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Comments

HANGING ON BY A “TAIL”: NEW JERSEY’S 2014 EFFORT TO LEGALIZE SPORTS GAMBLING STAYS ALIVE IN THE THIRD CIRCUIT

I. INTRODUCTION

New Jersey is no stranger to this situation; this is the second time in two years that New Jersey legislators and state sports officials (collectively “the New Jersey parties”) have faced the NCAA, the NFL, the NHL, the NBA, and MLB (collectively the “Sports Leagues”) in the Third Circuit Court of Appeals.¹ New Jersey has been on a quest to legalize sports gambling in the state for over five years.² According to one estimate, legalized sports betting could generate as much as \$120 million in tax revenue.³ The Professional and Amateur Sports Protection Act (“PASPA”), a federal statute enacted in 1992 prohibiting state-sponsored sports gambling, is the primary obstacle preventing New Jersey legislators from successfully enacting a legalized sports gambling scheme in the state.⁴

After the Third Circuit held that New Jersey’s 2012 Sports Wagering Law (the “2012 Law”) violated PASPA in *NCAA v. Governor of New Jersey* (“*Christie I*”),⁵ New Jersey legislators enacted a new sports betting law in October 2014 (the “2014 Law”).⁶ In an attempt to

1. See generally *NCAA v. Gov. of N.J.*, 730 F.3d 208 (3d Cir. 2013) [hereinafter *Christie I*] (declaring PASPA constitutional and that it preempts 2012 Law), *cert. denied sub nom.* *Christie v. NCAA*, 134 S. Ct. 2866 (2014); *NCAA v. Gov. of N.J.*, 799 F.3d 259 (3d Cir. 2015) [hereinafter *Christie II*] (holding PASPA preempts 2014 Law), *reh’g en banc granted, opinion vacated* Order Sur Petitions for Rehearing En Banc, Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015).

2. See Transcript of Oral Argument at 32–34, *NCAA v. Gov. of N.J.*, 799 F.3d 259 (3d Cir. 2015) (Nos. 14-4546, 14-4568, 14-4569) [hereinafter Transcript of Oral Argument, *Christie II*] (discussing legislative intent behind 2014 Law).

3. See James C. W. Goodall, Note, *Bringing Down the House: An Examination of the Law and Policy Underpinning the Professional and Amateur Sports Protection Act of 1992*, 67 RUTGERS L. REV. 1097, 1099 (2015) (introducing economic implications of legalized sports betting in New Jersey).

4. Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701-3704 (2006); see *Christie II*, 799 F.3d at 265 (“PASPA has clearly stymied New Jersey’s attempts to revive its casinos and racetracks and provide jobs for its workforce.”).

5. 730 F.3d 208 (3d Cir. 2013); see also N.J. STAT. ANN. §§ 5:12A-1 to 5:12A-4 (West 2012) (repealed 2014) (outlining 2012 Law).

6. See *Christie II*, 799 F.3d at 262–63 (summarizing *Christie I* litigation and enactment of 2014 Law); see also Act of Oct. 17, 2014, S.B. 2460, 216th Leg., 2014 NJ

circumvent PASPA, New Jersey legislators crafted the 2014 Law to partially repeal the state's sports betting laws.⁷ Legislators chose their words carefully, mirroring the language of PASPA and quoting the Third Circuit opinion of *Christie I* in the signing statement to demonstrate the legality of the bill.⁸ The Sports Leagues sued New Jersey Governor Chris Christie and other state gaming officials, similar to when New Jersey enacted the 2012 Law, in *NCAA v. Governor of New Jersey*⁹ ("*Christie II*").¹⁰ After New Jersey legislators enacted the 2014 Law, the Sports Leagues sought an injunction and claimed PASPA preempted the law.¹¹ *Christie I* involved the constitutionality of PASPA itself, whereas *Christie II* analyzed the language of the 2014 Law to determine whether it constituted a repeal or authorization of state-sanctioned sports betting.¹² After the Third Circuit declared that the 2014 Law violated PASPA, the New Jersey parties filed for a rehearing en banc.¹³ The Third Circuit granted the rehearing and vacated the judgment of *Christie II*.¹⁴

This article argues the Third Circuit's decision in *Christie II* correctly held the 2014 Law allows what PASPA prohibits.¹⁵ The Third Circuit still seems unsure of what state regulation PASPA would permit, and the New Jersey Parties reintroduced arguments of PASPA's unconstitutionality at the rehearing en banc.¹⁶ The court should

Sess. Law Serv. Ch. 62 (N.J. 2014) (codified at N.J. Stat. Ann. §§ 5:12A-7 to 5:12A-9 (West 2014)) (outlining 2014 Law).

7. See N.J. Stat. Ann. § 5:12A-7 (using specific language of PASPA in 2014 Law).

8. See S.B. 2460 (explaining authority on which 2014 Law is consistent with PASPA).

9. 799 F.3d 259 (3d Cir. 2015).

10. See *id.* at 262–63 (summarizing *Christie I* legislation and procedural history of *Christie II*).

11. See *id.* at 263 (explaining procedural history of case).

12. See *id.* at 263, 265–66 (declaring *Christie I* constitutional analysis of PASPA as law of Third Circuit and that 2014 Law constitutes "authorization" despite statutory language).

13. See generally Petition for Rehearing and/or Rehearing En Banc for Appellants Christopher J. Christie, David L. Rebeck, and Frank Zanzuccki, *NCAA v. Gov. of N.J.*, 799 F.3d 259 (3d Cir. 2015) (No. 14-4546) (requesting rehearing because of inconsistencies between *Christie I* and *Christie II*).

14. See Order Sur Petitions for Rehearing En Banc, *NCAA v. Gov. of N.J.*, 799 F.3d 259 (3d Cir. 2015) (Nos. 14-4546, 14-4568, 14-4569) [hereinafter Order Granting Rehearing En Banc] (granting rehearing en banc of *Christie II*). The rehearing en banc took place on February 17, 2016. The Third Circuit had not published an opinion at the time of publication.

15. For an analysis on the court's holding in *Christie I* and *Christie II*, see *infra* notes 86–110 and 118–41 and accompanying text.

16. See Rehearing En Banc Oral Argument at 16:31, *NCAA v. Gov. of N.J.*, Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Feb. 17, 2016), available at <http://www2.ca3.uscourts.gov/oralargument/audio/14-4546NCAAv.GovernoroftheState>

readdress the constitutionality of PASPA in their forthcoming opinion, most crucially the equal sovereignty doctrine.¹⁷ Part II details the history of PASPA’s enactment and outlines previous challenges to the constitutionality and statutory interpretation of the statute.¹⁸ Part III compares the holdings of *Christie I* and *Christie II*, outlining potential unresolved issues the court may address en banc.¹⁹ Part IV discusses the implications of the Third Circuit’s impending decision en banc on sports betting in New Jersey.²⁰ Part V summarizes these arguments.²¹

II. BACKGROUND

A. Congressional Intent Behind PASPA

The Professional and Amateur Sports Protection Act prohibits States from “sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing] or authoriz[ing] by law or compact . . . [a] betting, gambling, or wagering scheme based, directly or indirectly, . . . [on] competitive games in which amateur or professional athletes participate.”²² The Senate enacted this statute after considering the “moral erosion” sports gambling causes nationwide, erosion that creates a domino effect of States who cannot “resist the lure” when another state legalizes sports gambling.²³ Gambling on sports affects the moral values of American society, including fair competition and a sense of teamwork.²⁴ The Senate was also concerned with the effects of gambling on young people, urging that PASPA should be enacted because the government cannot condone the corruption of America’s youth.²⁵

The Senate enacted PASPA to stop states from sanctioning sports gambling, believing that a prohibition would uphold the integrity of professional sports and stop the spread of illegal mar-

ofNJetal.mp3 [hereinafter Rehearing En Banc Oral Argument] (arguing PASPA commandeers New Jersey by telling state legislators how to regulate sports gambling); *see also id.* at 40:54 (failing to find, according to one judge, any case law to illustrate what precisely “authorize by law” means within PASPA).

17. For an analysis on the constitutional issues of PASPA, *see infra* notes 152–193 and accompanying text.

18. *See infra* notes 22–151 and accompanying text.

19. *See infra* notes 152–93 and accompanying text.

20. *See infra* notes 194–221 and accompanying text.

21. *See infra* notes 222–25 and accompanying text.

22. 28 U.S.C. § 3702 (2006).

23. *See S. REP. NO. 102-248*, at 5 (1992) (discussing proposed statute on sports gambling).

24. *See id.* (providing testimony of National Football League commissioner).

25. *See id.* (discussing intent behind PASPA).

kets.²⁶ The federal interest in “protecting sports from corruption” is “implicit in existing Federal law.”²⁷ The Senate Committee did not believe that sports gambling could be exempt from regulation or taxation simply because it could provide revenue for states.²⁸ The Committee felt that states profiting from a “socially destructive” activity crosses into the realm of illegality and immorality.²⁹

Despite these concerns, the provisions of PASPA did not apply to all fifty states.³⁰ PASPA included a grandfathering clause that exempted any state that enacted a sports gambling scheme between January 1, 1976 and August 31, 1990.³¹ Nevada, Delaware, Oregon, and Montana already had sports lotteries in place; these states remain unaffected by the provisions of PASPA.³² New Jersey was given one year from PASPA’s enactment to choose whether to license sports gambling in Atlantic City, an exception of which the state did not avail itself.³³

B. Constitutional Issues Surrounding PASPA

1. *Governmental Regulation of Sports Gambling and the Anti-Commandeering Doctrine*

The Framers of the Constitution deliberately gave “Congress the power to regulate individuals, [but] not the States.”³⁴ Although Congress has the authority to regulate activities related to the States and their citizens, Congress cannot dictate how a state must regu-

26. *See id.* (discussing history of PASPA’s enactment).

