Nos. 13-1713, 13-1714, 13-1715

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

-and-

UNITED STATES OF AMERICA (Intervenor in District Court),

Appellees,

v.

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

-and-

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

Appellants.

On Appeal from the United States District Court for the District of New Jersey
No. 3:12-cv-04947-MAS-LHG

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

JEFFREY A. MISHKIN
ANTHONY J. DREYER
SKADDEN ARPS SLATE
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

WILLIAM J. O'SHAUGHNESSY
RICHARD HERNANDEZ
MCCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CANDICE CHIU
WILLIAM R. LEVI
BANCROFT PLLC
1919 M Street NW, Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Plaintiffs-Appellees National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball, doing business as Major League Baseball

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INTRODUCTION

Nothing in New Jersey's opening brief casts any doubt on the district court's conclusion that the Professional and Amateur Sports Protection Act ("PASPA") is constitutional and that the Sports Organizations have standing to prevent New Jersey from openly violating it.

After exhaustive consideration of the record and the arguments, the district court correctly rejected New Jersey's implausible contention that the Sports Organizations will suffer not even an "identifiable trifle" of injury should New Jersey authorize gambling on their own games. As the district court concluded, the Sports Organizations have a concrete and particularized interest in the extent to which their own games are the object of state-sponsored gambling, and the record developed below underscores the legitimacy of their concerns. This Court itself implicitly recognized the same thing four years ago when it rejected Delaware's attempt to authorize sports gambling in violation of PASPA, as did Congress when it enacted PASPA to combat the very harms New Jersey insists have no basis in reality. Indeed, even New Jersey recognizes such concerns, as it conspicuously excluded the sporting events of its *own* colleges and universities from its effort to legalize sports gambling.

The district court also correctly rejected New Jersey's attempt to analogize PASPA to the two statutes the Supreme Court has held to violate the anti-

commandeering doctrine. PASPA is an unremarkable exercise of Congress' commerce power to regulate the nationwide market in sports gambling by prohibiting governmental entities and private actors from engaging in conduct inconsistent with the federal policy against the spread of state-sponsored sports gambling. It does not compel states—or anyone else, for that matter—to do anything. Instead, it simply prohibits governmental entities from sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling, and prohibits private actors from undertaking the same activities pursuant to state or local law. PASPA therefore lacks the irreducible minimum of the only two successful commandeering challenges in Supreme Court history—namely, an affirmative command that states enact or implement a federal regulatory scheme.

PASPA also does not run afoul of the vague "equal sovereignty" notions New Jersey attempts to derive from inapposite cases. It is well settled that Congress may draw geographic distinctions when legislating pursuant to its commerce power, and Congress had utterly rational reasons for exempting from PASPA's prohibitions the handful of states whose economies depended at least in some part upon pre-existing sports gambling schemes. In any event, whatever concerns about equal treatment may arise when Congress singles out a minority of states for *disfavored* treatment, those concerns disappear when, as in PASPA, 46 states agree to provide four states with relatively *favorable* treatment. Nor is there

anything suspect about Congress' decision not to place an expiration date on PASPA's grandfathering provisions. Congress always retains the power to phase out or repeal PASPA, and whether labeled temporary or permanent, grandfathering clauses need satisfy only rational basis review, which PASPA's readily do.

In short, the Sports Organizations plainly have standing to challenge New Jersey's attempt to affirmatively authorize gambling on their own games, and Congress plainly has the power to prohibit New Jersey from doing so. Accordingly, the judgment below should be affirmed in its entirety.

STATEMENT OF ISSUES

1. Whether the district court correctly concluded that the Sports Organizations have standing to challenge state-sponsored gambling on their own games.

2. Whether the district court correctly concluded that PASPA, which does not compel states to enact, implement, or administer a federal regulatory scheme, does not run afoul of anti-commandeering principles.

3. Whether the district court correctly concluded that PASPA is valid Commerce Clause legislation and does not violate any free-standing "equal sovereignty" principle.

STATEMENT OF FACTS

A. Congress Has Long Recognized the Federal Interest in Protecting Sports and Regulating Gambling.

Congress has long recognized a federal interest in protecting the integrity of professional and amateur sports. In 1964, Congress made it a federal crime to fix or attempt to fix any sports contest—an offense punishable by a fine of up to $10,000, five years in prison, or both. *See* 18 U.S.C. § 224. The House Report called such offenses "a challenge to an important aspect of American life—honestly competitive sports." H.R. Rep. No. 88-1053, at 2 (1963). And Senator Kenneth Keating, in introducing the legislation, emphasized the profound import of "keep[ing] sports clean":

> Thousands of Americans earn a legitimate livelihood in professional sports. Tens of thousands of others participate in college sports as part of the physical fitness and character building programs of their schools. Tens of millions of Americans find sports a favorite form of recreation. We must do everything we can to keep sports clean so that the fans, and especially young people, can continue to have complete confidence in the honesty of the players and the contests.

109 Cong. Rec. 2,016 (1963).

Congress also has long recognized a federal interest in regulating gambling on a nationwide basis. *See, e.g.*, *Champion v. Ames*, 188 U.S. 321 (1903) (upholding federal law prohibiting trafficking of lottery tickets as valid exercise of Congress' commerce power). In 1974, Congress moved to exempt state lotteries from federal criminal lottery laws. *See* 18 U.S.C. § 1307(a)-(b). Critically,

however, Congress excluded state-sponsored *sports* gambling from this exemption, making clear that federal laws would and should continue to apply to any "placing or accepting of bets or wagers on sporting events or contests" conducted by states. *Id.* § 1307(d).

Congress' specific concern about state-sponsored sports gambling mirrors the longstanding concerns advanced by the professional and amateur sports organizations themselves. For decades, sports organizations have sought to thwart the negative effects of sports betting on their games and how those games are perceived by their fans. While recognizing that there is a limit to what can be done about illegal sports gambling, sports organizations have persistently resisted efforts by states to *sponsor* or legitimize such conduct.

In 1990, amid growing public dismay about the harms of sports gambling, Congress began considering federal legislation to stem the spread of state-sponsored gambling on professional and amateur sports. At the time, although only a handful of states had authorized any form of sports gambling, various states were considering authorizing state-sponsored sports gambling to be conducted on river boats or in off-track betting parlors and casinos; others were debating introducing sports themes to their lotteries.

After a robust debate and extensive hearings, Congress determined that although "sports gambling offers a potential source of revenue," "the risk to the

reputation of one of our Nation's most popular pastimes, professional and amateur sporting events, is not worth it." A-2305 (*reprinting* S. Rep. No. 102-248 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553). "Sports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling," "undermines public confidence in the character of professional and amateur sports," and "will promote gambling among our Nation's young people." A-2302. The Senate Report noted that, "[w]ithout Federal legislation, sports gambling is likely to … develop an irreversible momentum" because "[o]nce a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure." A-2303. As an example, the report singled out the "pressures in such places as New Jersey … to institute casino-style sports gambling." A-2303.

Congress ultimately enacted PASPA on October 28, 1992. The bill passed by a vote of 88-5 in the Senate and by voice vote in the House.

B. PASPA Seeks to Stem the Spread of State-Sponsored Sports Gambling.

PASPA makes it unlawful for any "governmental entity" to "sponsor, operate, advertise, promote, license, or authorize by law or compact":

> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based … on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. PASPA also makes it unlawful for "a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a government entity," any such sports gambling. *Id.* § 3702(2).

As a sensible compromise, PASPA also "grandfathered" a handful of states that had permitted sports gambling before PASPA's enactment and had developed substantial reliance interests. *Id.* § 3704; *see also* A-2306 ("Although the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of our legislation. Neither has the committee any desire to threaten the economy of Nevada … or to prohibit lawful sports gambling schemes in other States that were in operation when the legislation was introduced."). Accordingly, four states that had conducted sports wagering schemes during specified time periods—Delaware, Montana, Nevada, and Oregon—qualified for a narrow exemption from PASPA's general prohibition. *Id.* § 3704(a)(1)-(2). The grandfather provision also provided a one-year window of opportunity for states that had operated licensed casino gaming for the previous decade—only New Jersey so qualified—to pass laws permitting sports wagering and thereby obtain an exemption. *Id.* § 3704(a)(3). New Jersey chose not to avail itself of that opportunity. In fact, the New Jersey legislature did not even vote on a joint resolution that would have allowed a referendum on a constitutional

amendment authorizing casino betting on sporting events. *See In re Casino Licensees*, 268 N.J. Super. 469, 470 (Super. Ct. App. Div.), *aff'd*, 138 N.J. 1 (1993). It is thus uncontested that New Jersey is subject to PASPA's general prohibitions.

