text.

171. See *NCAA II*, 730 F.3d at 249 (Vanaskie, J., dissenting) (internal quotation marks omitted) (citations omitted) (suggesting "PASPA *does* require states in their sovereign capacity to regulate their citizens" which contravenes principle set forth in *Reno*).

172. See *id.* at 249 (Vanaskie, J., dissenting) (stating PASPA only sets "federal parameters as to how states may regulate sports gambling").

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 der-

the owners of databases,” and as a result, the Court in *Reno* treated the states as market participants.<sup>173</sup> However, PASPA regulates the states as states, meaning their capacity to regulate their own citizens.<sup>174</sup> Thus, PASPA has the effect of impermissibly commandeering the states.<sup>175</sup>

The Third Circuit also relied on *Hodel* in its analysis to support its conclusion that Congress may impose regulatory requirements on the states.<sup>176</sup> The federal statute at issue in *Hodel* did not violate the Tenth Amendment since the states had a choice of whether to adopt federal standards or to participate in a federal program regulating surface coal mining.<sup>177</sup> However, since PASPA prohibits the states from issuing sports gambling licenses, without the ability to make a choice at all, the comparison to the regulatory regime in *Hodel* is generally inapplicable.<sup>178</sup>

## VI. IMPACT

The Third Circuit’s decision in *NCAA* demonstrates the courts’ unwillingness to extend the anti-commandeering principles beyond the narrow holdings of *New York* and *Printz*.<sup>179</sup> As a result, Congress has the ability to pass similar prohibitions, without fear of having the laws overturned by the courts on Tenth Amendment

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regulatory scheme . . . 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.

*Id.* at 245 n.3.

173. See *Reno*, 528 U.S. at 151 (“The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce.”).

174. See Brief for States of West Virginia, *supra* note 161, at 19-20 (drawing distinction between DPPA and PASPA).

175. See *id.* (stating “[i]f anything, [*Reno*] supports the notion that Congress impermissibly commandeers even where it prohibits State action.”).

176. For a discussion of the Third Circuit’s reliance on *Hodel*, see *supra* notes 115 to 118 and accompanying text.

177. See *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981) (“If 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.”).

178. See *id.* at 288; *NCAA II*, 730 F.3d at 250 (Vanaskie, J., dissenting) (stating PASPA might be constitutional if it provides states with choice “to either implement state regulation of sports gambling that met federal standards or allow federal regulation to take effect”).

179. See *NCAA II*, 730 F.3d at 240 (“Extending [anti-commandeering] principles as [New Jersey] propose[s] would result in significant changes to the day-to-day operation of the Supremacy Clause in our constitutional structure.”). For a discussion of the Third Circuit’s analysis of the anti-commandeering doctrine as applied to PAPSAs, see *supra* notes 114 to 137 and accompanying text.

grounds.<sup>180</sup> For example, as studies continue to show that athletes have the potential to face long-term health risks resulting from repeated concussions in sporting events, Congress may feel pressure to enact legislation attempting to reduce or prevent instances of concussions in athletes, specifically youth athletes.<sup>181</sup> Rather than enforce a scheme at the national level, Congress could prohibit States from authorizing or licensing sports programs involving young athletes.<sup>182</sup> Under the Third Circuit's analysis, this statutory scheme would survive a constitutional challenge under the Tenth Amendment.<sup>183</sup>

Most importantly, the Third Circuit's decision maintains the status quo regarding state-sanctioned sports wagering in the United States.<sup>184</sup> While New Jersey placed its final bets on the Supreme Court hoping the Court would hear the case and strike down PASPA, the Court ultimately intimated that the odds were not in New Jersey's favor by declining to hear the case.<sup>185</sup> Until the Supreme Court agrees to hear a case implicating the constitutional concerns underlying PASPA, and rules in a challenger's favor, the law remains the sole obstacle for New Jersey, and all other states not exempted from the law, to implement sports wagering schemes.<sup>186</sup>

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180. See Brief for States of West Virginia, *supra* note 161, at 10-11 (stating law similar to PASPA would enable "Congress to pass laws that enact no federal regime and simply restrict a State's ability to issue licenses, permits, or authorizations.").

181. See Symposium, "CONCUSSION CONUNDRUM": PANELS 2 & 3, 20 JEFFREY S. MOORAD SPORTS L.J. 347, 347 (2013) (discussing impact of concussions on athletes). Concussions "happen to all athletes of all ages and all levels whether it's amateur, semi-pro, or pro and they happen of course outside of the sporting arena as well, but no athlete is immune from the risks of concussion." See *id.* at 350 (noting athletes are subject to concussions in both contact and non-contact sports); see also State Laws and Regulations for Camps, AMERICAN CAMP ASS'N, <http://www.acacamps.org/publicpolicy/regulations> (last visited Mar. 12, 2014) (suggesting camps in various states require licenses and permits to operate).

182. See Brief for States of West Virginia, *supra* note 161, at 14 (suggesting Congress, in an effort to divert blame, could prohibit States from authorizing or licensing youth football leagues).

183. See *NCAA II*, 730 F.3d at 240-41 (holding PASPA's prohibition of state-sanctioned sports gambling schemes valid under Tenth Amendment).

