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

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;

Plaintiffs-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; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; NEW JERSEY SPORTS & EXPOSITION AUTHORITY;

-and-

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

Defendants-Appellants.

On Appeal from the United States District Court for the District of New Jersey
No. 3:14-cv-06450-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
WILLIAM R. LEVI
TAYLOR MEEHAN
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

February 13, 2015

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INTRODUCTION

This case involves the latest in a series of efforts by New Jersey to authorize sports gambling at its casinos and racetracks in violation of the Professional and Amateur Sports Protection Act ("PASPA"). After failing to convince this Court that New Jersey may simply ignore PASPA because it is unconstitutional, the sponsors of the invalidated 2012 Sports Wagering Law vowed that they would not be deterred in their efforts to bring sports gambling to New Jersey's casinos and racetracks. And they were not.

A mere three days after the Supreme Court declined to review this Court's decision holding that PASPA is constitutional, the New Jersey legislature passed a new law purporting to "repeal" the state's sports gambling prohibitions, but to do so *only* at casinos and racetracks—in other words, only at state-licensed gambling venues. The Governor vetoed that blatant attempt, as he put it, "to circumvent the Third Circuit's ruling" and "to sidestep federal law." But just two months later, the Governor saw things differently, and signed into law the 2014 Sports Wagering Law that is the subject of this lawsuit. Just like the legislation that the Governor vetoed mere months earlier, the 2014 Law purports to "partially repeal" New Jersey's sports gambling prohibition, but only as applied to sports gambling that occurs at a casino or racetrack, by individuals who are 21 or older, and on particular sporting events.

The 2014 Law is no more consistent with PASPA than the invalidated 2012 Law was. Just as before, New Jersey has enacted a law that ensures that sports gambling will occur only under the conditions of the state's choosing. It has dictated where sports gambling may occur, by whom, and even which sporting events will be excluded. Worse still, New Jersey has dictated that sports gambling must be only at state-licensed gambling venues, thereby ensuring that the sports gambling it has authorized will occur only under the auspices of a state license. In a sea of prohibitions on sports (and other) gambling, New Jersey has dictated that sports (and other) gambling is permitted only at these islands of state-authorized gambling. No matter what New Jersey tries to label those actions, those cosmetic efforts cannot hide the reality that the 2014 law is yet another attempt to authorize state-licensed sports gambling in violation of PASPA.

Implicitly recognizing as much, the defendants devote most of their energy to trying to convince this Court that its decision rejecting their commandeering challenges to PASPA somehow entitles states to violate PASPA with impunity so long as they label their actions "repeals" rather than "authorizations." This Court's opinion does no such thing. In fact, this Court explicitly considered and explicitly *rejected* the very same argument that the defendants repeat anew here—namely, that if PASPA forces states to choose between prohibiting sports gambling entirely or not at all, then it unconstitutionally commandeers the states. The defendants'

continued disagreement with the Court's conclusion does not entitle them to another bite at the constitutional apple.

At bottom, no amount of clever labeling or parsing of this Court's opinion can save the defendants from the conclusion that the District Court correctly reached: Like the 2012 Law before it, the 2014 Law authorizes state-licensed sports gambling in violation of PASPA. The court therefore correctly enjoined the state defendants from giving the law any operation or effect.

STATEMENT OF ISSUES

Whether the District Court correctly concluded that New Jersey's attempt to "partially repeal" its otherwise-blanket sports gambling prohibitions solely at state-licensed gambling venues, and solely if those venues confine sports gambling to the persons and sporting events of the state's choosing, violates PASPA's prohibitions against authorizing or licensing sports gambling.

STATEMENT OF FACTS

A. The Professional and Amateur Sports Protection Act

The Professional and Amateur Sports Protection Act, 28 U.S.C. §3701, *et seq.* ("PASPA"), was enacted in response to growing public concern over the significant harm that would result from the spread of state-sponsored gambling on amateur and professional sporting events in the United States. PASPA makes it unlawful for any "governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact"—and any "person to sponsor, operate, advertise, or promote,

pursuant to the law or compact of a governmental entity"—any "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. PASPA authorizes both the Attorney General and "a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation" to bring suit to enjoin a violation of its prohibitions. *Id.* §3703.

To accommodate the reliance interests of the handful of states that already had authorized some form of sports gambling, PASPA exempted from its prohibitions authorized sports gambling that was in operation before its enactment. *Id.* §3704(a)(1)-(2). PASPA also included a special exemption specifically crafted for New Jersey, which flatly prohibited sports gambling at the time but did have extensive authorized and licensed gambling at casinos in Atlantic City. Under this exemption, New Jersey was given until "one year after [PASPA's] effective date" to "authorize[]" sports gambling to be "conducted exclusively in casinos located in a municipality" where "any commercial casino gaming scheme was in operation … throughout the 10-year period [before PASPA became effective] pursuant to a comprehensive system of State regulation authorized by that State's constitution and

applicable solely to such municipality." *Id.* §3704(a)(3). In other words, PASPA gave New Jersey one year to authorize sports gambling at casinos in Atlantic City.

New Jersey chose not to avail itself of PASPA's one-year option. 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 sports gambling at casinos during the one-year window. *See In re Pet. of Casino Licensees for Approval of a New Game, Rulemaking & Authorization of a Test*, 633 A.2d 1050, 1051 (N.J. Super. Ct. App. Div.), *aff'd*, 647 A.2d 454 (N.J. 1993). Instead, New Jersey continued to flatly prohibit sports gambling for the next two decades. *See, e.g.*, N.J.S.A. §2a:40-1 ("All wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."); N.J.S.A. §§2c:37-2, 2c:37-9 (prohibiting promotion of gambling unless authorized). The New Jersey Constitution also continued to prohibit the legislature from authorizing wagering on the results of any professional, college, or amateur sports or athletic event, excluding horse racing. *See In re Casino Licensees*, 633 A.2d at 1054.

B. New Jersey's Relentless Efforts to Authorize Sports Gambling

In recent years, New Jersey has come to regret its decision not to take Congress up on the offer to authorize sports gambling in its casinos back in 1993. Accordingly, the state has undertaken a series of efforts to get out from under

PASPA's prohibitions on sponsoring, licensing, or authorizing sports gambling. The state began by amending its own constitution, effective December 8, 2011, to permit the legislature "to authorize by law wagering … on the results of any professional, college, or amateur sport or athletic event." N.J. Const. art. IV, §VII, ¶2D. The constitution preserved a caveat, however, "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." *Id.* New Jersey then promptly enacted the Sports Wagering Law, N.J.S.A. §5:12A-1, *et seq.* (West 2012) (the "2012 Sports Wagering Law" or "2012 Law"), which, in open and acknowledged violation of PASPA, authorized Atlantic City casinos 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.* §§5:12A-1, 5:12A-2.

The National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Major League Baseball (collectively, "the Sports Organizations") brought suit to enjoin this blatant violation of PASPA. The state defendants (joined by the same parties that join them as defendants-appellants here) responded by conceding that the law violated PASPA but arguing that PASPA is unconstitutional because it, *inter alia*, commandeers the states. After carefully considering that argument, both the District Court and this

Court thoroughly rejected it and enjoined New Jersey from enforcing the 2012 Law and the regulations promulgated pursuant to it. *See Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d. 551 (D.N.J.), *aff'd Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) ("*Christie I*").

After the full court denied their petitions for rehearing *en banc*, the defendants filed petitions for certiorari with the United States Supreme Court. Even before the Court could act on those petitions, however, the sponsors of the 2012 Law announced that they had no intention of letting the courts stand in the way of their plans to sanction sports gambling at New Jersey's casinos and racetracks. As Senator Raymond Lesniak put it, no matter what the outcome before the Supreme Court, "we will push the envelope on sports betting. And we are not going to be deterred." JA101. To that end, the senator vowed that if the Supreme Court left undisturbed this Court's decision affirming the District Court's invalidation of the 2012 Law, he would introduce new legislation that, once again, would "allow casinos and racetracks to have sports betting." *Id.*

The Supreme Court denied the petitions on June 23, 2014. *See Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014). Three days later, the New Jersey legislature made good on Senator Lesniak's promise and passed Senate Bill 2250, 2014 Leg., Reg. Sess. (2014) ("S2250"). S2250 purported to "repeal" the state's existing prohibitions on sports gambling, but *only* "to the extent they would

apply to such wagering at casinos or gambling houses in Atlantic City or at current running and harness racetracks in this State." S2250. In other words, it purported to "repeal" the prohibitions only at state-licensed and heavily regulated commercial gambling venues. As Senator Lesniak, who sponsored this legislation, explained, like the invalidated 2012 law before it, this new legislation would "put [sports gambling] in the regulated hands of existing casino and racetrack operators" in New Jersey and "provide a safe and legal avenue for [people] to bet on their favorite teams." JA108.