Finally, PASPA included two mechanisms for enforcing its prohibitions. First, Congress empowered the Attorney General of the United States to seek an injunction against any violation of PASPA. 28 U.S.C. § 3703. Second, Congress granted professional and amateur sports organizations a cause of action to seek an injunction against a violation of PASPA whenever the organization's *own* "competitive game is alleged to be the basis of such violation." *Id.*

More than two decades have passed since PASPA's enactment, and concerns about the harm state-sponsored sports gambling inflicts on professional and amateur sports have been underscored by more recent empirical studies. A 1999 National Gambling Impact Study Commission Report, for example, found that legalized sports gambling "threatens the integrity of sports." A-743. Recent consumer studies, moreover, reveal that 38% of sports fans oppose the adoption of legalized sports betting, while only 17% support it, A-2298, and that fans perceive "[g]ambling influence[]" as a reason for officiating errors. A-1626; *see also* A-1728 (Pltfs.' Reply Statement of Undisputed Material Facts Pursuant to Local Rule 56.1 ¶¶ 25-27).

C. New Jersey Authorizes Sports Gambling in Willful Defiance of PASPA.

Until 2011, the New Jersey Constitution prohibited state laws that authorized wagering "on the results of any professional, college, or amateur sports or athletic event." *See* A-117 (Pltfs.' Statement of Undisputed Material Facts Pursuant to Local Rule 56.1 ¶¶ 10-11). Effective December 8, 2011, the New Jersey Constitution was amended to repeal that prohibition, paving the way for the state legislature "to authorize by law wagering … on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place." N.J. Const. art. IV, § VII, ¶ 2D.

That repeal alone did not violate PASPA's prohibition against authorizing sports gambling. But in January 2012, New Jersey enacted the Sports Wagering Law, N.J.S.A. § 5:12A-1 *et seq.* (West 2012), which affirmatively authorizes licensed casino or gambling houses in Atlantic City and horse racetracks throughout the state to engage in "the business of accepting wagers on any sports event by any system or method of wagering." *Id.* at §§ 5:12A-1, 5:12A-2. Notably, consistent with its amended constitution, New Jersey exempted the athletic programs of its *own* colleges and universities from the scope of the authorization, shielding them from the negative effects of the Sports Wagering

Law. *Id.* at § 5:12A-1 (defining "prohibited sports event" as "any collegiate sport or athletic event that takes place in New Jersey or a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place"). The Division of Gaming Enforcement, which is charged with regulating and issuing licenses for the sports gambling that the law authorizes, *id.* at §§ 5:12A-2, 5:12A-4, promulgated the Sports Gambling Regulations, which delineate various practices and procedures relating to the Sports Wagering Law and were scheduled to go into effect in October 2012. N.J. Admin. Code. § 13:69N.

Although the Sports Wagering Law and Sports Gambling Regulations unambiguously violate PASPA, rather than at least attempt to reconcile them with PASPA, as Delaware unsuccessfully attempted to do in *Office of the Commissioner of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009), New Jersey simply disregarded the obvious and acknowledged conflict. Instead, the governor challenged anyone to try to prevent New Jersey from openly violating federal law: "'[I]f someone wants to stop us, then they'll have to take action to try to stop us.'" A-118.

D. The District Court Rebuffs New Jersey's Efforts to Evade PASPA.

In August 2012, the National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and

Office of the Commissioner of Baseball, doing business as Major League Baseball ("the Sports Organizations") filed suit in the U.S. District Court for the District of New Jersey against Governor Christopher J. Christie, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of New Jersey David L. Rebuck, and Executive Director of the New Jersey Racing Commission Frank Zanzuccki (collectively, "New Jersey"), to prevent this clear violation of PASPA. Invoking the cause of action PASPA grants them, the Sports Organizations moved swiftly for summary judgment and to enjoin the implementation of New Jersey's illegal scheme. New Jersey, in response, moved to dismiss the complaint, arguing that the Sports Organizations lacked Article III standing to bring suit to enforce PASPA. New Jersey subsequently filed a cross-motion for summary judgment, arguing that PASPA violates various provisions of the U.S. Constitution.

After holding a hearing on standing, the district court dispatched New Jersey's standing argument on the undisputed facts. In a December 21, 2012 opinion, the court concluded that the Sports Organizations had "demonstrated, at least by an identifiable trifle, that state-sponsored gambling will adversely impact how the Leagues are perceived by those who can affect their future, specifically their fans." A-68. The district court also concluded that the Sports Organizations' injuries were "fairly traceable to Defendants" because it was "reasonable, and

likely, that a *perceived* increase in match-fixing and the increase of gambling will be attributable, at least in part, to the implementation of the Sports Wagering Law." A-73. The court further concluded that "enjoining the implementation of the Sports Wagering Law will redress the incremental harm that will be caused by implementation of the legalized sports betting." A-74.

With standing established and PASPA's constitutionality now squarely at issue, the United States intervened to defend it. The district court held a second hearing on the constitutionality of the statute and, on February 28, 2013, issued an opinion granting summary judgment to the Sports Organizations. Beginning with the "time-honored presumption that PASPA, enacted by a co-equal branch of government, is constitutional," and the courts' perennial obligation to "adopt an interpretation that would deem the statute constitutional so long as that reading is reasonable," the district court rejected each of New Jersey's constitutional attacks. A-16.

First, the court found PASPA wholly consistent with the Commerce Clause, concluding that Congress had an eminently rational basis for finding that sports gambling has a substantial effect on interstate commerce, and also for finding that the strong reliance interests of a handful of states warranted an exemption for those states from PASPA's prohibitions. Next, the court held that PASPA does not violate "anti-commandeering" principles because it does not force states to take

any legislative, executive, or regulatory action whatsoever and is thus far afield from the statutory commands at issue in the only two cases in which the Supreme Court has ever found a commandeering violation. The court also concluded that PASPA does not raise due process or equal protection concerns because its provisions, including its preferential treatment of a few states, are rationally related to Congress' aims. Finally, the court laid to rest any notion that PASPA violates the equal footing doctrine, concluding that *Coyle v. Smith*, 221 U.S. 559 (1911)—which held that Congress could not impose conditions that would force a new state to enter the Union on unequal footing with its sister states—was wholly inapposite. Recognizing that "if PASPA is held to be constitutional, then the Sports Wagering Law must be stricken as preempted by the Supremacy Clause," the court granted summary judgment to the Sports Organizations and permanently enjoined New Jersey from implementing the Sports Wagering Law. A-19.

SUMMARY OF ARGUMENT

I. As the district court correctly recognized, the Sports Organizations clearly have Article III standing to challenge the spread of state-sponsored gambling on their own games. The Article III injury requirement is not daunting—even a trifle will do—and the Sports Organizations' standing is obvious: Their own games are the object of New Jersey's state-sponsored gambling. The Sports Organizations have an essential interest in how their games are perceived and the degree to which

their *sporting* events become *betting* events. Congress explicitly recognized as much in PASPA when it granted the Sports Organizations a cause of action to prevent the spread of gambling on their own games, and this Court implicitly recognized as much in *Markell* when it rejected an argument that the Sports Organizations would not be injured by a state's legalization of gambling on their games. 579 F.3d at 297-98.

The district court's thorough and careful opinion should have eliminated any doubt about the Sports Organizations' standing. The court patiently listened to New Jersey's argument that, contrary to the judgment of both the Sports Organizations and the United States Congress (not to mention the judgment of New Jersey when it comes to New Jersey collegiate sports), additional state-sponsored sports wagering would actually benefit the Sports Organizations. The court then concluded that the totality of the evidence established a "causal link between legalized gambling and negative issues of perception on the part of Plaintiffs' fans." A-70. Article III certainly requires nothing more.

II. New Jersey also cannot meet the high bar for overcoming the presumption of constitutionality and establishing that PASPA is one of the exceptionally few statutes in our nation's history to run afoul of anti-commandeering principles. The Supreme Court has found only two commandeering violations, in the context of readily distinguishable statutes, and

has rejected efforts to repackage garden-variety Commerce Clause claims as commandeering cases. Even a Court with an early-Twentieth Century view of the Commerce Clause had little difficulty concluding that Congress has ample power to limit gambling. *See Champion v. Ames*, 188 U.S. 321 (1903). Under the modern conception of the commerce power, PASPA's constitutionality is not a close question, as this Court recognized in *Markell* in dispatching Delaware's invocation of Tenth Amendment principles. 579 F.3d at 303.

PASPA, moreover, shares none of the extraordinary characteristics that led the Supreme Court to find constitutional infirmities in its two commandeering cases. Both cases involved affirmative statutory commands that unambiguously compelled states to enact or administer federal regulations by legislation or executive action. PASPA, by contrast, achieves its remedial objective merely by prohibiting certain actions by governmental (and private) entities and does not compel—much less unambiguously compel—states to enact or administer anything. New Jersey attacks the distinction between prohibitions and affirmative commands as meaningless. But that argument ignores the basic constitutional reality that the anti-commandeering principle is an exception to the general rule that Congress has ample power to displace state law under the Supremacy Clause. Statutes affirmatively forcing state officers to enforce federal law or state

legislatures to enact new laws are constitutional outliers. Statutes precluding new state laws where Congress has legislated are routine.

New Jersey's attempt to read into PASPA the affirmative command it lacks is equally unavailing. Contrary to New Jersey's contention, nothing in the unambiguous text of PASPA requires states to keep prohibitions against sports gambling on their books. PASPA prohibits governmental entities from sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling. PASPA's actual language, which New Jersey's brief conveniently elides, includes no requirement that states maintain prohibitions on sports gambling. New Jersey remained in compliance with PASPA even *after* repeal of its state-law prohibition on the authorization of sports wagering. It was only after New Jersey affirmatively authorized sports gambling by enacting the Sports Wagering Law that it violated PASPA, and the Sports Organizations therefore seek only a declaration that the Sports Wagering Law is invalid, not the restoration of the former prohibition.

