United States Court of Appeals
for the Third Circuit

Docket No. 14-4568

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: United States District Court for the District of New Jersey
Sat Below: Hon. Michael A. Shipp, U.S.D.J.

PETITION FOR REHEARING AND/OR REHEARING EN BANC FOR APPELLANTS STEPHEN M. SWEENEY AND VINCENT PRIETO

On the Brief:
Michael R. Griffinger, Esq.
Thomas R. Valen, Esq.
Jennifer A. Hradil, Esq.

GIBBONS P.C.
One Gateway Center
Newark, New Jersey 07102
(973) 596-4500

Attorneys for Appellants
Stephen M. Sweeney and Vincent Prieto

REQUIRED STATEMENT FOR REHEARING EN BANC

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and Rule 35.1 of the Local Appellate Rules of the United States Court of Appeals for the Third Circuit, the undersigned counsel presents the following statement:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions, *i.e.*, the panel's decision is contrary to the decision of this court in *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) ("*Christie I*"), *cert. denied*, 134 S. Ct. 2866 (2014). In addition, this appeal involves a question of exceptional importance, *i.e.*, whether the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701-3704, can constitutionally prevent New Jersey from partially repealing its sports wagering prohibitions under the anti-commandeering doctrine of the Tenth Amendment.

Pursuant to Rule 35.2 of the Local Appellate Rules of the United States Court of Appeals for the Third Circuit, a copy of the panel's opinions and judgment are annexed hereto as Exhibits A and B, respectively.

INTRODUCTION

Appellants Stephen M. Sweeney and Vincent Prieto (the "Legislator Defendants") hereby petition for rehearing and/or rehearing en banc for the reasons stated herein and in the Petitions for Rehearing and/or Rehearing En Banc filed by Appellants Christopher J. Christie, David L. Rebuck, and Frank Zanzuccki in Docket No. 14-4546 (the "State Petition") and by Appellant New Jersey Thoroughbred Horsemen's Association, Inc. in Docket No. 14-4569 (the "NJTHA Petition"). The Legislator Defendants hereby incorporate and join in both the State Petition and the NJTHA Petition, but write separately to emphasize points of particular importance to the New Jersey Legislature (the "Legislature").

ARGUMENT

POINT I

THE *CHRISTIE II* MAJORITY'S HOLDING THAT THE 2014 LAW VIOLATES PASPA IS CONTRARY TO THIS COURT'S DECISION IN *CHRISTIE I*

It is hard to imagine a case in which the standard for granting rehearing en banc is more clearly met than the present one, in which the author of the Court's opinion in *Christie I*, Judge Fuentes, has dissented from the Court's opinion in *Christie II* on the grounds that the opinion is contrary to *Christie I*. There is no person more qualified to recognize the conflict between the opinions and the ways in which *Christie II* dramatically departs from *Christie I* in its interpretation of PASPA. Because these two precedential options are irreconcilable, this Court's

case law with respect to the interpretation of PASPA has become a quagmire. The Legislature is caught in the middle. One panel of this Court has held that the Legislature's discretion to repeal its laws is necessary to make PASPA constitutional, and a later panel has held that such a repeal is not permitted.

As set forth below, the *Christie II* majority's rationale conflicts with *Christie I* because it: (1) contradicts *Christie I*'s holding that the Legislature is free to repeal because it cannot constitute an "authorization by law" under PASPA; (2) appears to take away legislative options necessarily permitted under *Christie I* to save PASPA from being unconstitutional, such as repealing prior sports wagering prohibitions and enacting less restrictive ones; and (3) fails to even consider the constitutional analysis that was integral to *Christie I*'s interpretation of PASPA and how the States may comply with it. As a result of these conflicts, the two opinions are irreconcilable and must be re-examined by the full court to ensure uniformity of this Court's decisions.

A. *Christie II* Conflicts With *Christie I*'s Holding That a Repeal Cannot Constitute an "Authorization by Law" Under PASPA

PASPA prohibits New Jersey and forty-five other States from "authoriz[ing] by law . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based" on sporting events. 28 U.S.C. § 3702(1). In *Christie I*, this Court construed PASPA as permitting the Legislature to repeal any existing sports wagering

prohibitions because otherwise PASPA would "raise a series of constitutional problems" under the anti-commandeering doctrine of the Tenth Amendment. 730 F.3d at 233. To that end, the Court held that "[n]othing in [PASPA's] words *requires* that the states keep any law in place." *Id.* at 232. Rather, "[a]ll that is prohibited is . . . the affirmative 'authoriz[ation] *by law*' of [sports] gambling schemes." *Id.* It would be a "false equivalence[,]" the Court held, to equate a repeal of prohibitions with an "authorization by law." *Id.* at 233. *Christie I* identifies two reasons for this. First, because "PASPA speaks only of 'authorizing *by law*' a sports gambling scheme[,]" "[w]e do not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Id.* at 232. Second, "in reality, the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law" because "[t]he right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." *Id.*

