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Volume 66

Issue 1 Fall 2016: *Twenty-Sixth Annual DePaul Law  
Review Symposium*

Article 4

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## Recommended Citation

Justin Fielkow, Daniel Werly & Andrew Sensi, *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DePaul L. Rev. (2017)

Available at: <http://via.library.depaul.edu/law-review/vol66/iss1/4>

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# TACKLING PASPA: THE PAST, PRESENT, AND FUTURE OF SPORTS GAMBLING IN AMERICA

*Justin Fielkow, Daniel Werly & Andrew Sensi\**

## INTRODUCTION

In 2015, between \$148–\$500 billion worth of illegal wagers were placed on sporting events in the United States.<sup>1</sup> Meanwhile only \$4.2 billion was bet legally at Nevada sportsbooks.<sup>2</sup> The reason over 97% of the sports betting market is illegal: the Professional and Amateur Sports Protection Act (PASPA).<sup>3</sup>

Enacted October 28, 1992, PASPA is a federal statute which prohibits its states from sanctioning or sponsoring sports gambling, except in states where it had previously been allowed:<sup>4</sup> Delaware, Montana, Nevada, and Oregon.<sup>5</sup> At the time of PASPA's passage, the public's confidence in the purity of sporting events had dwindled following a wave of match-fixing scandals.<sup>6</sup> With as many as thirteen states considering

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1. The American Gaming Association conservatively estimated that Americans wagered \$148.8 billion illegally in 2015. Chris Moyer, *March Madness Betting to Total \$9.2 Billion this Year*, AM. GAMING ASS'N. (Mar. 14, 2016), <https://www.americangaming.org/newsroom/press-releases/march-madness-betting-total-92-billion-year>. On the high side, Princeton University economics professor Robert Willig estimates that as much as \$500 billion is wagered annually on sports in the U.S. See Alexandra Berzon, *Betting Against a Gambling Ban*, WALL ST. J. (Dec. 17, 2012, 10:05 PM), <http://www.wsj.com/articles/SB10001424127887324677204578185734003879740>.

2. See Dustin Gouker, *Nevada Sportsbooks Took Record \$4.2 Billion in Wagers in 2015*, LEGAL SPORTS REP. (Feb. 4, 2016, 11:14 AM), <http://www.legalsportsreport.com/7902/nevada-record-sports-betting-2015/> (citing data from the Nevada Gaming Control Board's monthly report from December 2015).

3. Pub. L. No. 102-559, 106 Stat. 4227 (codified at 28 U.S.C. §§ 3701–3704 (2012)).

4. *Id.*

5. Ryan M. Rodenberg, *U.S. Sport's Opposition to Betting: Potential for Change*, WORLD SPORTS L. REP., Jan. 2012, at 12.

6. See, e.g., Jerome Holtzman, *Giamatti Bans Rose for Life*, CHI. TRIB. (Aug. 25, 1989), [http://articles.chicagotribune.com/1989-08-25/sports/8901070792\\_1\\_stain-or-disgrace-mr-rose-bartlett-giamatti](http://articles.chicagotribune.com/1989-08-25/sports/8901070792_1_stain-or-disgrace-mr-rose-bartlett-giamatti) (reporting on Major League Baseball Commissioner A. Bartlett Giamatti's decision to

initiatives to allow sports betting within their borders, Congress acted swiftly to limit the spread of sports gambling, to protect America's youth and preserve both the character and integrity of sports.<sup>7</sup>

In the past decade PASPA has come under attack. With tax revenue coffers dwindling, several states have turned to sports gambling as a way to overcome their budget deficits. In 2008, Montana began offering Montana Sports Action, a lottery game that lets participants create fantasy football teams.<sup>8</sup> In 2009, Delaware revived its Sports Lottery program,<sup>9</sup> and, in both 2012 and 2014, New Jersey passed laws that sought to permit sports gambling at casinos and racetracks within the state.<sup>10</sup> Yet, New Jersey's recent attempts to legalize sports wagering have failed to come to fruition as the major professional and amateur sports organizations in the United States—the National Football League (NFL), the National Basketball Association (NBA), the National Hockey League (NHL), Major League Baseball (MLB), and the National Collegiate Athletic Association (NCAA) (collectively, the Leagues)—have successfully sued to enforce PASPA and preempt New Jersey's sports gambling initiative.<sup>11</sup>

Despite recent setbacks in court, this Article contends the legalization of sports gambling remains inevitable. New Jersey and other

give superstar Pete Rose a lifetime suspension from professional baseball for betting on games); Frances Frank Marcus, *8 Indicted in Tulane Scandal; School to Give up Basketball*, N.Y. TIMES (Apr. 5, 1985), <http://www.nytimes.com/1985/04/05/sports/8-indicted-in-tulane-scandal-school-to-give-up-basketball.html?pagewanted=all> (discussing the indictment of three Tulane University basketball players for points-shaving in 1985); John Underwood, *The Biggest Game in Town*, SPORTS ILLUSTRATED (Mar. 10, 1986), <http://www.si.com/vault/1986/03/10/638301/the-biggest-game-in-town> (discussing a scheme to shave points by Boston College basketball players during the 1978–79 season).

7. Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 8 (1992) (citing *Increasing Number of States Are Considering Initiatives*, USA TODAY, June 25, 1991, at 8C).

8. See *Montana Sports Action*, MONT. LOTTERY, <http://montanalottery.com/msa> (last visited Aug. 8, 2016); see also Nando Difino, *State of Montana to Institute Fantasy-Football Lottery Game*, WALL ST. J. (Aug. 22, 2008, 11:59 PM), <http://www.wsj.com/articles/SB121935765240561711>.

9. See *OFC Comm Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009); *Delaware Sports Lottery*, DEL. LOTTERY GAMES, <http://www.delottery.com/games/sports/> (last visited Aug. 8, 2016).

10. See N.J. STAT. ANN. § 5:12A (West 2012), preempted by PASPA, 28 U.S.C. §§ 3701–3704 (2012).

11. See *NCAA v. Governor of N.J. (Christie I)*, 730 F.3d 208, 215 (3d Cir. 2013) (affirming the district court's finding that PASPA was constitutional and enjoining New Jersey's 2012 Sports Wagering Law from going into effect), *aff'g* No. 12-4947 (MAS) (LHG), 2012 WL 6698684 (D.N.J. Dec. 21, 2012), *cert. denied*, 134 S. Ct. 2866 (2014); see also *NCAA v. Governor of N.J. (Christie II)*, 799 F.3d 259 (3d Cir. 2015) (affirming the district court's holding that New Jersey's 2014 partial repeal of its state prohibitions on sports gambling violated PASPA), *aff'g* 61 F. Supp. 3d 488 (D.N.J. 2014), *aff'd on reh'g*, 832 F.3d 389 (3d Cir. 2016) (en banc), *petition for cert. filed*, No. 16-476 (Oct. 7, 2016).

states interested in authorizing and regulating sports betting still have a number of options, as regulatory technology continues to evolve and public opinion is overwhelmingly trending towards acceptance.

Part I provides a robust explanation of the history of sports gambling and PASPA.<sup>12</sup> Part II discusses New Jersey's Sports Waging Law and the resulting *Christie I* case.<sup>13</sup> Part III examines the New Jersey Senate Bill 2460 and the *Christie II* case stemming from the bill's enactment.<sup>14</sup> Part IV argues that the legalization of sports gambling is inevitable and discusses the potential routes for legalization.<sup>15</sup> Part V concludes.

## I. THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

This Part provides a full understanding of the United States' history of sports gambling, the Congressional motives for passing PASPA, and the early challenges to the statute.

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

To comprehend the current climate surrounding sports gambling and New Jersey's recent legal challenges to PASPA, it is necessary to understand the history of sports gambling in America and the mindset of those who pushed the legislation through Congress.

The United States has had a complicated on-again, off-again relationship with gambling throughout its history. In the early eighteenth century, money from gambling operations was an effective government fundraising method in colonial settlements.<sup>16</sup> By the nineteenth century, the country was replete with organized gambling houses,<sup>17</sup> and America's obsession with the so-called "Sport of Kings"—horse

12. See *infra* notes 16–52 and accompanying text.

13. See *infra* notes 53–117 and accompanying text.

14. See *infra* notes 118–62 and accompanying text.

15. See *infra* notes 163–97 and accompanying text.

16. See Chil Woo, Note, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 571 (2013) (“All thirteen colonies used funds from lotteries to help fund substantial public works like the creation of universities (e.g., Harvard, Yale, Columbia, Dartmouth, Princeton, and William and Mary), churches and libraries.”); see also ROGER DUNSTAN, CAL. RES. BUREAU, CRB-97-003, GAMBLING IN CALIFORNIA (1997), <http://www.library.ca.gov/CRB/97/03/97003a.pdf>. Revenue generated from colony-sanctioned lotteries was even used to help finance the Revolutionary War. See Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State Sponsored Gambling*, 34 B.C. L. REV. 11, 12 (1992).