III. Finally, PASPA is a valid exercise of Congress' commerce power that raises no serious concern under "equal sovereignty" principles. Congress has long devised national policy to account for the varying economic interests and conditions of different regions, and PASPA's distinction between states with pre-existing gambling schemes and those without is eminently rational. Congress enacted PASPA to prevent the proliferation of state-sponsored sports gambling

and, recognizing the reliance interests of the handful of states that already had allowed sports gambling, rationally chose to achieve its objective without eliminating extant sports gambling. Due regard for states' established reliance interests does not come close to exceeding Congress' commerce power.

ARGUMENT

I. The Sports Organizations Readily Satisfy Article III Standing.

A. The District Court Correctly Concluded that the Sports Organizations Have Standing.

Applying the familiar three-part test for standing, the district court readily dispatched New Jersey's contention that the Sports Organizations lack standing to challenge New Jersey's attempt to authorize gambling on their own games. The district court correctly held that the Sports Organizations have shown "injury-in-fact" that is concrete and particularized and actual and imminent; that the threat is "fairly traceable" to the Sports Wagering Law; and that enjoining that law will "redress" the injury. A-64 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). Those conclusions are unassailable. Indeed, in the only other PASPA case ever to reach a court of appeals, this Court affirmed its jurisdiction and ordered entry of injunctive relief despite Delaware's claim that its sports gambling scheme would not irreparably injure the Sports Organizations. *See Markell*, 579 F.3d 293. Although this Court did not address standing as such, it did reject Delaware's attack on the Sports Organizations' injury. And having taken the

relatively extraordinary step of converting the Sports Organizations' appeal of the denial of a preliminary injunction into a grant of summary judgment, it would be quite remarkable for this Court to turn around four years later and find that the Sports Organizations lack standing altogether to vindicate PASPA.

The Sports Organizations' "injury-in-fact" is straightforward. New Jersey's law makes the Sports Organizations' own games the object of state-sponsored betting. Indeed, the law is designed to allow both the state and other private entities to benefit economically based on the Sports Organizations' events, which inevitably affects how those events are perceived. The Sports Organizations' personal stake in the degree to which others derive economic benefits from their own games is obvious, as is their distinct interest in how their events are perceived by fans. The successful operation of the Sports Organizations is inextricably intertwined with such factors, and thus with whether, and to what extent, their *sporting* events become *betting* events. When, as here, the "plaintiff is himself an object of the action … there is ordinarily little question that the action … has caused him injury, and that a judgment preventing … the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992); *see also Doe v. Nat'l Bd. of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) (individual has sufficiently concrete and personal interest in "being identified as a disabled person against his will"). The Sports Organizations are not asserting standing as a

taxpayer or undifferentiated sports fan or would-be future watcher of games. Rather, the Sports Organizations' own games are the "object of the action" they challenge—and that should be the end of the inquiry.

In fact, New Jersey appears to concede that the Sports Organizations have articulated a legally protected interest in how their games are perceived. Brief of New Jersey Appellants ("NJ Br.") 24. New Jersey, nonetheless, would demand a more substantial showing that the Sports Organizations will actually be harmed by allowing more gambling on their games. In New Jersey's view, the Sports Organizations have simply made a massive miscalculation in repeatedly and unanimously concluding that they are better off with as little state-sponsored gambling on their games as possible. *See* NJ Br. 25.

The district court rightly rejected that extreme position. At the outset, as New Jersey concedes, the Sports Organizations need show only "an 'identifiable trifle' of injury." NJ Br. 23 (quoting *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 210 (3d Cir. 2011)); *see also* A-65-66. And it is well-settled that "[i]n determining whether a plaintiff satisfies the requirements of constitutional standing, the extent of the injury plaintiff suffered is generally immaterial." *Gen. Instrument Corp. of Del. v. Nu-Tek Elecs. & Mfg., Inc.*, 197 F.3d 83, 87 (3d Cir. 1999). Accordingly, New Jersey has no choice but to take the extraordinary position that the Sports Organizations' considered judgment that the spread of

state-sponsored gambling will negatively affect how their games are perceived by fans has *no basis in reality*. NJ Br. 24, 32.

That contention is every bit as implausible as it sounds. The district court considered "undisputed material facts" from four studies that demonstrated, among other things, that sizable percentages of fans worry about game fixing and gambling problems in their sports; that fans perceive that outside sources have influenced or attempted to influence outcomes of collegiate games; and that significant numbers of fans would "definitely" spend less money on professional sports franchises if they were in close proximity to a legalized-gambling jurisdiction like Las Vegas. *See* A-68-70. New Jersey's own expert, meanwhile, proffered that its law "would result in an overall increase in total (legal plus illegal) sports wagering." A-70; *see also* A-325 (Expert Report of Prof. Robert D. Willig). Based on the totality of evidence, the district court found "sufficient support" for a "causal link between legalized gambling and negative issues of perception on the part of Plaintiffs' fans" and held that the Sports Organizations had "identified at least a 'trifle' of an injury." A-70-71. The undisputed nature of the evidence, moreover, did not call for an evidentiary hearing (which, in any event, New Jersey suggested only in a single footnote of a brief).

New Jersey takes issue with the force of some of the evidence. *See, e.g.*, NJ Br. 29 (inference that fans would spend less on franchises in proximity to legal

gambling was based on "the response of a small minority (17 percent)"); NJ Br. 30 (whether fans would spend less on franchises in Las Vegas should not shed light on what would happen in New Jersey). But such quibbling ignores that the Sports Organizations' burden is to show only an "identifiable trifle" of injury. A-66. Whether 17 or 15 or 20 percent of fans are turned off by legalized gambling, there is at least an identifiable trifle of harm, not to mention one that gives each Sports Organization an interest distinct from the public at large.

Nor were any of these pieces of evidence standalone bases for the district court's decision, as New Jersey suggests. NJ Br. 28. For instance, New Jersey zeroes in on one paragraph of the court's opinion discussing the 17% finding of the 2007 survey (in the middle of several pages discussing the record), labels this the "'proximity' theory of standing," then complains that it is "difficult to see how a single survey response ever could resolve a disputed question of fact as a matter of law." NJ Br. 28-30. The court, however, made clear that the causal link between legalized gambling and negative perceptions rests not on one statistic or study, but on "the record" as a whole, read in tandem with a "conce[ssion] by Defendants' expert." A-70.

More fundamentally, having correctly identified a concrete interest in not having their sporting events converted into state-sponsored betting events, the Sports Organizations were under no burden to establish that their traditional

reluctance to have legalized gambling on their games is itself economically rational. A business allegedly maligned by a competitor has standing to complain without being required to demonstrate that the false statement actually hurt rather than helped sales. A trademark holder has standing to challenge infringement without being required to demonstrate that the knock-offs did not actually stimulate demand for the genuine article.

In any event, the reasonableness of the Sports Organizations' conclusions has been confirmed by this Court, which noted in *Markell* that Delaware-sponsored betting "would engender the very ills that PASPA sought to combat." 579 F.3d at 304. And, as the district court correctly recognized, the reasonableness of the Sports Organizations' judgment is reinforced by New Jersey's parallel judgment in exempting its *own* college and university teams and in-state collegiate sporting events from the Sports Wagering Law, N.J.S.A. § 5:12A-1—a transparent effort to protect its own teams and events from the very ills it denies exist. *See* A-25 n.4 ("the statutory framework of New Jersey's Sports Wagering Law implicitly recognizes the deleterious effects PASPA targets"). In short, the Sports Organizations' perceived harm is based in reality and thus concrete.

Finally, New Jersey argues that any injury is traceable only to *illegal* gambling. NJ Br. 25-26. But, again, this distorts the record and the district court's reasoning. The court did not, as New Jersey claims, "acknowledge[] that this

evidence did not establish 'a direct causal link between *legalized* gambling and negative issues of perception on the part of Plaintiffs' fans' because it might 'only be traced to *illegal* gambling.'" NJ Br. 26. To the contrary, the district court held that "[w]hile *most* of these studies *alone* may not constitute a direct causal link between legalized gambling and negative issues of perception on the part of Plaintiffs' fans, *sufficient support to draw this conclusion exists*." A-70 (emphases added). The court further noted that one study, the 2007 survey, *did* "draw[] an undisputed direct link between legalized gambling and harm to the Leagues." A-69.