On August 8, 2014, Governor Christie vetoed this unabashed effort to undo the outcome of the *Christie I* litigation. In a letter accompanying his veto, the Governor described the legislation as a "novel attempt to circumvent the Third Circuit's ruling" by, "[i]n essence, partially deregulat[ing] betting at casinos and racetracks in an attempt to sidestep federal law." JA65. Reiterating that "the rule of law is sacrosanct, binding on all Americans," the Governor refused to sign onto the legislature's transparent effort to "[i]gnor[e] federal law." *Id*. Instead, he admonished that the state must respect the rule of law and the decisions of the courts. *Id.*

One month later, the Governor saw things differently. On September 8, 2014, with the Governor's support, New Jersey's acting attorney general issued a directive taking the remarkable position that, notwithstanding the District Court's affirmed

injunction prohibiting the state defendants from enforcing the 2012 Law in its entirety, the provisions of that law stating that casinos and racetracks "may operate a sports pool" continued to remain "in force and effect." JA118-21. This was so, according to the state, because, notwithstanding their plain language, these provisions did not "authorize" sports gambling, but rather merely "repealed" existing prohibitions on sports gambling at casinos and racetracks. JA120-21. The directive thus instructed the state's law enforcement agencies that they should neither object to nor seek to enjoin a sports pool operated by a casino or racetrack, so long as that sports pool did not permit wagering on college sporting events that take place in New Jersey or in which any New Jersey college team participates. JA121.

Although the state declared this directive effective immediately, the state defendants simultaneously filed a motion asking the District Court to "clarify" or "modify" its injunction to conform to the state's dubious new theory. The Sports Organizations opposed the motion to clarify, arguing that the directive violated both the injunction and PASPA. Before the court could act on that motion, however, New Jersey changed course once again. On October 17, 2014, Governor Christie signed into law Senate Bill 2460, 2014 Leg., Reg. Sess. (the "2014 Sports Wagering Law" or "2014 Law"), another Senator Lesniak-sponsored piece of legislation, which

repealed the 2012 Sports Wagering Law in its entirety, *see* N.J.S.A. §5:12A-7, and the state defendants then withdrew their pending motion.

As one of its sponsors candidly acknowledged, the 2014 Law is yet another attempt to achieve the same thing as the invalidated 2012 Law—namely, to "implement well regulated sports gaming" in New Jersey's casinos and racetracks. JA434. The law does so in the same manner as the vetoed S2250 would have done, *i.e.*, by purporting to "repeal" existing prohibitions on sports gambling, but *only* "to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State." N.J.S.A. §5:12A-7. This "partial repeal" applies, moreover, *only* to sports gambling "by persons 21 years of age or older situated at such location," and *only* to gambling that is not on "a collegiate sport contest or collegiate athletic event that takes place in New Jersey or … in which any New Jersey college team participates regardless of where the event takes place." *Id.* In short, the 2014 Sports Wagering Law, like the 2012 Law before it, ensures that sports gambling will be permitted only at certain locations, by certain persons, and on some but not all sporting events.

C. Proceedings Below

The Sports Organizations promptly responded by filing this new lawsuit on October 20, 2014, asking the District Court to enjoin the state defendants from giving effect to New Jersey's latest effort to authorize licensed sports gambling at

its casinos and racetracks in violation of PASPA. In addition to naming the same state defendants that they named in *Christie I*, the Sports Organizations also named as defendants the New Jersey Thoroughbred Horsemen's Association ("NJTHA"), which operates Monmouth Park Racetrack and announced within mere hours of the 2014 Law's signing its intent to "begin offering and accepting wagers on sporting contests and athletic events" at the racetrack within one week, JA97, as well as the New Jersey Sports and Exposition Authority ("NJSEA"), the state instrumentality that owns Monmouth Park (and other state-sponsored gambling venues). The complaint sought to enjoin the state defendants and NJSEA from violating section 3702(1) of PASPA pursuant to the 2014 Sports Wagering Law and NJTHA from violating section 3702(2).

When the defendants refused to agree to hold off initiating sports gambling even for a few weeks to give the District Court time to consider the legality of New Jersey's latest actions, the Sports Organizations were forced to seek a temporary restraining order. The District Court granted that order on October 24, 2014, after concluding that the Sports Organizations had established a reasonable likelihood of success on the merits and irreparable harm. *See* JA303-09. After providing notice and an opportunity for additional briefing, the court noticed its intent to "consolidate Plaintiffs' application for a preliminary injunction with a decision on the merits through summary judgment." JA48-49. The United States then filed a statement of

interest agreeing with the Sports Organizations that the 2014 Law authorizes and licenses sports gambling in violation of PASPA. *See* JA541-61.

The District Court held a hearing on November 20 and entered an order the next day permanently enjoining the state defendants from "giving operation or effect" to the 2014 Law. JA36-37. In its opinion accompanying the order, the court concluded that "PASPA preempts the type of *partial repeal* New Jersey is attempting to accomplish in the 2014 Law." JA28. Not only would "the 2014 Law … have the same primary effect of the 2012 Law," but "by allowing some, but not all, types of sports wagering in New Jersey," the court explained, the law "necessarily results in sports wagering with the State's imprimatur, which goes against the very goal of PASPA." *Id*. In reaching that conclusion, the court was "guided by" this Court's "determination of the congressional purpose of PASPA," which was "'to ban gambling … [that] carried with it a label of legitimacy that would make the activity appealing.'" *Id*. (quoting *Christie I*, 730 F.3d at 237).

Although the court acknowledged that New Jersey "carefully styled the 2014 Law as a repeal," JA30, the court recognized that "'[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of [a] word,' nor can it 'be evaded by formalism,' which would only 'provide a roadmap for States wishing to circumvent' federal law." JA29 (citation omitted) (quoting *Haywood v. Drown*, 556 U.S. 729, 742 & n.9 (2009); *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 382-

83 (1990)). "To accept the State Defendants' argument," the court thus concluded, "would be allowing the 2014 Law to stand as a sufficient obstacle to accomplishing the full purpose and objective of Congress in enacting PASPA." *Id*. The court also emphasized this Court's discussion expressly rejecting the argument that PASPA would be unconstitutional if it put states to a choice of either completely banning sports gambling or completely repealing sports gambling prohibitions. JA28-29.

Finally, the court rejected the state defendants' argument that they are immune from suit under the Eleventh Amendment, instead concluding that state officers who give effect to state statutes—even statutes that do not ordinarily give rise to enforcement proceedings—cannot avoid the *Ex parte Young* doctrine. *See* JA26. Having enjoined the state defendants from giving any operation or effect to the 2014 Law, the court concluded that it need not resolve the Sports Organizations' separate claims again NJSEA and NJTHA. JA32.

SUMMARY OF ARGUMENT

This is a case of déjà vu all over again. Dissatisfied with Congress' decision to prohibit states from authorizing sports gambling, in 2012, New Jersey decided to simply ignore PASPA and press ahead with its plans to authorize sports gambling in its casinos and racetracks. Now, dissatisfied with this Court's conclusion that nothing in the Constitution allows it to violate PASPA, New Jersey has decided to ignore that decision and, once again, press ahead with its plans to authorize sports

gambling in its casinos and racetracks. New Jersey's attempts to evade federal law fare no better this time around.

