No. 14-4546

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Plaintiffs-Appellees,

v.

GOVERNOR OF THE STATE OF NEW JERSEY, *et al.*,

Defendants-Appellants.

On Appeal From The United States District Court
For The District Of New Jersey

PETITION FOR REHEARING AND/OR REHEARING EN BANC FOR APPELLANTS CHRISTOPHER J. CHRISTIE, DAVID L. REBUCK, AND FRANK ZANZUCCKI

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REQUIRED STATEMENT OF COUNSEL FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to a decision 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 in this court, *i.e.*, the panel's decision is contrary to the decision of this Court in *National Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013). Moreover, this appeal involves a question of exceptional importance, *i.e.*, whether the federal government may prescribe the manner in which a State may govern by requiring it to maintain its existing laws.

INTRODUCTION

Two decisions of this Court, involving the same parties and the same federal statute, are in irreconcilable conflict, and the Court should review the matter en banc. After a previous panel of this Court narrowly construed the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq.*, to preserve the law's constitutionality, the Court in this case dramatically enlarged PASPA's reach by adopting a construction that, according to Judge Fuentes's dissenting opinion, is "precisely the opposite" of the Court's earlier construction. Dissent at 6. Judge Fuentes would know; he authored the majority opinion that set down the narrowing construction that the panel here contravened. And by rejecting this Court's prior narrowing construction, the panel here unavoidably has enmeshed PASPA in the very "series of constitutional problems" the earlier panel strained to avoid. *Nat'l Collegiate Athletic Ass'n v. Gov. of N.J.*, 730 F.3d 208, 233 (3d Cir. 2013) ("*Christie I*"). En banc review is warranted to ensure that this Court has a uniform interpretation of this federal statute that is consistent with the principles of federalism embodied in the Tenth Amendment.

PASPA prohibits 45 states, including New Jersey, from "licensing" or "authoriz[ing] by law" sports wagering. In 2012, New Jersey replaced its previous prohibition on sports wagering with a comprehensive licensing regime to authorize and regulate such wagering at the State's casinos and racetracks. When five sports

leagues (the "Leagues") challenged New Jersey's sports wagering regime under PASPA, New Jersey argued that if PASPA requires States to maintain prohibitions on sports wagering, such a mandate would violate the Tenth Amendment's prohibition on commandeering State governments.

In *Christie I*, this Court upheld PASPA's constitutionality by rejecting the State's construction of the statute. *Christie I* recognized that a construction of PASPA that requires States to maintain existing prohibitions would create "a series of constitutional problems." 730 F.3d at 233. The Court explained, however, that PASPA neither "prohibit[s] New Jersey from repealing its ban on sports wagering" (*id*. at 232), nor "require[s] states to maintain existing laws" (*id*. at 235), but instead gives the States "much room . . . to make their own policy" (*id.* at 233). Thus the United States, in successfully opposing review of *Christie I* by the Supreme Court, explained that *Christie I* preserved the States' sovereign rights to repeal their bans on sports wagering not just "in whole," but also "in part." Brief for the United States in Opposition at 11 ("U.S. Br."), *Christie v. Nat'l Collegiate Athletic Ass'n*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014).

Following *Christie I*, New Jersey put aside its effort to set up a licensing regime for sports wagering in the State and instead chose to repeal its prohibitions on sports wagering in the State's casinos, racetracks, and sites of former racetracks. *See* P.L. 2015, c. 62 (the "2014 Act"). The 2014 Act's repeal is entirely self-

executing; it simply withdraws civil and criminal prohibitions on sports wagering conduct at those locations. No further State action is necessary or contemplated to legalize sports wagering.

The Leagues immediately challenged the State's repeal as an "author-iz[ation] by law" of sports wagering in violation of PASPA. In this appeal ("*Christie II*"), a majority of the panel agreed with the Leagues. Contrary to the express holding of *Christie I*, the panel here held that PASPA actually *does* require New Jersey to "maintain existing laws." *Christie I*, 730 F.3d at 235. The *Christie II* majority redefined "authorize by law" as meaning "[t]o permit a thing to be done in the future," such that any "selective" legalization of sports wagering violates PASPA. Op. at 17. The *Christie II* majority thus ran headlong into exactly the "series of constitutional problems" that *Christie I* avoided through its narrowing construction of PASPA (730 F.3d at 233), but sidestepped those constitutional issues, treating them as resolved by *Christie I*'s holding that PASPA was constitutional. Yet it did not explain how *Christie I*'s constitutional holding could survive without the narrowing construction of PASPA adopted in *Christie I* but abrogated by the panel here. As Judge Fuentes's dissent makes clear, it cannot.