Christie I thus announced that PASPA permits state lawmakers to repeal any existing sports wagering prohibitions they so choose because a repeal—without the affirmative establishment of any state laws governing sports wagering—could not possibly be considered an "authorization by law." Thus, when the Legislature enacted the 2014 Law, which repealed New Jersey's prohibitions on sports

wagering at casinos and racetracks and by persons over age 21, the Legislature was acting in compliance with PASPA, as interpreted by this Court in *Christie I*.

Over the dissent of the author of *Christie I*, this Court interpreted PASPA in the opposite way in *Christie II*. The panel majority held that the 2014 Law's repeal *does* equate to an "authorization by law" because the effect of the repeal is that it permits some people to wager on sports while others cannot, and this "selectiveness constitutes specific permission and empowerment." Opinion, at 16-17. This reasoning is directly contrary to the holding of *Christie I*, which would necessarily find no "authorization by law" regardless of whether a State completely or partially repealed its sports wagering prohibitions.

That *Christie II* holds "precisely the opposite" of what this Court held in *Christie I* is not just the Legislature's view, but that of Judge Fuentes—the author of *Christie I*'s majority opinion and the only judge to sit on both panels in *Christie I* and *II*. Dissent, at 6. As Judge Fuentes stated in his dissenting opinion in *Christie II*, the majority's holding that a partial repeal amounts to an "authorization by law" under PASPA "rests on the same false equivalence we rejected in *Christie I*" and "dismissed as a logical fallacy." Dissent, at 2, 5. First, because a "partially repealed statute is treated as if only the remaining part exists[,]" there is, in fact, "*no law* in place governing sports wagering" with respect to those areas in which prohibitions were repealed. Dissent, at 3; *see also Christie I*, 730 F.3d at 232. In

the case of the 2014 Law, it is simply as if New Jersey never prohibited sports wagering at casinos and racetracks, and it is beyond dispute that there are no laws or regulations governing the private sports wagering activity that may or may not take place at those locations. *See* Dissent, at 3. Second, with a partial repeal, the removal of prohibitions in certain areas does not mean the activity is "*affirmatively* authorized by law" in those areas because the right to engage in the activity does not come from the State. *See* Dissent, at 3-4; *see also Christie I*, 730 F.3d at 232. To the contrary, under the 2014 Law, people have the right to wager on sports at casinos and racetracks because the activity is *no longer prohibited* at these locations, not because there is any law "granting permission" to wager there. *See* Dissent, at 4-5. *Christie II* thus contradicts *Christie I*'s holding that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law." *Christie I*, 730 F.3d at 232.

Furthermore, as Judge Fuentes explained, *Christie I*'s holding that a repeal does not equate to an "authorization by law" applies to *any repeal*, whether complete or partial:

> If withdrawing prohibitions on 'some' sports wagering is the equivalent to authorization by law, then withdrawing prohibitions on all sports wagering must be considered an authorization by law. Under this logic, New Jersey is left with no choice at all—it must uphold all prohibitions on sports wagering in perpetuity. This is precisely the opposite of what we held in *Christie I*—'[n]othing in

> these words requires that the states keep any law in place"—and why we found PASPA did not violate the anti-commandeering principle.

Dissent, at 5-6 (quoting *Christie I*, 730 F.3d at 232). There is simply no rational way to square *Christie II*'s decision that the 2014 Law's partial repeal amounts to an "authorization by law" with the Court's rejection of that interpretation in *Christie I*.