Notwithstanding the state's deliberate effort to style the 2014 Sports Wagering Law as a "repeal" rather than an "authorization," there is no escaping the reality that New Jersey has enacted a law that dictates where sports gambling may occur, by whom, and on what sporting events. The notion that this does not amount to an authorization of sports gambling on the state's chosen terms blinks reality. But for the 2014 Law, casinos, racetracks, and their patrons would remain subject to the same still-intact complete prohibitions on sports gambling as everyone else in New Jersey. Accordingly, their "right" to operate and engage in sports gambling derives not from the absence of any state law dictating otherwise, but from New Jersey's affirmative act giving them—and them alone—the opportunity of engaging in an activity denied to everyone else. The defendants cannot plausibly claim that these actions have not lent the state's imprimatur to the sports gambling that the 2014 Law authorizes.

And to make matters worse, New Jersey has made sports gambling legal *only* if it takes place at a state-licensed venue for state-authorized gambling. In other words, New Jersey has made obtaining a license or permit to operate a commercial gambling establishment a condition of operating sports gambling. Like its 2012 predecessor, the 2014 Law thus violates PASPA twice over: It not only authorizes

sports gambling, but also ensures that it will take place only under the auspices of a state license—and a state license to operate a commercial, state-sanctioned gambling establishment, no less. That the 2014 Law achieves this end indirectly, rather than by establishing a distinct "sports gambling licensing regime" is no matter. Either way, the ultimate result is the same. Indeed, the ultimate result is remarkably similar to the option Congress gave New Jersey for only one year to allow sports gambling only at state-licensed casinos. Having passed on that option in the early 1990s, New Jersey cannot seriously contend that PASPA allowed it to accomplish the same thing in 2014. That the 2014 Law *purports* not to authorize or license sports gambling is equally beside the point. It is the substance, not the form, of a state law that governs a preemption analysis, and the substance of the 2014 Law could not be clearer: The law authorizes state-licensed sports gambling in violation of PASPA.

The defendants' principal response to all this is to insist that this Court's decision in *Christie I* somehow entitles states to make any sports gambling policies they choose, so long as they do so under the guise of "repealing" existing sports gambling prohibitions, rather than expressly "authorizing," "licensing," or "regulating" the sports gambling that they permit. Even a cursory reading of this Court's decision confirms that it does no such thing. In fact, this Court explicitly *rejected* the notion that there is anything constitutionally problematic about reading PASPA to force states to choose between retaining complete bans on sports

gambling or repealing those bans *in their entirety*. Although the Court acknowledged that this may be a difficult choice, it did not find the choice *unconstitutional*. Whether PASPA leaves states with other options is therefore beside the point, as neither PASPA nor this Court's opinion authorizes New Jersey to do what it has done here. The defendants' attempts to resist that conclusion are nothing more than attempts to relitigate a constitutional question that this Court already has resolved.

The defendants are no more successful in their efforts to attack the injunction the District Court ordered. The state defendants' Eleventh Amendment argument fails because it rests on the same faulty premise as their merits arguments—namely, that the 2014 Law does not authorize or license sports gambling. In fact, that is precisely what the 2014 Law does. And the state defendants are precisely the parties through which the law does so, as they bear direct responsibility for issuing the licenses under which the sports gambling that the law authorizes will occur. That makes them the right defendants in this case for the same reason that they were the right defendants in the last one, as they are the state officers whose actions are resulting in violations of PASPA.

The District Court also correctly concluded that the 2014 Law should be denied operation or effect in its entirety, rather than permitted to operate in some circumstances but not others or, worse still, converted into the complete *repeal* of

New Jersey's sports gambling prohibitions that the legislature pointedly declined to adopt. If New Jersey wants to repeal its sports gambling prohibitions in their entirety, it remains free to do so—which is precisely why the defendants' commandeering arguments fare no better the second time around. But the defendants have no business asking this Court to force that decision upon the people of New Jersey under the guise of conducting a severability analysis.

ARGUMENT

I. The 2014 Sports Wagering Law Plainly Violates PASPA.

New Jersey's latest attempt to authorize sports gambling is just as unlawful as its invalidated attempt to do so through the 2012 Sports Wagering Law. There is no question that PASPA prohibits states from authorizing or licensing sports gambling, and there is now no question that PASPA's prohibitions are constitutional. There also is no question that the 2014 Sports Wagering Law violates them. Although styled as a "partial repeal," the law in fact authorizes sports gambling under the limited circumstances of the state's choosing, dictating where it may occur, by whom, and on what sporting events. Moreover, the law confines sports gambling to state-licensed gambling venues, thereby ensuring that it will occur only under the auspices of a state license. That the state has disclaimed any intent to regulate the sports gambling that the 2014 Law exempts from New Jersey's otherwise-blanket sports gambling prohibitions does not change the bottom line: Like the 2012 Law

before it, the 2014 Law authorizes and licenses sports gambling in clear violation of PASPA.

A. The 2014 Sports Wagering Law Authorizes Sports Gambling in Violation of PASPA.

The defendants' defense of the 2014 Sports Wagering Law rests largely on the premise that the law does not authorize any sports gambling, but instead simply "repeals" existing prohibitions on sports gambling. That premise is demonstrably false. The 2014 Sports Wagering Law does not repeal any of New Jersey's myriad prohibitions on sports gambling. To the contrary, the state's criminal prohibitions on sports gambling remain intact. *See, e.g.*, N.J.S.A. §2c:37-2. So, too, do all of its civil sports gambling prohibitions. *See, e.g.*, *id.* §2a:40-1. The 2014 Law instead just defines the limited circumstances under which the state will now treat sports gambling as legal notwithstanding those prohibitions—namely, when it occurs in places of the state's choosing (state-licensed casinos or racetracks), by persons of the state's choosing (casino or racetrack patrons who are 21 or older), and on sporting events of the state's choosing (those that do not involve college sports contests taking place in New Jersey or in which a New Jersey college team is participating).

The notion that this law does not "authorize" sports gambling defies reality. The state has not deregulated all sports gambling in New Jersey or taken an agnostic position on whether or how sports gambling will occur. Instead, the state has decided

on the narrow conditions under which it approves of sports gambling, and then codified those conditions as an exception to its otherwise-blanket sports gambling prohibitions. New Jersey has maintained a state-wide prohibition on sports gambling with the exception of the islands of state-authorized gambling called casinos and racetracks, and even there dictates who can bet on what. That cannot rationally be understood as anything other than an effort to permit sports gambling "under the auspices of state approval and authorization," *Christie I*, 730 F.3d at 232—*i.e.*, under the very circumstances that PASPA prohibits.

That much is clear from the manner in which New Jersey's sports gambling scheme would operate were it permitted to take effect. It is not as if New Jersey has "*no law* in place governing sports wagering," such that the "right" to offer or engage in sports gambling "derives … from the inherent rights" "to do that which is not prohibited" by law. *Id.* New Jersey quite clearly continues to retain laws flatly prohibiting sports gambling. Accordingly, to the extent anyone now has a "right" to offer or engage in sports gambling in New Jersey, that "right" derives solely from the 2014 Law itself, which sets forth the conditions with which people or entities must comply to avail themselves of the exception to the state's sports gambling prohibitions. In other words, the 2014 Law affirmatively grants casinos, racetracks, and their 21-or-older patrons a legal "right" that New Jersey has denied everyone else in the state. That is the very definition of authorization. *See, e.g.*, Merriam-

Webster.com, http://www.merriam-webster.com/dictionary/authorize (defining "authorize" as "to give power or permission to," or "to give legal or official approval to").

That the state achieved this end by purporting to "repeal" its sports gambling prohibitions when its chosen conditions are satisfied rather than declaring that sports gambling "may occur" under such circumstances does not change that bottom line. After all, "'[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention [or omission] of [a] word,' nor can it 'be evaded by formalism,' which would only 'provide a roadmap for States wishing to circumvent' federal law." JA29 (citation omitted) (quoting *Haywood*, 556 U.S. at 742 & n.9; *Howlett*, 496 U.S. at 382-83). Instead, it is the substance of a state law that governs the preemption analysis. *See, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214-15 (2004) (states may not "'elevate form over substance … to evade'" federal preemption). And the substance of the 2014 Law could not be clearer: The law authorizes sports gambling under the conditions of the state's choosing.[1]

[1] That conclusion also is consistent with the New Jersey Constitution, which commands that all forms of gambling conducted in a casino "shall be determined by or pursuant to the terms of [a] law authorizing the establishment and operation thereof." N.J. Const. art. IV, §VII, ¶2D; *see also In re Casino Licensees*, 633 A.2d at 1052. Accordingly, as a matter of state constitutional law, the legislature is powerless to permit any form of gambling in casinos that is not specifically authorized by law.