There can be no clearer basis for en banc review. *Christie II* reached "precisely the opposite" conclusion of *Christie I* on the key issue in this case (Dissent at 6) and in so doing has permitted Congress, through PASPA, to commandeer the

States into maintaining legal prohibitions they wish to abolish. This conflict alone warrants the consideration of the full Court. The federalism issues raised by *Christie II*'s reinterpretation of PASPA provide a further basis for en banc review.

BACKGROUND

In 2012, New Jersey voters overwhelmingly approved an amendment to the State's Constitution that permitted the State Legislature to legalize sports wagering. With a strong bipartisan consensus, the Legislature enacted the 2012 Law, N.J. Stat. Ann. § 5:12A-1 *et seq.*, which lifted the State's ban on sports wagering, vested State regulators with comprehensive supervisory authority over sports wagering, and ensured that no sports wagering would take place unless it was directly licensed by the State.

Under PASPA, it is unlawful for a State "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate . . . ." 28 U.S.C. § 3702. In 2012, the Leagues sued the State Appellants, contending that the 2012 Law conflicted with PASPA. After construing PASPA as not requiring States to maintain existing laws to avoid a "series of constitutional problems" (*Christie I*, 730 F.3d at 233), this Court held PASPA constitutional and overturned the 2012 Law as conflicting with it.

Having been advised that, under *Christie I*, a State may repeal its prohibitions on sports wagering "in whole or in part" (U.S. Br. at 11), the New Jersey Legislature enacted the 2014 Act, P.L. 2015, c. 62. The 2014 Act repealed the 2012 Law and its accompanying regulations in their entirety, but also repealed provisions in the criminal code (*see* N.J. Stat. Ann. § 2C:37 *et seq.*), the civil code (*see* N.J. Stat. Ann. § 2A:40 *et seq.*; N.J. Stat. Ann. § 5:12-1 *et seq.*), and "any rules and regulations" that "prohibit participation in or operation of" a sports-wagering pool, to the extent those laws apply at casinos, racetracks, and former racetracks that wish to have such wagering occur on their premises. The 2014 Act thus repealed both laws that *prohibit* sports wagering at casinos and racetracks, and also the 2012 Law that *licensed or authorized* sports wagering in casinos and racetracks, leaving "no law in place" (*Christie I*, 730 F.3d at 232, emphasis omitted), and no regulatory role for the State with respect to sports wagering at those locations. The activity simply was no longer unlawful if engaged in by persons 21 or older on contests not involving New Jersey-based college teams.

In October 2014, the Leagues again sued the State Appellants, this time arguing that the self-executing 2014 Act was functionally indistinguishable from the licensing regime of the 2012 Law and violated PASPA because its repeal was limited to certain locations, persons, and sporting events. A divided panel of this Court affirmed the district court's grant of summary judgment to the Leagues.

As a result of this panel's decision, New Jersey remains compelled—required by federal law—to maintain civil and criminal prohibitions on sports wagering activity that the State's voters, its governor, and broad bipartisan majorities of its Legislature no longer wish to prohibit.

ARGUMENT

In *Christie I*, the parties vigorously disputed the scope of PASPA's prohibition on "authoriz[ing] by law" sports wagering. The State contended it required States to "keep laws on their books" and thus unconstitutionally commandeered the State's regulatory authority. Opening Br. of State Appellants at 41. The Leagues and the United States insisted that PASPA did not have the broad meaning New Jersey attributed to it. PASPA, they argued, was constitutional because, contrary to the State's arguments, "nothing in the unambiguous text of PASPA requires states to keep prohibitions against sports gambling on their books." Response Br. of Plaintiffs-Appellees at 16, *Christie I*. The United States agreed that "nothing in [PASPA] requires New Jersey to maintain or enforce its sports wagering prohibitions." Brief of the United States at 28, *Christie I*.