Moreover, far from conceding that the evidence was limited to the effects of illegal gambling, the district court merely held that "even assuming" this premise, the Sports Wagering Law "will increase the total pool of gambling, 'legal plus illegal,' such that fans' negative perceptions attributed to game fixing and gambling will necessarily increase." A-70. The perception of game fixing, with its threat to the integrity of the games, is not somehow limited to *illegal* gambling; the greater "the total pool of gambling," the greater the risk that fans will assume game-fixing is occurring.[1] There is little doubt that legalizing sports gambling will

[1] New Jersey's suggestion that any injury relating to game-fixing is "'self-inflicted,'" NJ Br. 26, ignores that the Sports Organizations' injury derives at least in part from *the perception* of game-fixing. As the district court correctly recognized, "referees and players need not *actually* engage in gambling or game

increase the total pool and diminish any stigma on partaking in sports gambling. The injury to the Sports Organizations certainly does not rest on an attenuated and "speculative chain of possibilities" unsupported by "any evidence" that the challenged law will ever affect them. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148, 1150 (2013). Rather, should the Sports Wagering Law go into effect, the harm is "actual and imminent," "traceable" to that law, and "redress[able]" at least in part by enjoining that law. *Summers*, 555 U.S. at 493; *see also Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) ("While … regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."). The relatively undemanding requirement for Article III standing is readily satisfied.

B. PASPA Reflects Congress' Considered Judgment that the Sports Organizations Have a Concrete Interest in Preventing State-Sponsored Gambling on Their Own Games.

While the Sports Organizations do not need a statute to grant them standing to challenge state-sponsored gambling on their own games, PASPA confirms beyond all doubt that any objection to the Sports Organizations' standing is

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fixing in order for fans to have an increased perception that the integrity of the games is suffering due to the expansion of legalized gambling." A-73.

untenable.[2] Congress passed the "Professional and Amateur Sports Protection Act" to protect professional and amateur sports organizations from the very injuries that New Jersey insists do not exist. After reviewing a voluminous record of evidence and testimony, Congress made the considered judgment that the spread of state-sponsored sports gambling would, in fact, injure the Sports Organizations. Congress therefore prohibited states from authorizing sports gambling and granted "a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation" a cause of action to enjoin that violation. 28 U.S.C. § 3703. Congress did not grant a cause of action to all citizens—it granted it to the Sports Organizations and the Sports Organizations alone. Even more tellingly, Congress did not purport to authorize the Sports Organizations to seek injunctions against all state-sponsored betting—it enabled each organization to seek an injunction only when its own games are "the basis of [a] violation." *Id.* Accordingly, PASPA is a straightforward example of a statute in which Congress "identif[ied] the injury it seeks to vindicate and relate[d]

[2] Indeed, in the *Markell* litigation, the Sports Organizations brought claims under both PASPA and the Delaware Constitution. *Markell*, 579 F.3d at 296. Although the latter claims were not before this Court, *id.* at 304, those claims underscore that, wholly apart from PASPA, the Sports Organizations have an obvious legal interest in the degree to which state law permits gambling on their games. PASPA simply removes any doubt on the matter.

the injury to the class of persons entitled to bring suit." *Massachusetts*, 549 U.S. at 516.

This case thus does not implicate the more difficult constitutional questions on which New Jersey dwells. *See* NJ Br. 35-39. New Jersey concedes that Congress may "'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" NJ Br. 37 (quoting *Lujan*, 504 U.S. at 578). And here Congress granted the Sports Organizations a cause of action because they *already* had a concrete, *de facto* injury and particularized interest that Congress decided merited legal protection. That is what the Sports Organizations argued in the district court, and it is what they argue here. *See* Pltfs.' Opp. to Defts.' Mot. to Dismiss 11-12 (Doc. 39) (in granting the Sports Organizations a cause of action, Congress "acted well within the scope of its power to 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries'"). PASPA falls within the heartland of what New Jersey itself has described as Congress' power. New Jersey's insistence that Congress cannot "'erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff,'" NJ Br. 38, is therefore entirely beside the point. PASPA does not

"erase" standing requirements at all; it simply provides a cause of action where standing already exists.[3]

New Jersey alternatively contends that the Sports Organizations' right to run their own games free from the spread of state-sponsored betting is somehow less concrete and particularized than other statutorily defined rights that this Court has deemed constitutionally sufficient. *See Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 762-63 (3d Cir. 2009) (right to receive kickback-free referral under the Real Estate Settlement Procedures Act); *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 456 (3d Cir. 2003) (right to receive honest information free of fiduciary breach under the Employee Retirement Income Security Act). If anything, the opposite is true: If all members of the class of homebuyers in *Alston* were concretely and personally injured by a referral that caused no monetary harm, *a fortiori* each Sports Organization is concretely and personally injured when its own games are turned into state-sponsored gambling events that cause perceptional harms against its will.

[3] There may be harder questions concerning the outer bounds of the principle that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975). But they are not implicated here, where Congress has pinpointed the injury it seeks to vindicate (harms from state-sponsored gambling on the Sports Organizations' own games) and related the injury to a narrow class of persons entitled to sue (a Sports Organization whose own games are the object of gambling). *See Massachusetts*, 549 U.S. at 516.

At bottom, New Jersey essentially asks this Court to conclude that Congress conferred a cause of action in PASPA that it did not have the power under the Constitution to confer. New Jersey rests that remarkable request on the implausible contentions not only that the Sports Organizations have acted wholly contrary to their own best interests in resisting the spread of state-sponsored gambling on their games for decades, but that Congress enacted PASPA to combat harms that unequivocally do not exist. There is nothing suspect, let alone irrational, about Congress' considered judgment that the spread of state-sponsored sports gambling would, in fact, injure the Sports Organizations, and it does not fall to this Court to overturn that judgment. Accordingly, the Sports Organizations plainly have Article III standing to bring this suit under the cause of action Congress granted them.

II. PASPA Does Not Violate Anti-Commandeering Principles.

A. The Supreme Court Has Identified a Commandeering Problem Only Twice, and Each Case Involved an Extraordinary Statutory Command.

PASPA is a straightforward exercise of Congress' power to regulate interstate commerce. Although New Jersey's brief proceeds as if PASPA compels states to maintain prohibitions on sports gambling on their statute books, the plain text of PASPA is quite different and involves an unremarkable effort to make certain actions by governmental entities and private actors unlawful as a matter of

federal law. The actual text of PASPA's operative provision, which New Jersey's argument essentially ignores, is as follows:

> It shall be unlawful for—
>
> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. In short, PASPA makes it a violation of federal law for a state or locality either to conduct or promote sports gambling itself or to authorize anyone else to do so, makes it a violation of federal law for anyone else to promote or operate state-sponsored sports gambling, and preempts any state or local law to the contrary.

Neither Congress' decision to regulate sports gambling nor the method by which it chose to do so raises any red flags under settled Commerce Clause jurisprudence. Long before the modern breadth of the commerce power was established, the Supreme Court had no trouble concluding that Congress may exercise its commerce power to regulate gambling on a nationwide basis. *See Champion*, 188 U.S. 321 (upholding federal law prohibiting interstate trafficking in lottery tickets). The Court has since made clear that, "[w]here economic activity

substantially affects interstate commerce, legislation regulating that activity will be sustained." *United States v. Lopez*, 514 U.S. 549, 560 (1995). Sports gambling—whether interstate or intrastate—readily satisfies that standard.

There also can be no serious dispute that Congress may regulate sports gambling by prohibiting or preempting state or local laws inconsistent with federal policy. Federal laws that operate to prohibit states or localities from enacting or enforcing laws contrary to federal policy are commonplace. *See, e.g.*, *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008) (considering 49 U.S.C. § 14501(c)(1), which provides that a state "may not enact or enforce a law … related to a price, route, or service of any motor carrier … with respect to the transportation of property"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992) (considering 49 U.S.C. § 1305(a)(1), which precluded "States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes").[4] These laws are routine exercises of

[4] *See also, e.g.*, 7 U.S.C. § 136v(b) (a "State shall not impose or continue in effect any requirements for labeling or packaging [pesticides] in addition to or different from those required under this subchapter"); 15 U.S.C. § 1121(b) ("[n]o State or other jurisdiction of the United States or any political subdivision or any agency thereof may" impose certain requirements relating to trademarks); 21 U.S.C. § 360k ("no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement" that conflicts with federal requirements); 21 U.S.C. § 678 (identifying requirements relating to meat inspection that "may not be imposed by any State"); 46 U.S.C. § 4306 ("a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a

Congress' commerce power, which includes the power to preempt state or local law through the direct operation of the Supremacy Clause. *See Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012) ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision."); *Roth v. Norfalco LLC*, 651 F.3d 367, 374, 379 (3d Cir. 2011) (the Supremacy Clause "elevates federal law above that of states, providing Congress with 'the power to preempt state legislation if it so intends'").

New Jersey does not purport to take issue with Congress' power to preempt state regulations of sports gambling as a general matter. NJ Br. 42. It instead contends that the manner in which PASPA operates violates the "anti-commandeering" principle articulated in two Supreme Court cases, *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). NJ Br. 46-50; *see also* Brief of Appellants Sweeney, *et al.* ("Sweeney Br.") 20. That is grasping at straws. PASPA is conventional commerce power

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recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment"); 49 U.S.C. § 11501(b) ("a State, subdivision of a State, or authority acting for a State or subdivision of a State may not" impose certain taxes on rail transportation property); 49 U.S.C. § 31111(b) ("a State may not prescribe or enforce a regulation of commerce" that imposes length requirements on certain vehicles); 49 U.S.C. § 40116(b) ("a State, a political subdivision of a State, and any person that has purchased or leased an airport under … this title may not levy or collect a tax, fee, head charge, or other charge on" air commerce or transportation).

legislation that operates in conventional ways. It does not commandeer the states or anyone else.