27. *See id.* at 6–7 (citing laws addressing bribery in sports contests, 18 U.S.C. § 224, (1994) and exceptions relating to certain advertisements and other information and to State-conducted lotteries, 18 U.S.C. § 1307 (1988)).

28. *See id.* at 7 (arguing “other destructive activities” that provide revenue may legally be regulated or taxed).

29. *See id.* at 7 (feeling compelled to “draw a line between legal and illegal, right and wrong”). However, it is important to note that the court in *Christie II* declined to consider the legislative intent of PASPA in determining the validity of the 2014 Law. *See* Transcript of Oral Argument, *Christie II*, *supra* note 2, at 37 (addressing no need to look beyond statutory language).

30. *See* Joshua Winneker, Ira Sprotzer & Lindsay Demery, *Sports Gambling and the Expanded Sovereignty Doctrine*, 13 VA. SPORTS & ENT. L.J. 38, 40 (2013) (introducing PASPA grandfathering clause). Specifically, the Senate did not want to harm Nevada’s economy and thus allowed the state to be exempt. *See Christie I*, 730 F.3d 208, 216–17 (3d Cir. 2013) (discussing history of PASPA’s enactment), *cert. denied sub nom. Christie v. NCAA*, 134 S. Ct. 2866 (2014).

31. *See* 28 USC § 3704(a)(1)–(2) (1992) (outlining PASPA applicability).

32. *See* Winneker et al., *supra* note 30, at 40–43 (summarizing sports gambling operations in Nevada, Delaware, Montana, and Oregon).

33. *See Christie I*, 730 F.3d at 216 (discussing history of PASPA’s enactment).

34. *See* *New York v. United States*, 505 U.S. 144, 166 (1992) (outlining constitutional history of anti-commandeering doctrine).

late these activities.³⁵ The Third Circuit classifies sports gambling as an activity which substantially affects interstate commerce; therefore, it may be regulated by Congress under the Commerce Clause.³⁶

Congressional acts are in violation of the anti-commandeering doctrine when the act does not allow the states to choose how to regulate an activity or when the act forces states to choose between two unconstitutional options.³⁷ *New York v. United States*³⁸ and *Printz v. United States*³⁹ are the only two cases in which the United States Supreme Court struck down laws for violation of the anti-commandeering doctrine.⁴⁰ In *New York*, the Supreme Court struck down a provision of the Low-Level Radioactive Waste Policy Act requiring a state government to take ownership of radioactive waste or regulate the removal of radioactive waste according to Congress' program.⁴¹ The states were left with no choice; whether they took title of the waste or Congress took ownership, the states were forced to adhere to the federal program and follow Congress' instructions.⁴² In

35. See *id.* at 162 (explaining tenets of anti-commandeering doctrine).

36. See *Christie I*, 730 F.3d at 225 (citing *Gonzalez v. Raich*, 545 U.S. 1 (2005)) (declaring sports gambling “quintessentially economic” activity). The *Christie I* court in the Third Circuit determined that sports gambling activities substantially influenced interstate market conditions to be regulated by Congress. See *id.* (declaring regulation of sports gambling within Congressional authority); cf. *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972) (deferring to Congressional report that illegal gambling affects interstate commerce); *United States v. Ceraso*, 467 F.2d 653, 658 (3d Cir. 1972) (explaining that gambling negatively impacts businesses, labor unions, and democratic processes).

37. See *New York*, 505 U.S. at 175–76 (explaining that Congress can neither directly regulate state governments nor regulate state activities without Constitutional authority).

38. 505 U.S. 144 (1992).

39. 521 U.S. 898 (1997).

40. See *Christie I*, 730 F.3d at 229 (discussing history of anti-commandeering doctrine in Supreme Court). The discussion of whether states should act as agents of Congress began before the Constitution was written. See *New York*, 505 U.S. at 163 (providing background information on anti-commandeering doctrine). The first time a commandeering issue reached the Supreme Court was not until the 1970s when the Environmental Protection Agency required states to employ certain programs such as designated carpool lanes and auto emissions testing; however, the Supreme Court did not define any principles in that case because the Government had invalidated the controversial provisions by the time the case reached the Court. See *Printz*, 521 U.S. at 925 (discussing *EPA v. Brown*, 431 U.S. 99 (1977)). After upholding the constitutionality of the statutes at issue in *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), the Court found the statute at issue in *New York v. United States* to be the first “that unambiguously required the States to enact or administer a federal regulatory program.” See *Printz*, 521 U.S. at 925-26 (discussing Supreme Court precedent regarding anti-commandeering).

41. See *New York*, 505 U.S. at 175 (describing statute at issue).

42. See *id.* at 176 (reasoning statute commandeers states).

Printz, The Brady Handgun Violence Prevention Act required state and local law enforcement officers to perform background checks on those who attempted to purchase a handgun.⁴³ This law went beyond Congress' authority, as Congress could not directly regulate the duties of a state officer in order to enforce a federal regulatory program.⁴⁴ Therefore, the Act was held unconstitutional.⁴⁵

Conversely, certain schemes do not violate the anti-commandeering principle if states are given a choice between two or more actions.⁴⁶ In *Hodel v. Virginia Surface Mining and Reclamation Association*⁴⁷ the Court established that Congress may require states to comply with federal standards in an area that would otherwise be preempted.⁴⁸ At issue in *Hodel* was a federal statute governing coal mining standards.⁴⁹ States could propose a regulatory program consistent with the federal statute's requirements; the federal government would regulate the program within a state if the state did not propose a system.⁵⁰ The Court emphasized that states were not compelled to establish a regulatory system for coal mining.⁵¹ Congress allowed states to choose whether the state or federal government would bear the burden of establishing the coal mining system.⁵²

Similarly, in *FERC v. Mississippi*,⁵³ the Supreme Court upheld a law giving states two choices: comply with federal regulations regarding energy efficiency standards or forego the activity altogether.⁵⁴ The Court recognized that this was a difficult situation, a sentiment that the Third Circuit would later echo in *Christie I* regarding PASPA.⁵⁵ Nevertheless, providing a state with two choices

43. See *Printz*, 521 U.S. at 902 (discussing statute at issue).

44. See *id.* at 935 (reiterating violation of anti-commandeering doctrine).

45. See *id.* (declaring statute violates anti-commandeering doctrine).

46. See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *FERC v. Mississippi*, 456 U.S. 742 (1982).

47. 452 U.S. 264 (1981).

48. See *id.* at 290–91 (holding that Congress may proscribe states to regulate private activity affecting interstate commerce).

49. See *id.* at 268 (outlining relevant sections of Surface Coal Mining Act).

50. See *id.* at 268–69 (describing regulatory program proscribed in statute).

51. See *id.* at 288 (illustrating how states have choice and are not commandeered by statute).

52. See *id.* (describing why statute does not commandeer states). Congress could have constitutionally enacted a statute prohibiting any state regulation of surface coal mining. See *id.* at 290 (postulating other constitutionally valid legislation).

53. 456 U.S. 742 (1982).

54. See *id.* at 749–50 (discussing choice statute provides to states).

55. See *id.* at 766 (conceding state choice provided by statute is not easy to make). The Third Circuit in *Christie I* agreed that the choice between maintaining

did not commandeer them into enacting a federal regulatory program.⁵⁶

2. *Shelby County and Equal Sovereignty*

According to the equal sovereignty principle, states enjoy the power to exercise their constitutional rights equally.⁵⁷ However, in extraordinary circumstances Congress may regulate an activity of one state differently than in other states.⁵⁸ In *Christie I* and *Christie II*, the New Jersey parties heavily relied on a recent Supreme Court case regarding the equal sovereignty principle.⁵⁹ In *Shelby County, Alabama v. Holder*⁶⁰ an Alabama county challenged the constitutionality of two requirements of the Voting Rights Act of 1965, which applied to only nine states.⁶¹ The first, called the coverage formula, defined voting jurisdictions only within certain states in an attempt to eliminate racial discrimination in voting.⁶² The second, known as the preclearance requirement, mandated that those jurisdictions defined under the coverage formula seek federal approval of any changes to election laws within those specific jurisdictions.⁶³ Because these two provisions only applied to jurisdictions within nine states, and any other jurisdiction in the country could change voting laws without federal approval, the Alabama county plaintiffs argued they both violate the doctrine of equal sovereignty.⁶⁴ The Court did not issue a holding on the preclearance requirement,

sports prohibitions and repealing them entirely was not easy, but this did not mean that PASPA gave states no choice at all. *See Christie I*, 730 F.3d 208, 233 (3d Cir. 2013) (declaring PASPA does not commandeer states), *cert. denied sub nom. Christie v. NCAA* 134 S. Ct. 2866 (2014).

56. *See FERC*, 456 U.S. at 769–70 (upholding statute’s constitutionality).

57. *See Shelby Cty., Ala. v. Holder*, 133 S.Ct. 2612, 2623 (2013) (discussing importance of avoiding disparate treatment among states).

58. *See id.* at 2624 (defining scope of Congressional authority in regulating state activities).

59. *See Christie I*, 730 F.3d at 237–38 (describing New Jersey’s argument that PASPA violates equal sovereignty similar to Voting Rights Act).

60. 133 S.Ct. 2612 (2013).

61. *See id.* at 2624 (describing effect of statute).

62. *See id.* at 2619–20 (detailing history of coverage formula). The coverage formula considered factors such as jurisdictions exhibiting a low voter registration, low voter turnout, and jurisdictions requiring tests (such as literacy tests) for voter eligibility. *See id.* at 2620 (summarizing rationale for enacting coverage formula).