Christie I adopted the Leagues' and the United States' construction of PASPA, concluding that "as between two plausible statutory constructions, we ought to prefer the one that does not raise a series of constitutional problems." 730 F.3d at 233. The Court rejected the State's contention that "PASPA precludes re-

pealing prohibitions on gambling just as it bars affirmatively licensing it," on the ground that "authorizing *by law*" requires affirmative conduct beyond the mere withdrawal of a prohibition. *Id*. at 232. The Court reasoned that the State's construction "rests on a false equivalence between repeal and authorization and reads the term 'by law' out of the statute." *Id*. at 233. *Only* because the Court "d[id] not read PASPA to prohibit New Jersey from repealing its ban on sports wagering" did it hold that PASPA was constitutional. *Id*. at 232.

In *Christie II*, after the State enacted the repeal "in part" that the Leagues and the United States both said PASPA did not prohibit, the Leagues and the United States reversed course and argued that PASPA has exactly the meaning they denied in *Christie I*. In hearing that dispute, *Christie I* should have constrained the *Christie II* panel in two ways: First, as a matter of circuit precedent, the panel should have construed PASPA to prohibit only the affirmative authorization by law of sports wagering, and not repeals that merely decriminalize the activity or decline to prohibit it. Second, the constitutional concerns that compelled the narrowing construction of PASPA applied in *Christie I* should have caused the panel here similarly to recognize that a federal requirement that States maintain their prohibitions on sports wagering would be unconstitutional.

Instead of following the previous panel's narrowing construction of PASPA, the panel here reinterpreted the federal prohibition to reach any state law that

"permit[s]" sports wagering to take place. Op. at 18. That holding is irreconcilable with *Christie I*'s effort to avoid the "series of constitutional problems" presented by a federal requirement upon States to maintain laws on their books. 730 F.3d at 233. The *Christie II* panel treated those constitutional problems as resolved by *Christie I*, but then unraveled the basis of *Christie I*'s constitutional holding by rejecting the narrowing construction of PASPA that was the essential predicate of *Christie I*'s constitutional analysis.

The two interpretations of PASPA are not reconcilable and the Court should review the matter en banc. If Judge Fuentes's construction of PASPA, reflected in *Christie I* and his dissent in *Christie II*, is correct, then the 2014 Act does not violate PASPA. If the panel majority's interpretation here is correct and PASPA requires States to maintain prohibitions on sports wagering, then PASPA is unconstitutional. In either event, the 2014 Act should be upheld.

I. The Panel's Construction Of PASPA Is Irreconcilable With *Christie I.*

In construing the reach of PASPA, *Christie I* placed significant weight on its origins: a Congressional concern about "State-sponsored sports gambling" (730 F.3d at 216 (quoting Sen. Rep. 102-248, at 4, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555)) and a desire to "stop[] the states from lending their imprimatur to gambling on sports" (*id*. at 240). The *Christie I* panel thus concluded that "Congress in PASPA itself saw a difference between general sports gambling activity

and that which occurs under the auspices of state approval and authorization, and chose to reach private activity only to the extent that it is conducted 'pursuant to State law.'" *Id*. at 232-33.

Because it is the State's affirmative *sponsorship* of the wagering, not the mere fact that the activity is permitted, that grants the State's imprimatur, *Christie I* construed PASPA to require some affirmative act of authorization by the State, such as the issuance of a license (730 F.3d at 232) or the perception of gambling which occurs "under the auspices of state approval and authorization" or other "sponsor[ship]" (*id*. at 232-33, 234). If the State merely chooses not to prohibit an activity, that "does not mean that 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*. at 232.

Christie I thus left "much room for the states to make their own policy," allowing a State to permit or prohibit sports wagering, in whole or in part, so long as it does not take the further step of affirmatively sponsoring or approving the activity. 730 F.3d at 233.

Christie II abandoned this constitutionally compelled construction of "authorize by law" and instead interpreted the prohibition as encompassing legislation that "permit[s] a thing to be done in the future." Op. at 17 (quoting Black's Law Dictionary 133 (6th ed. 1990)). The 2014 Act violated this reading of PASPA, the

Court held, because it "constitutes specific permission and empowerment" to engage in sports wagering. *Id*.