That does not necessarily mean, as the defendants insist, *see* Sweeney Br.24-25, that there could never be a scenario in which a state prohibits some but not all forms of sports gambling without running afoul of PASPA. But the backdrop of how a state deals with sports gambling as a general matter must inform the analysis of whether efforts to address specific types of sports gambling are consistent with PASPA. Here, New Jersey has created a default rule that sports gambling is flatly impermissible, and then established only a limited set of conditions under which that default rule will no longer govern. Whether a different state with a different default rule could prohibit some but not all sports gambling without violating PASPA is therefore beside the point, as there is no escaping the conclusion that what New Jersey has done is given its imprimatur to certain forms of sports gambling.

The state has done so, moreover, on the heels of a law that sought to achieve the same basic end through an unambiguous authorization of sports gambling that the state itself acknowledged violated a federal statute. *Cf. Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556, 566-67 (1974) (recognizing that prior efforts to evade federal law can inform interpretation of what appear to be subsequent efforts to do the same). And, as the coup de grâce, the state has done so in a way that ensures that sports gambling will occur only in state-licensed gambling venues, a subset of which were the express subject of a one-year-only option for New Jersey to allow

limited sports gambling without violating PASPA. *See* Part I.B *infra*. Whatever else a state may do without violating PASPA, it most certainly may not do that.

The defendants' contrary arguments rest on the mistaken assumption that there is no meaningful distinction between withdrawing prohibitions on *all* sports gambling and withdrawing prohibitions on *some* sports gambling. *See* NJ Br.34. But the difference between the two is self-evident. In the former situation, a state is disclaiming any role in determining whether or to what extent sports gambling is appropriate. There is no de facto authorization of some sports gambling. But in the latter, a state is labeling some sports gambling a societal evil and other sports gambling a societal good. That is precisely the kind of "'label of legitimacy'" that the defendants themselves concede PASPA prevents states from attaching to sports gambling. NJ Br.33 (*quoting Christie I*, 730 F.3d at 237). In short, New Jersey may not carefully calibrate its sports gambling prohibitions to allow only the limited forms of sports gambling that it prefers, then turn around and disclaim any intent to authorize or approve of that sports gambling. Nor may it avoid a preemption problem through the simple expedient of declaring that it "does not intend for the Act to do anything that PASPA prohibits." Sweeney Br.7.

In all events, the intention behind the state's actions is hardly a mystery. New Jersey has made no secret of the fact that it affirmatively welcomes sports gambling in its casinos and racetracks. Indeed, far from disclaiming any intent to lend a label

of legitimacy to the sports gambling the legislature authorized, Senate President Stephen Sweeney has celebrated all the ways that sports gambling purportedly will inure to the state's benefit, including by providing "a windfall for New Jersey taxpayers and help[ing] stabilize a gaming industry that is critical to the state's economy." John Brennan, *UPDATED: Reactions to the NJ sports betting ruling*, NorthJersey.com (Nov. 21, 2014), http://perma.cc/bj96-zmkq. Those are hardly the words of a legislature that "does not intend for any entity to perceive" of its actions as an "approval or authorization" of sports gambling. NJ Br.35.

B. The 2014 Sports Wagering Law Licenses Sports Gambling in Violation of PASPA.

That the state's chosen conditions for approving of sports gambling include confining it to casinos and racetracks makes the violation of PASPA all the more blatant. By law, a casino cannot "operat[e]" in Atlantic City "unless and until a valid operation certificate has been issued" to it by the Division of Gaming Enforcement (DGE). N.J.S.A. §5:12-96. Likewise, a racetrack cannot offer gambling unless and until it is "granted a permit" by the New Jersey Racing Commission (NJRC). *Id.* §5:5-50. And casino and racetrack operators must satisfy countless conditions to obtain and retain the state's permission to operate these commercial gambling establishments. *See generally* N.J.A.C. §§13:69–13:74B.

For example, an applicant for a casino license must submit to a criminal history background check and provide documentation and assurances of financial

stability and personal integrity. *See* N.J.S.A. §5:12-84; N.J.A.C. §§13:69C-4.2, 13:69C-5.3. A corporation must be incorporated in New Jersey to apply for such a license, *see* N.J.S.A. §5:12-82(d), and must provide a slew of information about itself, including personal employment and criminal histories of all corporate officers, directors, and other employees; all holding, intermediary, and subsidiaries companies; the terms and structure of any authorized securities issued by the corporation; the terms and conditions on all outstanding loans and debts; equity holdings of all officers, directors, and underwriters; a description of all bonus and profit-sharing arrangements; and copies of all management and service contracts. *See, e.g.*, N.J.S.A. §5:12-85; N.J.A.C. §§13:69C-2.3, 13:69C-2.4, 13:69C-4.3.

And layered on top of these extensive qualification requirements are intricate regulations of the casinos themselves, which cover everything from the size of the facility, who may enter, how alcohol may be sold, what entertainment may be offered, and what security must be employed. *See, e.g.*, N.J.A.C. §§13:69G-1.3 (requiring casinos to exclude "[a]ny person who has been convicted of a criminal offense under the laws of any state, or of the United States, which is punishable by more than six months of incarceration, or who has been convicted of any crime or offense involving moral turpitude, and whose presence in a licensed casino establishment would be inimical to the interest of the State of New Jersey or of licensed gaming therein"), 13:69G-1.7, 13:69C-6.4, 13:69C-7.1(b)(2), 13:69C-7.3,

13:69C-15.1, 13:69I-1.3; N.J.S.A. §§5:12-98 (requiring each casino hotel to have "[a] closed circuit television system according to specifications approved" by DGE, "with access on the licensed premises to the system"), 5:12-103.

As these myriad restrictions and requirements confirm, it is no accident that New Jersey has "repealed" its sports gambling prohibitions only at state-licensed casinos and racetracks. By imposing that limitation, New Jersey has ensured that any sports gambling occurring within its borders will be overseen by entities that the state has deemed qualified to operate commercial gambling establishments, and only in facilities designed and operated according to the state's specifications. In doing so, New Jersey not only has "authorize[d]" sports gambling, but has "license[d]" it as well. 28 U.S.C. §3702(1); *see also* U.S. Br.11-12 ("By confining the operation of the 2014 Act to facilities that are operated pursuant to gambling licenses, New Jersey is engaged in licensing under the guise of repeal.").[2]

[2] To the extent the defendants continue to argue that the 2014 Law allows sports gambling to be conducted at the site of the former Garden State Park racetrack without a gambling license or permit, *see* Sweeney Br.5-6 n.5, that argument is meritless. As the defendants themselves have acknowledged, various legislative and other efforts have been made to authorize the establishment of an off-track betting parlor at that location. Leagues Reply 4 n.2 (ECF #49). It is clear that the 2014 Law is intended to authorize sports gambling at this location *only* if those efforts to convert it into an off-track betting establishment are successful. Of course, off-track betting is subject to its own detailed licensing regime. *See* N.J.S.A. §§5:5-127–5:5-160.

Implicitly recognizing this problem, the defendants emphasize that the 2014 Law disclaims any intent to "license" sports gambling and "has no licensing scheme" of its own. *See* NJ Br.32; N.J.S.A. §5:12A-8. But that ignores the obvious reality that it is the existence of the licensing regime for casinos and racetracks that obviates the need for a separate licensing regime for sports gambling. In a state without licensed casinos and racetracks, a state would need to create a licensing system from scratch. New Jersey's ability to piggyback on an existing licensing regime for casinos and racetracks does not exempt New Jersey from PASPA. If there were any doubt on that score, it would be removed by the one-year-only option Congress extended to New Jersey. Congress specifically adverted to the reality that New Jersey had authorized gambling "conducted exclusively at casinos" that already were subject "to a comprehensive system of State regulation." 28 U.S.C. §3704(a)(3). But Congress did not give New Jersey a permanent option to piggyback onto that pre-existing licensing scheme; it instead gave New Jersey only a one-year window that closed decades ago.