The difficulty of New Jersey's burden in establishing that PASPA commandeers the states cannot be overstated. PASPA, like all federal statutes, enjoys a strong presumption of constitutionality. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 944 (1983); *Koslow v. Pennsylvania*, 302 F.3d 161, 175 (3d Cir. 2002). Moreover, this Court has *never* found a violation of the anti-commandeering principle, and in contrast to scores of cases emphasizing the breadth of Congress' commerce power, the Supreme Court has identified an anti-commandeering violation a grand total of *twice*, in obviously distinguishable circumstances.

The first of those cases, *New York*, involved a provision of the Radioactive Waste Policy Amendments Act of 1985 that required states either to take title to radioactive waste or to regulate the waste pursuant to Congress' direction. Either option, the Court explained, "'commandeer[ed] the legislative processes of the States by *directly compelling* them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161 (emphasis added). The Court noted that the provision "appears to be unique" in that it "offers a state government no option other than that of implementing legislation enacted by Congress." *Id.* at 177. The Court thus invalidated the provision on the ground that it "infringe[d] upon the core of state sovereignty reserved by the Tenth Amendment." *Id.*

The second commandeering case, *Printz*, involved a provision of the Brady Handgun Violence Protection Act that imposed mandatory obligations on state law-enforcement officers to perform federal background checks on prospective firearm buyers. Reviewing its sparse commandeering jurisprudence, the Court described *New York* as the first case in which it had ever confronted "a federal statute that unambiguously required the States to enact or administer a federal regulatory program." *Printz*, 521 U.S. at 926. It then held that the Brady Act provision did the same, albeit through the states' officers instead of their legislative processes. *Id.* Congress, the Court reiterated, "may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id.* at 925.

Both *New York* and *Printz* entailed an extraordinary type of statutory command: an "unambiguous[]" directive to states to enact, administer, implement, or enforce federal regulation by legislation or executive action. *Id.* at 926. As the Court emphasized in both cases, such a "thou must do X" direction to the states was essentially unprecedented. *Id.*; *see also New York*, 505 U.S. at 177. By conscripting state legislatures and officers to implement federal regulatory programs, each statute enabled Congress to avoid accountability by interposing the state to "absorb the costs of implementing a federal program" or "tak[e] the blame

for [the federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

While there have been many anti-commandeering challenges since *New York* and *Printz*, none has been successful in the Supreme Court, which has readily rejected the notion that every federal statute that influences the conduct of states commandeers them. For instance, in *Reno v. Condon*, 528 U.S. 141 (2000), the Court made clear that a federal law that will "require time and effort on the part of state employees," but "does not require [a state] to enact any laws or regulations," or "require state officials to assist in the enforcement of federal statutes regulating private individuals," does not commandeer the states. *Id.* at 150-51; *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981) (upholding statute that did not require states to enforce its provisions, expend state funds, or participate in a federal regulatory program). This Court, moreover, has *never* held that a statute violates the Tenth Amendment. *See, e.g.*, *Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 412-13 (3d Cir. 2012) (rejecting Tenth Amendment claim); *United States v. Parker*, 108 F.3d 28, 31 (3d Cir. 1997) (same); *cf. United States v. Shenandoah*, 595 F.3d 151, 161 (3d Cir.

2010), *abrogated on other grounds by Reynolds v. United States*, 132 S. Ct. 975 (2012) (same).[5]

New Jersey's heavy burden is more daunting still given that this Court did not identify any Tenth Amendment problem when it considered PASPA's preemption provision in *Markell*. Although *Markell* did not present the anti-commandeering argument New Jersey presses here, the Court did "find unpersuasive Delaware's argument that its sovereign status requires that it be permitted to implement its proposed betting scheme." 579 F.3d at 303. The Court also rejected Delaware's reliance on *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which is based on Tenth Amendment principles, *id.* at 463. *See Markell*, 579 F.3d at 303. Having already concluded that PASPA's clear language trumped Delaware's "generalized notions of 'state sovereignty,'" *id.*, it would be

[5] Anti-commandeering challenges also have been rejected routinely by other courts of appeals. *See, e.g.*, *Strahan v. Coxe*, 127 F.3d 155, 167-170 (1st Cir. 1997); *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir. 2002); *Kennedy v. Allera*, 612 F.3d 261, 268-70 (4th Cir. 2010); *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997); *Cutter v. Wilkinson*, 423 F.3d 579, 588-89 (6th Cir. 2005); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650, 662-64 (7th Cir. 2004); *Dakota, Minn. & E. R.R. v. South Dakota*, 362 F.3d 512, 517-18 (8th Cir. 2004); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 844-49 (9th Cir. 2003); *Oklahoma ex rel. Okla. Dep't of Public Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1242-43 (11th Cir. 2004); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1305-07 (D.C. Cir. 2004).

remarkable for this Court now to conclude that PASPA unconstitutionally interferes with state sovereignty by commandeering state legislatures.

B. The District Court Correctly Concluded that PASPA Does Not Commandeer the States.

The district court correctly declined to make this case a successor to *New York* and *Printz*. As the court correctly concluded, PASPA is not at all "analogous" to the novel statutory provisions the Supreme Court held unconstitutional in those cases. A-28, A-41-47. That is because PASPA lacks the critical element that distinguished those provisions from the vast array of federal statutes that pose no commandeering problems—namely, their "*affirmative* 'federal *command* to the States'" and use of Congress' power to "*compel*[] the actions of States." A-40, 44; *compare*, *e.g.*, *City of New York v. Beretta U.S.A. Corp*., 524 F.3d 384, 397 (2d Cir. 2008) (rejecting commandeering claim where statute "'impose[d] no affirmative duty of any kind'"); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906-07 (D.C. Cir. 1999) (rejecting commandeering claim where statute did "not force state officials to do anything affirmative"); *United States v. Bostic*, 168 F.3d 718, 724 (4th Cir. 1999) (rejecting Tenth Amendment claim where statute imposed no "affirmative obligation" on states). In other words, while PASPA makes certain actions by governmental entities and private parties violations of federal law, it does not require, much less unambiguously require, states to do anything.

That much is clear from the plain text of the statute. New Jersey suggests that PASPA "require[s] the States to keep laws on their books" prohibiting sports gambling and therefore "dictate[s] the content of state law." NJ Br. 40, 41. PASPA does nothing of the sort. PASPA states that "[i]t shall be unlawful for a governmental entity to sponsor, operate, advertise, promote, license, or authorize" gambling on amateur or professional athletic games. 28 U.S.C. § 3702. It similarly prevents persons from sponsoring, operating, advertising, or promoting such gambling. *Id.* § 3702(2). Noticeably absent from that language, which this Court has described as "unambiguous" and "'unmistakably clear,'" *Markell*, 579 F.3d at 302-03, is any requirement that states enact, maintain, or enforce anything. Instead, the statute sets forth only what a government entity may *not* do.

To be sure, "PASPA unmistakably prohibits state-sponsored gambling," whether undertaken or promoted by the state itself or by a private party. *Id.* at 303. But it does so by *prohibiting* states from undertaking conduct—either as market participants or as authorizers of commercial activity—that conflicts with the federal policy against the spread of state-sponsored sports gambling. In that respect, PASPA is no different from scores of federal statutes that prevent states from taking or authorizing actions inconsistent with federal policy and preempt state laws that purport to authorize private parties to do so. *See supra* p. 30 & n.4;

A-44.[6] If, for instance, a racetrack sought to offer gambling on the Sports Organizations' sporting events pursuant to a state law, PASPA would prohibit it from doing so in the same way as any other federal law that prohibits commercial activity authorized by state laws inconsistent with federal policy. The racetrack's activity would violate PASPA, and if the racetrack invoked the state law as a defense, the court clearly would find the state law preempted by PASPA. That is not commandeering; it is the routine operation of the Supremacy Clause.