17. See COMM'N ON THE REV. OF THE NAT'L POL'Y TOWARD GAMBLING, GAMBLING IN AMERICA 169 (1976) [hereinafter COMM'N REPORT], <https://ia802205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit.pdf>. In 1850, New York City was home to six-thousand gambling houses (one for every eighty-five residents). *Id.*

racing—was in full force, with fans permitted to legally wager at racetracks across the country.<sup>18</sup> Yet, after over a century of being an accepted practice, gambling reform efforts were underway.<sup>19</sup> By the early twentieth century, members of the Progressive Movement, who concluded that gambling was among the many social ills in need of reform, succeeded in their campaign to close down racetracks and outlaw nearly all forms of gambling across the United States.<sup>20</sup>

America's attitude toward, and acceptance of, sports gambling soon reached its low point. Coinciding with the decline in *legal* gambling activities was the rise in popularity of professional baseball.<sup>21</sup> As baseball captured the nation's attention, it was no coincidence that there was a corresponding increase in *illegal* gambling activities—primarily betting on baseball games—largely accomplished through organized crime syndicates.<sup>22</sup> The nation's consciousness was soon shocked when it was determined that notorious gangster Arnold Rothstein had bribed members of the Chicago White Sox to lose the 1919 World Series.<sup>23</sup> As a result of the infamous “Black Sox” scandal, baseball owners appointed Judge Kenesaw Mountain Landis as the first Commissioner in all of professional sports.<sup>24</sup> Among Landis' first acts was to ban all eight players believed to be part of the conspiracy.<sup>25</sup> Following the MLB's lead, every major professional sports league in the United States now has Commissioners charged with, among other responsibilities, maintaining the “integrity of the game” in their respective sports.<sup>26</sup>

Gradually the negative stigma attached to gambling waned and the need for revenue rose following the Great Depression.<sup>27</sup> States once again began authorizing certain forms of gambling.<sup>28</sup> Gambling on

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18. *Timeline: Horseracing in the U.S.*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/timeline/seabiscuit/> (last visited Aug. 9, 2016). The first Belmont Stakes, Preakness Stakes, and Kentucky Derby were run in 1867, 1873, and 1875, respectively, and in 1900, horse racing fans could bet at over three hundred racetracks nationwide. *Id.*

19. Woo, *supra* note 16, at 572 (discussing how “[m]any lotteries ended in scandal, with operators absconding with or misappropriating proceeds,” which prompted reform).

20. See 2 JOSEPH R. CONLIN, *THE AMERICAN PAST: A SURVEY OF AMERICAN HISTORY* 563 (9th ed. 2010); Woo, *supra* note 16, at 572.

21. Woo, *supra* note 16, at 572.

22. *Id.*

23. *Id.*

24. Adriano Pacifici, *Scope and Authority of Sports League Commissioner Disciplinary Power: Bounty and Beyond*, 3 BERKELEY J. ENT. & SPORTS L. 93, 96 (2014).

25. *Id.* at 96.

26. See *id.* at 96–97 (discussing the broad powers of commissioners of the major professional sports leagues).

27. Woo, *supra* note 16, at 572.

28. *Id.*

sports contests, however, remained illegal throughout the nation until 1949, when Nevada became the first state to legalize sports wagering within its borders.<sup>29</sup> Although the effects were not immediate, Nevada sportsbooks prospered after Congress lowered the wagering excise tax in an effort to enable legal bookmakers to be more competitive with their illegal counterparts.<sup>30</sup>

Despite the growth of Nevada's legal sports gambling operations, especially those in Las Vegas, organized crime remained a problem. Sophisticated criminal organizations openly defied authorities and quickly "became the primary operators of [illegal] sports gambling schemes throughout the United States."<sup>31</sup> As a result, in the early 1960s there was a palpable fear that organized crime would once again attempt to corrupt professional sports.<sup>32</sup> Capitalizing on this fear, Congress enacted a plethora of laws designed to thwart organized crime's grip on the illegal sports gambling marketplace.<sup>33</sup> In 1961, Congress passed the Wire Act,<sup>34</sup> the Travel Act,<sup>35</sup> and the Interstate Transportation of Wagering Paraphernalia Act;<sup>36</sup> followed by the 1964 Sports Bribery Act,<sup>37</sup> and finally, the 1970 Illegal Gambling and Business Act.<sup>38</sup> Each of these laws aimed at cracking down on organized crime and illegal gambling rings.

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29. See *NFL v. Governor of Del.*, 435 F. Supp. 1372, 1379 (D. Del. 1977) (examining the history of legal sports betting in the United States).

30. *Id.* at 1379. In December 1974, Congress lowered the wagering excise tax from 10% to 2%, and since then, casinos saw a significant increase in their sportsbook revenue. COMM'N REPORT, *supra* note 17, at 17 (discussing the reasons behind lowering the tax). Sports wagering in Nevada in the fourth quarter of 1973 was \$826,767, but following the lowering of the excise tax in 1974, wagers rose to \$3,873,217 and exploded to \$26,170,328 in 1975. *NFL*, 435 F. Supp. at 1379. The wagering excise tax was lowered again in 1982 to the current rate of 0.25%. 26 U.S.C. § 4401 (2012).

31. Eric Meer, Note, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 284 (2011).

32. See DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 93–95 (2005).

33. See *id.*

34. Act of Sept. 13, 1961, Pub. L. No. 87-216, 75 Stat. 491 (codified as amended at 18 U.S.C. § 1084 (2012)).

35. Act of Sept. 13, 1961, Pub. L. No. 87-228, 75 Stat. 498 (codified as amended at 18 U.S.C. § 1952 (2012)).

36. Act of Sept. 13, 1962, Pub. L. No. 87-218, 75 Stat. 492 (codified as amended at 18 U.S.C. § 1953 (2012)).

37. Act of June 6, 1962, Pub. L. No. 88-316, 78 Stat. 293 (codified as amended at 18 U.S.C. § 224 (2012)).

38. Act of Oct. 15, 1970, Pub. L. No. 91-452, 84 Stat. 937 (codified as amended at 18 U.S.C. § 1955 (2012)). The Illegal Gambling Business Act was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.), which also contains the well-known Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961–1968 (2012).

Despite the federal government's best efforts, illegal sports gambling persisted. According to a 1976 report prepared by the Commission on the Review of the National Policy Toward Gambling (the Commission), "effective gambling law enforcement [is] an impossible task."<sup>39</sup> The Commission found that over two-thirds of the population indulged in gambling and that approximately 80% of the population approved of gambling.<sup>40</sup> According to the Commission, "Gambling is inevitable. No matter what is said or done by advocates or opponents of gambling in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans."<sup>41</sup>

Notwithstanding its conclusions that gambling law enforcement was "an impossible task," the Commission opined that current state prohibitions on sports wagering should remain in place.<sup>42</sup> According to the Commission, it would be unwise for states to engage in legal sports-betting-activities because a "single-event sports wagering system would provide relatively little revenue for the state, and existing Federal tax policies make effective competition with illegal bookmakers impossible."<sup>43</sup> Thus, sports gambling remained illegal in nearly all states, with only limited exceptions.<sup>44</sup>

Perhaps recognizing the impracticality of prohibiting sports betting outright, the U.S. Department of Justice put "a low priority on enforcement of antigambling laws."<sup>45</sup> Fewer individuals were arrested for engaging in illegal gambling activities every year, and even fewer received convictions, prison sentences, or substantial fines.<sup>46</sup> As a re-

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39. COMM'N REPORT, *supra* note 17, at 35. The Commission was created by Congress as a part of the Organized Crime Control Act, and it conducted forty-three days of hearings and received testimony from approximately 275 witnesses. *Id.* at x.

40. *Id.* at ix.

41. *Id.* at 1.

42. *Id.* at 176-78 (recommending that states not legalize sports wagering); *see id.* at 49-53 (providing recommendations regarding gambling policy and enforcement at the state level).

43. *Id.* at 4.

44. At the time of the Commission's report, only Nevada, Montana, and Delaware offered some form of legal sports betting or lottery. *See NFL v. Governor of Del.*, 435 F. Supp. 1372, 1375, 1379 (D. Del. 1977) (discussing Nevada and Montana's sports gambling offerings and upholding Delaware's NFL-based lottery game); *see also* Meer, *supra* note 31, at 288 ("From 1989 until 2007, Oregon operated a sports betting lottery called 'Sports Action,' which allowed Oregonians to make parlay bets on NFL games. However, on July 1, 2007, the Oregon Legislature repealed Sports Action in an effort to attract collegiate basketball tournaments to its state.").

45. Bart Barnes, *Friendly Wagers to Big Bookmaking*, WASH. POST (Jan. 18, 1982), <https://www.washingtonpost.com/archive/sports/1982/01/18/friendly-wagers-to-big-bookmaking/73abae5a-3ce8-47f0-9740-b1bb83328ec1>.