The state defendants protest that not every activity that occurs at a business with a state license necessarily occurs "under the auspices of" that license. *See* NJ Br.44. That may be so in many instances, but it is decidedly not the case when, as here, the state dictates that an activity may be carried out *only* at a business that operates with such a license. The state defendants' veterinarian services example is

illustrative. *See* NJ Br.43-44. To be sure, if the state allowed anyone and everyone to offer pet-boarding services, then a veterinarian who was licensed to administer medicine and also offered pet-boarding services would not be offering the latter "under the auspices of" its license to do the former. So, too, if (as New Jersey apparently does) a state required separate licenses for each service and a veterinarian acquired one of each. But if the state enacted a law allowing pet-boarding services to be offered *only* by veterinarians who are licensed to administer medicine, then such a veterinarian most certainly would be offering pet-boarding services under the auspices of its license to administer medicine; but for the license to offer the latter, the veterinarian could not offer the former.

In short, there is no meaningful difference between licensing an entity to offer sports gambling, and licensing an entity to offer gambling generally and then enacting a law that permits only those licensees to offer sports gambling. Either way, New Jersey has made obtaining a license or permit from the state a condition of offering sports gambling, and thus has authorized sports gambling "under the auspices of a state license." *Christie I*, 730 F.3d at 236. The state defendants' insistence (at 44) that there is "no logical stopping point" to "this reasoning" is fundamentally flawed, as there is nothing "illusory" about the distinction between allowing sports gambling to be carried out *anywhere* (including at businesses that operate with some form of license) and allowing sports gambling to be carried out

only at places that have a commercial gambling license. New Jersey cannot elide the obvious difference between the two by disingenuously declaring that the 2014 Law is "not intended" and "shall not be construed" to do what it plainly does, N.J.S.A. §5:12A-8—particularly when those declarations are a transparent attempt to evade federal law.

C. New Jersey's Attempts to Reconcile the 2014 Sports Wagering Law With PASPA Are Unavailing.

The defendants alternatively protest that New Jersey's actions are consistent with PASPA because the state is not "regulat[ing]" the sports gambling that the 2014 Law authorizes under the auspices of a state license. NJ Br.35-36, 40-42; *see also* Sweeney Br.7-8. At the outset, whether the 2014 Law "regulates" the sports gambling that it authorizes and licenses is largely beside the point, as PASPA does not confine its prohibitions to "state-*regulated*" sports gambling. It instead makes it unlawful for a state "to sponsor, operate, advertise, promote, license, or authorize by law" sports gambling. 28 U.S.C. §3702. The degree of oversight a state chooses to exercise over the sports gambling that it authorizes or licenses is therefore irrelevant. What Congress sought to prevent was the "lending" of the state's "imprimatur to gambling on sports." *Christie I*, 730 F.3d at 240. As Congress recognized in crafting PASPA's prohibitions, a state does not cease to lend that imprimatur just because it decides not to otherwise regulate the sports gambling that it authorizes or licenses.

In any event, the suggestion that the 2014 Law "is an absolute forfeiture of regulatory authority" over sports gambling is defeated by the law itself. NJ Br.40. The law exercises regulatory authority over sports gambling in the most basic way possible: by dictating where it may take place, by whom it may take place, and on what sporting events it may take place.[3] To call that "unregulated" sports gambling is akin to calling sales of beer "unregulated" so long as they are made only by liquor stores that are licensed to sell alcohol, only to customers who are 21 or older, and only in bottles not cans. That a state did not take the additional steps of dictating the size of a liquor store or the prices it may charge, *see* NJ Br.41-42, would not negate the regulatory oversight that the state *did* choose to exercise.

The incompatibility of New Jersey's actions and PASPA is underscored by the statute's one-year-only window for New Jersey. As section 3704(a)(3)(B) makes crystal clear, Congress specifically recognized that the "comprehensive system of State regulation" that governed "commercial casino[s]" that operate in Atlantic City would allow New Jersey to permit sports gambling at those casinos more readily than other states without comparable venues for state-licensed and state-authorized gambling. Congress expressly contemplated the possibility of New Jersey allowing

[3] Moreover, the state appears to continue to assert authority to regulate sports gambling in other ways, including by enforcing unspecified "generally applicable" laws and collecting taxes on sports gambling revenues. *See, e.g.*, NJ Br.44-45; NJ Mem. in Opp. 17 n.4 (ECF #44).

sports gambling at those venues—and those venues alone. And Congress' judgment was not that sports gambling at state-licensed casinos was consistent with the prohibitions of PASPA. To the contrary, Congress gave New Jersey a one-year window to pass legislation that would qualify for an exception to PASPA. Having declined that option in 1993, New Jersey cannot achieve the same reality 20 years later by relaxing its state-wide prohibition only at state-licensed casinos and racetracks.

In the end, there is no escaping the conclusion that New Jersey has, once again, authorized licensed sports gambling in violation of PASPA. Indeed, New Jersey's own legislators have readily conceded that the 2014 Law is yet another attempt to "implement well regulated sports gaming" in New Jersey. JA434. As they explained, the goal of the law is to give state-licensed gambling venues "a shot in the arm"—*i.e.*, "to do something for the gaming business in the state of New Jersey." JA91; *see also, e.g.*, JA124-25. Whatever the merits of that goal as a policy matter, New Jersey may not seek to achieve it by authorizing and licensing sports gambling in violation of PASPA.

II. New Jersey's Appeals To Commandeering Principles Rehash Arguments This Court Already Rejected.

Implicitly recognizing that the 2014 Sports Wagering Law cannot seriously be understood as anything other than an effort to authorize licensed sports gambling, the defendants devote the bulk of their briefs to attempting to relitigate constitutional

issues that this Court already resolved. In their view, unless PASPA allows states to "partially repeal" their gambling prohibitions in this manner, thereby achieving sports gambling only at the places, by the persons, and on the sporting events of their choosing, the statute unconstitutionally compels states "to maintain existing laws." NJ Br.30; *see also* Sweeney Br.13.

That argument fails for the same reason that this Court rejected it the last time the *Christie I* defendants made it: PASPA simply does not require New Jersey to keep any of its existing laws on the books. *See Christie I*, 730 F.3d at 232 ("We do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering."). If New Jersey wants to repeal its sports gambling prohibitions entirely, it remains just as free to do so now as it was when this Court considered the question two years ago. That New Jersey would prefer to have some middle path whereby it may "partially repeal" those prohibitions only to the extent that they would prohibit sports gambling that it affirmatively welcomes does not mean that *PASPA* (or the District Court's injunction, *see* NJ Br.30) has forced New Jersey to "maintain" its "existing laws." Instead, sports gambling remains prohibited in New Jersey after the invalidation of the 2014 Law because New Jersey remains unwilling to accept the option Congress has given it of repealing its sports gambling prohibitions in their entirety.

Contrary to the defendants' suggestions, there is nothing at all anomalous about the fact that the "partial repeal" option New Jersey seeks to exercise here is off the table. That kind of limitation on a state's options is a natural consequence of countless preemption schemes. For instance, a state does not have the option of "partially repealing" federal standards that it has agreed to adopt and enforce on the federal government's behalf. *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). But that does not mean that a state is being "forced" to keep those standards on its books, as the state always retains the option of repealing them *in their entirety* and ceding to the federal government the power to enforce its own policies. That a state must choose between retaining federal standards in their entirety or not at all does not mean that it has no choice. Here, too, if it is more important to New Jersey to legalize sports gambling in its casinos and racetracks than to prohibit it everywhere else, then New Jersey is free to eliminate its sports gambling prohibitions in their entirety. That New Jersey does not like that option does not change the reality that its blanket sports gambling prohibitions remain in force because *New Jersey* has decided to continue to retain them.