63. *See id.* (explaining preclearance requirement was necessary to reinforce Act’s goal of reducing racial discrimination in voting).

64. *See id.* at 2621–22 (describing history of case).

although a concurring opinion argued it should have been held unconstitutional.⁶⁵

The Court held that the coverage formula was unconstitutional for violating the equal sovereignty principle.⁶⁶ At the time of the enactment of the Voting Rights Act, Congress had justifiably tailored the coverage formula to identify areas of the country where racial discrimination in voting occurred.⁶⁷ However, the formula does not accurately reflect the conditions of those jurisdictions today; therefore, the coverage formula would be an irrational basis on which to single out certain states and violate the principle of equal sovereignty among the states.⁶⁸

C. Pre-*Christie I* and *II* Constitutional and Statutory Interpretation Challenges to PASPA

Although a court did not rule on the constitutionality of PASPA until *Christie I*, the statute was challenged on constitutional grounds twice before the Sports Leagues sued to enjoin New Jersey's 2012 Law.⁶⁹ Both cases were brought in the District Court of New Jersey, and both cases were ultimately dismissed for lack of standing.⁷⁰ The plaintiffs in these cases argued that PASPA violated constitutional provisions including the Commerce Clause, the Tenth Amendment, the Eleventh Amendment, and the Equal Pro-

65. See *id.* at 2632 (Thomas, J., concurring) (arguing that unprecedented nature of preclearance requirement is unjustifiable and Court's refusal to issue holding further illustrates this).

66. See *id.* at 2630–31 (examining lack of relation between today's standards and those of society when Voting Rights Act coverage formula was enacted).

67. See *id.* at 2625 (summarizing Court's prior analysis of coverage formula in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

68. See *id.* at 2625–27, 2631–32 (holding coverage formula unconstitutional).

69. See Joshua M. Peles, Note, *NCAA v. N.J.: New Jersey Rolls the Dice on a Tenth Amendment Challenge to the Professional and Amateur Sports Protection Act*, 22 MOORAD SPORTS L.J. 149, 160 (2015) (describing challenges to PASPA prior to *Christie I*).

70. See *Interactive Media Entm't & Gaming Ass'n v. Holder*, No. 09-1301 (GEB), 2011 WL 802106, at *5–8 (D.N.J. Mar. 7, 2011) (holding nonprofit electronic gaming website, New Jersey Horsemen's Associations, and state senators did not satisfy injury requirement for standing to challenge PASPA); *Flagler v. U.S. Atty for the Dist. of N.J.*, No. 06-3699 (JAG), 2007 WL 2814657, at *3 (D.N.J. Sept. 25, 2007) (holding New Jersey citizen did not establish injury in fact for standing to challenge PASPA). The court in *Interactive Media* articulated that only a state, not legislators, would be able to bring a Tenth Amendment challenge to PASPA because state regulation of sports gambling affects "state sovereignty, not legislative sovereignty." See *Interactive Media*, 2011 WL 802106, at *10; see also Peles, *supra* note 69, at 160–61 (summarizing holdings of *Interactive Media* and *Flagler*).

tection Clause.⁷¹ However, by dismissing the cases, the courts were not required to determine the constitutionality of PASPA.⁷²

Furthermore, challenges to the language and statutory interpretation of PASPA reached the Third Circuit Court of Appeals only once before *Christie I* and *Christie II*.⁷³ While *Christie II* analyzed the construction of the statute and the meaning of the word “authorize,” *Office of the Commissioner of Baseball v. Markell*⁷⁴ defined the parameters of PASPA’s grandfathering provision.⁷⁵ The existing sports lotteries in Delaware at the time of PASPA’s enactment only involved multi-game schemes on NFL teams.⁷⁶ Therefore, the grandfathering clause of PASPA did not allow the establishment of new types of gambling schemes, such as single-game sports betting of any kind or multi-game schemes on any league other than the NFL.⁷⁷ The exemption given to Delaware meant that its sports gambling scheme must not be substantially different from its scheme that existed at the time of PASPA’s enactment.⁷⁸

D. New Jersey’s 2012 and 2014 Laws and Subsequent Litigation

1. *The 2012 Law*

Legalizing sports gambling within New Jersey’s borders has been a legislative priority for the past decade.⁷⁹ In 2011, New Jersey voters approved a referendum to amend the state constitution and

71. See *Interactive Media*, 2011 WL 802106, at *2 (outlining plaintiff’s constitutional claims against PASPA); *Flagler*, 2007 WL 2814657, at *1 (discussing Tenth Amendment and Commerce Clause claims and rules for standing).

72. See *Christie I*, 730 F.3d 208, 216 (3d Cir. 2013), *cert. denied sub nom.* *Christie v. NCAA*, 134 S. Ct. 2866 (2014) (stating *Christie I* is first case analyzing constitutionality of PASPA).

73. See *id.* (declaring *Markell* as only court of appeals case before *Christie I* decided under PASPA).

74. 579 F.3d 293 (3d Cir. 2009).

75. See *id.* at 304 (analyzing definition of “conducted” with regard to sports betting scheme). In interpreting PASPA, the court considered the statute unambiguous in its objective to prohibit state-sponsored sports gambling. See *id.* at 303 (discussing obvious intent of PASPA). For a discussion on PASPA’s grandfathering clause, see *supra* note 31 and accompanying text.

76. See *id.* at 300 (explaining Delaware lotteries before 1992).

77. See *id.* at 304 (discussing case holding). Also called a parlay lottery, a multi-game gambling scheme “ask[s] bettors to correctly choose the winners of two or more sports contests” or a combination of over/under bets. See *id.* at 304 n.1.

78. See *id.* at 303 (explaining scope of PASPA’s exemption).

79. See *Christie II*, 799 F.3d at 261–62 (describing 2010 New Jersey referendum). The 2014 Law was New Jersey’s fourth attempt to legalize sports gambling since its constitutional referendum in 2010. See Transcript of Oral Argument, *Christie II*, *supra* note 2, at 32 (discussing legislative intent enacting 2014 Law).

legalize sports gambling within the state.⁸⁰ This referendum was in direct response to the closing of many Atlantic City casinos, in light of the recent economic downturn.⁸¹ Specifically, this amendment would allow the state legislature to “authorize by law wagering . . . on the results of any professional, college, or amateur sport or athletic event.”⁸² New Jersey subsequently enacted the 2012 Law allowing state authorities to authorize sports gambling in racetracks, sports wagering lounges, and casinos.⁸³ The law provided guidelines for operating sports pools, including a provision regarding eligible candidates from whom operators may accept bets and licensing requirements.⁸⁴ The 2012 Law also gave the Division of Gambling Enforcement the right to regulate sports wagering in the same manner in which they currently regulate other casino games, in addition to the right to “adopt a similar regulatory framework”, as other states that allow sports gambling.⁸⁵

2. Christie I

The Sports Leagues brought suit in *Christie I*, arguing the 2012 Law violated PASPA and sought an injunction of the law’s enforcement.⁸⁶ The New Jersey parties argued the leagues lacked standing and that PASPA violated two tenets of the Tenth Amendment: the “anti-commandeering doctrine” and the “equal sovereignty doctrine.”⁸⁷ After determining the leagues had standing, the New Jersey District Court asked the United States to intervene when addressing the constitutionality issues of PASPA.⁸⁸ The District Court

80. See *NCAA v. Christie*, 61 F. Supp. 3d 488, 493 (D.N.J. 2014), *aff’d sub nom.* *NCAA v. Governor of N.J.*, 799 F.3d 259 (3d Cir. 2015), *vacated, reh’g en banc granted* (3d Cir. 2015) [hereinafter *NCAA*] (discussing history of New Jersey’s efforts to legalize sports gambling).

81. See Erik Brady, *Sports Gambling in New Jersey Not Money in the Bank*, USA TODAY (Sep. 11, 2014, 8:06 PM), <http://www.usatoday.com/story/sports/2014/09/11/new-jersey-sports-gambling-betting-chris-christie/15478405/> (outlining decision to enact 2012 Law).

82. N.J. CONST. art. IV, § 7, ¶ 2(D), (F) (West, Westlaw through Nov. 2014 amendments) (allowing authorizations to wager at casinos, gambling houses, and racetracks).

83. See N.J. STAT. ANN. §§ 5:12A-1 to 5:12A-4 (West 2012) (repealed 2014); see also *Christie I*, 730 F.3d 208, 217 (3d Cir. 2013), *cert denied sub nom.* *Christie v. NCAA*, 134 S. Ct. 2866 (2014) (explaining scheme of 2012 law).

84. See § 5:12A-2 (describing regulatory sports betting scheme).

85. See *id.*

86. See *Christie I*, 730 F.3d at 214–15 (describing procedural history of case).

87. See *id.* at 214 (describing procedural history of case).

88. See *id.* at 217 (describing procedural history of case). Under federal law, any United States court may ask the United States to address the constitutionality of a Congressional Act in a suit to which the United States is not a party. See 28 U.S.C. § 2403.

granted summary judgment in favor of the leagues and enjoined enforcement of the 2012 Law.⁸⁹ The New Jersey parties appealed to the Third Circuit Court of Appeals.⁹⁰

When it reached the Third Circuit, *Christie I* was the first case within the circuit to address the constitutionality of PASPA.⁹¹ The Third Circuit held that PASPA does not commandeer the states because it does not require states to enact any laws or maintain existing laws.⁹² Distinguishing PASPA from other statutes deemed to be in violation of the anti-commandeering principle in cases such as *New York* and *Printz*, the court reasoned that PASPA “does not require or coerce states to do” anything.⁹³ Rather, PASPA only prohibits an affirmative authorization by law of State-sponsored sports gambling.⁹⁴

Moreover, the court determined that PASPA provides a state with two choices: repeal the existing sports gambling ban or retain a complete ban on sports gambling.⁹⁵ Simply put, the states could ignore PASPA entirely and refrain from enacting any legislation regarding sports gambling.⁹⁶ If a state retains the complete ban, the state has the discretion 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.”⁹⁷ Furthermore, the fact that PASPA may present states with a difficult choice between two options does not mean that the statute is unconstitutional; the fact that the states have two options means PASPA does not force the states into doing only one course of action.⁹⁸

The Third Circuit also rejected the New Jersey parties’ argument that PASPA violated the equal sovereignty principle.⁹⁹ The New Jersey parties hoped to prevail based on the Supreme Court’s holding of *Shelby County*, in which the Court found a requirement

89. *See id.* at 214–15 (describing procedural history of case).