By holding that mere permission of a previously banned activity constitutes "authorization by law," the *Christie II* majority equated mere repeals of prohibitions of sports wagering with affirmative acts of State approval and sponsorship (*i.e.*, State licensing) in precisely the way the *Christie I* Court labeled a "false equivalence." 730 F.3d at 233. The panel majority's use of "the same false equivalence [the Court] rejected in *Christie I*" (Dissent at 2) is illustrated by its reliance on the fact that PASPA, upon its enactment in 1992, gave New Jersey a one-year window to legalize and regulate sports wagering in Atlantic City casinos. The panel claimed that the 2014 Act accomplished exactly what New Jersey could have accomplished if it had exercised its rights during PASPA's one-year window (Op. at 18-19), but that is not correct. Had New Jersey availed itself of that one-year opportunity, it could have licensed and promoted sports wagering in Atlantic City casinos in the manner of the ***2012 Law*** invalidated in *Christie I*. Here, with that option foreclosed by *Christie I*, the State made the hard choice to decriminalize the activity at casinos and racetracks, without any form of licensing or other affirmative State involvement. Indeed, the 2014 Act not only does not permit such licensing and regulation; it actually prohibits it. The 2014 Act thus does not accomplish

remotely the same end as if New Jersey had seized the license to "authorize by law" sports wagering briefly offered to it in 1992.

The panel majority also relied on the "selective" nature of the 2014 Act's repeal, saying that the "selectiveness" constituted the "specific permission" it held to be prohibited by PASPA. Op. at 17. But as Judge Fuentes aptly observed, a partial repeal does not constitute state authorization (*see* Dissent 4-5), and (as the majority did not dispute), "[i]f withdrawing prohibitions on 'some' sports wagering is the equivalent to authorization by law, then withdrawing prohibitions on *all* sports wagering must be considered authorization by law." Dissent at 5-6. Although the panel majority said it "would be hard-pressed, given *Christie I*," to find that a full repeal is "an 'authorizing by law' in violation of PASPA" (Op. at 18), it did not even try to explain why a full repeal would not fall within its construction of "authorize by law."

Judge Fuentes rightly stated that *Christie II* delivered "precisely the opposite of what [the Court] held in *Christie I*." Dissent at 6. Here, the same parties litigated the meaning of the same statute in front of two different panels and obtained two different results. That is precisely the type of direct conflict that warrants en banc review.

II. The Panel's Construction Of PASPA Enmeshes The Statute In The Same Constitutional Problems That The *Christie I* Majority Construed PASPA To Avoid.

If *Christie II*'s interpretation of PASPA is controlling, then, as is clear from *Christie I*, PASPA unconstitutionally commandeers the authority of the States by requiring them to prohibit conduct they do not wish to prohibit.

Congress did not, in PASPA, regulate citizens directly. Instead, it directed the *States* with respect to *State* laws respecting sports wagering. But "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions" (*New York v. United States*, 505 U.S. 144, 162 (1992)), and, accordingly, Congress may not "require the States in their sovereign capacity to regulate their own citizens" (*Reno v. Condon*, 528 U.S. 141, 151 (2000)).

Christie I closely examined PASPA to determine whether it fell within the anti-commandeering doctrine developed in *New York*. The Court's holding that it did not was grounded squarely on the Court's construction of PASPA as reaching only affirmative authorization by law of sports wagering, not conduct that withdraws prohibitions on sports wagering. Indeed, *Christie I* explicitly distinguished *Reno* on the basis that "no one contends that PASPA requires the states to enact any laws, and *we have held that it also does not require states to maintain existing laws*." *Christie I*, 730 F.3d at 235 (emphasis added). If, as the panel majority con-

cluded (Op. at 16), PASPA actually *does* require States to maintain existing prohibitions on sports wagering, then *Christie I*'s constitutional analysis cannot be sustained.

Indeed, *Christie I*'s constitutional analysis turned largely on an "affirmative/negative command distinction" that the panel decision here obliterated. 730 F.3d at 232. In *Christie I*, the State argued that directions to the State to govern in a particular way, and prohibitions on governing in a particular way, both are unconstitutional commandeering. The *Christie I* panel disagreed, holding that a line could be maintained between affirmative commands to the States (which are unconstitutional) and prohibitions on particular conduct (which are permissible). But, critically, the *Christie I* panel "agree[d] with Appellants" that the distinction between commands and prohibitions was a tenuous one, observing that "the affirmative act requirement, if not properly applied, may permit Congress to 'accomplish exactly what the commandeering doctrine prohibits' by stopping the states from 'repealing an existing law.'" 730 F.3d at 232 (quotation omitted).