The defendants alternatively protest that, if PASPA forces states to choose between complete prohibition and complete repeal, it is unconstitutional. *See* NJ Br.29. If that argument sounds familiar, that is because it tracks nearly verbatim the argument the *Christie I* defendants made last time they tried to convince this Court

that PASPA is unconstitutional. *See, e.g.*, *Christie I*, NJ Br.51 ("Giving a State a choice between prohibiting sports wagering or allowing wagering to take place without *any* controls at all does not cure the commandeering defect because the latter alternative is manifestly unacceptable and thus presents no 'choice' at all."); *id.* at 52 ("Congress cannot avoid the anti-commandeering limitation simply by giving a State a 'choice' between implementing Congress's preferred regulatory scheme and courting limited anarchy."); *Christie I*, NJ Reply Br.19 ("reading … PASPA . . . [to] put States to the choice of either prohibiting private sports wagering schemes altogether or permitting them in an utterly unfettered environment" would "circumvent the prohibition on 'requiring the States in their sovereign capacity to regulate their own citizens'").

Of course, this Court emphatically *rejected* that argument in the course of rejecting the *Christie I* defendants' contention that PASPA runs afoul of the commandeering doctrine. As the Court explained, "to the extent we entertain the notion that PASPA's straightforward *prohibition* on action may be recast as presenting two *options*, these options" create no constitutional problem, as they are "quite unlike" the kinds of "coercive choices" that have been held to constitute commandeering. 730 F.3d at 233 (emphasis in original). The "two options" the Court identified in reaching that conclusion were the same two options New Jersey still has now: (1) "a state may repeal its sports wagering ban," or (2) "a state may

choose to keep a complete ban on sports gambling." *Id.* Whether PASPA does in fact put states to that binary choice is therefore irrelevant from a constitutional standpoint, as this Court unambiguously concluded that the statute need not be construed to offer states anything more in order to avoid a commandeering problem.

The defendants nonetheless insist that this Court's opinion somehow entitles New Jersey to a third option under which it may permit the sports gambling that it does like while still prohibiting the sports gambling that it does not like. The opinion itself is answer enough to that. The "exact contours" language on which the defendants rely so heavily in making that argument comes in a sentence identifying what a state may do if it "choose[s] to keep a *complete ban* on sports gambling." *Id.* (emphasis added). In that situation, the court observed, "it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be." *Id.*

The defendants cannot plausibly convert a description of what a state may do if it *keeps* a "complete ban" into an entitlement to keep something *less* than a "complete ban." Instead, what the Court plainly was contemplating in that passage were changes to the "exact contours" of a state's scheme for *enforcing* its complete ban—*i.e.*, whether it will be enforced civilly or criminally, what penalties will attach, and so on. That much is clear from the fact that the "exact contours" language is preceded immediately by a reference to "how much of a law enforcement priority

[the state] wants to make of sports gambling" if it maintains its complete ban. *Id.* It is also clear from the dissent's characterization of the majority's opinion as finding no constitutional problem with reading PASPA to "essentially give[] the states the choice of allowing totally unregulated betting on sporting events or prohibiting all such gambling." *Id*. at 241 (Vanaskie, J., concurring in part and dissenting in part).

Indeed, in attempting to convince the *en banc* Court and the Supreme Court to reconsider the panel's decision, the defendants themselves acknowledged repeatedly that this Court did not premise its rejection of their commandeering argument on the existence of any "option three." For instance, in their *en banc* petition, the state officers in *Christie I* complained that the panel erred by holding that no constitutional problem results from interpreting PASPA to "command[] States to address sports wagering within their borders according to only one of *two* congressionally approved options: 'a state may choose to keep a *complete* ban on sports gambling' or it 'may repeal its sports wagering ban' but without a system of licensing to regulate the resulting market." *Christie I*, NJ Rehearing Pet.2 (emphasis added). Likewise, in their petition for certiorari, the state officers complained that this Court erred by holding that there is nothing unconstitutional about reading PASPA as forcing a state to choose whether "to *entirely* 'repeal[] its ban'" on sports gambling. NJ Cert. Pet.15 (emphasis added).

The defendants nonetheless protest that, without the third option they now attempt to squeeze out of this Court's opinion, states would no longer have "much room … to make their own policy" with respect to sports gambling. *Christie I*, 730 F.3d at 233. To be sure, that is the argument that the *dissent* advanced in *Christie I*. *See id.* at 250 n.9 (Vanaskie, J., concurring in part and dissenting in part) ("I fail to discern the 'room' that is accorded the states to make their own policy on sports wagering" if "the only choice is to allow for completely unregulated sports wagering … or to ban sports wagering completely."). But it is an argument that the majority expressly *rejected*. As the majority explained, "that these are not easy choices …. does not mean that [states] were given no choice at all, or that the choices are otherwise unconstitutional." *Id.* at 233. The Court would hardly have needed to emphasize the difficulty of the choice states may face under PASPA had its constitutional analysis assumed that New Jersey remained entitled to retain complete control over the extent to which legalized sports gambling is permitted within its borders, so long as it does so under the guise of "partially repealing" existing prohibitions.

The defendants fare no better with their reliance on this Court's rejection of the "'false equivalence' between a repeal and an authorization," *id.* *See, e.g.*, NJ Br.22; Sweeney Br.13-14. To be sure, the Court rejected the *Christie I* defendants' argument that there is *never* a meaningful difference between a "repeal" and an

"authorization." *See Christie I*, 730 F.3d at 232 (rejecting argument that "PASPA precludes repealing prohibitions on gambling just as it bars affirmatively licensing it"). But the Court in no way suggested that "states retain the freedom to repeal *any* of their laws that they wish to repeal" without running afoul of PASPA. Sweeney Br.23 (emphasis added).[4] Nor did the Court ever suggest that simply labeling a law a "repeal" would obviate the need to examine whether it is in fact an attempt to authorize or license sports gambling. *See* Sweeney Br.19-24. As the state itself concedes, "*Christie I* does not create a magic words test." NJ Br.45 n.4.

Finally, there is no more merit to the suggestion that PASPA sanctions every state scheme that purports to leave legalized sports gambling "unregulated." The Court certainly recognized that "*complete* deregulation" of sports gambling is consistent with PASPA. *Christie I*, 730 F.3d at 235 (emphasis added). But, as noted, *see* Part I.A *supra*, there is an obvious difference between *completely* deregulating sports gambling, and dictating where, how, and by whom it may take place but then

[4] Nor did the United States in its brief in opposition to the *Christie I* defendants' petitions for certiorari. Although that brief noted that "New Jersey is free to repeal [state-law] prohibitions *in whole or in part*," U.S. BIO 11, *Christie*, 134 S. Ct. 2866 (2014) (emphasis added), the United States has since made clear that it never intended to suggest "that *every* partial repeal of a state's prior sports betting prohibitions will automatically satisfy PASPA, or that a state legislature is free to enact any laws that it wishes regarding sports gambling as long as it takes care to frame them as 'partial repeals' of existing prohibitions." U.S. Br.14. And what kinds of partial repeals might satisfy PASPA is a question the Court need not answer in this case, as this partial repeal most certainly does not. *See id.* at 9; *supra* Part I.A.

declining to exercise further regulatory authority. Nothing in this Court's opinion suggests that it failed to grasp the basic distinction between the two.

At bottom, the defendants' commandeering arguments are nothing more than an ill-conceived effort to relitigate a constitutional question that this Court already resolved. Worse still, those arguments continue to rest on the very same flawed reading of PASPA as compelling states "to maintain existing laws," NJ Br.30, that this Court already so thoroughly rejected. The defendants' continued disagreement with this Court's resolution of those arguments does not entitle them to a second bite at the constitutional apple.

