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 TO PETITIONS FOR REHEARING AND/OR REHEARING EN BANC

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INTRODUCTION

In the latest chapter of their ongoing quest to evade the prohibitions of the Professional and Amateur Sports Protection Act ("PASPA"), Defendants ask this Court to resolve a conflict that does not exist, in hopes of reopening a constitutional question that they already lost. According to Defendants, this Court's decision in *Christie II* is irreconcilable with its decision in *Christie I* rejecting New Jersey's first effort to authorize sports gambling because *Christie II* renders *Christie I*'s conclusion that PASPA does not compel states to maintain existing prohibitions on sports gambling a false promise. Worse still, according to Defendants, by doing so, *Christie II* has "enmeshed" PASPA in constitutional difficulties that *Christie I* avoided. Defendants are wrong on both counts, as *Christie II* explained.

First, while Defendants insist repeatedly that *Christie II* reads PASPA to compel states to maintain their existing sports gambling prohibitions, *Christie II* in fact does no such thing. To the contrary, *Christie II* goes out of its way to reiterate that New Jersey remains just as free under PASPA as it always has been to enact a genuine repeal of its sports gambling prohibitions. *Christie II* simply makes the commonsense points that not every law styled as a "repeal" is a genuine repeal, and that the "repeal" of generally applicable prohibitions only at state-chosen venues and for betting on state-chosen sporting events is a far cry from a genuine repeal. A

complete and genuine repeal thus remains a legal option available to New Jersey. Nothing in PASPA or *Christie II* precludes it.

Precisely because *Christie II* does *not* interpret PASPA as compelling states to maintain existing sports gambling prohibitions, it in no way reopens the constitutional question resolved against Defendants in *Christie I*. *Christie I* found it sufficient to defeat Defendants' commandeering claim that PASPA preserves states' ability to repeal their sports gambling prohibitions entirely, rendering the question at issue in *Christie II—i.e.*, whether PASPA also allows states to "repeal" prohibitions only at the state's favored venues on the state's favored games—academic to the constitutional issue resolved against Defendants in *Christie I*. This Court declined Defendants' pleas to reconsider that constitutional holding en banc in *Christie I*, and Defendants fared no better in their petitions for Supreme Court review. Defendants' continued disagreement with that holding does not entitle them to yet another bite at the constitutional apple, and neither does *Christie II*.

The only real dispute after *Christie I*, then, is whether, *in addition* to preserving New Jersey's right to repeal its sports gambling prohibitions entirely, PASPA also allows New Jersey to accomplish the authorization of sports gambling at its preferred venues by selectively "repealing" its general, statewide prohibitions only at those comprehensively regulated state-licensed gambling venues (and only for the persons and sporting events of the state's choosing). And as to that question,

the majority in *Christie II* plainly got it right. Whatever else PASPA may allow a state to do, it certainly does not allow a state to dictate where sports gambling may occur, by whom, and even on what sporting events, under the guise of "partially repealing" its otherwise-blanket sports gambling prohibitions.

In all events, the question presented in this case does not warrant this Court's consideration en banc. Just as New Jersey is the one and only state that has ever attempted to authorize and license casino sports gambling in open and acknowledged violation of PASPA, it is also the one and only state that has ever attempted to "partially repeal" its sports gambling prohibitions in an open and acknowledged effort to evade PASPA. Accordingly, there is no reason to think—and no Defendant even claims—that the question resolved by *Christie II* is recurring. That being so, this Court should reject Defendants' attempts to enlist the Court in New Jersey's latest efforts to authorize and license sports gambling at its casinos and racetracks in blatant violation of federal law.

BACKGROUND

The Professional and Amateur Sports Protection Act, 28 U.S.C. §3701, *et seq.*, makes it unlawful for any "governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" 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 [the] violation" to bring suit to enjoin a violation of its prohibitions. *Id.* §3703.

In recent years, New Jersey has undertaken a series of persistent efforts to evade PASPA's prohibitions on authorizing or licensing sports gambling. This Court rejected the first of those efforts in *National Collegiate Athletic Association v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) ("*Christie I*"), where, in open and acknowledged violation of PASPA, New Jersey enacted a law explicitly authorizing licensed sports gambling at its casinos and racetracks, and then tried to defend its actions by arguing that PASPA is unconstitutional. After this Court denied petitions for rehearing en banc, Defendants filed petitions for certiorari with the Supreme Court. Even before the Court could act on those petitions, however, the sponsors of the invalidated 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. *See* JA101.