New Jersey seeks to downplay the critical distinction between prohibitions on activity and affirmative commands to act, but *Printz* itself emphasized this fundamental difference between preemption and commandeering. As the Court explained, there is a "duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid." *Printz*, 521 U.S. at 913. That is a necessary, appropriate, and unremarkable consequence

[6] The legislator-intervenors attempt to rely on a distinction between "statutes that generally apply to States as well as private citizens" and "statutes that are directed to the States as sovereigns," deeming the former permissible and the latter unconstitutional commandeering. Sweeney Br. 13. But their characterization of PASPA as the latter ignores that the statute regulates *both* "governmental entit[ies]" *and* private "person[s]." 28 U.S.C. § 3702(1)-(2). And it cannot be squared with their characterization of the law in *Reno* as the former. *See* 18 U.S.C. § 2721 (generally regulating disclosures by "State [DMVs]"; incidentally regulating redisclosures by private persons who obtain information from the state DMV).

of the Supremacy Clause itself. Thus, even the commandeering cases make perfectly clear that Congress does not commandeer the states when it simply precludes them from enacting or enforcing laws that conflict with federal policy.[7]

New Jersey makes the strained argument that *Reno* disavowed the relevance of affirmative activity to the anti-commandeering doctrine because the Court found no anti-commandeering violation *despite* acknowledging that the law at issue there would "require time and effort on the part of state employees." 528 U.S. at 1501. But that just underscores that simply requiring some affirmative activity by states is insufficient to establish commandeering. *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 214 (4th Cir. 2002) ("more is required than the expenditure of time and effort on the part of state officials in order to offend the Tenth Amendment"); *see also* A-41 (noting the absence in *Reno* of "an *affirmative* aspect *which violated the Tenth Amendment*" (second emphasis added)). That compelling

[7] Contrary to New Jersey's contention, nothing in *Coyle*, much less in the Supreme Court's mere citation to it in *New York*, calls into question this settled principle. *Coyle* struck down a federal statute that provided that the location of Oklahoma's capital "'not be changed'" before 1913. 221 U.S. at 564. As the district court recognized, *see* A-45-46, that statute was unconstitutional not because it commandeered the state legislature, but because it was "referable to no power granted to Congress over the subject" (whereas PASPA was an exercise of Congress' commerce power); "pertain[ed] purely to the internal policy of the state" (whereas gambling impacts interstate commerce and has long been regulated on a nationwide basis); and placed Oklahoma "upon a plane of inequality with its sister states in the Union" (whereas here no equal sovereignty problem exists, *see infra* Part III). *Coyle*, 221 U.S. at 565, 574, 579.

some affirmative action is not sufficient to state a commandeering violation does not mean that compelling a particular kind of affirmative action—namely, legislation or executive action to enforce federal law—is not necessary to establish a commandeering violation. *Reno* could not have been clearer that there was no commandeering violation because the challenged law did "not require the South Carolina Legislature to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals." 528 U.S. at 151. New Jersey cannot obscure the fact that, like the statute in *Reno*, PASPA imposes neither of those affirmative commands.

New Jersey alternatively insists that the real purpose of the anti-commandeering doctrine is not to prevent Congress from forcing states to enact or implement federal regulatory schemes, but to prohibit Congress from attempting to "influence the manner in which States regulate private parties." NJ Br. 45-47; *see also* Sweeney Br. 9, 15-16, 34; Brief for *Amicus* West Virginia, *et al.* ("West Virginia Br.") 20. That conception of commandeering sweeps far too broadly. In this day and age *most* federal statutes—even those that do not have preemptive force—"influence" state regulation of private parties in areas of traditional state concern. If a commandeering violation required nothing more than that, then the anti-commandeering doctrine would become the exception that swallows the general rule that federal laws "shall be the supreme Law of the Land." U.S. Const.

art. VI. Indeed, New Jersey's argument would endanger countless statutes that not only "influence the manner in which States regulate private parties," but that also squarely prohibit states from regulating private parties in a manner contrary to federal law or policy. *See supra* p. 30 & n.4 (collecting statutes that directly prohibit states from enacting or enforcing laws).[8]

In short, New Jersey's argument ignores how unusual the laws at issue in *New York* and *Printz* really were. The district court was correct to differentiate between federal legislation that compels legislative or executive action and federal legislation that prohibits certain conduct. *See* A-41-47. Whatever the elusiveness of the omission/commission distinction in other contexts, the distinction between compelling legislative or executive action and simply forbidding conduct that can take the form of legislation is absolutely critical to ensuring that *New York* and *Printz* remain the narrow decisions they purported to be. It does not fall to this Court to extend *New York* and *Printz* to novel settings that would cast doubt on the constitutionality of an untold number of statutes. *See, e.g.*, *Oklahoma ex rel. Okla. Dep't of Public Safety v. United States*, 161 F.3d 1266, 1272 (10th Cir. 1998) ("any

[8] The briefs by the legislator-intervenors and four state *amici* suffer from the same basic flaw: They consistently and erroneously define commandeering in a manner so overbroad as to sweep in countless preemptive provisions. *See, e.g.*, Sweeney Br. 9-15; West Virginia *Amicus* Br. 17-20.

expansion of Tenth Amendment jurisprudence … is best left to the Supreme Court").[9]

New Jersey protests that the federal government can shunt political accountability regardless of whether a federal law imposes an affirmative command or a prohibition on the states. *See* NJ Br. 49; *see also* Sweeney Br. 23-28; West Virginia *Amicus* Br. 7-16. Again, New Jersey's logic proves far too much. The same accountability argument could be made every time Congress uses its enumerated powers to preempt an otherwise duly enacted state law. The district court therefore correctly followed the Supreme Court's lead in treating accountability concerns as particularly heightened only when Congress affirmatively commands states to enact or implement federal regulations. *See* A-47. Precisely because New Jersey stood in full compliance with PASPA for two decades without enacting or implementing anything, PASPA did not put New Jersey in a situation where it was "forced to absorb the costs of *implementing* a federal program" or "tak[e] the blame for [a federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930 (emphasis added). Nor is there any

[9] In fact, the Supreme Court has rejected similar attempts to identify Tenth Amendment violations based on broader and thus more malleable measures of state sovereignty. *See* A-32-34; *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) ("the attempt to draw the boundaries of state regulatory immunity in terms of 'traditional government function' is not only unworkable but is also inconsistent with established principles of federalism").

accountability problem now. Governor Christie has made it quite clear that it is federal law, and federal law alone, that stands in the way of his desire to affirmatively authorize lawful sports gambling in New Jersey. And there is no question that any sports gambling that might occur pursuant to New Jersey's statutes would violate federal law—namely, PASPA—and not state law.

In the end, PASPA undisputedly "has 'altered the usual constitutional balance' with respect to sports wagering," *Markell*, 579 F.3d at 303, but it has not done so in any constitutionally suspect way. Congress' power to regulate gambling on a nationwide basis is as settled as its power to prohibit states from undertaking or authorizing conduct that conflicts with federal policy. *See, e.g.*, *Champion*, 188 U.S. 321; *Arizona*, 132 S. Ct. at 2501; A-44 (Congress' "power to *restrict*, rather than *compel*, the actions of States in preempted spheres was, and remains, a settled issue"). Nothing in New Jersey's arguments calls either commonly exercised power into question.

C. PASPA Can and Should Be Read to Avoid Any Commandeering Concerns.

Implicitly recognizing that affirmative commands *do* matter, New Jersey repeatedly attempts to read one into PASPA. It insists throughout its brief that PASPA "requires States to prohibit sports wagering within their borders." NJ Br. 18. That gets matters backwards. Courts are supposed to read statutes to avoid constitutional difficulties, not to create them. *See Clark v. Martinez*, 543 U.S. 371,

380-81 (2005). Nowhere in its unambiguous text does PASPA order states to keep laws on their books. There is absolutely no reason to artificially construe PASPA to create constitutional issues that simply do not exist.

New Jersey attempts to derive this non-existent affirmative command from the notion that, when Congress enacted PASPA, it presumably was aware that many states prohibited sports gambling. NJ Br. 8, 43. That may well be true, but it does not compel the atextual reading of PASPA that New Jersey advances. To be sure, Congress legislated against the backdrop of existing state laws. But there is no reason to assume—particularly in the absence of anything in the statute or its legislative history even hinting at such an objective—that Congress therefore meant to *compel* states to keep those existing laws in place. PASPA's approach toward states that already had sports gambling in effect is illustrative. Nothing in PASPA requires those states to keep existing state laws in effect. Delaware, for instance, is entirely free under PASPA to offer or not offer the sports lotteries it had in place before the statute was enacted. But just like every other state, what Delaware may not do—as *Markell* makes clear—is authorize sports gambling that it had not authorized before PASPA was enacted; in other words, it may not take actions that *spread* state-sponsored gambling. *See* 28 U.S.C. § 3704.

It is particularly ironic that New Jersey seeks to fault Congress for *not* enacting a blanket federal prohibition on sports gambling by any and all actors. NJ

Br. 42. Congress decided to refrain from doing so at the time because as long as states did not authorize sports gambling, Congress did not see a need to federalize every sports gambling prosecution.[10] Congress retains the ability to step in and prohibit sports gambling itself should it choose to do so. But it would be an odd Tenth Amendment jurisprudence that forced Congress to federalize sports gambling prosecutions. In reality, Congress opted for a more modest approach in PASPA out of respect for state sovereignty. Moreover, it did so in a manner that accommodated the varying approaches different states had taken toward sports gambling at the time. *See* A-2306. Rather than preempt state regulation of sports gambling entirely, Congress opted to prohibit only those states that had declined to authorize sports gambling from doing so in the future, while accommodating the reliance interests of the few states that already had allowed it. *See* 28 U.S.C. § 3704. New Jersey essentially asks this Court to punish Congress for acting in a manner more, not less, solicitous of state sovereignty. But, notwithstanding New

[10] PASPA is not unique in assuming the existence of state-law gambling prohibitions without compelling states to keep those laws on their books. Numerous statutes do the same. The Illegal Gambling Business Act of 1970, for instance, makes it a violation of federal law to operate a gambling business in violation of state law. 18 U.S.C. § 1955(b)(1)(i); *see also, e.g.*, *id.* §§ 1084(b), 1952(b)(1), 1953(b)(1)-(2), 1960(b)(1)(A), 1961(1); 15 U.S.C. § 1172(a); 31 U.S.C. § 5362(10). Far from constituting a commandeering problem, such statutes are an appropriate exercise in cooperative federalism that gives states more of a role than a one-size-fits-all federal standard. *See, e.g.*, *United States v. Meienberg*, 263 F.3d 1177, 1183 (10th Cir. 2001).