III. Neither The Eleventh Amendment Nor Anything Else Bars The Relief That The District Court Ordered In Its Injunction.

Notwithstanding the defendants' grab bag of arguments to the contrary, there is nothing problematic about the District Court's order permanently enjoining the state defendants from "giving operation or effect to [the 2014 Law] in its entirety." JA34. As the state actors directly responsible for authorizing and licensing casinos and racetracks to operate sports gambling in violation of PASPA, the state defendants can claim no Eleventh Amendment immunity from suit. Their contrary argument rests on the same flawed premise as their merits argument—*i.e.*, that the 2014 Law does not authorize licensed sports gambling. The defendants fare no better with their efforts to narrow the scope of the injunction, as it was just as

appropriate for the District Court to enjoin the preempted 2014 Law in its entirety as it was for the court to do the same with the preempted 2012 Law.

A. This Case Falls Squarely Within the *Ex parte Young* Exception to Eleventh Amendment Immunity.

The *Ex parte Young* doctrine allows federal courts to grant declaratory and equitable relief against state officials as necessary "to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)). "'In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 (2011) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)). That "straightforward inquiry" is readily satisfied here: The state defendants are actively engaged in authorizing and licensing sports gambling in violation of PASPA, and the relief sought and obtained enjoins them from doing so on a prospective basis.

The state defendants nonetheless insist that they are immune from suit under the Eleventh Amendment because they are not "'charged by law with any special duty in connection with the'" 2014 Sports Wagering Law. NJ Br.48 (quoting *Fitts v. McGhee*, 172 U.S. 516, 529 (1899)). Their argument rests, however, not on the

premise that the state defendants are complete strangers to the 2014 Law—*i.e.*, that naming them is no different from naming the "state superintendent of schools," *Ex parte Young*, 209 U.S. at 156—but rather on the premise that *no* state officer bears a sufficient "connection with" the 2014 Law because the law "is a self-executing repeal." NJ Br.49.

That argument fails for all the same reasons as the state defendants' arguments on the merits. The 2014 Law is not simply a "repeal" of existing sports gambling prohibitions; it is rather a direct effort to authorize sports gambling that is licensed by the state. *See* Part I *supra*. The law is not some stand-alone measure that operates in a vacuum; it operates against the backdrop of a complex, preexisting licensing and regulatory scheme overseen by the DGE and NJRC. Those two state agencies not only issue the licenses and permits under the auspices of which the sports gambling that the 2014 Law authorizes will occur, *see, e.g.*, N.J.S.A. §§5:5-50, 5:12-96, but also presumably are the agencies responsible for ensuring that any sports gambling in the casinos and racetracks whose operations they oversee complies with the conditions that the 2014 Law establishes—*i.e.*, is offered only to patrons who are 21 or older, and excludes college games taking place in New Jersey or involving New Jersey teams.

If that task does not fall to them, then it surely falls to the Governor, who is charged both with "tak[ing] care that the laws be faithfully executed" and

"enforc[ing] compliance with any constitutional or legislative mandate" and with overseeing "[a]ll executive and administrative offices, departments, and instrumentalities of the State government." N.J. Const. art. V, §1, ¶11; *id.* §4. The Governor and the heads of the DGE and NJRC therefore are permissible—indeed, natural—parties to this litigation for the same reason that they were permissible parties to the last litigation: because they are the state officers responsible for authorizing and licensing sports gambling "under the sanction of an unconstitutional statute." *Fitts*, 172 U.S. at 530.[5]

To be sure, the DGE and NRJC issue licenses and permits pursuant to separate statutes setting forth their licensing and permitting authority. *See, e.g.*, N.J.S.A. §§5:5-50, 5:12-96. But *Ex parte Young* itself expressly rejected the argument that that makes a difference for Eleventh Amendment purposes. As the Court explained, there is no requirement that the "duty" that connects the state officer to the challenged law "be declared in the same act which is" being challenged. *Ex parte Young*, 209 U.S. at 157. "The fact that the state officer, by virtue of his office, *has*

[5] Of course, even if the 2014 Law were completely self-executing, that alone would not immunize the state defendants from suit. As this Court has recognized, courts have concluded that a state governor may be sued to challenge a "self-enforcing" statute consistent with *Ex parte Young*. *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1988); *see also Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134-35 (9th Cir. 2012); *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992); *Luckey v. Harris*, 860 F.2d 1012, 1015 (11th Cir. 1988).

some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists." *Id.* (emphasis added).

By the same token, there is no requirement to enjoin the operation or effect of the general laws out of which that duty arises, rather than the law that is the source of the constitutional violation. The state defendants cannot plausibly claim, for instance, that the District Court was required to craft some novel "as applied" exception to the licensing or permitting laws, or grant the dramatically overbroad relief of enjoining those separate laws *in their entirety*. Instead, the appropriately limited response to the state defendants' violation of PASPA's command to refrain from authorizing or licensing sports gambling was to enjoin them from authorizing or licensing sports gambling. And the most natural way to do so given the operation of New Jersey's licensing scheme is by enjoining them from giving the 2014 Law operation or effect, as it is that law that converts licenses and permits to operate other forms of gambling into licenses and permits to operate sports gambling.

In short, there can be no serious dispute that the state defendants "ha[ve] some connection with" the 2014 Sports Wagering Law and the federal law violations that it sanctions. *Ex parte Young*, 209 U.S. at 157. It is not as if the Sports Organizations plucked these defendants out of thin air in hopes of devising some means of "testing the constitutionality of the" 2014 Law. *Id.* The Sports Organizations sued them

because they are directly responsible for issuing the licenses and permits that must be obtained to operate the commercial gambling establishments at which the 2014 Law authorizes sports gambling. Indeed, but for the state defendants' actions, there would not be *any* casinos or racetracks in which that sports gambling could take place. That is more than enough to satisfy *Ex parte Young*'s minimal "some connection" requirement. *Id.*; *see also Luckey*, 860 F.2d at 1015-16.

In all events, even if there were some Eleventh Amendment problem in this case (and there is not), that would not insulate the 2014 Law from this Court's review, as the defendants before this Court include not just state actors, but also private entities that seek to violate PASPA pursuant to the 2014 Law. Specifically, NJTHA, the licensed operator and permit holder of Monmouth Park Racetrack, in conjunction with NJSEA, the state-run instrumentality that owns the racetrack, seek to rely on the 2014 Law to begin to offer sports gambling immediately at Monmouth Park. JA70. NJTHA's actions plainly would violate PASPA's prohibitions against sponsoring, operating, advertising, or promoting sports gambling pursuant to state law, 28 U.S.C. §3702(2), and NJSEA's actions plainly would violate its prohibitions against "a governmental entity" sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling "by law or compact," *id.* §3702(1).[6]

[6] Although the NJSEA is a creation of state law, it is not an arm of the state for purposes of Eleventh Amendment immunity. *See, e.g.*, *DeSantis v. Ricci*, 614 F.

The District Court correctly saw no need to enter separate injunctions against these entities in light of its decision to enjoin the state defendants from giving the 2014 Law any operation or effect. But in the event this Court were to take issue with that relief, it should remand to the District Court to enter relief against the private party defendants. The state defendants' contrary contention—that Monmouth Park may operate sports gambling with impunity because it would do so only "pursuant to the *absence* of a law," NJ Br.53 n.6—just repeats the same mistake as their arguments on the merits. The NJTHA and NJSEA do not claim that the park may operate sports gambling because no law precludes it from doing so; they claim it may operate sports gambling because they intend to comply with the conditions necessary to fall within the exception to the state's sports gambling prohibitions that comprises the 2014 Law. In other words, they seek to "resort[] to state law as a cover for gambling on sports." *Christie I*, 730 F.3d at 236. As this Court has already concluded, that is precisely what PASPA prohibits.

Supp. 415, 418-23 (D.N.J. 1985); *Int'l Soc'y for Krishna Consciousness, Inc. v. NJSEA*, 691 F.2d 155, 161 (3d Cir. 1982). Indeed, NJSEA has never asserted an Eleventh Amendment immunity defense and has altogether abandoned its burden of proving one. *See Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995) ("[T]he party asserting Eleventh Amendment immunity bears the burden of proving entitlement to it.").

B. The Defendants' Remaining Challenges to the District Court's Order Are Demonstrably Incorrect.

The defendants' various other efforts to narrow or invalidate the District Court's injunction are equally unavailing. The legislators accuse the court of having "ignored" the 2014 Law's severability clause, and insist that, rather than invalidate the law, the court should have rewritten the law to repeal New Jersey's sports gambling prohibitions in their entirety. Sweeney Br.29. In fact, the District Court expressly acknowledged that "[t]he 2014 Law contains a broad severability clause," but correctly recognized that the legislators' novel proposal is impossible to reconcile with the law's evident intent. *See* JA31.