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 tried again, passing a law that purported to "repeal" the state's

existing sports gambling prohibitions, 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." S.B. 2250, 2014 Leg., Reg. Sess. (N.J. 2014). Governor Christie vetoed that unabashed effort to undo the outcome of *Christie I*. In a letter accompanying his veto, the Governor described the legislation as a "novel attempt to circumvent the Third Circuit's ruling" by "partially deregulat[ing] betting at casinos and racetracks in an attempt to sidestep federal law." JA65.

A few months later, the Governor saw things differently. On October 17, 2014, he signed into law S.B. 2460, 2014 Leg., Reg. Sess. (N.J. 2014) (the "2014 Law"), which repealed the invalidated 2012 law and replaced it with a "repeal" of New Jersey's sport gambling prohibitions nearly identical to the "partial repeal" he had vetoed just two months earlier. *See* N.J.S.A. §5:12A-7. Just like the law that Governor Christie vetoed, the 2014 Law purports to "repeal" those prohibitions *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." *Id.* 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.*

Plaintiffs responded to New Jersey's latest effort to authorize licensed sports gambling at its casinos and racetracks in violation of PASPA by promptly filing this lawsuit seeking to prevent the 2014 Law from taking effect. The United States, which intervened in support of Plaintiffs' challenge to the invalidated 2012 law in *Christie I*, filed a statement of interest agreeing that New Jersey had once again authorized and licensed sports gambling in violation of PASPA. *See* Statement of Interest of the United States (Nov. 19, 2014), ECF No. 57. The District Court agreed as well and enjoined the 2014 Law from taking effect. Defendants appealed, and this Court affirmed in a 2-1 decision, concluding that, "[w]hile artfully couched in terms of a repealer, the 2014 Law …. is not a repeal; it is an authorization." *Christie II*, slip op. 18. Having reached that conclusion, the Court saw no need to resolve Plaintiffs' argument that the 2014 Law also *licenses* sports gambling in violation of PASPA. *Id.* at 20 n.8.

ARGUMENT

I. *Christie II* Does Not Disturb *Christie I*'s Holding That PASPA Does Not Require States To Maintain Prohibitions On Sports Gambling.

Defendants' petitions for rehearing en banc rest entirely on a premise that they do not and cannot prove. In an effort to reopen a debate that they already lost in *Christie I*, Defendants insist repeatedly throughout their petitions that *Christie II* somehow "abrogated" *Christie I*'s conclusion that PASPA does not require states to "'maintain existing laws'" prohibiting sports gambling, thereby reinvigorating their

claim that PASPA unconstitutionally "commandeer[s] the States into maintaining legal prohibitions they wish to abolish." Pet. for Rehearing and/or Rehearing En Banc for Appellants Christopher J. Christie, David L. Rebuck and Frank Zanzuccki ("NJ Pet.") 3-4 (quoting *Christie I*, 730 F.3d at 235); *see also* Pet. for Rehearing and/or Rehearing En Banc for Appellants Stephen M. Sweeney and Vicent Prieto 3; Pet. for Rehearing and/or Rehearing En Banc for Appellant New Jersey Thoroughbred Horsemen's Association, Inc. 8. Defendants' pleas for rehearing en banc fail at the outset because *Christie II* simply did not do what they say it did. Far from disturbing *Christie I*'s holding that PASPA "does not require states to maintain existing laws," *Christie I*, 730 F.3d at 235, *Christie II* expressly reaffirmed it, reiterating that New Jersey would not have run afoul of PASPA had the state actually "repealed all prohibitions on sports gambling," rather than enacted a law that merely exempts from those otherwise-blanket prohibitions the places, persons, and sporting events of the state's choosing. *Christie II*, slip op. 17-18.