90. *See id.* at 217 (describing procedural history of case).

91. *See id.* at 216 (discussing history of litigation surrounding PASPA).

92. *See Christie I*, 730 F.3d at 227, 235 (upholding constitutionality of PASPA).

93. *See id.* at 231 (comparing PASPA to federal statutes held in violation of anti-commandeering principle).

94. *See id.* at 232 (discussing prohibition versus affirmative authorization).

95. *See id.* at 233 (defining constitutional options PASPA offers to states).

96. *See id.* (deeming PASPA as consistent with anti-commandeering principle).

97. *Id.* This is the exact language legislators included in the 2014 Law signing statement as evidence that the Third Circuit believed a partial repeal of sports gambling laws was permissible under PASPA. *See infra* note 117 and accompanying text.

98. *See id.* at 233 (analyzing constitutionality of PASPA).

99. *See id.* at 239 (rejecting argument PASPA is unconstitutional).

provision of the Voting Rights Act in violation of the equal sovereignty principle.¹⁰⁰ The Third Circuit noted that election procedures are “not of the same nature” as gambling, and that the Commerce Clause does not guarantee that gambling regulations should be applied uniformly among the states.¹⁰¹

In a dissenting opinion, Judge Thomas Vanaskie agreed that PASPA did not violate the equal sovereignty principle, but went on to argue that PASPA unconstitutionally forced states to regulate sports gambling in the proscribed way.¹⁰² The dissent draws upon an example from the *New York* opinion that although Congress has the power to regulate interstate commerce, it may not police the manner in which state governments regulate interstate commerce.¹⁰³ Yet, as Judge Vanaskie pointed out, PASPA does exactly this.¹⁰⁴ Sports gambling is a facet of interstate commerce, and PASPA compels the manner in which states must regulate it.¹⁰⁵ There is no difference between the statute being crafted as a prohibition or an affirmative command; either statute would commandeer the states.¹⁰⁶ Furthermore, the effect of PASPA does not fall within one of the categories upheld by the Supreme Court as a legitimate Congressional regulation of interstate commerce.¹⁰⁷ PASPA fails to regulate the activity itself to provide a policy solution, regulate a state activity related to interstate commerce, or encourage state regulation of an activity.¹⁰⁸

The Third Circuit Court of Appeals ultimately decided PASPA was constitutional and that it preempted the 2012 Law.¹⁰⁹ Following this decision, the United States Supreme Court denied certiorari.¹¹⁰

100. *See id.* at 237–38 (explaining New Jersey parties’ arguments).

101. *See id.* at 238 (clarifying gambling may be regulated by Congress).

102. *See id.* at 241 (Vanaskie, J., dissenting) (arguing PASPA violates anti-commandeering doctrine).

103. *See id.* at 245 (demonstrating Supreme Court precedent supporting PASPA’s unconstitutionality).

104. *See id.* (arguing PASPA directly regulates states).

105. *See id.* (supporting argument that PASPA violates anti-commandeering doctrine).

106. *See id.* at 251 (criticizing majority’s argument that PASPA is constitutional because statute is affirmative mandate rather than prohibition).

107. *See id.* at 245 (contrasting PASPA with examples from Supreme Court cases of constitutionally permissible regulations.)

108. *See id.* (contrasting PASPA with examples from Supreme Court cases of constitutionally permissible regulations).

109. *See id.* at 240–41 (holding PASPA did not violate anti-commandeering doctrine or equal sovereignty),

110. *See Christie v. NCAA*, 134 S. Ct. 2866 (2014) (denying petition for writ of certiorari in *Christie I*).

3. “*You Meant What You Said and You said What You Meant and We Followed Your Guidance 100 Percent*”:¹¹¹ *The 2014 Law*

In October 2014, in response to the Third Circuit opinion in *Christie I*, the New Jersey State Senate proposed and passed a new bill related to sports wagering, which Governor Christie signed into law.¹¹² The 2014 Law partially repealed permits, licenses, and authorizations concerning “wagers on professional, collegiate, or amateur sport contests or athletic events.”¹¹³ The law allowed persons twenty-one years of age and older to legally gamble at New Jersey racetracks and casinos; however, they could not bet on collegiate sporting events either taking place in New Jersey or played by New Jersey collegiate teams.¹¹⁴

The New Jersey legislature intentionally attempted to circumvent PASPA by using language mirroring that of PASPA, such as, “[t]he provisions of this act. . . are not intended . . . as causing the State to sponsor, operate, advertise, promote, license, or authorize by law . . . the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event.”¹¹⁵ Furthermore, in a statement accompanying the law, the governor stated that the “bill implements the decision of [the Third Circuit in *Christie I*],” directly quoting parts of the opinion as well as the United States’ Brief in Opposition to Petitions for Writ of Certiorari, stating that “New Jersey is free to repeal those state-law prohibitions [against sports gambling adopted prior to PASPA] . . . *in whole or in part*.”¹¹⁶ The statement also declared that “the Third Circuit does ‘not read PASPA to prohibit New Jersey from repealing its ban on sports wagering,’ and ‘it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gam-

111. Transcript of Oral Argument, *Christie II*, *supra* note 2, at 32 (quoting DR. SEUSS, HORTON HEARS A WHO!) (illustrating New Jersey legislators’ belief that 2014 Law was consistent with *Christie I* holding).

112. See *NCAA*, 61 F. Supp. 3d 488, 494 (D.N.J. 2014) (discussing enactment of 2014 Law), *aff’d sub nom.* *NCAA v. Governor of N.J.*, 799 F.3d 259 (3d Cir. 2015), *vacated, reh’g en banc granted* Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015).

113. N.J. STAT. ANN. § 5:12A-7 (West 2014).

114. See *NCAA*, 61 F. Supp. 3d at 491 (explaining provisions of 2014 Law).

115. Act of Oct. 17, 2014, S.B. 2460, 216th Leg., 2014 NJ Sess. Law Serv. Ch. 62 (N.J. 2014) (codified at N.J. Stat. Ann. §§ 5:12A-7 to 5:12A-9 (West 2014)); see also *NCAA*, 61 F. Supp. 3d at 495 (“The legislative statement immediately following the 2014 Law provides that it implements the Third Circuit’s decision in *Christie I*.”).

116. S.B. 2460 (quoting Brief to the Supreme Court in Opposition to Petitions for Writs of Certiorari, to the Supreme Court in Opposition to Petitions for Writs of Certiorari at 11, *Christie I*, 730 F.3d 208 (3rd Cir. 2013) (Nos. 13-967, 13-979, 13-980) (emphasis in original)).

bling, or *what the exact contours of the prohibition will be,*” quoting language directly from *Christie I* to illustrate that the 2014 Law was consistent with the Third Circuit’s interpretation of PASPA.¹¹⁷

4. Christie II

Upon the enactment of the 2014 Law, the Sports Leagues from the *Christie I* litigation filed suit to enjoin the enforcement of the 2014 Law.¹¹⁸ The New Jersey parties did not challenge the constitutionality of PASPA again, instead arguing that the 2014 Law is a partial repeal of the state’s sports gambling prohibitions and not an authorization of sports gambling by the state.¹¹⁹ Because the *Christie I* opinion mentioned that PASPA allows a state to “repeal” existing laws, and PASPA specifically prohibits the “authoriz[ation]” of wagering schemes, the New Jersey parties argued the 2014 Law was in compliance with both PASPA and the decision of *Christie I*.¹²⁰ The District Court for the District of New Jersey declared the 2014 Law violated PASPA, and the New Jersey parties appealed to the Third Circuit.¹²¹

A three-judge panel of the Third Circuit Court of Appeals affirmed that the 2014 Law violated PASPA.¹²² The majority believed

117. See *NCAA*, 61 F. Supp. 3d at 495 (quoting S.B. 2460) (emphasis in original).

118. See *id.* at 490–91 (discussing procedural history of case). The five leagues consisted of the National Collegiate Athletic Association (NCAA), the National Basketball Association (NBA), the National Football League (NFL), the National Hockey League (NHL), and Major League Baseball (MLB). See *Christie II*, 799 F.3d 259, 272 n.1 (3d Cir. 2015), *vacated, reh’g en banc granted* Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015). These were the same plaintiffs as in *Christie I*. See *Christie I*, 730 F.3d 208, 217 (3d Cir. 2013) (describing procedural history of case), *cert denied sub nom.* *Christie v. NCAA*, 134 S. Ct. 2866 (2014). Listed as defendants in the litigation are the governor of New Jersey, the Director the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey, the Executive Director of the New Jersey Racing Commission, the New Jersey Thoroughbred Horsemen’s Association, Inc. (NJTHA), the Speaker of the New Jersey General Assembly, the President of the New Jersey Senate, and the New Jersey Sports and Exposition Authority. *Id.*

119. See *Christie II*, 799 F.3d 259, 264 (3d Cir. 2015) (describing procedural history of case), *vacated, reh’g en banc granted* Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015).