B. *Christie II* Conflicts With *Christie I* Because it Takes Away Legislative Options That Were Necessarily Permitted Under *Christie I* to Save PASPA From Being Unconstitutional

1. *Christie II Leaves the Legislature with No Room to Make its Own Policy and Prevents Even a Complete Repeal of New Jersey's Sports Wagering Prohibitions*

In *Christie I*, in order to save PASPA from being declared unconstitutional under the anti-commandeering doctrine, this Court held that PASPA must be interpreted to allow the States the freedom to repeal and to determine the "exact contours" of their sports wagering prohibitions, leaving the States with "much room . . . to make their own policy." *Christie I*, 730 F.3d at 233. As the author of *Christie I* has noted, this includes the Legislature's freedom to completely or partially repeal any prohibitions. *See* Dissent, at 5-6. The *Christie II* majority, however, interpreted PASPA as leaving the Legislature with *no room* to make its own policy—in the majority's view, the States can either uphold whatever prohibitions they had in place when PASPA was enacted or they can completely

repeal all such prohibitions. *See* Opinion, at 17-18 ("We agree that, had the 2014 Law repealed all prohibitions on sports gambling, we would be hard-pressed, given *Christie I*, to find an 'authorizing by law' in violation of PASPA."). But, in reality, a complete repeal of prohibitions that permits any person of any age to gamble at any location is irresponsible and is not a viable legislative option. Thus, under *Christie II*, the Legislature is essentially left with "no choice at all—it must uphold all prohibitions on sports wagering in perpetuity[.]" Dissent, at 6.

Furthermore, notwithstanding the fact that *Christie II* paid lip service to the idea that a complete repeal would not violate PASPA under *Christie I*, the majority's rationale appears to compel the opposite conclusion. For instance, when discussing PASPA's one-year exception for New Jersey casinos,[1] the majority made the sweeping statement that "permitt[ing]" sports wagering in New Jersey casinos would violate PASPA and render the exception "superfluous." Opinion, at 18-19. The allowance of a complete repeal is inherently inconsistent with this statement—either New Jersey can repeal its prohibitions and "permit" sports wagering to occur everywhere, *including New Jersey casinos*, or it cannot. If a

[1] The one-year exception gave any State who had a "commercial casino gaming scheme" with a "comprehensive system of State regulation" in operation for the 10 years prior to PASPA "not later than one year" after PASPA's January 1, 1993 effective date to authorize "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos[.]" 28 U.S.C. § 3704(a)(3).

complete repeal is truly permissible under PASPA (as *Christie I* unequivocally held), then there is no logical reason why the 2014 Law's "selective" repeal of prohibitions at New Jersey casinos would render the one-year exception superfluous while a complete repeal would not.

As the reasoning of the *Christie II* majority would apparently preclude even a complete repeal of prohibitions, *Christie II* leaves the Legislature without any options under PASPA—the only course of action that will not "permit" sports wagering to occur in New Jersey casinos is if New Jersey continues to maintain its existing statutory prohibitions. Even assuming that the *Christie II* majority's intra-opinion conflict could somehow be resolved to permit a complete repeal as the single alternative to maintaining all prohibitions, such a course of action would not be a realistic option for the Legislature, and it would hardly leave the Legislature with "much room . . . to make [its] own policy" and to determine the contours of its sports wagering prohibitions, as *Christie I* held PASPA must in order to be valid under the Tenth Amendment. 730 F.3d at 233.

Furthermore, the *Christie II* majority's reliance upon the one-year exception illustrates yet another fundamental conflict between the two opinions. In *Christie I*, this Court held that PASPA prohibits only "the *affirmative* 'authoriz[ation] *by law*' of [sports] gambling *schemes*." 730 F.3d at 232 (first and third emphases added); *see also* 28 U.S.C. § 3702(1) (prohibiting States from "authoriz[ing] by

law . . . a lottery, sweepstakes, or other betting, gambling, or wagering *scheme* based" on sporting events") (emphasis added). *Christie II*'s holding that PASPA broadly prohibits States from "permitt[ing]" sports wagering is a far cry from the Court's earlier interpretation (as well as the from the text of PASPA). Opinion, at 18-19. Indeed, as Judge Fuentes pointed out in his dissent, the one-year exception clearly contemplated New Jersey enacting a "[sports] wagering *scheme*" as part of the "comprehensive system of State regulation" already present in its casinos; it did not contemplate the Legislature repealing sports wagering prohibitions in casinos and allowing the activity to occur there without state regulation (as the 2014 Law has done). Dissent, at 7; 28 U.S.C. § 3704(a)(3) (emphasis added).