46. In 1960, almost 123,000 arrests were made for illegal gambling. Dan McGraw, *The National Bet*, U.S. NEWS & WORLD REP., Apr. 7, 1997, at 50. In 1974, that number dropped by half to an estimated 61,900 arrests. COMM'N REPORT, *supra* note 17, at 35-36.

sult of this lack of enforcement, illegal sports gambling in America continued to proliferate. In 1983, approximately \$8 billion was wagered illegally on sports in the United States.<sup>47</sup> By 1989, the amount quadrupled to around \$50 billion.<sup>48</sup>

As the amounts wagered on sports increased at an astonishing pace, so did skepticism that games were being fixed. In 1980, a scheme to shave points by Boston College basketball players was revealed when Henry Hill informed federal prosecutors that he worked with several players to shave points in nine games during the 1978–79 season.<sup>49</sup> A few years later, in 1985, three Tulane University basketball players were indicted in a point-shaving case.<sup>50</sup> A prominent 1986 Sports Illustrated article exemplified the growing feelings of those who saw gambling as a plague on sports: “[N]othing has done more to despoil the games Americans play and watch than widespread gambling on them. As fans cheer their bets rather than their favorite teams, dark clouds of cynicism and suspicion hang over games, and the possibility of fixes is always in the air.”<sup>51</sup> The clamor between the shadowy underworld of sports gambling and its opponents reached its pinnacle in August 1989, when MLB Commissioner A. Bartlett Giamatti concluded that Pete Rose “bet on baseball” and the Commissioner announced that Rose would receive a lifetime banishment.<sup>52</sup>

### B. Congressional Motivations and the Enactment of PASPA

Although most states had already elected to prohibit sports betting prior to the enactment of PASPA, Congress, for the most part, had given states the freedom to regulate sports gambling within their borders.<sup>53</sup> That all changed on February 22, 1991. With the full support of the professional sports leagues,<sup>54</sup> U.S. Senators from the states of

47. McGraw, *supra* note 46.

48. Berzon, *supra* note 1. Any measure of the illegal sports gambling market is, however, inherently imprecise due to the difficulty in gathering accurate figures. For example, the Organized Crime and Racketeering Section of the U.S. Department of Justice completed a study in which it estimated that between \$18.5–\$25 billion were wagered on sporting events illegally in 1973. COMM’N REPORT, *supra* note 17, at 132–33. This is, of course, significantly higher than the 1983 estimate of \$8 billion. McGraw, *supra* note 46.

49. See Underwood, *supra* note 6. Yes, the same Henry Hill featured in the 1990 film *Goodfellas*.

50. See Marcus, *supra* note 6.

51. Underwood, *supra* note 6.

52. Holtzman, *supra* note 6.

53. Provided, of course, the state regulations were consistent with the federal government’s promulgations regarding organized crime and its prohibition on conducting interstate-sports-gambling schemes. See *supra* notes 33–38 and accompanying text.

54. See S. REP. NO. 102-248, at 14–15 (1991), reprinted in 1992 U.S.C.C.A.N. 3553, 3564–65, 1991 WL 258663, at \*4–5. See Rodenberg, *supra* note 5, at 12.



Utah, Arizona, Pennsylvania, and, ironically, New Jersey introduced PASPA.<sup>55</sup>

At the time, the primary arguments in favor of PASPA were (1) protecting the integrity, and preserving the character, of sports; (2) shielding America's impressionable youth from vice; and (3) restricting any further spreading of state-authorized sports gambling.<sup>56</sup>

"Integrity" in sports refers to the public's confidence that games are free from corruption. Similarly, the concept of "character" alludes to the nature of sporting events as wholesome entertainment and competition. Ultimately, one of PASPA's primary goals was to keep sports "clean."<sup>57</sup> Former NFL Commissioner Paul Tagliabue, in his September 1991 Congressional testimony, best explained the threat that gambling poses to sports:

First, sports gambling threatens the character of team sports. Our games embody our very finest traditions and values. . . . With legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing. . . .

Second, sports gambling threatens the integrity of, and public confidence in, team sports. Sports lotteries inevitably foster a climate of suspicion about controversial plays and intensify cynicism with respect to player performances, coaching decisions, officiating calls and game results.<sup>58</sup>

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55. See *Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 473 and S. 474 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 102d Cong., 1st Sess. 7 (1992) [hereinafter *S. 473 and S. 474 Hearing*] (S. 473 and S. 474 were cosponsored by Senators Orrin Hatch (R-UT), Dennis DeConcini (D-AZ), Arlen Specter (R-PA), and Bill Bradley (D-NJ)). Senator Bradley was also a former basketball star for the Princeton University Tigers and the New York Knicks. It is possible that Senator Bradley had a particularly negative experience with point shaving during his professional career. At the end of a Knicks game at Madison Square Garden, Knicks fans cheered as the opponent cut the lead to three points and covered the point spread. John Brennan, *Man Behind Sports Betting Ban Stands His Ground*, NORTHJERSEY.COM (Oct. 27, 2011), <http://www.northjersey.com/news/man-behind-sports-betting-ban-stands-his-ground-1.268432>. The FBI would later investigate members of the Knicks in the early 1980s for point-shaving and game-fixing. Ben Golliver, *Reports: FBI Investigated 1980s Knicks Players for Alleged Game-Fixing, Drug Scandal*, SPORTS ILLUSTRATED (Sept. 15, 2013), <http://www.si.com/nba/point-forward/2013/09/15/new-york-knicks-gambling-scandal-drugs-co-caine-1980s>. Perhaps motivated by this incident, Bradley was arguably the most important political force driving the enactment of PASPA.

56. See S. REP. NO. 102-248, at 5; see also *S. 473 and S. 474 Hearing*, *supra* note 55, at 1–2 (statement of Dennis DeConcini, Chairman, Subcomm. on Patents, Copyrights and Trademarks).

57. S. REP. NO. 102-248, at 6.

58. *S. 473 and S. 474 Hearing*, *supra* note 55, at 25; see also S. REP. NO. 102-248, at 3556. Senator Bradley expressed similar sentiments during a 1992 Senate debate. 138 CONG. REC. 33823 (1992) (statement of Sen. Bradley) ("Sports betting threatens the integrity of and public confidence in professional and amateur team sports, converting sports from wholesome athletic entertainment into a vehicle for gambling. Sports gambling raises people's suspicions about

By restricting the expansion of sports betting, Congress and the Leagues hoped to re-instill in the public a sense of confidence in the genuineness of the outcome of games, as well as assuage concerns that sports were simply becoming a vehicle for gambling, rather than a form of healthy entertainment.<sup>59</sup>

With as many as thirteen states considering offering legal sports betting, proponents of PASPA proclaimed that the statute was needed to protect minors.<sup>60</sup> According to some members of Congress, and seconded by the Leagues, legalizing sports gambling would not only send the wrong message to young people, but it would also encourage their participation in gambling activities.<sup>61</sup> In a similar vein, some argued that legalizing sports betting would give the activity the “imprimatur of the state”—an appearance of governmental approval—and thereby increase the number of gamblers who would not have otherwise engaged in sports betting absent the apparent state sanctions of such activities.<sup>62</sup>

Once again, Tagliabue best sums up the arguments of those who advocated for the passage of PASPA. When asked how the expansion of sports lotteries would change anything given the vast sums already being wagered illegally on sports, Tagliabue responded, “There will be millions of additional Americans induced and seduced into gambling if this growth industry is permitted to take the imprimatur of the State and support State-sanctioned point-spread betting.”<sup>63</sup> On October 28,

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point-shaving and game-fixing. . . . If sports betting spreads, more and more fans will question every coaching decision and official’s call.”).

59. See *supra* notes 57–58 and accompanying text.

60. Bradley, *supra* note 7, at 6–8.

61. See *S. 473 and S. 474 Hearing, supra* note 55, at 26 (statement of Paul Tagliabue, Comm’r, NFL) (“[L]egalized sports gambling sends a terrible message to youth. Sports are very important to millions of our young people. Youth look up to athletes. Our players cannot be expected to serve as healthy role models for youth if they are made to function as participants in gambling enterprises.”); see also *S. REP. NO. 102-248*, at 5 (referring to the proliferation of video games and video gambling, the Senate Judiciary Committee believed, “Youngsters inevitably would find sports gambling schemes that utilize these new technologies to be highly seductive”).

62. See *138 CONG. REC. 32,439* (1992) (statement of Rep. Hamilton Fish, Jr., Member, H. Comm. on the Judiciary) (“If a large number of States and localities make betting on sports a public institution, they are really incorporating it into the fabric of public policy and implicitly giving it the stamp of an official sanction.”).

63. *Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Economics and Commercial Law of the S. Comm. on the Judiciary*, 102d Cong., 1st Sess. 26, 52 (1991) (statement of Paul Tagliabue). Francis T. Vincent, Jr., the MLB Commissioner at the time, expressed a similar sentiment. *S. 473 and S. 474 Hearing, supra* note 55, at 40. “Once the moral status of sports betting has been redefined by legalization, however, many new gamblers will be created, some of whom inevitably will seek to move beyond lotteries to wagers with higher stakes and more serious consequences.” *Id.*

1992, less than two years after its introduction, President George H. W. Bush signed PASPA into law.<sup>64</sup>

### C. PASPA and Pre-Christie Challenges

PASPA is a relatively simple statute. It prohibits any governmental entity from sponsoring, operating, advertising, promoting, licensing, or authorizing by law any “lottery, sweepstakes, or other betting scheme based . . . on one or more competitive games in which amateur or professional athletes participate.”<sup>65</sup> The Act also provides that a civil action may be brought in federal court by either the U.S. Attorney General or a professional or amateur sports organization to enjoin any violations of the law.<sup>66</sup>

The law further contains two limited exemptions—one for states in which sports wagering had previously existed and the other for Atlantic City.<sup>67</sup> A state is exempt from PASPA’s prohibitions if it conducted sports betting at any time between 1976 and 1990.<sup>68</sup> Additionally, if a state had a statute permitting sports gambling or lottery in effect on October 2, 1991, and if betting or lottery had actually occurred between 1989 and 1991, the conduct was exempt.<sup>69</sup> Nevada, Delaware, Montana, and Oregon were the only four states that fit under these exemptions.<sup>70</sup> Under the second exemption, if casino gambling continuously occurred in a municipality for at least the ten years prior to PASPA’s effective date, and legislation had been adopted permitting the conduct within one year of the effective date, it would be exempt.<sup>71</sup> Atlantic City was the only place in the United States that could meet this exception.<sup>72</sup> New Jersey, however, failed to enact such permissible legislation within the required timeframe.<sup>73</sup>

At the time of PASPA’s enactment, the primary rationales in support of the statute were persuasive, and Congress’ effort to stop the

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64. PASPA, Pub. L. No. 102-559, 106 Stat. 4227 (codified as amended at 28 U.S.C. §§ 3701–3704 (2012)).