120. See *id.* (summarizing New Jersey parties’ argument).

121. See *id.* at 263–64 (discussing procedural history of case).

122. See *id.* at 264 (discussing holding of case). The District Court said that the 2014 Law was a “novel” attempt to create a “roadmap around PASPA.” *NCAA*, 61 F. Supp. 3d 488, 492 (D.N.J. 2014), *aff’d sub nom.* *NCAA v. Gov. of N.J.*, 799 F.3d 259 (3d Cir. 2015), *vacated, reh’g en banc granted* Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015). The court also recognized that New Jersey’s aim in passing the law was to bolster its economy and provide jobs for its citizens, and that PASPA provided an obvious roadblock in achieving this goal. See *Christie II*, 799 F.3d at 265 (“PASPA has clearly stymied New Jersey’s attempts to revive its casinos and

that the implications of the 2014 Law if put into effect would amount to an authorization of sports gambling, one of the six actions PASPA specifically prohibits.¹²³ Even if New Jersey’s sports betting laws were partially repealed, remaining laws declare sports betting illegal.¹²⁴ The repealed laws, therefore, would permit illegal conduct.¹²⁵ However, if no laws were in place prohibiting sports betting, then the New Jersey government would not be “authorizing,” “licensing,” or “sponsoring” anything related to sports gambling.¹²⁶ This echoes the *Christie I* court’s interpretation of PASPA, which provides the states with an option of completely repealing sports wagering laws.¹²⁷ The 2014 Law provided specific instructions on who may legally bet on which sporting events and where; therefore, the law constituted an authorization, not a repeal as the statutory language suggested.¹²⁸

Although not explicitly mentioned in the opinion, the court quickly pointed out the state-sponsored nature of the 2014 Law at oral argument, further evidence that the 2014 Law’s violation of PASPA.¹²⁹ The 2014 Law only applies within casinos, gambling houses, and running or harness horse racetracks.¹³⁰ These venues require licenses given by the state to operate; therefore, the 2014 Law would allow legalized betting only in venues that have some form of state oversight.¹³¹ Broadening the power of a license is con-

racetracks and provide jobs for its workforce.”). However, the court relied on its language from *Christie I*, reiterating that the role of the court is not to evaluate the “wisdom of PASPA” and “usurp Congress’ role simply because PASPA may have become an unpopular law.” *See id.*

123. *See Christie II*, 799 F.3d at 265 (reasoning 2014 Law violates PASPA). This is not the same analysis employed by the District Court, which held that the 2014 Law violated PASPA because the state law was preempted by the federal statute. *See NCAA*, 61 F. Supp. 3d at 505 (reiterating Third Circuit analysis on preemption and anti-commandeering principles in *Christie I*).

124. *See Christie II*, 799 F.3d at 265–66 (reasoning 2014 Law is authorization rather than repeal).

125. *See id.* (reasoning 2014 Law is authorization rather than repeal).

126. *See Christie I*, 730 F.3d 208, 232 (3d Cir. 2013) (describing options PASPA provides to states), *cert denied sub nom. Christie v. NCAA*, 134 S. Ct. 2866 (2014).

127. *See Christie II*, 799 F.3d at 265–66 (reasoning that partial repeal is actually authorization by permitting illegal conduct).

128. *See id.* (reasoning 2014 Law authorizes sports gambling).

129. *See* Transcript of Oral Argument, *Christie II*, *supra* note 2, at 19–23 (calling into question New Jersey’s choice to only allow sports betting in venues with existing gambling licenses).

130. *See* N.J. STAT ANN. § 5:12A-7 (West 2015) (listing where statute applies).

131. *See* Transcript of Oral Argument, *Christie II*, *supra* note 2, at 31 (noting by court state involvement if 2014 Law enacted). The attorney for the New Jersey legislators argued that the state would have no interest in the sports gambling activities, but conceded that the state would tax them. *See id.* at 67. Two of the venues were unlicensed former racetracks; however, they must have received li-

sidered a licensing, and licensing is one of the six specific actions PASPA prohibits.¹³²

The court consistently struggled to define the word “authorize” and determine whether PASPA only permits organized betting schemes.¹³³ The word “authorize” means “[t]o empower; to find a right or authority to act,” or “[t]o permit a thing to be done in the future.”¹³⁴ The court reasoned that a repeal would no longer make sports gambling illegal or criminal, but it would not be an endorsement from the government to immediately participate in sports gambling.¹³⁵ The 2014 Law went beyond removing the laws from record; the 2014 Law “affirmatively permit[ted]” sports gambling in certain venues.¹³⁶ The court rejected Appellants’ argument that the 2014 Law did not violate PASPA because it did not promulgate a “broad regulatory scheme,” one of the reasons the Third Circuit cited in *Christie I* that the 2012 Law violated PASPA.¹³⁷ Ultimately, the 2014 Law violated PASPA because PASPA prohibits *any state authorization* of legalized sports gambling.¹³⁸

The Third Circuit believed that PASPA’s constitutional issues were resolved in *Christie I*; accordingly, *Christie II* also did not interpret PASPA to require states to keep its existing sports betting laws, which would allow New Jersey to completely repeal its laws prohibiting sports gambling.¹³⁹ Furthermore, the holding in *Christie I* —

censes within the past 15 years. *See id.* at 52–53 (discussing venues selected by 2014 Law).

132. *See id.* at 54 (arguing 2014 Law violates PASPA).

133. *See id.* at 34–35 (questioning definition of “authorize”).

134. *See Christie II*, 799 F.3d 259, 266 (3d Cir. 2015) (citing BLACK’S LAW DICTIONARY 133 (6th ed. 1990)), *vacated, reh’g en banc granted* Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015)).

135. *See* Transcript of Oral Argument, *Christie II*, *supra* note 2, at 48 (providing one Third Circuit judge’s definition of repeal). While trying to figure out what kind of repeal would be consistent with PASPA, the court compared the 2014 Law to zoning laws: if it would be permissible to designate one area for certain property but not another, the same may be allowed for sports gambling. *See id.* at 41–42 (questioning whether 2014 Law identifying specific venues necessarily violates PASPA).

136. *See id.* at 31 (discussing practical effect of 2014 Law). The Third Circuit remained steadfast that 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,” constitutes an authorization of sports gambling. *Christie II*, 799 F.3d at 266.

137. *See Christie II*, 799 F.3d at 267 (conceding differences between 2012 Law and 2014 Law).

138. *See id.* (declaring 2014 Law authorizes sports gambling).

139. *See* Response Brief of Plaintiffs-Appellees to Petitions for Rehearing and/or Rehearing En Banc at 1–2, *Christie II*, 799 F.3d 259 (3d Cir. 2015) (Nos. 14-4546, 14-4568, 14-4569) [hereinafter New Jersey’s Response to Petition for Rehearing En

that PASPA constitutionally does not violate the anti-commandeering doctrine — serves as the law of the Third Circuit.¹⁴⁰ “Whatever else PASPA may allow a state to do, it certainly does not allow a state to dictate where sports gambling may occur, by whom, and even on what sporting events, under the guise of ‘partially repealing’ its otherwise-blanket sports gambling prohibitions.”¹⁴¹

5. *A Tail or a Leg: Judge Fuentes’ Dissent in Christie II*

Christie II was accompanied by one dissenting opinion from Judge Julio Fuentes, who accused the majority of “calling a tail a leg—which, as the adage goes, does not make it so.”¹⁴² The dissent argued that the majority’s analysis inappropriately equated authorization with repeal.¹⁴³ As the Third Circuit stated in *Christie I*, “the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law.”¹⁴⁴ The 2014 Law did not give “explicit grant of permission for *any* entity to engage in sports wagering.”¹⁴⁵

The dissent further argued the majority opinion directly contradicted the holding of *Christie I* by giving New Jersey “no choice at all . . . [either to] uphold all prohibitions on sports wagering in perpetuity or until PASPA is no more.”¹⁴⁶ The dissent employed the same reasoning as the New Jersey legislature when publishing the bill for the 2014 Law: both the Third Circuit and the United States agreed that New Jersey was free to repeal its prohibitions on sports gambling “in whole or in part.”¹⁴⁷ Furthermore, the dissent

Banc] (discussing choice PASPA leaves to states regarding sports gambling prohibitions).

140. See *Christie II*, 799 F.3d at 263 (holding *Christie I* to be correct and binding on Third Circuit).

141. New Jersey’s Response to Petition for Rehearing En Banc, *supra* note 139, at 3. The court believed that using similar language to PASPA only masked the true fact that the 2014 Law still violated the federal statute. See *Christie II*, 799 F.3d at 267 (rejecting argument 2014 Law construction circumvents PASPA). Including or excluding a word or phrase in statutory language cannot trump the Supremacy Clause. See *id.* at 267 (rejecting 2014 Law’s construction circumvents PASPA).

142. See *Christie II*, 799 F.3d at 272 (Fuentes, J., dissenting). Interestingly, Judge Fuentes wrote the majority opinion in the Third Circuit Appeal in *Christie I* upholding that the 2012 Law violated PASPA. See *Christie I*, 730 F.3d 208, 214 (3d Cir. 2013), *cert denied sub nom.* *Christie v. NCAA* 134 S. Ct. 2866 (2014).