2. *Christie II Prevents the Legislature from Completely Repealing New Jersey's Sports Wagering Prohibitions and Then Passing New Prohibitions*

The *Christie II* majority would also prevent the Legislature from proceeding with another legislative option permitted under *Christie I*—completely repealing all sports wagering prohibitions and then passing new limited prohibitions (*e.g.*, making it unlawful for persons under age 21 to wager on sporting events). While the distinction between that option and the 2014 Law may be largely formalistic, both options were clearly available under *Christie I*, which interpreted PASPA as permitting repeals and prohibiting only "the affirmative 'authoriz[ation] *by law*' of [sports] gambling schemes." 730 F.3d at 232. Because nothing in PASPA could

possibly be construed as prohibiting the States from *restricting* sports wagering, it was a given after *Christie I* that the Legislature could repeal its old prohibitions, as well as pass any new ones that it so desired.

Indeed, Judge Fuentes' *Christie II* dissent emphasizes that *Christie I* permits the Legislature to take this very approach:

> Put another way, would a state violate PASPA if it enacted a complete repeal of sports-wagering prohibitions and later enacted limited prohibitions regarding age requirements and places where wagering could occur? There is simply no conceivable reading of PASPA that could preclude a state from restricting sports wagering.

Dissent, at 6 n.16. The *Christie II* majority's rationale appears to foreclose not only complete repeals, but also the possibility of enacting any new *prohibitions* on sports wagering that are anything less than "complete." In holding that the 2014 Law's partial repeal violated PASPA, the majority reasoned that it constitutes an "authorization by law" because it resulted in some people being permitted to sports wager while others remained prohibited from doing so. *See* Opinion, at 16-17. Thus, it stands to reason that the majority would find that any new prohibitions that result in only *some* people being prohibited from sports wagering (*e.g.*, persons under age 21) would similarly violate PASPA.

This incredibly expansive reading of PASPA is irreconcilable with *Christie I*'s interpretation of PASPA as encompassing only "the affirmative 'authoriz[ation]

by law' of [sports] gambling schemes." 730 F.3d at 232. It is also completely unmoored from PASPA's text. It is difficult to see how a State *restricting* persons under age 21 from sports wagering could logically be considered "authoriz[ing] by law . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based" on sporting events within the meaning that Congress intended when it enacted PASPA. 28 U.S.C. § 3702(1).

If the *Christie II* majority had followed *Christie I*, it would have had to accept that neither repealing prohibitions nor enacting new prohibitions can possibly be considered an "authorization by law" under PASPA. And, as Judge Fuentes recognizes, if PASPA permits a complete repeal of prohibitions followed by the enactment of partial prohibitions, then such an approach could yield the same result as the 2014 Law's partial repeal, and there is no logical explanation as to why PASPA would prohibit one and not the other. *See* Dissent, at 6 n.16. For instance, it makes no sense that PASPA would allow a State to completely repeal its prohibitions and then decide to prohibit persons under age 21 from sports wagering, but would not allow a State to simply repeal its prohibitions *in part* as they apply to persons over age 21 (as the 2014 Law has done). Thus, this Court's interpretation of PASPA has become nonsensical due to the *Christie II* majority's failure to follow *Christie I*.

C. *Christie II* Interpreted PASPA in a Conflicting Manner Because it Refused to Examine the Constitutional Analysis That Was Integral to the Court's Interpretation of PASPA in *Christie I*

The inconsistencies between *Christie I* and *Christie II* in interpreting PASPA stem from the *Christie II* majority's failure to examine the constitutional analysis that was integral to *Christie I*'s interpretation of PASPA. In *Christie I*, this Court held that PASPA would violate the anti-commandeering doctrine of the Tenth Amendment only if it required the States to take any "affirmative action(s)," such as by requiring the States to enact or enforce a law or regulation. 730 F.3d at 231. As part of this analysis, the Court acknowledged that the anti-commandeering doctrine would be violated if Congress could "stop[] the states from 'repealing an existing law'" because that would be no different from compelling a State to affirmatively enact a new law stating the opposite. *Id.* at 232 (quoting *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring) (noting that "preventing [a] state from repealing an existing law is no different from forcing it to pass a new one")). Expressly to save PASPA from this constitutional problem, the Court construed the statute narrowly: it did "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." *Id.*