65. *Id.* § 3702.

66. *Id.* § 3703. The law provides, however, that a professional or amateur sports organization may only bring an action if that organization’s contest is alleged to be the basis of the violation. *Id.*

67. See Christopher L. Soriano, *The Efforts to Legalize Sports Betting in New Jersey—A History*, N.J. Law., Apr. 2013, at 22, [http://www.duanemorris.com/articles/static/soriano\\_njlawyer\\_0413.pdf](http://www.duanemorris.com/articles/static/soriano_njlawyer_0413.pdf) (discussing PASPA’s “grandfather” clauses).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Soriano, *supra* note 67, at 23.

spread of illegal gambling and maintain the integrity of our national pastimes was, and continues to be, commendable. Nonetheless, the period between 1992 and 2016 has demonstrated that, despite the federal government's intentions, PASPA has failed to achieve its desired result. Recognizing the reality of PASPA's failure and perhaps sensing an opportunity to generate revenue for ever dwindling state treasuries, the 1992 law has come under attack by a number of state and private actors.

The first assailment of the controversial federal law came in 2009, when Delaware Governor Jack Markell signed a bill that would grant racetrack casinos in Delaware the ability to accept bets on any professional and amateur American sporting event.<sup>74</sup> Prior to PASPA, Delaware had offered a weekly lottery game, called "Scoreboard," based on regularly scheduled NFL games.<sup>75</sup> The 2009 law, however, sought to expand the scope of Delaware's permissible sports wagering to allow single-game bets.<sup>76</sup> The law was intended to help close the projected \$700 million deficit for the state's 2010 budget.<sup>77</sup>

Before Delaware could accept a single bet, however, the Leagues filed a complaint—and soon thereafter, a motion for preliminary injunction—against Governor Markell and Wayne Lemons, the Director of the Delaware State Lottery Office, claiming that elements of Delaware's proposed sports betting scheme violated PASPA. The United States District Court for the District of Delaware refused to grant the Leagues' request for injunction, and on appeal the United States Court of Appeals for the Third Circuit held that PASPA barred Delaware from implementing its plan.<sup>78</sup> According to the Third Circuit, Delaware's proposed law violated PASPA<sup>79</sup> because under the exemption to PASPA the state was constrained to the same scheme that it had previously conducted through its 1976 Scoreboard games—multi-bet "parlay" wagers on NFL games.<sup>80</sup> While the court concluded that the state was permitted to offer parlay betting on at least

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74. Meer, *supra* note 31, at 281–82.

75. See *NFL v. Governor of Del.*, 435 F. Supp. 1372, 1376 (D. Del. 1977) (discussing "Scoreboard").

76. *OFC Comm Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009) (discussing how the 2009 law expanded sports betting beyond what was conducted by Delaware prior to PASPA).

77. Meer, *supra* note 31, at 281–82 (citing Chad Millman, *Delaware Governor Jack Markell Is Ready to Legalize Sports Betting in His State*, ESPN (Mar. 19, 2009), <http://sports.espn.go.com/espnmag/story?id=3698082>).

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

79. *Id.*

80. *Id.*

three NFL teams, Delaware was prohibited from allowing single-game bets or wagers on athletic contests in leagues other than the NFL.<sup>81</sup>

Another challenge to PASPA also came in 2009.<sup>82</sup> “Throughout the 1990s and early 2000s, Atlantic City’s casinos experienced a period of substantial business success.”<sup>83</sup> But gaming revenue in New Jersey began to decline as a result of the recession that began in 2008.<sup>84</sup> “Some viewed sports betting as a way to enhance Atlantic City as a [tourist] destination” and increase “both gaming and non-gaming revenues.”<sup>85</sup>

New Jersey, however, had missed its opportunity to take advantage of PASPA’s grandfather clause when the state failed to implement legislation that would have legalized sports betting in Atlantic City casinos.<sup>86</sup> Nonetheless, in 2009, the Interactive Media & Entertainment Gaming Association (iMEGA), several horsemen’s groups, and New Jersey State Senator Raymond Lesniak filed an action against the U.S. Attorney General, seeking a declaratory ruling that PASPA was unconstitutional.<sup>87</sup> The federal district court quickly concluded that the plaintiffs did not have standing because neither New Jersey, nor any of the plaintiff organizations, permitted, offered, or otherwise authorized any sort of sports betting scheme at the time of the suit.<sup>88</sup> According to the court, the mere threat of federal preemption did not grant the plaintiffs the right to challenge the constitutionality of a federal law.<sup>89</sup> Thus, the case was dismissed without the U.S. Department of Justice ever taking a position on the constitutionality of PASPA.<sup>90</sup>

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81. *Id.* Despite the limitations placed on the scope of its permissible sports betting operations, Delaware’s “Sports Lottery” program still sold \$37.9 million worth of parlay cards in 2015, raising \$7 million in taxes as a result. Jonathan Starkey, *Sports Betting Lucrative for Delaware*, DELAWAREONLINE (Dec. 4, 2015, 9:30 PM), <http://www.delawareonline.com/story/news/politics/2015/12/04/sports-gambling/76628358/>. This represents a steady increase in sales and revenue since it began offering the sports lottery in 2010, when it sold \$10.8 million in parlay cards and raised \$1.6 million in taxes. *Id.*

82. See Complaint & Demand for Declaratory Relief, Interactive Media Entm’t & Gaming Ass’n v. Holder, No. 09-CV-01301, 2011 WL 802106 (D.N.J. Mar. 23, 2009), 2009 WL 4890878.

83. See Soriano, *supra* note 67, at 23.

84. *Id.*

85. *Id.*; see also *State of the States: The AGA Survey of Casino Entertainment*, AM. GAMING ASS’N 2 (2013), [https://www.americangaming.org/industry/factsheets/issues\\_detail.cfv?Id=16](https://www.americangaming.org/industry/factsheets/issues_detail.cfv?Id=16) (last visited Aug. 4, 2016). In 2012, casino visitors in Nevada legally wagered more than \$3.4 billion on sporting events, and those sportsbooks, which are heavily taxed, generated gross gaming revenues in excess of \$170 million. *Id.* at 39.

86. Soriano, *supra* note 67, at 23.

87. See *Interactive Media*, 2011 WL 802106, at \*1–2.

88. *Id.* at \*10.

89. *Id.*

90. *Id.*

## II. THE SPORTS WAGERING LAW AND *CHRISTIE I*

This Part first discusses New Jersey's Sports Wagering Law. This Part then turns to the resulting *Christie I* challenge and provides a full explanation of the Constitutional issues raised in the case.

### A. *The 2012 Sports Wagering Law*

Seeking to boost its struggling economy and “to stanch the sports-wagering black market flourishing within [New Jersey’s] borders,”<sup>91</sup> the New Jersey voters passed a referendum that amended the state’s Constitution to permit the legislature to “authorize by law wagering . . . on the results of professional, college, or amateur sport or athletic event[s].”<sup>92</sup> Thereafter, on January 17, 2012, the legislature enacted the Sports Wagering Law,<sup>93</sup> which permitted New Jersey authorities to license sports gambling in casinos and racetracks, and casinos to operate “sports pools.”<sup>94</sup>

### B. *Christie I*

After the Sports Wagering Law was passed, the Leagues sued New Jersey Governor Chris Christie, New Jersey’s Racing Commissioner, and New Jersey’s Director of Gaming Enforcement (collectively, New Jersey) in the U.S. District Court for the District of New Jersey. The Leagues alleged that the law violated PASPA (*Christie I*).<sup>95</sup> In response, New Jersey contended that PASPA was unconstitutional, in violation of the Commerce Clause and the U.S. Constitution’s anti-commandeering and equal sovereignty principles.<sup>96</sup> The District Court found PASPA to be constitutional, granted summary judgment in favor of the Leagues, and enjoined the Sports Wagering Law from

91. *Christie I*, 730 F.3d 208, 217 (3d Cir. 2013) (quoting Brief for Appellants Christopher J. Christie, David L. Rebeck & Frank Zanzuccki at 13, *Christie I*, 730 F.3d 208 (No. 13-1715), 2013 WL 1873966, at \*13).

92. N.J. CONST. art. IV, § 7, ¶¶ 2(D), (F).

93. N.J. STAT. ANN. §§ 5:12A-1 to -6 (West 2012 & Supp. 2014) (repealed 2014).

94. *Id.* § 5:12A-2; see also N.J. ADMIN. CODE § 13:69N-1 (West 2016) (regulations implementing the law).