Defendants never even acknowledge that aspect of *Christie II*, let alone attempt to reconcile it with the flawed theory underlying their petitions. That is because it is impossible to do so. If New Jersey does not want to maintain its sports gambling prohibitions, *Christie II* leaves the state just as free to repeal them as *Christie I* did. 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 the state affirmatively welcomes does not mean that PASPA or *Christie II* has forced New Jersey to "maintain" its "existing laws." If New Jersey wants to repeal those laws entirely, that remains its prerogative. New Jersey's continued aversion to exercising the total repeal option PASPA has given it does not change the reality that the state's sports gambling prohibitions remain in force because it has made a conscious decision to keep them, not because this Court or PASPA has compelled it to do so.[1]

The conflict Defendants purport to identify between *Christie I* and *Christie II* therefore does not exist, as neither decision "read[s] PASPA to prohibit New Jersey from repealing its ban on sports wagering." *Christie I*, 730 F.3d at 232. Instead, *Christie II* resolved an entirely different question from *Christie I*—namely, whether PASPA prohibits New Jersey from *retaining* its general ban on sports gambling but enacting a law that exempts from that ban state-licensed casinos and racetracks. *Christie I* had no occasion to consider that question because New Jersey's first effort to authorize and license sports gambling was an open and acknowledged violation of PASPA. Indeed, Defendants tellingly cannot point to a single passage in *Christie I* even alluding to the possibility of "partial repeals." Instead, *Christie I*'s discussion

[1] Nor can Defendants lay the blame at the District Court's feet, as its injunction does not "command[] New Jersey to continue prohibiting sports wagering," NJ Pet. 14; it merely enjoins the 2014 Law from taking effect. New Jersey would not violate the injunction were it to repeal its prohibitions entirely.

of authorization and repeal concerned only Defendants' contention that PASPA does not even allow states to *completely* repeal their sports gambling prohibitions. It was Defendants' insistence in the context of their commandeering argument that "having *no law* in place governing sports wagering is the same as authorizing it by law" that *Christie I* rejected as "rest[ing] on a false equivalence between repeal and authorization." *Christie I*, 730 F.3d at 232, 233. Having laws in place that prohibit sports gambling in all circumstances except those of the state's choosing is another matter entirely—and a matter that *Christie I* did not consider.

To be sure, Judge Fuentes would have concluded that the Court's rejection of the "false equivalence between repeal and authorization" is just as applicable to "a partial repeal" as it is to "a total repeal." *Christie II*, slip op. 5 (Fuentes, J., dissenting). But whatever Judge Fuentes' views on the applicability of PASPA to "partial repeals" may be, there is no denying that the question was not at issue in *Christie I*. Moreover, while Judge Fuentes (and Defendants) may not have been *persuaded* by the distinction that the *Christie II* majority drew between a total repeal and the kind of "partial repeal" that New Jersey attempted here, there is no denying that *Christie II* drew that distinction, reiterating that it would not have found a violation of PASPA "had the 2014 Law repealed all prohibitions on sports gambling." *Christie II*, slip op. 17-18. Defendants cannot manufacture a conflict

between *Christie I* and *Christie II* by pretending that this unambiguous acknowledgement does not exist.[2]

Nor can Defendants do so by pointing to *Christie I*'s characterization of PASPA as leaving "much room for the states to make their own policy." *Christie I*, 730 F.3d at 233. Defendants continue to ignore the fact that this language is found in a passage identifying what options remain open to a state if it "choose[s] to keep a *complete ban* on sports gambling." *Id.* (emphasis added). Indeed, it is found in a paragraph that begins by assuming that PASPA gives states only "two 'choices'": complete ban or complete repeal. *Id.* The "much room" the Court proceeded to identify for a state that chooses a "complete ban" was room "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.—i.e.*, whether it will be enforced civilly or criminally, what penalties will attach, and so on. Those decisions remain just as open to a state after *Christie II* as they were after *Christie I*, as does, at a minimum,

[2] Defendants fare no better in relying on language in the United States' brief in opposition before the Supreme Court suggesting that a state may repeal its sports gambling prohibitions "in whole or in part." U.S. Br. in Opp. 11, *Christie I*, 134 S. Ct. 2866 (No. 13-967). As the United States has since explained, that language was 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." *Christie II*, Br. for United States as Amicus 14. And the United States has since affirmatively taken the position that *this* "partial repeal" violates PASPA. *See id.* at 14-15.

the choice between complete ban and complete repeal. Accordingly, Defendants' insistence that *Christie II* somehow converts PASPA into a command that New Jersey maintain its sports gambling prohibitions is simply wrong.

II. *Christie II* Neither Reopens The Constitutional Question That *Christie I* Resolved Nor Provides Any Other Basis For En Banc Review.