In holding that the 2014 Law violates PASPA, the *Christie II* majority did not even discuss whether construing PASPA to prevent New Jersey from partially repealing its prohibitions would cause the statute to violate the anti-

commandeering doctrine.[2] While the *Christie II* panel recited that *Christie I* held PASPA to be constitutional,[3] it proceeded to ignore the constitutional restraints and rationale that informed *Christie I*'s interpretation of PASPA. If *Christie I*'s rationale had been examined, *Christie II* presumably would have concluded that the same logic that compelled *Christie I* to hold that Congress cannot constitutionally prevent a State from repealing any of its existing laws also compels the conclusion that Congress cannot constitutionally prevent a State from repealing *any portion* of its existing laws. For example, if Congress could prevent a State from partially repealing any existing prohibitions on sports gambling as they apply to persons under age 21, then that is no different, for purposes of the anti-commandeering doctrine, from Congress forcing the State to affirmatively enact a new law prohibiting sports gambling by persons under age 21. Under *Christie I*, the anti-commandeering doctrine prevents Congress from doing either, and PASPA is constitutional only if it is construed to do neither. Because *Christie II* fails to delve into the reason why the Court construed PASPA as permitting

---

[2] This constitutional argument was a primary focus of the Legislator Defendants' briefing in *Christie II*. *See* Case No. 14-4568, 1/14/15 Brief, at 17-25; 2/27/15 Reply Brief, at 17-20.

[3] *Christie II* noted that it would not revisit the issue of PASPA's constitutionality. *See* Opinion, at 15 n.5. On en banc review, this Court is free to revisit that issue from *Christie I*.

repeal, its holding that the 2014 Law's partial repeal violates PASPA is fundamentally inconsistent with the Court's prior holding in *Christie I*.[4]

CONCLUSION

Wherefore, Appellants Stephen M. Sweeney and Vincent Prieto respectfully request that the Court grant rehearing and/or rehearing en banc.

Dated: Newark, New Jersey
September 8, 2015

Respectfully submitted,

GIBBONS P.C.

By: /s/ [redacted]

Michael R. Griffinger, Esq.
Thomas R. Valen, Esq.
Jennifer A. Hradil, Esq.
One Gateway Center
Newark, New Jersey 07102
Telephone: (973) 596-4500
Facsimile: (973) 596-0545

Attorneys for Appellants
Stephen M. Sweeney and Vincent Prieto

[4] For this reason, in addition to being contrary to *Christie I*, the *Christie II* majority's holding is also contrary to the Supreme Court's anti-commandeering jurisprudence, *see, e.g.*, *New York v. U.S.*, 505 U.S. 144 (1992); *Printz v. U.S.*, 521 U.S. 898 (1997), which constitutes a separate ground for seeking rehearing.

CERTIFICATION OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and Local Appellate Rule 113.4, I hereby certify that on this 8th day of September, 2015, the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system.

Service was accomplished electronically on the following Filing Users by the Notice of Docket Activity generated by the CM/ECF system:

<table>
<tr>
<td>Jeffrey A. Mishkin
jeffrey.mishkin@skadden.com
Anthony J. Dreyer
anthony.dreyer@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
4 Times Square
New York, NY 10036</td>
<td rowspan="2">Geoffrey S. Brounell
geoffrey.brounell@dol.lps.state.nj.us
John J. Hoffman
john.hoffman@lps.state.nj.us
Stuart M. Feinblatt
stuart.feinblatt@dol.lps.state.nj.us
Peter M. Slocum
peter.slocum@dol.lps.state.nj.us
Jeffrey S. Jacobson
jeffrey.jacobson@dol.lps.state.nj.us
OFFICE OF THE ATTORNEY GENERAL OF NEW JERSEY
R. J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, NJ 08625</td>
</tr>
<tr>
<td>Paul D. Clement
pclement@bancroftpllc.com
Erin E. Murphy
emurphy@bancroftpllc.com
William R. Levi
wlevi@bancroftpllc.com
BANCROFT PLLC
1919 M Street N.W., Suite 470
Washington, DC 20036</td>
</tr>
</table>

William J. O'Shaughnessy woshaughnessy@mccarter.com Richard Hernandez rhernandez@mccarter.com **McCARTER & ENGLISH LLP** 100 Mulberry Street Four Gateway Center, 14th Floor Newark, NJ 07102	Theodore B. Olson tolson@gibsondunn.com Matthew D. McGill mmcgill@gibsondunn.com Ashley E. Johnson ajohnson@gibsondunn.com **GIBSON, DUNN & CRUTCHER LLP** 1050 Connecticut Ave., N.W. Washington, DC 20036
Ronald J. Riccio rriccio@mdmc-law.com Eliott M. Berman eberman@mdmc-law.com **McELROY, DEUTSCH, MULVANEY,** **& CARPENTER, LLP** 1300 Mount Kemble Avenue P.O. Box 2075 Morristown, NJ 07962	

Dated: September 8, 2015

/s/ [redacted]
Michael R. Griffinger