Jersey's seeming assumption otherwise, nothing requires Congress to enact its own direct prohibitions on private conduct in order to preempt state laws contrary to federal policy. New Jersey conspicuously fails to identify any authority in support of its contrary argument. *See* NJ Br. 42.

New Jersey claims that the Sports Organizations equate failure to maintain a state-law prohibition on sports gambling to "authoriz[ation]" under PASPA. NJ Br. 48. But the procedural history of the Sports Wagering Law belies that claim. Before enacting the Sports Wagering Law, New Jersey amended its state constitution to remove its existing prohibition against state laws authorizing wagering "on the results of any professional, college, or amateur sport or athletic event." N.J. Const. art. IV, § VII, ¶ 2D. That repeal of a constitutional prohibition on state laws authorizing sports gambling, alone, was not enough to *authorize* such gambling—as evidenced by New Jersey's subsequent enactment of the Sports Wagering Law and accompanying regulations. Tellingly, the Sports Organizations *did not* sue to compel New Jersey to maintain or reinstate its constitutional prohibition.

It was only after New Jersey took the next step, and affirmatively authorized sports gambling by enacting the Sports Wagering Law, that the Sports Organizations filed suit. And the Sports Organizations sought only a declaration that the Sports Wagering Law and regulations, which affirmatively authorize sports

gambling, may not be enforced. *See* A-111 (Compl. ¶¶ 32-33) (PASPA violated by the Sports Wagering Law's effort to "*expressly authorize* sports gambling in New Jersey and establish a licensing scheme to regulate such gambling" (emphasis added)). Congress' intent in PASPA was to prohibit states from *authorizing* sports gambling, and the Sports Organizations have brought suit here to enforce that prohibition.

In sum, this Court should read PASPA to do no more than its plain text says—namely, to make it "unlawful for a governmental entity to sponsor, operate, advertise, promote, license, or authorize" gambling on amateur or professional athletic games. 28 U.S.C. § 3702. The statute unambiguously does not contain the kind of affirmative command to enact or implement federal law that doomed the statutory provisions at issue in *New York* and *Printz*. Moreover, even if New Jersey's contrary reading of the statute were a plausible one (and it is not), this Court would be bound to reject it under the long-settled principle that, when presented with two reasonable interpretations of a statute, courts must adopt the construction that *avoids* constitutional problems, not the one that *creates* them. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The Sports Organizations' reading of PASPA is not only the obvious one, but is also—unlike New Jersey's—the one that

confirms beyond doubt that the statute falls well within established constitutional bounds.[11]

III. PASPA Accords With Equal Sovereignty.

A. The District Court Correctly Concluded that PASPA Is a Valid Exercise of Congress' Commerce Clause Power.

In the district court, New Jersey argued that PASPA violates the Commerce Clause because it treated states differently by creating exceptions for states with pre-existing gambling schemes. *See* Defts.' Opp. to Pltfs.' Mot. for Summary Judgment 33-36 (Doc. 72-3). In this Court, New Jersey has conspicuously reduced that Commerce Clause challenge to a single sentence. NJ Br. 54. And for good reason: A long line of Supreme Court cases establishes beyond peradventure that "[t]here is no requirement of uniformity in connection with the commerce power." *Currin v. Wallace*, 306 U.S. 1, 14 (1939); *accord Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 468 (1982); *Hodel v. Indiana*, 452 U.S. 314, 332 (1981); *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 327 (1917); *Morgan v. Virginia*, 328 U.S. 373, 388 (1946) (Frankfurter, J., concurring) ("Unlike other powers of congress … the power to regulate commerce does not require

[11] New Jersey alternatively suggests that the Court should construe PASPA to prohibit states *only* from "sponsor[ing], operat[ing], advertis[ing], [and promot[ing]" wagering schemes—*not* "licens[ing]" or "authoriz[ing]" them—which, in its view, avoids interfering with state regulation of private conduct. NJ Br. 52-53. That construction reads half the text out of section 3702 and does violence to Congress' "'unmistakably clear'" intent. *Markell*, 579 F.3d at 303.

geographic uniformity."). These cases provide no support for the assertion that the Commerce Clause does not require "uniform rules" but does require "equality of treatment." Brief of Appellant New Jersey Thoroughbred Horsemen's Ass'n ("NJTHA Br.") 47. Congress has long devised "national policy with due regard for the varying and fluctuating interests of different regions," *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950), and such distinctions need only be drawn on rational bases to pass constitutional muster. *See Hodel*, 452 U.S. at 331-32. Thus, when Congress exercises its commerce power, "[a] claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact." *Id*. at 332.

Accordingly, the district court correctly concluded that Congress' "use of its Commerce Clause powers, which here effectuates a difference in treatment of States that have developed a reliance interest on sports gambling pre-dating the inception of PASPA, is both rational and constitutional." A-25-26 n.5. Congress enacted PASPA to stem the *spread* of state-sponsored sports gambling.[12] Consistent with that objective, Congress recognized that certain states had a reliance interest in continuing or offering sports gambling. Having no "desire to

[12] NJTHA proclaims that Congress' *actual* intent must have been to "put[] an end to all legal sports betting." NJTHA Br. 27-28. But the evidence NJTHA points to only disproves that theory. NJTHA Br. 27 (two senators' ruminations on how they would have preferred a bill banning *all* state-sponsored sports gambling to the law actually enacted).

threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry, or to prohibit lawful sports gambling schemes in other States that were in operation when the legislation was introduced," A-2306, Congress rationally chose to prevent the expansion of state-sponsored sports gambling without eliminating extant state-sponsored sports gambling. *See, e.g.*, *Salem Blue Collar Workers Ass'n v. Salem*, 33 F.3d 265, 272 (3d Cir. 1994) ("The Supreme Court has approved of 'grandfather' clauses that protect individuals and interests from changes in the law that would destroy established reliance on previously valid regulations and laws."); *Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992) ("'[t]he protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification'"). That decision did not cause PASPA to exceed Congress' commerce power or to violate any vague notion of equal sovereignty.

Nor is the sophistic reading of PASPA as reaching "casual bets" divorced from interstate commerce, NJTHA Br. 33-44, enough to overcome the "'substantial deference [given] to a Congressional determination that it had the power to enact particular legislation.'" *Parker*, 108 F.3d at 30. There can be no serious dispute that "Congress had a rational basis to conclude that legalized sports gambling would impact interstate commerce." A-25. And it is equally well-settled

that "Congress is empowered to 'regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce.'" A-22 (quoting *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)); *see also Fry v. United States*, 421 U.S. 542, 547 (1975). As Congress explained, the "harms [legalized sports gambling] inflicts are felt beyond the borders of those States that sanction it," and "[w]ithout Federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum." A-2303.

Thus, Congress' judgment that "sports gambling—whether sponsored or authorized by a State or other governmental entity—is a problem of legitimate Federal concern for which a Federal solution is warranted," A-2304-05, was perfectly rational. And the district court correctly declined the invitation to "'substitute [its] evaluation of legislative facts for that of the legislature.'" A-23 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981)).

B. The District Court Correctly Concluded that PASPA Does Not Violate Any Free-Standing "Equal Sovereignty" Principle.

Implicitly recognizing the problem with any attempt to derive a uniformity requirement from Commerce Clause cases, New Jersey attempts to repackage its challenge to PASPA in "equal sovereignty" terms, but such repackaging is just that. The Supreme Court has long recognized that in exercising the commerce power, Congress has unquestionable authority to acknowledge that economic conditions vary across states and to draw rational lines accommodating those

differences. Whatever equal sovereignty principles may apply in other contexts, those principles do not apply to legislation enacted under the Commerce Clause.

New Jersey supplies not a single case in support of the contrary proposition. Instead, it relies almost exclusively on *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009)—an entirely inapposite case addressing legislation enacted pursuant to Congress' enforcement authority under the reconstruction amendments. *Northwest Austin* involved Congress' power under the Enabling Clause of the Fifteenth Amendment to enact legislation—the Voting Rights Act—that requires certain states and localities to "preclear" their election procedures with federal authorities. *Nw. Austin*, 557 U.S. at 204 (evaluating the "standard to apply in deciding whether … Congress exceeded its Fifteenth Amendment enforcement power"); *see also Shelby Cnty. v. Holder*, 679 F.3d 848, 859 (D.C. Cir. 2012) (evaluating the appropriate standard of review under *Northwest Austin* for "legislation enacted pursuant to Congress's Fifteenth Amendment power").