143. See *Christie II*, 799 F.3d at 269 (discussing primary issue with majority opinion).

144. See *id.* at 270 (quoting *Christie I*, 730 F.3d at 232).

145. *Id.*

146. See *id.* at 270–71.

147. See *id.* at 271.

believes a complete repeal of sports wagering would be impossible, because the state would violate PASPA if it issued a complete repeal but attempted to enact age requirements for sports wagering.¹⁴⁸

The dissent drew a comparison to the 2012 Law, which set out a regulatory scheme to authorize sports betting in the state.¹⁴⁹ The 2012 scheme violated PASPA, whereas the 2014 Law sets forth no such scheme or state involvement.¹⁵⁰ The majority's confusion between repeal and authorization effectively makes any and all prohibitions on sports wagering a violation of PASPA, and therefore unconstitutional.¹⁵¹

III. ANALYSIS

Two weeks after the Third Circuit published their opinion, the New Jersey parties filed a motion for a rehearing of the case en banc.¹⁵² The request argued that the Third Circuit opinion was inconsistent with *Christie I* and that the case raised an issue of "exceptional importance, i.e., whether the federal government may prescribe the manner in which a State may govern by requiring it to maintain existing laws."¹⁵³ The Third Circuit opinion in *Christie II*, the New Jersey parties argued, extended the reach of PASPA by forcing the state to keep laws in place which they desired to repeal.¹⁵⁴ The Third Circuit granted a rehearing en banc on October 14, 2015, vacating their judgment from *Christie II*.¹⁵⁵ The Third Circuit did not discuss why they granted the rehearing or which issues they will address en banc.¹⁵⁶

148. *See id.* at 271 n.6 (postulating potential ramifications if complete repeal of sports wagering prohibitions occurred).

149. *See id.* at 272 (arguing 2014 Law promulgates no such scheme).

150. *See id.* (comparing 2012 Law to 2014 Law).

151. *See id.* at 271 (reasoning that majority's opinion is inconsistent with prior case law on PASPA).

152. *See* Brent Johnson, *Christie Asks for Rehearing in N.J.'s Sports Betting Battle*, NJ.COM (Sep. 8, 2015, 7:09 PM), http://www.nj.com/politics/index.ssf/2015/09/christie_asks_for_re-hearing_in_njs_sports_betting_battle.html (discussing New Jersey parties' rehearing request).

153. Petition for Rehearing and/or Rehearing En Banc for Appellants Christopher J. Christie, David L. Rebeck, and Frank Zanzuccki at iii, *Christie II*, 799 F.3d 259 (3d Cir. 2015) (No. 14-4546) (arguing necessity for rehearing of *Christie II*).

154. *See id.* at 3-4 (contending PASPA commandeers states).

155. *See* Order Granting Rehearing En Banc, *supra* note 14 (granting rehearing en banc of *Christie II*).

156. *See id.* (stating only rehearing was granted and no reasoning behind it). Voting for an en banc hearing is "a procedural vote, not a vote on the merits." *See* Grange95, *New Jersey Sports Betting En Banc Rehearing: Everything You Wanted to Know*, LEGAL SPORTS REPORT (Oct. 26, 2015, 3:42 PM), <http://www.legalsportsreport.com/5262/new-jersey-sports-betting-en-banc/>. According to the Third Circuit's in-

A. The 2014 Law is Inconsistent with *Christie I*'s Interpretation of PASPA

The language of the Third Circuit's opinion in *Christie I* does not support the New Jersey parties' argument that PASPA would allow for a partial repeal of state sports gambling prohibitions.¹⁵⁷ In *Christie I*, the Third Circuit only discussed two options that followed PASPA: having no law in place or keeping current sports gambling prohibitions in place.¹⁵⁸ The *Christie I* court discussed authorization and repeal only in reference to PASPA not allowing a complete repeal of state gambling prohibitions.¹⁵⁹ In its conclusion in *Christie I*, the Third Circuit summarized New Jersey's options: keep its laws, repeal them entirely, or wait for Congress to amend or repeal PASPA.¹⁶⁰ The only time a party mentioned a partial repeal was in the United States' brief for petition of writ of certiorari in *Christie I*.¹⁶¹ The United States later argued the language of “in whole or in part” did not mean “that *every* partial repeal of a state's prior sports betting prohibitions will automatically satisfy PASPA, or that a state's legislature is free to enact any laws that it wishes regarding sports gambling as long as it takes care to frame them as

ternal policy, en banc hearings are granted only in “extraordinary” cases where hearing by a full court is of “immediate importance.” INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT § 9.2 (2015), available at http://www2.ca3.uscourts.gov/legacyfiles/2015_IOPs.pdf; see also Grange95, *supra* (explaining possibility that *en banc* hearing was granted because sports gambling issue is significantly important that full court should hear case). Moreover, en banc hearings are generally not granted if the issue is the application of the law to the facts of the case when the court's statement of the law is correct. See Internal Operating Procedures of the United States Court of Appeals for the Third Circuit § 9.3.2. The court may ultimately affirm the District Court's decision but for different legal reasons. See Grange95, *supra* (predicting outcome of en banc hearing).

157. See *Christie I*, 730 F.3d 208, 233 (3d Cir. 2013) (outlining only two options under PASPA as maintaining sports wagering ban or completely repealing it), *cert denied sub nom.* *Christie v. NCAA* 134 S. Ct. 2866 (2014).

158. See *id.* at 232 (“Nothing in [PASPA] 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. . . . We do not see how having *no law* in place governing sports wagering is the same as authorizing it by law.”) “PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field[.]” *Id.* at 235.

159. See New Jersey's Response to Petition for Rehearing En Banc, *supra* note 139, at 8–9 (arguing rehearing en banc is unnecessary).

160. See *Christie I*, 730 F.3d at 240–41 (outlining two options PASPA gives to states).

161. See New Jersey's Response to Petition for Rehearing En Banc, *supra* note 139, at 8 (stating there is no mention of partial repeals in *Christie I*).

'partial repeals' of existing prohibitions."¹⁶² Perhaps New Jersey became too reliant on this passage from the United States' brief; the New Jersey parties' argument is weakened by the fact that the idea of a partial repeal did not come directly from the Third Circuit.¹⁶³

Christie I only explicitly grants a complete repeal of New Jersey's sports gambling prohibitions, which is the opposite of the 2014 Law's effect.¹⁶⁴ At first glance, it seems difficult to reconcile the statement from *Christie I* that each state can decide what level of police power to use against sports gambling "or what the exact contours of the prohibition will be"; however, this seems to be the only tacit suggestion of a partial repeal.¹⁶⁵ The *Christie I* court reasoned that PASPA only requires "states [to] enforce the laws they choose to maintain," which may seem to indicate that states can maintain the prohibitions they leave in place.¹⁶⁶

The Third Circuit's reasoning is consistent from *Christie I* to *Christie II*.¹⁶⁷ This is apparent when analyzing the application of the 2014 Law in practice.¹⁶⁸ The New Jersey parties would argue that "because the *lack of* a prohibition on certain sports wagering" is not *affirmatively* authorizing it by law, the 2014 Law is inconsistent with the Third Circuit's construction of PASPA in *Christie I*.¹⁶⁹ Additionally, restricting sports gambling to specific locations is the same as permitting them in those listed locations.¹⁷⁰ Therefore, although

162. Brief for United States as Amicus at 14, *Christie II*, 799 F.3d 259 (3d Cir. 2015).

163. See New Jersey's Response to Petition for Rehearing En Banc, *supra* note 139, at 8 ("Defendants tellingly cannot point to a single passage in *Christie I* even alluding to the possibility of 'partial repeals.'").

164. See *Christie I*, 730 F.3d at 235 ("PASPA gives the states a choice of either implementing a ban on sports gambling or of accepting a complete deregulation of that field as per the federal standard.").

165. *Id.* at 233.

166. See Joint Motion for Leave to File Reply in Support of Petition for Rehearing and/or Rehearing En Banc, *Christie II*, 799 F.3d 259 (3d Cir. 2015) (Nos. 14-4546, 14-4568, 14-4569) [hereinafter Joint Motion for Leave to File Reply in Support of Petition for Rehearing and/or Rehearing En Banc].

167. See New Jersey's Response to Petition for Rehearing En Banc, *supra* note 139, at 10 (arguing Third Circuit analysis of 2014 Law is correct).

168. See *generally id.* (arguing Third Circuit analysis of 2014 Law is correct).

169. See Joint Motion for Leave to File Reply in Support of Petition for Rehearing and/or Rehearing En Banc, *supra* note 166 (attempting to distinguish repeal from authorization). It is suspect that New Jersey would limit sports gambling to these specific racetracks and casinos, which require state licenses to operate. See New Jersey's Response to Petition for Rehearing En Banc, *supra* note 139, at 12 (arguing 2014 Law authorizes state-sponsored sports gambling).

170. See Transcript of Oral Argument, *Christie II*, *supra* note 2, at 31; see also Goodall, *supra* note 3, at 1133 (arguing 2014 Law likely violates PASPA by singling out state regulated venues for betting).

crafted as a repeal, the 2014 Law is an authorization by granting some venues to take bets on sporting events and excluding others.¹⁷¹

The *Christie II* dissent’s contention—that a complete repeal would also be considered an authorization—is unfounded because not having any regulation in place is different from having only certain limitations in place.¹⁷² “Indeed, *Christie II* only grudgingly acknowledged that a total repeal may not violate PASPA, saying it would be ‘hard-pressed, given *Christie I*,’ to find that a full repeal is ‘authorizing by law.’”¹⁷³

B. “That horse has left the barn”:¹⁷⁴ Revisiting the
Constitutionality of PASPA from *Christie I*

At oral argument of *Christie II* in the Third Circuit, the judges seemed to disagree whether *Christie I* definitively resolved the constitutional issues of PASPA.¹⁷⁵ However, at the conclusion of this oral argument, the court decided that *Christie I* should be binding upon the Third Circuit.¹⁷⁶ Although the Third Circuit stated *Christie I* is “in play” during the rehearing en banc, it is unclear whether the court will address these issues in the en banc opinion.¹⁷⁷ However, ignoring the constitutional issues of PASPA may prove to be problematic.¹⁷⁸

171. See *Christie II*, 799 F.3d 259, 267 (3d Cir. 2015) (rejecting statutory language as exemption from PASPA), *vacated, reh’g en banc granted* Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015).