Precisely because *Christie II* does not require states to maintain existing sports gambling prohibitions, it also does not undermine in the slightest *Christie I*'s rejection of the commandeering claims that Defendants unsuccessfully pressed in that case. Contrary to Defendants' suggestions, *Christie I* did not hold that the constitutionality of PASPA turns on whether the statute allows states to repeal their sports gambling prohibitions "partially" rather than completely. It instead held that PASPA is constitutional *whether or not* it gives states any options in addition to complete repeal. The Court could not have been clearer about that, reiterating that Defendants' commandeering claim fails *even if* "we entertain the notion that PASPA's straightforward *prohibition* on action may be recast as presenting *two options*"—either "repeal its sports wagering ban" or "keep a complete ban on sports gambling." *Christie I*, 730 F.3d at 233 (some emphasis added).

Although Defendants vigorously resisted that conclusion in *Christie I*, arguing that "[g]iving a State a choice between prohibiting sports wagering or allowing wagering to take place without *any* controls … presents no 'choice' at all," *Christie I*, NJ Opening Br. 51, this Court emphatically disagreed. As the Court explained,

"the fact that Congress gave the states a hard or tempting choice does not mean that they were given no choice at all, or that the choices are otherwise unconstitutional." *Christie I*, 730 F.3d at 233. *Christie I* thus rejected Defendants' commandeering claim because it is enough for *constitutional* purposes that PASPA allows a state to repeal its sports gambling prohibitions entirely—something that the *Christie II* majority both recognized and reaffirmed. Accordingly, Defendants cannot leverage *Christie II* into an opportunity to re-litigate their commandeering claims.

What this case really boils down to, then, is a simple dispute about how PASPA applies to New Jersey's novel effort to "partially repeal" its sport gambling prohibitions. There is no need for this Court to reconsider that narrow question en banc because the majority plainly got it right. "While artfully couched in terms of a repealer," *Christie II*, slip op. 18, the 2014 Law in fact "provides the authorization for conduct that is otherwise clearly and completely legally prohibited," *id.* at 16, "selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling," *id.* at 17. 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. In short, rather than deregulate all sports gambling or take an agnostic position on whether or how it will occur, New Jersey 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. "This is not a repeal; it is an authorization." *Id*. at 18.

If there were any doubt on that score, it would be removed by the one-year-only option PASPA extended to New Jersey to achieve what the 2014 Law achieves. When Congress enacted PASPA, it specifically acknowledged the reality that New Jersey already had authorized gambling "conducted exclusively at casinos" that were subject "to a comprehensive system of State regulation." 28 U.S.C. §3704(a)(3). Congress gave New Jersey the option to piggyback sports gambling onto that pre-existing licensing scheme, but it did not make that option available permanently; it instead gave New Jersey only a one-year window to exercise that option, and that one-year window closed decades ago. *Id.* New Jersey cannot now accomplish the same end by purporting to "repeal" existing sports gambling prohibitions, but do so only at those same comprehensively regulated gambling venues. "If Congress had not perceived that sports gambling in New Jersey's casinos would violate PASPA, then it would not have needed to insert the" one-year exception for New Jersey in the first place. *Christie II*, slip op. 18.

But in all events, the circumstances under which PASPA allows a state to "partially repeal" its sports gambling prohibitions is hardly a question that warrants this Court's en banc review. No Defendant even attempts to suggest that this narrow question is likely to arise in any other case, and understandably so, as PASPA has

been the subject of a grand total of three cases other than this litigation in the entirety of its 23 years on the books. Indeed, as Defendants acknowledge, the question they are asking this Court to resolve is the product of a single overarching dispute that has generated "[t]wo decisions … *involving the same parties*." NJ Pet. 1 (emphasis added). The panel's decision thus is not only correct, but of little consequence beyond this case. Those are hardly the makings of a fitting candidate for en banc review.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

s/Paul D. Clement

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September 29, 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.

CERTIFICATE OF COMPLIANCE WITH PAGE LIMIT

I hereby certify that this brief complies with the type-volume requirements and limitations of Fed. R. App. P. 32(a) and this Court's September 15, 2015 order calling for a response to the Petitions for Rehearing and/or Rehearing En Banc which established a page limit of 15 pages. This brief contains 15 pages in 14-point Times New Roman font.

VIRUS SCAN CERTIFICATE

I hereby certify that this brief complies with L.A.R. 31.0(c) because the virus detection program Kaseya Antivirus, Version 10.2.1.23a, has been run on the file and no virus was detected.

s/Erin E. Murphy
ERIN E. MURPHY

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on this 29th day of September, 2015, the foregoing Response Brief for Appellees to Petitions for Rehearing and/or Rehearing En Banc was electronically filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system.

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