The Supreme Court has recognized that section 5 of the Voting Rights Act is an unprecedented "'federal intrusion into sensitive areas of state and local policymaking,'" and thus imposes "'substantial federalism costs.'" *Nw. Austin*, 557 U.S. at 202. Section 5 requires state officials to get the approval of either a three-judge court or a federal official before a duly enacted state law can take

effect. Whatever the "equal sovereignty" concerns implicated by such an extraordinary law, they have no impact whatsoever on the well-established principle that Congress can exercise its commerce power in ways that take account of local conditions and need not impose nationwide rules. *See supra* Part III.A.

In all events, *Northwest Austin* at most suggests a need for more searching review when Congress singles out a handful of states for *disfavored* treatment. PASPA, however, presents the converse situation: The *four* "favored States hav[ing] the power to decide whether to permit [sports] wagering" are heavily outnumbered by a purportedly disfavored, overwhelming majority of *46* states that may not authorize such wagering. NJ Br. 56. New Jersey and NJTHA invoke the specter of a tyrannical majority dictating "winners and losers" from among a hapless minority of subjugated states. *See, e.g.*, NJTHA Br. 46 ("No court should endorse such a pernicious principle that allows Congress, in response to special interest groups, to pick and choose which States it favors over others."). Yet here, there is no conceivable basis for concern that the 46 "disfavored States" with "less sovereign power" were deprived of any say in the matter. NJ Br. 56. Moreover, New Jersey is particularly poorly positioned to complain about PASPA's preferences for a few states because New Jersey itself was singled out in PASPA for more favorable treatment—it alone was given a one-year window following

PASPA's enactment to pass laws permitting sports wagering, which it declined to do. *See* 28 U.S.C. § 3704(a)(3); *supra* p. 7.

All of that makes this case readily distinguishable from both *Northwest Austin* and *Coyle*. In *Coyle*, it might have made sense to ask whether a single disfavored state was deprived of "those attributes essential to its equality in dignity and power with other states" when Congress conditioned Oklahoma's admission to the Union on the requirement that Oklahoma not relocate its capital before 1913. 221 U.S. at 568. Under the enabling act at issue there, one disfavored state stood to be deprived of the power to determine the location of its seat of government by all other favored states who would retain that same power. *See id*. Here, the situation is the reverse. Should the 46 states that are prohibited by PASPA from authorizing sports gambling wish to eliminate that prohibition, they have more than enough political power to do so.

C. PASPA's Favorable Treatment of States with Pre-Existing Sports Gambling Schemes Easily Withstands Rational Basis Review.

New Jersey fares no better with its attempt to derive some sort of limit on Congress' power to enact so-called "permanent," rather than "temporary," preferences for a small minority of states. *See* NJ Br. 57. At the outset, it is not clear that there is any such thing as a "permanent" preference as long as Congress, with its authority to revisit and revise its laws, sits. *See, e.g., United States v. Dixon,* 648 F.3d 195, 200 (3d Cir. 2011) ("'one legislature cannot abridge the

powers of a succeeding legislature'" (quoting *Fletcher v. Peck*, 10 U.S. 87, 135 (1810)). But in all events, neither the Supreme Court's decision in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), nor this Court's decision in *Delaware River Basin Commission v. Bucks County Water & Sewer Authority*, 641 F.2d 1087 (3d Cir. 1981), renders permanent preferences disfavored, let alone impermissible.

Nothing in *Dukes*, which upheld a statute exempting pushcart operators in the French Quarter of New Orleans who had operated for more than eight years from a new, general ban on pushcarts, suggested that the rationality of that distinction depended one iota on whether or when the preference would expire. And understandably so—the preference in *Dukes* was *permanent*, granted to licensed vendor *companies*, not the individuals who operated them. *See Dukes*, 427 U.S. at 300. Moreover, the Court's reasoning indicates that any distinction between temporary and permanent grandfather clauses is irrelevant. The Court not only reasoned that the "city could reasonably decide that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Vieux Carre." *Id.* at 305. It also relied for its finding of rationality on the possibility "that the two vendors who qualified under the 'grandfather clause' both of whom had operated in the area for over 20 years rather than only eight had *themselves become part of the distinctive character and charm that distinguishes the Vieux Carre*." *Id.* (emphasis added). This latter judgment would only be

strengthened by the passage of time. *See id*. at 306 (rejecting argument that grandfather clause "could not stand because 'the hypothesis that a present eight year veteran of the pushcart hot dog market in the Vieux Carre will continue to operate in a manner more consistent with the traditions of the Quarter than would any other operator is without foundation'").

There is also no support for New Jersey's contention that this Court "rejected grandfathering as a justification for [a] 'permanent exemption'" in *Delaware River Basin Commission*. NJ Br. 58. The Court in that case simply found that a grandfather provision in the water policy at issue "appear[ed] to be … arbitrary, rather than … rational." 641 F.2d at 1098. This was due not to its "apparent[] permanen[cy]," *id*. at 1099, but instead to, as the district court put it, the "lack[] [of] legislative findings that the Court could analyze to determine whether the statute passed rational basis review." A-26. Indeed, nothing in the water regulation at issue or in its legislative history "explain[ed] the exemption." 641 F.2d at 1094. The only record evidence offered in support of the provision provided reasons that "seem[ed] at best unrelated, and perhaps even contrary, to" the broader regulatory scheme. *Id*. at 1093. And the Court found nothing in the record to assist it in identifying a "reliance interest" that might support the exemptions. *Id*. at 1099.

Any suggestion that *Delaware River Basin Commission* deemed permanent grandfathering clauses impermissible is conclusively refuted by the fact that, after raising these concerns, the Court did not hold the regulation unconstitutional. Instead, it remanded to give the Commission an opportunity to "proffer some purpose that the court may reasonably presume to have motivated the Congress that added [the grandfather provision]," in order that "there will be available a standard against which to test the rationality of [the regulation]." *Id*. at 1100. On remand, the Commission did just that, and the district court subsequently identified "significant reliance interests" sufficient to justify the permanent "insulat[ion] [of] enterprises already in situ from the burdens of a newly adopted regulatory scheme." *Del. River Basin Comm'n v. Bucks Cnty. Water & Sewer Auth.*, 545 F. Supp. 138, 144-45 (E.D. Pa. 1982). The district court consequently held the regulation constitutional, finding that the applicable exemptions "differentiate[] among users of Delaware River Basin water in a manner that is rationally related to the goals of preserving existing development and protecting significant reliance interests that are embodied in the provisions of the [statute]." *Id*. at 148.

Here, the Court need look no further than the legislative history of PASPA to conclude that Congress had eminently rational reasons for exempting states with pre-existing gambling schemes from PASPA's prohibitions. The ample legislative record plainly reveals Congress' intent to offer a limited accommodation of the

economic reliance interests of a handful of states. *See, e.g.*, A-2306. The record further demonstrates that Congress considered that limited accommodation consistent with PASPA's broader purpose of halting the spread of state-sponsored sports gambling in the many states with no reliance interests to speak of. A-2306. As the district court rightly noted, "[t]he reliance interests of the excepted states, coupled with the government's legitimate interest in stemming the tide of legalized sports gambling, provide ample support for upholding PASPA pursuant to rational basis review." A-53; *see also* A-27 ("the legislative record reveals that the committee believed all sports gambling is harmful, but had no desire to threaten or to prohibit lawful sports gambling schemes in operation prior to the legislation").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

s/ Paul D. Clement

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CANDICE CHIU
WILLIAM R. LEVI
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

JEFFREY A. MISHKIN
ANTHONY J. DREYER
SKADDEN ARPS SLATE
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

WILLIAM J. O'SHAUGHNESSY
RICHARD HERNANDEZ
MCCARTER & ENGLISH, LLP
Four Gateway Center
100 Mulberry Street
Newark, NJ 07102

Counsel for Plaintiffs-Appellees National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball, doing business as Major League Baseball

June 7, 2013

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Dated: June 7, 2013

s/Paul D. Clement

PAUL D. CLEMENT
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

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Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on this 7th day of June, 2013, the foregoing Brief for Appellees was electronically filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. I also hereby certify that I caused 7 paper copies to be sent by Federal Express to the Clerk's Office the next business day.

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JEFFREY S. CHIESA
Attorney General of the State of New Jersey
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, NJ 08625-0112
(609) 984-9666

THEODORE B. OLSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

Attorneys for State Defendant-Appellee, et al.

PETER J. PHIPPS
UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION
P.O. Box 883
Ben Franklin Station
Washington, DC 20044
(202) 616-8482
peter.phipps@usdoj.gov

Attorney for Intervenor-Appellee United States of America

MICHAEL R. GRIFFINGER
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500

Attorney for Intervenor-Defendant Appellants Stephen M. Sweeney and Sheila Y. Oliver

ELLIOTT M. BERMAN
MCELROY, DEUTSCH,
MULVANEY & CARPENTER
100 Mulberry Street
Three Gateway Center
Newark, NJ 07102
(973) 622-7711
eberman@mdmc-law.com

RONALD J RICCIO
MCELROY, DEUTSCH,
MULVANEY & CARPENTER
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, NJ 07962
(973) 993-8100
rriccio@mdmc-law.com

Attorneys for Intervenor-Appellee
New Jersey Thoroughbred Horsemens Association

Dated: June 7, 2013

s/Paul D. Clement

PAUL D. CLEMENT
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com