172. See Jeannie O’Sullivan, “Rematch Possible in Fight Over NJ Sports Betting Law,” *LAW 360* (Aug. 25, 2015), *available at* <http://www.blankrome.com/index.cfm?contentID=31&itemID=3493> (quoting attorney Eric G. Fikry as stating, “The dissent contends that if a partial repeal of prohibitions on sports wagering is construed as an authorization, then a complete repeal ‘must be considered authorization by law This point seems problematic, as the complete absence of any regulation whatsoever does seem to be qualitatively different than the selective restriction of an activity to certain locations.”).

173. See Joint Motion for Leave to File Reply in Support of Petition for Rehearing and/or Rehearing En Banc, *supra* note 166, at 7 (arguing Third Circuit would not be satisfied with any state regulation after complete repeal).

174. Transcript of Oral Argument, *Christie II*, *supra* note 2, at 13 (insinuating that chance to address constitutional issues of PASPA passed when Third Circuit did not grant rehearing en banc of *Christie I*).

175. See *id.* (“Maybe we should clarify what *Christie I* says.”).

176. See *Christie II*, 799 F.3d at 263.

177. See Rehearing *En Banc* Oral Argument, *supra* note 16, at 12:22 (“*Christie I* is now in play because we’re sitting en banc.”).

178. See Joint Motion for Leave to File Reply in Support of Petition for Rehearing and/or Rehearing En Banc, *supra* note 166 at 2 (“*Christie II* treated as settled and binding *Christie I*’s holding that PASPA is constitutional, while erasing the *Christie I* majority’s basis for reaching that holding.”).

1. *The Anti-Commandeering Doctrine*

Given the Supreme Court's evolving definition of the anti-commandeering doctrine, PASPA does not violate the Tenth Amendment.¹⁷⁹ Congress has the power to regulate sports gambling; therefore, PASPA's preemption of the field is constitutional.¹⁸⁰ Specifically, in *F.E.R.C. v. Mississippi*, the Supreme Court acknowledged that a statute does not commandeer the states if it requires states merely to consider federal regulations.¹⁸¹ The statute at issue in *F.E.R.C.* allowed states to regulate utilities according to the federal program or not regulate them at all, similar to PASPA's two options regarding sports gambling prohibitions.¹⁸² Ultimately, PASPA is constitutional because it does not require states to enact a legislative program.¹⁸³

2. *Equal Sovereignty*

Critics of *Christie I* are unconvinced that PASPA is consistent with the equal sovereignty principle; moreover, they are unsure whether courts have actually defined the equal sovereignty principle.¹⁸⁴ Specifically, the motives behind PASPA's grandfathering provision, preventing the corruption of sports and youth, does not relate to society today, much like the Voting Rights Act coverage

179. See Goodall, *supra* note 3, at 1130 (predicting Third Circuit would find PASPA in compliance with Tenth Amendment in *Christie II*).

180. See *FERC v. Mississippi*, 456 U.S. 742, 764–65 (1982) (explaining Supreme Court precedent allows Congressional discretion in regulating activities which they may preempt). For a discussion on sports wagering as a field that can be regulated by Congress, see *supra* note 36 and accompanying text.

181. See *FERC*, 456 U.S. at 764 (explaining statute at issue does not commandeer states).

182. Compare *id.* at 764 (“[I]f a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals”), with *Christie I*, 730 F.3d 208, 235 (3d Cir. 2013) (“PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field[.]”), *cert. denied sub nom. Christie v. NCAA*, 134 S. Ct. 2866 (2014).

183. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (holding statute does not commandeer states because it does not require them to enforce federal regulatory program); *Printz v. United States*, 521 U.S. 898 (1997) (“We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program . . . nor command the States’ officers . . . to enforce a federal regulatory program”).

184. See Justin Willis McKithen, Note, *Playing Favorites: Congress’ Denial of Equal Sovereignty to the States in the Professional and Amateur Sports Protection Act*, 49 GA. L. REV. 539, 540 (2015) (arguing PASPA’s grandfathering provision favors states such as Nevada and Delaware, violating equal sovereignty); Goodall, *supra* note 3, at 1131 (arguing *Shelby County* is unclear whether its equal sovereignty analysis is limited to facts of that case); Abigail B. Molitor, Comment, *Understanding Equal Sovereignty*, 81 U. CHI. L. REV. 1839, 1879 (2014) (arguing recent case law, including *Christie I*, offers potentially contradicting ideas of scope of equal sovereignty).

formula at issue in *Shelby County* became irrelevant after its creation.¹⁸⁵ Congress has a right to protect the moral fiber of professional and amateur sports by prohibiting state-sponsored sports gambling, but then allowing some state-sponsored sports gambling is contradictory.¹⁸⁶

New Jersey legislators were left confused after *Christie II* and felt they had “no guidance to ascertain what is left of their sovereignty vis-à-vis the federal government.”¹⁸⁷ After *Christie II*, there seem to be only two options for New Jersey: to maintain its existing laws or to repeal them entirely.¹⁸⁸ At oral argument for *Christie II*, the court seemed to agree with this possibility: one way for New Jersey to get around PASPA is to not mention any venues in its law; in essence, a complete repeal.¹⁸⁹ While some believe this goes beyond what the Constitution permits, the court in *Christie I* felt confident that the Supreme Court precedent recognized that “Congress may treat states differently under its power to regulate interstate commerce.”¹⁹⁰

The fact remains that PASPA gives some states, like Nevada, rights that other states do not currently possess.¹⁹¹ PASPA leaves forty-six states, including New Jersey, without any opportunity to profit from legalized sports gambling.¹⁹² The Supreme Court seem unwilling to address PASPA’s constitutionality, as its denial of

185. See McKithen, *supra* note 184, at 541 (arguing preclusion of forty-six states from sports gambling does not reflect today’s standards). However, the First Circuit has employed *Christie I*’s analysis to hold that a state’s right to participate in a federal health insurance program, like a state’s right to regulate sports gambling, “is not a core sovereign state function” like regulating elections. See *Mayhew v. Burwell*, 772 F.3d 80, 95–96 (1st Cir. 2014) (finding provision of Patient Protection and Affordable Care Act compliant with equal sovereignty).

186. See McKithen, *supra* note 184, at 562 (“Congress may claim that PASPA was intended to protect the sanctity of sports, but if sports wagering were truly imposing of a threat, it would make little sense to allow the enterprise anywhere at all.”).

187. Joint Motion for Leave to File Reply in Support of Petition for Rehearing and/or Rehearing En Banc, *supra* note 166, at 2.

188. See *id.* (explaining Third Circuit interpretation of constitutional options PASPA provides).

189. See Transcript of Oral Argument, *Christie II*, *supra* note 2, at 49 (discussing what state statutory construction of sports gambling law would satisfy PASPA).

190. See *NCAA, Pro Leagues Urge Supreme Court to Reject Petition Over N.J. Sports Gambling Law*, 26 No. 5 WESTLAW J. ENT. INDUS. 3 (2014) (summarizing government’s arguments to affirm *Christie I* district court ruling).

191. See Noah Feldman, *Sports Gambling Law is Unfair to New Jersey*, BLOOMBERG VIEW (Aug. 28, 2015, 8:00 AM), <http://www.bloomberglaw.com/articles/2015-08-28/sports-gambling-law-is-unfair-to-new-jersey> (explaining potential constitutional issues of PASPA).

192. See McKithen, *supra* note 184, at 543 (arguing PASPA violates equal sovereignty).

certiorari to *Christie I* guarantees Nevada's monopoly over legalized sports gambling in the nation.¹⁹³

IV. NEXT STEPS FOR NEW JERSEY

While legalizing sports gambling is an issue of immediate importance to the state of New Jersey, the Third Circuit will unlikely uphold the 2014 Law.¹⁹⁴ Despite hearing arguments regarding the constitutionality of PASPA at the rehearing en banc, there is a possibility that the Third Circuit will analyze only the text of the 2014 Law.¹⁹⁵ Unless the court chooses to question PASPA's constitutionality, the fact that the 2014 Law limits gambling to state-licensed venues and calls for a partial, not complete, repeal almost certainly guarantees that it is inconsistent with PASPA.¹⁹⁶

Whatever the Third Circuit rules on the rehearing, there is a significant chance that the losing party will appeal to the Supreme Court; however, given the Court's past refusal to hear *Christie I*, it is unlikely that the Supreme Court would hear the case.¹⁹⁷ If the Third Circuit rules in favor of New Jersey, sports betting could commence immediately at the racetracks and casinos specified by the 2014 Law.¹⁹⁸ In this case, the Sports Leagues could request that the Supreme Court stay the Third Circuit's ruling, which would halt any sports betting from occurring until the Supreme Court ruled on the issue.¹⁹⁹

"While New Jersey is at the forefront of this movement [to legalize sports gambling], many states around the country appear poised to join should New Jersey provide a roadmap around

193. See McKithen, *supra* note 184, at 542 (arguing PASPA violates equal sovereignty).

194. See Casey C. Sullivan, *New Jersey Loses Gamble on Legalized Sports Betting, Again*, FINDLAW 3RD CIRCUIT NEWS & INFORMATION BLOG (Sept. 11, 2015, 5:59 AM), http://blogs.findlaw.com/third_circuit/2015/09/new-jersey-loses-gamble-on-legalized-sports-betting-again.html (suggesting New Jersey propose new legislation to get around PASPA).