95. The New Jersey Senate Majority Leader Stephen Sweeney, New Jersey House Speaker Sheila Oliver, and New Jersey Thoroughbred Horsesmen’s Association (the owner of the Monmouth Park Racetrack intervened as defendants). *Christie I*, No. 12-4947 (MAS) (LHG), 2012 WL 6698684, at \*1 (D.N.J. Dec. 21, 2012) (holding that Plaintiffs had standing to challenge New Jersey Sports Wagering Law), *aff’d*, 730 F.3d 208 (3d Cir. 2013), *cert denied*, 134 S. Ct. 2866 (2014); see also *Christie I*, 926 F. Supp. 2d 551, 553 (D.N.J. 2013) (holding that New Jersey’s Sports Wagering Law was preempted by PASPA), *aff’d*, 730 F.3d 208 (3d Cir. 2013), *cert denied*, 134 S. Ct. 2866 (2014).

96. *Christie I*, 730 F.3d 208, 224–40 (3d Cir. 2013).

going into effect.<sup>97</sup> The state appealed the District Court's opinion to the Third Circuit Court of Appeals.<sup>98</sup> After granting an expedited appeal and hearing oral argument, in a 2–1 decision, the Third Circuit affirmed the District Court.<sup>99</sup>

### 1. *Standing*

Before reaching the merits, the Third Circuit reviewed whether the Leagues had standing to sue New Jersey. Unlike in the *iMEGA* case, in which the district court determined that the New Jersey plaintiffs lacked standing because they were unaffected parties and the suit was premature in the absence of passed legislation,<sup>100</sup> the court in *Christie I* concluded that the Leagues had standing because the Sports Wagering Law was “as much directed at the Leagues’ events as it [was] aimed at the casinos,”<sup>101</sup> thus, the Leagues’ games were the object of state-licensed gambling.<sup>102</sup> Moreover, the Third Circuit found that the Sports Wagering Law would impact the “integrity” of the Leagues’ games, causing reputational harm to the Leagues.<sup>103</sup>

### 2. *The Commerce Clause*

Turning to New Jersey's arguments that PASPA was unconstitutional, the Third Circuit first analyzed whether Congress had the authority under the Commerce Clause to regulate activities that PASPA governs.<sup>104</sup> Article I of the U.S. Constitution gives Congress the ability to “regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>105</sup> Under this clause, Congress may regulate an activity that “substantially affects interstate commerce” if it “arise[s] out of or [is] connected with a commercial transaction.”<sup>106</sup>

The court found that the activity PASPA governs, state-licensed wagering on sports, is interstate commerce activity that may be regulated by Congress under the Commerce Clause because (1) wagering and the operations of sports leagues are economic activity, (2) sporting

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97. *Christie I*, 926 F. Supp. 2d 551, 579 (D.N.J. 2013).

98. *Christie I*, 730 F.3d 208, 208 (3d Cir. 2013).

99. *See id.* at 208–09, 217, 241.

100. *Interactive Media Entm't & Gaming Ass'n v. Holder*, No. 09-CV-01301, 2011 WL 802106, at \*10 (D.N.J. Mar. 23, 2009).

101. *Christie I*, 730 F.3d 208, 219 (3d Cir. 2013).

102. *Christie I*, 730 F.3d at 219.

103. *Id.* at 220–23.

104. *Id.* at 224–26.

105. U.S. CONST., art. I, § 8, cl. 3.

106. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

events hosted all across the country “substantially affect” interstate commerce, and (3) the \$500 billion that Americans gamble on sports each year also “substantially affects” interstate commerce.<sup>107</sup>

### 3. *Anti-Commandeering Principle*

After determining that Congress had authority to implement PASPA under the Commerce Clause, the court addressed New Jersey’s argument that PASPA violated the anti-commandeering principle, which prohibits any federal law that “commandeers the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.”<sup>108</sup>

In order for Congress to “commandeer” a state legislative process, Congress must impose a federal scheme on state officials and cannot merely invalidate contrary state laws.<sup>109</sup> For example, in *New York v. United States*,<sup>110</sup> the Supreme Court found that a law that forced states to take title to radioactive waste if they did not arrange for the disposal of the waste by a certain date, commandeered the states because it forced them to “enact and enforce a federal regulatory program” or expend resources in taking title to the waste.<sup>111</sup> Here, in contrast, the court found that the anti-commandeering principle was not violated because PASPA merely invalidates state laws attempting to regulate sports gambling and “does not require or coerce the states to lift a finger.”<sup>112</sup>

### 4. *Equal Sovereignty Principle*

Finally, the Third Circuit considered whether PASPA violated “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>113</sup> The court rejected New Jersey’s argument, holding that while legislation under the Commerce Clause may be limited by the equal sovereignty principle in certain aspects, Congress is not prevented from enacted laws that treat states differently.<sup>114</sup> Indeed, the Commerce Clause authority is aimed at matters of national

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107. *Christie I*, 730 F.3d 208, 224–25 (3d Cir. 2015).

108. *Id.* at 227 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981), *abrogated by* *Ala. Elk River Dev. Agency v. Rogers*, 516 So. 2d 637 (Ala. 1987)).

109. *Christie I*, 730 F.3d 208, 230 (3d Cir. 2015).

110. 505 U.S. 144 (1992).

111. *Id.* at 149–54, 161, 175 (quoting *Hodel*, 452 U.S. at 288).

112. *Christie I*, 730 F.3d 208, 231 (3d Cir. 2013).

113. *Id.* at 237–40. Delaware, Montana, and Oregon also permitted “lotteries tied to the outcome of sport events.” *Id.* at 215.

114. *Id.* at 238.



concern, and laws enacted under the clause “will necessarily affect states differently.”<sup>115</sup>

### 5. Judge Vanaskie’s Dissent

Although the Third Circuit ruled in favor of the Leagues, it was not a unanimous decision. In his dissenting opinion, Judge Thomas Vanaskie argued that PASPA violated the anti-commandeering principle by policing the manner in which state governments regulate interstate commerce.<sup>116</sup> Unlike the majority, Judge Vanaskie found no difference between “compelling state governments to exercise their sovereignty to enact or enforce laws on the one hand, and restricting state governments from exercising their sovereignty to enact or enforce laws on the other.”<sup>117</sup>

## III. NEW JERSEY SB 2460 AND *CHRISTIE II*

The Third Circuit ruled against New Jersey in *Christie I*, but its opinion may have effectively provided a roadmap for the state to legalize sports betting without running afoul of PASPA. Sensing an opportunity based on the language used by the court in its majority opinion, New Jersey attempted a PASPA end-around by partially repealing its current state law prohibitions against sports gambling.

### A. The 2014 Law

Sports gambling had been prohibited in New Jersey for many years by statute and by the state Constitution.<sup>118</sup> As previously discussed, New Jersey’s initial attempt to legalize sports wagering within its borders fell flat when a federal district court in *Christie I* held that PASPA was constitutional and enjoined the implementation of the 2012 Sports Wagering Law, which the Third Circuit affirmed.<sup>119</sup> The Third Circuit, however, opined:

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115. *Id.*

116. *Id.* at 241–45 (Vanaskie, J., concurring in part, dissenting in part). Judge Vanaskie agreed with the majority that the Leagues had standing and that PASPA does not violate the Equal Sovereignty Principle or the Commerce Clause. *Id.*

117. *Id.* at 251.

118. See N.J. CONST. art. IV, § 7, ¶ 2 (2016); N.J. STAT. ANN. § 2A:40-1 to -9 (West 2016). An amendment to the New Jersey Constitution, which permitted the state legislature to “authorize by law” sports wagering at casinos at racetracks, was approved at the general election in November 2011. N.J. CONST. art. IV, § 7, ¶ 2 (historical note to 2011 Amendment).

119. *Christie I*, 730 F.3d 208, 215 (3d Cir. 2015) (noting that while the court was “cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games’ integrity and whether states should be permitted to license and profit from the activity—engender strong views,” it declined to “judge the wisdom of PASPA or of New Jersey’s law,

[W]e do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering. . . . [U]nder PASPA, on the one hand, *a state may repeal its sports wagering ban*, a move that will result in the expenditure of no resources or effort by any official. On the other hand, a state may choose to keep a complete ban on sports gambling, but it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be.<sup>120</sup>

Seizing upon the language in the Third Circuit’s majority opinion, the New Jersey Legislature enacted Senate Bill 2460 in 2014 (2014 Law).<sup>121</sup> The 2014 Law provided that:

[A]ny rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sports contests or athletic events . . . .<sup>122</sup>

In essence, rather than approving legislation that would authorize sports betting, the 2014 Law had the effect of partially repealing its current state law prohibitions, thereby allowing sports gambling only in casinos and racetracks that are licensed and regulated by the state of New Jersey.<sup>123</sup>

## B. Christie II

### 1. *Partial Repeal: Authorization or Deregulation?*

In October 2014, the Leagues challenged the 2014 Law, filing a second complaint for declaratory and injunctive relief against Governor

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or of the desirability of the activities they seek to regulate,” and holding that “New Jersey’s sports wagering law conflicts with PASPA and, under our Constitution, must yield”).

120. *Id.* at 232–33 (emphasis added); *see also id.* at 235 (noting that “PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field as per the federal standard”).

121. S. 2460, 216th Leg., Reg. Sess. (N.J. 2014); *see* Act of Oct. 17, 2014, 2014 N.J. Laws ch. 62 (codified at N.J. STAT. ANN. §§ 5:12A-7 to -9 (West 2014), *invalidated* by Christie II, 832 F.3d 389 (3d Cir. 2016)).