184. See *id.* (holding PASPA constitutional).

185. See *Christie v. NCAA*, 134 S. Ct. 2866 (2014) (denying writ of certiorari); see *Christie v. NCAA*, 2014 WL 572929, *petition for cert. filed*, (U.S. Feb. 12, 2014) (No. 13-967) (requesting United States Supreme Court grant petition for certiorari); see also Matt Friedman, *N.J.'s Gamble on Sports Betting is \$2.3M and Counting*, NJ.COM (Dec. 30, 2013, 8:51AM), [http://www.nj.com/politics/index.ssf/2013/12/states\\_gamble\\_on\\_sports\\_betting\\_is\\_23\\_million\\_and\\_counting.html](http://www.nj.com/politics/index.ssf/2013/12/states_gamble_on_sports_betting_is_23_million_and_counting.html) (stating New Jersey has spent \$2.3 million on its legal challenge of PASPA).

186. For a discussion of PASPA and its impact on the states, see *supra* notes 51 to 59 and accompanying text.

As the effects of the recent economic downturn are still felt by individuals all over the country, state governments, too, are feeling its effects since they are consistently burdened with budget shortfalls.<sup>187</sup> Low tax revenues have largely contributed to the budget gaps of many states.<sup>188</sup> In order to raise revenues and close budget gaps, states have sought to enact sports wagering laws seeking to tax the profits realized by gambling entities.<sup>189</sup> However, PASPA, as it stands, prevents states not exempted from the law from enacting sports wagering schemes in an effort to close budget shortfalls.<sup>190</sup> Moreover, PASPA also prevents Delaware, Montana, and Oregon from enacting sports wagering schemes that include single-game betting on live sports outside of the NFL, and thus, severely limits each states' ability to increase revenues related to sports gambling.<sup>191</sup> Due in part to single-game sports gambling, Nevada gambling entities realized \$3.4 billion in profits in 2012, \$15 million of which was collected by the state in taxes.<sup>192</sup> Therefore, the Third Circuit's decision has the effect of allowing Nevada to continue to retain a monopoly over sports wagering.<sup>193</sup>

However, as the Third Circuit noted in its opinion, "New Jersey and any other state that may wish to legalize gambling on sports

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187. See *Study: Illinois To See Continued Budget Shortfalls Despite Pension Reform*, PROGRESS ILLINOIS (Jan. 22, 2014, 2:09PM), <http://www.progressillinois.com/news/content/2014/01/22/study-illinois-see-continued-budget-shortfalls-despite-pension-reform> (reporting Illinois' budget gap is expected to get larger despite overhauling state programs).

188. See Phil Oliff, Chris Mai, and Vincent Palacios, *States Continue to Feel Recession's Impact*, Center on Budget and Policy Priorities (Jun. 27, 2012), <http://www.cbpp.org/cms/?fa=view&id=711> (reporting "[a]s of the first quarter of 2012, state revenues remained 5.5 percent below pre-recession levels, and are not growing fast enough to recover fully soon.").

189. See Batley, *supra* note 8 (stating that in addition to New Jersey, Illinois and California have considered sports wagering laws to close budget shortfalls).

190. See 28 U.S.C. § 3702 (2006). Because PASPA prohibits the states from implementing state-sanctioned licensing schemes, States are prevented from realizing revenues by taxing sports gambling profits. See *id.*

191. For a discussion of Delaware's unsuccessful attempt to expand its sports gambling regime from multi-game betting to include single-game sports betting, see *supra* notes 60 to 73 and accompanying text.

192. See Batley, *supra* note 8 ("Nevada, the gaming capital of the world, took in \$3.4 billion last year alone from sports betting and \$15 million of it was deposited directly into state tax-revenue coffers.").

193. See Anthony G. Galasso, Jr., *Betting Against the House (and Senate): The Case of Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 Ky. L.J. 163, 168 (2011) (suggesting Nevada has developed monopoly on sports wagering due to its exemption in PASPA). "Nevada is the only state where wagering on collegiate sports could ever be legal because the other three exempted states [Delaware, Montana, and Oregon] would be limited to offering wagering to the extent they have in the past: multi-game wagers on NFL contests." See *id.* (discussing Nevada's ability to reign in millions of dollars resulting from terms of PASPA).

within their borders are not without redress.”<sup>194</sup> States and gambling entities can choose to lobby Congress to make changes to PASPA or ultimately repeal the law.<sup>195</sup> As the negative stigma associated with sports gambling continues to dissipate, and as more fans engage in the activity, both legally and illegally, PASPA’s underlying premise may now be untenable.<sup>196</sup> In fact, despite the Third Circuit’s decision in *NCAA*, New Jersey may have finally called Congress’s bluff.<sup>197</sup>

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194. See *NCAA II*, 730 F.3d at 240-41 (suggesting states could “invoke Congress’s authority” to change PASPA).

195. See *id.* (implying states could lobby Congress to receive an exemption from PASPA or repeal law).

196. See S. Rep. No. 102-248, *supra* note 51, at 4-5 (stating purpose of PASPA is “to maintain the integrity” of professional and amateur sports). See James Vlahos, *The Super Bowl of Sports Gambling*, THE NEW YORK TIMES (Jan. 30, 2014), [http://www.nytimes.com/2014/02/02/magazine/the-super-bowl-of-sports-gambling.html?\\_r=1](http://www.nytimes.com/2014/02/02/magazine/the-super-bowl-of-sports-gambling.html?_r=1) (reporting “[o]ne in five American men polled by researchers at Fairleigh Dickinson University (and nearly one in 10 women) said they bet on sports in 2012”). It is estimated between \$80 billion and \$380 billion is spent on illegal gambling annually. See *id.* (citing statistics from National Gambling Impact Study Commission, include a link (“available here”) to NGISC statistics, if possible).

197. For a discussion of states’ ability to invoke Congress’s authority, see *supra* note 183 and accompanying text.

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