195. See New Jersey's Response to Petition for Rehearing En Banc, *supra* note 139, at 11–12 (stating *Christie II* does not reopen any constitutional issues regarding PASPA).

196. See NCAA, 61 F.Supp.3d 488, 492 (D.N.J. 2014) (recommending repeal of PASPA as option for New Jersey), *aff'd sub nom.* NCAA v. Gov. of N.J., 799 F.3d 259 (3d Cir. 2015), *vacated, reh'g en banc granted* Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015).

197. See Dustin Gouker, *New Life for New Jersey Sports Betting Case: Rehearing Granted by Court*, LEGAL SPORTS REPORT (Oct. 14, 2015, 7:09 PM), <http://www.legalsportsreport.com/4987/nj-sports-betting-case/> (predicting future of litigation).

198. See *id.* (predicting gambling activity in New Jersey if 2014 Law).

199. See *id.* (predicting future of litigation).

PASPA.”²⁰⁰ Mere weeks after the Third Circuit published the *Christie II* opinion, and only days after New Jersey filed for rehearing *en banc*, California introduced a sports wagering bill, effective only if both PASPA and California’s state constitution are amended to allow sports betting in California.²⁰¹ The California bill would allow existing casinos, racetracks, and card rooms to authorize gambling to those over twenty-one years of age, and licensees would have to pay a percentage of winnings to the state.²⁰² In addition to California, six states have discussed enacting sports betting bills in 2015.²⁰³ New Jersey officials continue to insist legalized sports betting will generate millions of dollars in revenue for the state, despite the millions of dollars taxpayers have already paid in legal fees throughout both sets of litigation.²⁰⁴

However, the 2014 Law was not a successful roadmap to legalizing sports gambling within a state.²⁰⁵ Had New Jersey prevailed, or if New Jersey prevails in the future, other states will likely follow and begin legalizing sports gambling.²⁰⁶ One study showed that Americans will bet \$95 billion, mostly illegally, on NFL and college football in the 2015-2016 season.²⁰⁷ The president and CEO of the American Gaming Association declared that the “federal ban on traditional sports betting outside of Nevada is failing.”²⁰⁸

The District Court for the District of New Jersey and the Third Circuit have consistently stated that the only path to legalized sports

200. NCAA, 61 F.Supp.3d at 492; *see also* David Purdum, *Research Shows U.S. Could Dominate Global Legalized Sports Betting Market*, ESPN (Sept. 9, 2015), http://espn.go.com/chalk/story/_/id/13614240/research-shows-united-states-dominate-global-legalized-sports-betting-market (detailing seven states that proposed sports betting bills similar to New Jersey in 2015).

201. *See* Dustin Gouker, *California Eyes Legalized Sports Betting, Introduces New Bill*, LEGAL SPORTS REPORT (Sep. 11, 2015, 8:47 P.M.), <http://www.legalsportsreport.com/3757/california-eyes-legalized-sports-betting/> (providing overview of California bill).

202. *See id.* (reviewing proposed provisions of California bill).

203. *See* Purdum, *supra* note 200 (arguing state-sponsored sports gambling is of national interest).

204. *See* Johnson, *supra* note 152 (predicting whether officials will file rehearing *en banc*).

205. *See id.*

206. *See* Michael McCann, *Analyzing the Future of New Jersey Sports Betting After Denied Appeal*, SPORTS ILLUSTRATED (Aug. 25, 2015), <http://www.si.com/more-sports/2015/08/25/new-jersey-sports-betting-appeal-denied> (discussing nationwide interest in legalizing sports gambling).

207. *See* Purdum, *supra* note 200.

208. *See id.* (quoting Geoff Freeman, President and CEO of American Gaming Association).

betting is through a Congressional repeal or PASPA amendment.²⁰⁹ Many believe Congress will approve legalized sports gambling in the future.²¹⁰ State senators, including John McCain of Arizona and Roderick D. Wright of California, have expressed their support.²¹¹

Cooperation between the states and the Sports Leagues would also create a smoother path to legalized sports gambling.²¹² Adam Silver, commissioner of the NBA, has publicly declared his support for repealing PASPA and creating a regulated system of legalized sports gambling.²¹³ He believes that Americans have changed their attitude since PASPA's enactment and that sports gambling "has increasingly become a popular and accepted form of entertainment."²¹⁴ Furthermore, sports fans are demanding a secure and legal way to bet on sports.²¹⁵ David Stern, former NBA Commissioner, agrees with Silver that sports gambling should be under federal regulation that would allow for protection of leagues' intellectual property and provide a channel to monitor illegal betting.²¹⁶ Yet, he is wary of New Jersey's efforts to legalize sports betting, calling the 2014 Law "ham-handed" and stating that it would "cause people to bet their grocery money on gambling."²¹⁷

209. See *NCAA*, 61 F.Supp.3d 488, 492 (D.N.J. 2014) (reiterating that court's role does not involve questioning congressional intent), *aff'd sub nom.* *NCAA v. Gov. of N.J.*, 799 F.3d 259, 263 (3d Cir. 2015), *vacated, reh'g en banc granted* Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015).

210. See Jeff Ifrah, *Wanted: A Quarterback for Legalization of U.S. Sports Betting*, LEGAL SPORTS REPORT (Aug. 11, 2015, 12:16 P.M.) <http://www.legalsportsreport.com/3022/sports-betting-legalization-push-needs-leader/> (arguing legalized sports gambling is in America's immediate future).

211. See *id.* (providing evidence that favoring legalized sports gambling is growing trend); *Should Sports Betting Be Legal?* U.S. NEWS & WORLD REPORT, <http://www.usnews.com/debate-club/should-sports-betting-be-legal> (last visited Apr. 10, 2016) (providing list of arguments for and against legalizing sports gambling from politicians and sports industry professionals).

212. See Goodall, *supra* note 3, at 1133 (arguing Sports Leagues' support is crucial and 2014 Law alienates them).

213. See Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014) http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=1 (urging formation of new regulatory system while maintaining integrity of sports).

214. See *id.*

215. See *id.* (supporting repeal of PASPA in favor of new scheme).

216. See John Brennan, *Former NBA Commissioner: Time has Come for Legal Sports Betting*, NORTHJERSEY.COM (Oct. 1, 2015, 6:26 PM), <http://www.northjersey.com/news/former-nba-commissioner-time-has-come-for-legal-sports-betting-1.1423270> (summarizing Stern's opinion that cooperation between professional sports leagues and the federal government would be profitable).

217. See *id.*

As New Jersey awaits the Third Circuit’s response, legislators are continuing to find ways to call attention to the climate surrounding sports gambling in America.²¹⁸ New Jersey will continue to fight for legalized gambling within the state.²¹⁹ This may require a new state law completely repealing New Jersey’s sports betting laws (and inevitably a new set of litigation), or a serious push for Congress to change or repeal PASPA.²²⁰ New Jersey legislators remain committed to not only “New Jersey being treated fairly under federal law, but [also] the common sense reality of bringing a sports wagering industry that is already taking place every day in our state out of the shadows.”²²¹

V. CONCLUSION

Regardless of the Third Circuit’s decision en banc, New Jersey will likely be unable to take its victory lap around the sports gambling racetrack anytime soon.²²² New Jersey would have a better chance of success if the Third Circuit called into question the constitutional analysis of PASPA in *Christie I*.²²³ However, if the Third Circuit leaves the holding of *Christie I* untouched, New Jersey is unlikely to prevail because of the apparent level of state involvement that the 2014 Law seems to promulgate.²²⁴ New Jersey remains dedicated to legalizing sports gambling in the state, and with many other states in the nation watching, the issues of reforming PASPA

218. See, e.g., *As New Jersey Sports Betting Court Case Inches Along, Congressmen Pursue Legislative Path*, FOX BUSINESS (Sept. 21, 2015), <http://www.foxbusiness.com/markets/2015/09/21/as-new-jersey-sports-betting-court-case-inches-along-congressmen-pursue/> (describing New Jersey legislators’ actions). New Jersey representative Frank Pallone has requested that the Committee on Energy and Commerce investigate the role of professional sports leagues in fantasy sports gambling. See *id.* Many see PASPA as the “guarantor” of Nevada’s monopoly in sports gambling in America. See Feldman, *supra* note 191 (explaining potential constitutional issues of PASPA).

219. See Joe Drape, *New Jersey’s Effort to Legalize Sports Betting is Denied on Appeal*, N.Y. TIMES (Aug. 25, 2015), http://www.nytimes.com/2015/08/26/sports/football/new-jerseys-effort-to-legalize-sports-betting-is-denied-on-appeal.html?_r=0 (quoting Joe Asher, president of bookkeeping service William Hill U.S.). “It’s pretty clear to me that this matter is far from over. . . . I remain convinced that legal sports betting will come to New Jersey. It’s a matter of when, not if.” *Id.* (quoting Joe Asher).

220. See Feldman, *supra* note 191 (“Unless a state can convince Congress to change the law, it’s stuck without sports gambling.”).

221. See Johnson, *supra* note 152 (quoting Brian Murray, Spokesman for Office of New Jersey Governor Chris Christie).

222. See *supra* notes 194–221 and accompanying text.

223. See *supra* notes 152–93 and accompanying text.

224. See *supra* notes 152–93 and accompanying text.

and instituting legalized state sports gambling will not remain contained primarily within the Third Circuit for much longer.²²⁵

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²²⁵. *See supra* notes 194–221 and accompanying text.

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