122. N.J. STAT. ANN. § 5:12A-7.

123. *Id.* The 2014 Law also prohibited wagering on New Jersey’s college teams’ competitions and on any collegiate competition occurring in New Jersey, and it limited sports wagering to “persons 21 years of age or older” situated at New Jersey racetracks and Atlantic City casinos and gambling houses. *Id.*

Christie (*Christie II*).<sup>124</sup> According to the Leagues, the 2014 Law was “nothing more than a de facto authorization of sports gambling.”<sup>125</sup> While the Leagues complained the legislation repealed “all existing prohibitions, rules, and regulations that are specific to sports wagering,” it did so “only at Atlantic City casinos and horse racetracks throughout the state—in other words, only at venues that are already state-licensed and regulated.”<sup>126</sup> As such, the Leagues argued that the effect of the 2014 Law was to authorize and license sports gambling and therefore, like its 2012 predecessor, was in violation of PASPA.<sup>127</sup>

New Jersey claimed that it was “deregulating” and removing the activity from the state’s control by partially repealing its state laws restricting sports betting.<sup>128</sup> The state believed that its partial repeal was consistent with the Third Circuit’s majority opinion,<sup>129</sup> which held that “under PASPA . . . a state may repeal its sports wagering ban, a move that will result in the expenditure of no resources or effort by any state official.”<sup>130</sup> New Jersey believed the 2014 Law would not run afoul of PASPA’s prohibition against a state government’s ability to “sponsor, operate, advertise, promote, license, or authorize” a system to wager on sporting contests.<sup>131</sup>

Governor Christie’s efforts were at least temporarily derailed in November 2014 when the district court held that New Jersey’s law violated PASPA,<sup>132</sup> and again in August 2015, when the Third Circuit affirmed the lower court’s decision.<sup>133</sup> According to the appellate court, New Jersey could not simply use “clever drafting” to sidestep PASPA.<sup>134</sup> “The word ‘authorize’ means, inter alia ‘[t]o empower; to give a right or authority to act,’ or ‘[t]o permit a thing to be done in the future.’”<sup>135</sup> The 2014 Law provided specific instructions on who may legally place a bet and selectively dictated where a bet could be placed and on what sports, because of which the court concluded that

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124. See Complaint for Declaratory & Injunctive Relief, *Christie II*, 61 F. Supp. 3d 488 (D.N.J. 2014), 2014 WL 5395199.

125. *Id.* ¶ 5.

126. *Id.*

127. *Id.* ¶ 1.

128. *Christie II*, 799 F.3d 259, 264, 271 (3d Cir. 2015).

129. *Id.* at 264.

130. *Christie I*, 730 F.3d 209, 233 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014).

131. *Id.* at 232.

132. See *Christie II*, 61 F. Supp. 3d 488, 506 (D.N.J. 2014), *aff’d on reh’g*, 832 F.3d 389 (3d Cir. 2016) (en banc), *petition for cert. filed*, No. 16-476 (U.S. Oct. 7, 2016).

133. *Christie II*, 799 F.3d 259, 268 (3d Cir. 2015).

134. *Id.* at 267.

135. *Id.* at 266 (alteration in original) (quoting *Authorize*, BLACK’S LAW DICTIONARY (6th ed. 1990)).

the practical effect of the law was more than a repeal, but rather it “affirmatively authorized” sports betting such that it constituted an “authorization” in violation of PASPA.<sup>136</sup> According to the Third Circuit’s majority opinion, “[W]e acknowledge New Jersey’s salutary purpose in attempting to legalize sports gambling to revive its troubled casino and racetrack industries.”<sup>137</sup> “We now turn to the primary question before us: whether the 2014 law violates PASPA. We hold that it does.”<sup>138</sup>

## 2. Judge Fuentes’ Dissent

Seemingly left for dead, New Jersey was thrown a lifeline from an unexpected source: Third Circuit Judge Julio Fuentes. Judge Fuentes, who previously had ruled against New Jersey in *Christie I*, penned a passionate dissent in *Christie II*.<sup>139</sup> Whereas the majority opinion in *Christie II* contended that “the ‘selective’ nature of the 2014 Law” granted permission “to certain entities to engage in sports gambling,” Judge Fuentes argued that the 2014 Law contained no explicit grant of permission for any entity to engage in sports wagering (as required by PASPA).<sup>140</sup> According to Judge Fuentes, the majority’s analysis inappropriately equated authorization with repeal.<sup>141</sup> “In holding that a partial repeal of prohibitions is state authorization, the majority must infer authorization. PASPA, however, contemplates more.”<sup>142</sup>

Further, Judge Fuentes argued that the logic employed in the majority opinion left New Jersey with “no choice,” contradicting the court’s holding in *Christie I*—also drafted by Judge Fuentes—and po-

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136. *Christie II*, 799 F.3d 259, 266 (3d Cir. 2015) (“[T]he 2014 Law authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling.”).

137. *Id.* at 264.

138. *Id.* at 265.

139. *See id.* at 268–72 (Fuentes, J., dissenting).

140. *Id.* at 270 (Fuentes, J., dissenting).

141. *Id.* at 269 (Fuentes, J., dissenting) (discussing primary issue with majority opinion).

142. *Christie II*, 799 F.3d 259, 269 (3d Cir. 2015) (Fuentes, J., dissenting), *aff’d on reh’g*, 832 F.3d 389 (3d Cir. 2016) (en banc), *petition for cert. filed*, No. 16-476 (U.S. Oct. 7, 2016). In support of its belief that the 2014 Law does not amount to an “authorization” in violation of PASPA, the dissent also cited the United States’ 2014 brief in opposition to New Jersey’s petition for certiorari. *Id.* at 271 (citing Brief for the United States in Opposition at 11, *Christie II*, Nos. 13–967, 13–979, 13–980 (U.S. May 14, 2014) 2014 WL 1989100). In its brief, “the United States went as far as to concede that New Jersey could repeal its prohibitions in whole or in part.” *Id.* According to the dissent, because a partial repeal is merely a “self-executing deregulatory measure that repeals existing prohibitions and regulations for sports wagering and requires the State to abdicate any control or involvement in sports wagering,” it is not an authorization prohibited by PASPA. *Id.*

tentially violated the anti-commandeering principle of the U.S. Constitution.<sup>143</sup> The dissent reasoned:

If withdrawing prohibitions on “some” sports wagering is the equivalent to authorization by law, then withdrawing prohibitions on *all* sports wagering must be considered authorization by law. Under this logic, New Jersey is left with no choice at all—it must uphold all prohibitions on sports wagering in perpetuity or until PASPA is no more. This is precisely the opposite of what we held in *Christie I*—“[n]othing in these words *requires* that the states keep any law in place”—and why we found PASPA did not violate the anti-commandeering principle.<sup>144</sup>

### 3. *Rehearing En Banc*

Just weeks after the Third Circuit published its opinion, the New Jersey parties filed a motion for a rehearing of the case *en banc*.<sup>145</sup> Likely as a result of Judge Fuentes’ dissent, the Third Circuit granted the state’s request for rehearing.<sup>146</sup> The rehearing *en banc* gave the full court the opportunity to resolve some of the apparent inconsistencies from the results of *Christie I* and *Christie II*.<sup>147</sup>

By a 9–3 margin, the Third Circuit panel again affirmed the district court’s holding that the 2014 Law violated PASPA.<sup>148</sup> According to the court, the 2014 Law “provides the authorization for [sports betting] conduct that is otherwise clearly and completely legally prohibited.”<sup>149</sup> The court clarified that, even though the 2014 Law contains the word “repeal,” its actual impact was an “affirmative authoriza-

143. *Christie II*, 799 F.3d 259, 270–71 (3d Cir. 2015).

144. *Id.* (alteration in original) (footnotes omitted).

145. See Petition for Rehearing and/or Rehearing En Banc for Appellants Christopher J. Christie, David L. Rebeck & Frank Zanzuccki at iii, *Christie II*, 799 F.3d 259 (3d Cir. 2015) (No. 14–4546), <http://thesportsesquires.com/wp-content/uploads/2014/05/State-Defendants-Petition-for-Rehearing-by-Third-Circuit-Christie-II.pdf>. An *en banc* rehearing is a rare review in which all or most of the sitting judges of the Third Circuit, not just the three judges that heard the initial case, are provided the opportunity to hear the case. See INTERNAL OPERATING PROCEDURES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT § 9.2 (2015), [http://www2.ca3.uscourts.gov/legacyfiles/2015\\_IOPs.pdf](http://www2.ca3.uscourts.gov/legacyfiles/2015_IOPs.pdf) (providing that *en banc* hearings are granted only in “extraordinary” cases where hearing by a full court is of “immediate importance”).

146. See Order Sur Petitions for Rehearing En Banc, *Christie II*, F.3d 259 (3d Cir. 2015) (Nos. 14–4546, 14–4568, 14–4569), <http://www.legalsportsreport.com/wp-content/uploads/2015/10/144546po.pdf> (granting rehearing *en banc* of *Christie II*).

147. See Daniel Wallach, *New Jersey Faces Tough Climb in Winning over Judges on Sports Betting Case*, LEGAL SPORTS REP. (Feb. 16, 2016, 8:39 PM), <http://www.legalsportsreport.com/8300/new-jersey-sports-betting-rehearing-2/> (analyzing potential arguments on rehearing).

148. See *Christie II*, 832 F.3d 389 (3d Cir. 2016) (*en banc*), *petition for cert. filed*, No. 16–476 (U.S. Oct. 7, 2016).