As the District Court explained, under New Jersey law, a severability clause "merely creates a presumption that the invalid sections of the [statute] are severable." *Old Coach Dev. Corp. v. Tanzman*, 881 F.2d 1227, 1234 (3d Cir. 1989). A court is still obligated to ask "whether the legislature would have enacted the remaining sections of the statute even without the objectionable part," *Kennecott Corp. v. Smith*, 507 F. Supp. 1206, 1225 (D.N.J. 1981), or whether "the void provisions … so affect the dominant aim of the whole statute as to carry it down with them," *New Jersey ex rel. McLean v. Lanza*, 143 A.2d 571, 577 (N.J. 1958) (quotation marks omitted). Thus, with or without a severability clause, a court must determine whether "the objectionable feature of the statute can be excised without

substantial impairment of the principal object of the statute." *Affiliated Distillers Brands Corp. v. Sills*, 289 A.2d 257, 258 (N.J. 1972).

The clear intent of the legislature in the 2014 Law was to authorize sports gambling only in the limited circumstances that the law identifies—*i.e.*, at casinos and racetracks, by persons 21 or older, and on only the sporting events identified. It would be decidedly contrary to that clear intent to "excise" from the law, Sweeney Br.29, the very conditions that the legislature established for legalizing sports gambling. Indeed, those conditions could *not* be severed without creating a massive state constitutional problem, as the New Jersey Constitution expressly provides 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 (emphasis added). The District Court was thus manifestly correct in concluding that "[t]o sever the 2014 Law to provide for a complete repeal of all New Jersey's prohibitions on sports wagering would be to enact legislation never intended by its proponents." JA31.

NJTHA, for its part, argues that the District Court should have confined its injunction to sports gambling on the Sports Organizations' own games rather than invalidating the 2014 Law in its entirety. NJTHA confuses the Sports Organizations' right to bring a claim under PASPA with the remedies that a court may grant under

PASPA. To be sure, a sports organization may sue to enjoin a violation of PASPA only when its own "competitive game is alleged to be the basis of such violation." 28 U.S.C. §3703. But when the violation stems from a state law that is invalid in all of its applications, nothing prevents a court from remedying the violation by invalidating the state law in its entirety, rather than crafting some sort of as-applied relief. Indeed, that is precisely the relief that the District Court ordered—and this Court affirmed—in *Christie I*. As this Court observed in doing so, PASPA operates "to invalidate state laws that are contrary to the federal statute," *Christie I*, 730 F.3d at 226, not just to invalidate particular applications of such laws.

Here, too, New Jersey's law violates PASPA on its face, and thus is facially invalid. Indeed, NJTHA does not and cannot suggest that the 2014 Law is somehow more valid as applied to gambling on games other than the Sports Organizations' games. It instead contends only that the state defendants (and, by implication, NJTHA itself) should be able to continue to violate PASPA with impunity unless and until every single sports organization complains. That is simply not how preemption works. Once a law is deemed invalid in all its applications, it is perfectly appropriate to enjoin its operation in all its applications. *See, e.g.*, *N.J. Payphone Ass'n v. Town of West New York*, 299 F.3d 235, 241 (3d Cir. 2002); *Ass'n for Fairness in Bus. Inc. v. New Jersey*, 82 F. Supp. 2d 353, 364 (D.N.J. 2000) (enjoining enforcement of certain provisions of Casino Control Act); *see also Legend Night Club v. Miller*, 637

F.3d 291, 303 (4th Cir. 2011) (affirming permanent injunction against the enforcement of an unconstitutionally overbroad statute as applied to all current and future liquor licensees, not only plaintiffs); *Roach v. Stouffer*, 560 F.3d 860, 871 (8th Cir. 2009) (affirming injunction requiring state officer to issue "Choose Life" license plates to all applicants, not just challengers of the regulation); *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 988 (9th Cir. 1991) (enjoining application of city ordinance regulating airport as to all airlines, not only plaintiff airlines, because the ordinance violated the due process clause). Because there is no plausible basis for deeming the 2014 Sports Wagering Law anything other than a facial violation of PASPA, the relief the court granted is both commonplace and correct.

None of the decisions cited by NJTHA is to the contrary. *See* NJHTA Br.55-56. In fact, these cases have nothing to do with whether a preempted statute may be invalidated in its entirety or only on a piecemeal basis. For instance, in *Meyer v. CUNA Mutual Insurance Society*, 648 F.3d 154 (3d Cir. 2011), the problem was that the district court's novel injunction "effectively allowed the Court to retain jurisdiction over the claims of former class members despite decertification." *Id.* at 171. In *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 381-82, 394 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012), it was that the district court issued a nationwide injunction, thereby "imposing [its] view of the law on all the other circuits." 263

F.3d at 394. In *Meinhold v. U.S. Department of Defense*, 34 F.3d 1469 (9th Cir. 1994), it was that the district court had enjoined in its entirety a policy that the Ninth Circuit declined to hold unconstitutional. *Id.* at 1480. None of these situations is anything like this one, where total invalidation of the state's law follows from a "straightforward operation of the Supremacy Clause." *Christie I*, 730 F.3d at 227 n.9. In that situation, it would be quite extraordinary indeed to force a district court to craft an injunction that allowed the state to continue giving effect and operation to its preempted law.

Finally, NJTHA's "unclean hands" argument is barely deserving of response. NJTHA Br.35-51. Indeed, in addition to resting on flatly inaccurate factual representations, *see, e.g.*, *id.* at 43-44, that argument is little more than a repackaging of the same fundamentally flawed standing arguments that this Court considered and rejected in the last round of litigation. As the Court explained, "[t]hat the Leagues may believe that holding events in Canada and England is not injurious to them does not negate that harm may arise from an expansion of sports wagering to the entire country." *Christie I*, 730 F.3d at 223. "The same can be said," the Court also concluded, "of the Leagues' promotion of fantasy sports," *id.* 223 & n.4—an activity that the Unlawful Internet Gambling Enforcement Act of 2006 explicitly states does not constitute gambling. *See* 31 U.S.C. §5362(1)(E)(ix).

In any event, NJTHA's baseless allegation comes nowhere close to establishing the kind of "unconscionable act immediately related to the equity the party seeks in respect to the litigation" that is necessary to justify invocation of the extraordinary doctrine of "unclean hands." *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 174 (3d Cir. 2001). Indeed, if anyone comes to this Court with unclean hands, it is the defendants, who all but invited this litigation by insisting upon enacting a law that the Governor himself previously recognized is a blatant effort "to sidestep federal law." Courts typically do not look kindly on "elaborate subterfuge" to evade the force of federal laws or federal court decrees, *Gilmore*, 417 U.S. at 566-67, and there is no reason the Court should look any more kindly on New Jersey's efforts here. In short, nothing in any of the defendants' arguments provides any basis for disturbing the District Court's decision invalidating and enjoining the operation of New Jersey's latest attempt to violate PASPA.

CONCLUSION

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

Respectfully submitted,

s/Paul D. Clement

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
(DC Bar No. 433215)
ERIN E. MURPHY
(DC Bar No. 995953)
WILLIAM R. LEVI
(DC Bar No. 1007057)
TAYLOR MEEHAN
(IL ARDC No. 6313481)
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

February 13, 2015

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that, pursuant to L.A.R. 46.1, I am admitted to and a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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I hereby certify that this brief complies with the type-volume requirements and limitations of Fed. R. App. P. 32(a). Specifically, this brief contains 12,518 words in 14-point Times New Roman font.

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Dated: February 13, 2015

s/Paul D. Clement

PAUL D. CLEMENT
(DC Bar No. 433215)
ERIN E. MURPHY
(DC Bar No. 995953)
WILLIAM R. LEVI
(DC Bar No. 1007057)
TAYLOR MEEHAN
(IL ARDC No. 6313481)
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com