149. *Id.* at 396.

tion” of sports betting activities in violation of PASPA.<sup>150</sup> The Third Circuit also used the rehearing as an opportunity to backtrack on its majority opinion in *Christie I*:

To the extent that in *Christie I* we took the position that a repeal cannot constitute an authorization, we now reject that reasoning. Moreover, we do not adopt the District Court’s view that the options available to a state are limited to two. Neither of these propositions were necessary to their respective rulings and were, in essence, dicta.<sup>151</sup>

Accordingly, the court expressly declined to articulate a line whereby a partial repeal of a sports wagering ban would not amount to an unlawful authorization under PASPA.<sup>152</sup> Rather, it merely opined that “[i]t is sufficient to conclude that the 2014 Law overstepped [that line].”<sup>153</sup>

The Third Circuit panel further made clear that it was not persuaded by New Jersey’s Tenth Amendment arguments.<sup>154</sup> In order for Congress to “commandeer” a state, it must impose a federal scheme on state officials and cannot merely invalidate contrary state laws.<sup>155</sup> In *Christie I*, the court found that the anti-commandeering principle was not violated, because PASPA merely invalidates state laws attempting to regulate sports gambling and “does not require or coerce the states to lift a finger.”<sup>156</sup> On rehearing, the Third Circuit reached a similar conclusion, finding that “PASPA does not command states to take affirmative actions, and it does not present a coercive binary choice.”<sup>157</sup>

Two dissenting opinions authored by Judge Fuentes and Judge Vanaskie, respectively, attacked different parts of the majority opinion.<sup>158</sup> According to Judge Fuentes, the 2014 Law strictly repealed New Jersey’s prohibitions against sports betting and was therefore not “authorizing” any state conduct in violation of PASPA.<sup>159</sup> Meanwhile, Judge Vanaskie (who also dissented in *Christie I*) disagreed with the

150. *Id.* at 397 (“The presence of the word ‘repeal’ does not prevent us from examining what the provision actually does, and the Legislature’s use of the term does not change that the 2014 Law selectively grants permission to certain entities to engage in sports gambling.”).

151. *Id.* at 396–97.

152. *Id.* at 402.

153. *Id.*

154. See *Christie II*, 832 F.3d 389, 401–02 (3d Cir. 2016) (en banc), *petition for cert. filed*, No. 16-476 (U.S. Oct. 7, 2016).

155. See, e.g., *Printz v. United States*, 521 U.S. 898, 916, 925 (1997); *New York v. United States*, 505 U.S. 144 (1992).

156. *Christie I*, 730 F.3d 208, 231 (3d Cir. 2013).

157. *Christie II*, 832 F.3d 389, 401 (3d Cir. 2016) (en banc).

158. *Id.* at 402 (Fuentes, J., dissenting); *id.* at 406 (Vanaskie, J., dissenting).

159. *Id.* at 403–06.

majority's holding that PASPA does not commandeer the states.<sup>160</sup> Judge Vanaskie contended that there was no difference between *compelling* state governments to exercise their sovereignty to enact or enforce laws and *restricting* them from doing so.<sup>161</sup> Inasmuch, Judge Vanaskie maintained the majority's distinction was "illusory" and the opinion did not give the states any option except to "maintain an anti-sports wagering scheme" directly in violation of the anti-commandeering principle.<sup>162</sup>

#### IV. THE FUTURE OF PASPA AND SPORTS BETTING IN THE UNITED STATES

Notwithstanding the unlikely chance that the United States Supreme Court elects to hear *Christie II* on appeal, the Third Circuit's ruling once again sets back the timeline for bringing legal sports betting to the majority of the nation. Yet, many scholars continue to posit that legalization remains inevitable, even if the route is still undetermined.<sup>163</sup>

##### A. *Route Forward*

The most obvious route is the aforementioned Supreme Court appeal. According to State Senator Raymond Lesniak, who has spearheaded New Jersey's sports betting efforts, the state intends to petition the Supreme Court to hear the case.<sup>164</sup> The Third Circuit's opinion deals heavily with constitutional issues—something the Supreme Court often looks for in determining whether to grant certiorari<sup>165</sup>—as well as multiple dissenting opinions, which may demonstrate a significant difference in opinion among federal appeals judges. However, only about 1% of petitions are accepted by the Supreme Court,<sup>166</sup> and it has already declined to hear New Jersey's ap-

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160. *Id.* at 406.

161. *Id.* at 406–08.

162. *Id.* at 408, 411.

163. See Bob Cohn, *Legalized Sports Gambling Across U.S. Could Soon Become Reality*, TRIBLIVE (June 20, 2015, 9:30 PM), <http://triblive.com/sports/nationworldsports/8532839-74/sports-betting-gambling> (quoting attorneys, team owners, and league officials regarding the likelihood of legal sports betting); Daniel Wallach, *How to Legalize Sports Betting*, DEADSPIN (Aug. 31, 2016, 4:30 PM), <http://deadspin.com/how-to-legalize-sports-betting-1786002079>.

164. David Purdum, *Appeals Court Rejects New Jersey's Bid to Legalize Sports Betting*, ESPN (Aug. 10, 2016, 8:32 AM), [http://www.espn.com/chalk/story/\\_/id/17253701/appeals-court-rejects-new-jersey-bid-legalize-sports-betting](http://www.espn.com/chalk/story/_/id/17253701/appeals-court-rejects-new-jersey-bid-legalize-sports-betting).

165. See generally *Types of Cases the Court Hears*, SUP. CT. HIST. SOC'Y, [http://supremecourt.history.org/htcw\\_casesthecourthears.html](http://supremecourt.history.org/htcw_casesthecourthears.html) (last visited Sept. 22, 2016).

166. The Supreme Court "receives approximately 7,000-8,000 petitions for a writ of certiorari each term, but grants and hears oral argument in [only] about 80 cases." *Frequently Asked Ques-*

peal following *Christie I*.<sup>167</sup> As such, the odds the Supreme Court reviews *Christie II* appear long.

Another possible route to legalization would be the so-called “nuclear option.”<sup>168</sup> The Third Circuit has concluded that New Jersey’s partial repeal was tantamount to an authorization of sports gambling activities in the state, in large part because it had the effect of allowing sports gambling only in state-licensed and state-regulated casinos and racetracks.<sup>169</sup> While the Third Circuit, on rehearing, declined to create a bright-line rule as to when a *partial* repeal would not amount to a state “authorizing” sports gambling,<sup>170</sup> it is widely accepted that a *full* repeal of a state’s current laws against sports gambling would not violate PASPA.<sup>171</sup> Such a repeal would, in effect, create an entirely unregulated environment for sports betting in which anyone who wanted could offer wagering legally within a state. For both political and logistical reasons,<sup>172</sup> it seems unlikely that a state, whether New Jersey or otherwise, would take such a drastic step. The “nuclear option” may, however, be the solution that puts the most pressure on Congress and the Leagues, faced with the potential of sports betting existing in a completely unregulated manner, to work quickly towards a federal solution.

Another option is for additional states to bring challenges.<sup>173</sup> While New Jersey’s efforts have been at the forefront, a number of other states may be poised to adopt sports betting regulations. For example, both Minnesota and Mississippi have previously introduced legislation

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tions, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/faq.aspx#faqg9> (last updated Aug. 13, 2016).

167. *Christie I*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014).

168. Vincent Oliver, *The Problems with the New Jersey Sports Betting Decision, and NJ’s Next Steps*, LEGAL SPORTS REP. (Aug. 17, 2016, 9:19 AM), <http://www.legalsportsreport.com/11060/nj-sports-betting-case-analysis/> (explaining that the “nuclear option” is Congress fully repealing its sports betting prohibition).

169. *See Christie II*, 832 F.3d 389, 396 (3d Cir. 2015) (en banc), *petition for cert. filed*, No. 16-476 (U.S. Oct. 7, 2016).

170. *Id.* at 397.

171. *See Christie I*, 730 F.3d 208, 233 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014); *see also Christie II*, 799 F.3d 259, 266 (3d Cir. 2015), *aff’d on reh’g*, 832 F.3d 389 (3d Cir. 2016) (en banc), *petition for cert. filed*, No. 16-476 (U.S. Oct. 7, 2016).

172. “Politicians would have to vote for a bill that would CREATE UNREGULATED GAMBLING. This is a difficult position to support, no matter what the ends.” Dustin Gouker, *The Path Forward for Sports Betting in New Jersey, US Is Daunting After Court Loss*, LEGAL SPORTS REP. (Aug. 11, 2016, 12:02 PM), <http://www.legalsportsreport.com/11015/whats-next-for-sports-betting-in-new-jersey-and-the-us/>. Further, even if Congress was forced to act in regard to PASPA, the passage of any federal legislation is typically a slow process. *Id.* “Meanwhile, New Jersey would be left with an unregulated gambling environment for an undetermined amount of time.” *Id.*

173. *See Wallach, How to Legalize, supra* note 163.



that would permit wagering on the results of athletic events.<sup>174</sup> Other states, such as New York, are reportedly considering adopting laws that would set themselves up for a PASPA challenge.<sup>175</sup> Although persuasive, the Third Circuit's holdings in both *Christie I* and *Christie II* are not binding on federal courts in other jurisdictions. Furthermore, the nuanced arguments set forth by New Jersey led to three split decisions in the Third Circuit. It is, therefore, not inconceivable that another court could reach a different conclusion regarding the same or similar laws.<sup>176</sup>

### B. A Static Law Operating in a Digital World

A lot has changed in the two decades since PASPA was signed into law. In 1989, only 15% of households even owned a computer, let alone had access to the Internet.<sup>177</sup> Now, Americans can wear glasses that double as a personal computer<sup>178</sup> and are sharing the roads with autonomous, self-operating cars.<sup>179</sup> Technology has rapidly evolved, and it has changed the way in which we consume and interact with sports. Yet, in most of the United States, it remains illegal to place a bet on your favorite sports team.

“In many countries, sports wagering is legal and regulated, with scandals more readily exposed and violators punished”—in large part due to enhancements in technology and strong regulations emphasizing transparency.<sup>180</sup> Generally, sports in the United Kingdom and

174. See, e.g., H.F. 765, 2015 Leg., 89th Sess. (Minn. 2015), [https://www.revisor.mn.gov/bills/text.php?number=HF0765&version=latest&session=89&session\\_number=0&session\\_year=2015](https://www.revisor.mn.gov/bills/text.php?number=HF0765&version=latest&session=89&session_number=0&session_year=2015); H.B. 806, 2015 Leg., Reg. Sess. (Miss. 2015), <http://billstatus.ls.state.ms.us/documents/2015/html/HB/0800-0899/HB0806IN.htm>.

175. Sara Friedman, *New York Ponders PASPA Challenge*, GAMBLING COMPLIANCE (Aug. 11, 2016), [https://gamblingcompliance.com/premium-content/news\\_analysis/new-york-ponders-paspa-challenge](https://gamblingcompliance.com/premium-content/news_analysis/new-york-ponders-paspa-challenge).

176. Additionally, it is one thing for the Leagues to litigate against a single state, as they successfully did with New Jersey, but it is another thing to have to confront multiple legal challenges all at one time across various jurisdictions. If multiple states mount legal challenges, the additional litigation pressure could be enough to achieve the desire effect, (e.g., the Leagues urging Congress to act).

177. *Home Computers and Internet Use in the United States: August 2000*, U.S. CENSUS BUREAU (Sept. 2001), <https://www.census.gov/prod/2001pubs/p23-207.pdf>.

178. David Goldman, *Google Unveils 'Project Glass' Virtual-Reality Glasses*, CNN (Apr. 4, 2012, 2:35 PM), <http://money.cnn.com/2012/04/04/technology/google-project-glass/>.

179. John Ramsey, *Self-Driving Cars To Be Tested on Virginia Highways*, RICHMOND TIMES-DISPATCH (June 1, 2015, 10:30 PM), [http://www.richmond.com/news/article\\_b1168b67-3b2b-5274-8914-8a3304f2e417.html](http://www.richmond.com/news/article_b1168b67-3b2b-5274-8914-8a3304f2e417.html).

180. See Stephen F. Ross & Adrian Anderson, *Strong Regulation Could Inject Integrity into Sports Gambling*, SPORTS BUS. J. (Feb. 16, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/02/16/Opinion/Ross-Anderson.aspx>.

Australia are seen as fair and clean.<sup>181</sup> Meanwhile, China and India—the nations with the largest populations of sports consumers—outlaw sports gambling in all forms.<sup>182</sup> In these markets, unregulated gambling has thrived and corruption has flourished.<sup>183</sup>

In the United States, it is estimated that between \$148–\$500 billion worth of wagers were placed on sporting events in 2015—very little of it legally.<sup>184</sup> “It is easier than ever to place a bet . . . illegally on one of a few hundred offshore websites” with our society’s continually increasing Internet connectivity.<sup>185</sup> Despite Congress’ best intentions, sports betting currently exists in a wholly unregulated environment, with states powerless to take action. “Prohibition, we’ve found in this country, doesn’t work very well,” said Geoff Freeman, President and CEO of the American Gaming Association.<sup>186</sup> “It’s certainly not working with sports betting.”<sup>187</sup>

Although no safeguard is foolproof, technology has advanced to the point where the integrity of America’s pastimes can be best protected through transparent regulation, rather than prohibition.<sup>188</sup> According to Lee Amaitis, President and CEO of CG Technology, “[t]echnology helps monitor accountability.”<sup>189</sup> For example, current advances in technology assist regulators in tracking customers’ activity and identifying irregular betting patterns.<sup>190</sup>

As NBA Commissioner Adam Silver wrote in a November 2014 op-ed published in the *New York Times*, “Times have changed since [PASPA] was enacted. Gambling has increasingly become a popular and accepted form of entertainment in the United States.”<sup>191</sup> Rather

181. *Id.*

182. *Id.*

183. *Id.* “The Singaporean and Malaysian soccer leagues folded in the 1990s, and the Chinese football league disbanded after sponsors Pirelli and China Central TV pulled out due to endemic match-fixing. One of the fastest-growing leagues in world sports, the Indian Premier League in cricket, has also been rocked by ongoing match-fixing scandals.” *Id.*

184. *See supra* notes 1–3 and accompanying text.

185. Bob Cohn, *Technology Driving Sports Gambling Industry*, TRIBLIVE (June 27, 2015, 9:30 PM), <http://triblive.com/sports/nationworldsports/8532857-74/betting-technology-sports>.

186. Mark Gruetze, *Expansion of Sports Betting Moves from ‘What If’ to ‘When,’* TRIBLIVE (Apr. 10, 2016, 9:00 PM), <http://triblive.com/aande/gambling/10270770-74/sports-million-betting>.

187. *Id.*

188. *See, e.g.,* Kevin F. King, Note, *Geolocation and Federalism on the Internet: Curing Internet Gambling’s Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41, 57–63 (2010) (discussing the use of geolocation technology to regulate Internet gambling).

189. Cohn, *Technology Driving Sports*, *supra* note 185. CG Technology is “a global technology solutions provider for lottery, gaming, race and sports wagering.” *Id.*

190. *Id.*

191. Adam Silver, Opinion, *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?smid=tw-share&\\_r=0](http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?smid=tw-share&_r=0).

than continuing to shun America's underground sports gambling industry, Commissioner Silver asserted that the nation's leaders should take control of the system by calling for Congress to adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards.<sup>192</sup> According to Commissioner Silver:

These requirements would include: mandatory monitoring and reporting of unusual betting-line movements; a licensing protocol to ensure betting operators are legitimate; minimum-age verification measures; geo-blocking technology to ensure betting is available only where it is legal; mechanisms to identify and exclude people with gambling problems; and education about responsible gaming.<sup>193</sup>

In line with Commissioner Silver's comments, the prevailing sentiment in the United States continues to be one of acceptance of legalized sports betting. Of those who watched Super Bowl 50, 80% want to see the country's current sports betting laws change.<sup>194</sup> The NHL recently placed a franchise in Las Vegas,<sup>195</sup> and the NFL is reportedly considering doing the same.<sup>196</sup> The explosive growth of daily fantasy sports has also blurred the line between traditional fantasy sports and gambling. Fantasy sports players are predicted to spend up to "\$14 billion in entry fees by 2020."<sup>197</sup> As regulatory technology and attitudes regarding sports betting continue to evolve, the most likely path towards the legalization of sports betting in the United States remains an amendment to, or the repeal of, PASPA.

## V. CONCLUSION

When PASPA was enacted in 1992, its proponents argued that an outright ban of sports gambling was the most effective way to achieve PASPA's laudable goals. Time has proven, however, that the statute

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192. *Id.*

193. *Id.*

194. "Some two-thirds, or 66 percent of those questioned, believe individual states should have the ability to legalize sports betting." Howard Stutz, *Survey: Americans Want Ability to Legally Wager in the Super Bowl*, LAS VEGAS REV.-J. (Feb. 3, 2016, 12:51 PM), <http://www.reviewjournal.com/sports/betting/survey-americans-want-ability-legally-wager-the-super-bowl>.

195. Dan Rosen, *Las Vegas Awarded NHL Franchise*, NHL (June 22, 2016), <https://www.nhl.com/news/nhl-expands-to-las-vegas/c-281010682?tid=281011650>.

196. John Sigety, *The Las Vegas Raiders: A Tale of Mark Davis's Bluff that Could Become a Reality*, SPORTS ESQUIRES (Feb. 4, 2016), <http://thesportsesquires.com/the-las-vegas-raiders-a-tale-of-mark-daviss-bluff-that-could-become-a-reality/>.

197. Dustin Gouker, *Daily Fantasy Sports Market Size Forecast: Revised Down, with Cloudy Prospects*, LEGAL SPORTS REP. (Feb. 22, 2016, 11:49 AM), <http://www.legalsportsreport.com/8459/dfs-market-size-forecast/> (citing Adam Krejcik & Chris Grove, *Daily Fantasy Sports Industry Update – 2016*, EILERS & KREJCIK GAMING (Feb. 22, 2016), <https://goo.gl/oDqyxm>).

has been largely ineffective. Despite its prohibitions, Americans continue to illegally wager billions on sports.

Moreover, the world has changed significantly since PASPA's passage. Regulatory technology has rapidly evolved. Concerns over protecting the "integrity of the game" may now best be addressed through transparent regulation, not prohibition. Gambling has also increasingly become a popular and accepted form of entertainment in the United States, and some of the nation's professional sports leagues, such as the NBA, have recently softened their stance regarding PASPA's prohibitions. The recent federal court decisions in *Christie I* and *Christie II* have likely pushed back the timeline—barring the U.S. Supreme Court unexpectedly granting certiorari in the latter case—but with numerous avenues towards legalization available, a broad expansion of legal sports gambling in America remains inevitable.