The Court's decision in *Christie I* that PASPA fell on the permissible side of this tenuous distinction was based on its conclusion that PASPA does not include any "requirement that the states must affirmatively keep a ban on sports gambling in their books." 730 F.3d at 233. Because the Court "d[id] not read PASPA to prohibit New Jersey from repealing its ban on sports wagering" (*id.* at 232), and

believed that PASPA left "much room for the states to make their own policy" (*id.* at 233), the Court categorized PASPA as a permissible prohibition on State sponsorship of sports wagering, rather than an affirmative command that States maintain their existing prohibitions on sports wagering. *Id*. at 232.

Christie II dissolved this distinction, holding that PASPA's prohibition on "authorization by law" of sports wagering in fact commands the States to maintain existing bans on sports wagering. The proof of that is the injunction in this case that the panel majority affirmed. That injunction commands New Jersey to continue prohibiting sports wagering at casinos, racetracks, and former racetracks despite the State's decision to cease prohibiting sports wagering at those locations. That injunction leaves New Jersey with *none* of the room to craft policy in the field of sports wagering that *Christie I* promised. Instead, *Christie II* commandeers the State's regulatory authority in service of the federal objective of stopping the spread of sports wagering.

If the distinction between commands and prohibitions on which *Christie I* relied is to be maintained, it must, as the majority in *Christie I* acknowledged, be "properly applied" to ensure that anti-commandeering principles are not "circumvented" simply by "recast[ing] as prohibitions" "affirmative commands" that violate State sovereignty. 730 F.3d at 233. A prohibition on repeals is the same as a

command to keep laws on the books. PASPA as construed by *Christie II* therefore fails the constitutional analysis set forth in *Christie I*.

At the Constitutional Convention, the Framers of our Constitution carefully considered whether Congress "would exercise legislative authority directly upon individuals, without employing the States as intermediaries." *New York*, 505 U.S. at 164. The Framers adopted a system of direct governance, because they concluded that "a sovereignty over sovereigns, a government over governments . . . is subversive of the order and ends of civil polity." *Id*. at 180 (quoting The Federalist No. 20, p. 138 (C. Rossiter ed. 1961)). As construed by the panel majority here, PASPA defies this foundational principle of federalism, and must be invalidated.

CONCLUSION

This Court should grant rehearing en banc and reverse the judgment of the district court.

Dated: September 8, 2015

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

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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

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

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

Appellants in 14-4568

Governor of New Jersey; David L. Rebuck; Frank Zanzuccki,
Appellants in 14-4546

New Jersey Thoroughbred Horsemen's Association, Inc.,
Appellant in 14-4569

On Appeal from the United States District Court
for the District of New Jersey
(District Court No.: 3-14-cv-06450)
District Judge: Honorable Michael A. Shipp

Argued on March 17, 2015

Before: RENDELL, FUENTES and BARRY, Circuit Judges
(Opinion filed: August 25, 2015)

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O P I N I O N

RENDELL, Circuit Judge:

The issue presented in this appeal is whether SB 2460, which the New Jersey Legislature enacted in 2014 (the "2014 Law") to partially repeal certain prohibitions on sports gambling, violates federal law. 2014 N.J. Sess. Law Serv. Ch. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9. The District Court held that the 2014 Law violates the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701-3704. We will affirm. PASPA, by its terms, prohibits states from authorizing by law sports gambling, and the 2014 Law does exactly that.

I. Background

Congress passed PASPA in 1992 to prohibit state-sanctioned sports gambling. PASPA provides:

> It shall be unlawful for—
>
> (1) a governmental entity to *sponsor, operate, advertise, promote, license, or authorize by law* or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . 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 (emphasis added). PASPA defines "governmental entity" to include states and their political subdivisions. 28 U.S.C. § 3701(2). PASPA includes a remedial provision that permits any sports league whose games are or will be the subject of sports gambling to bring an action to enjoin the gambling. 28 U.S.C. § 3703.

Congress included in PASPA exceptions for state-sponsored sports wagering in Nevada and sports lotteries in Oregon and Delaware, and also an exception for New Jersey but only if New Jersey were to enact a sports gambling scheme within one year of PASPA's enactment. 28 U.S.C. § 3704(a). New Jersey did not do so and, thus, the PASPA exception expired. Notably, sports gambling was prohibited in New Jersey for many years by statute and by the New Jersey Constitution. *See, e.g.*, N.J. Const. Art. IV § VII ¶ 2; N.J. Stat. Ann. § 2C:37-2; N.J. Stat. Ann. § 2A:40-1. In 2010, however, the New Jersey Legislature held public hearings on the advisability of allowing sports gambling. These hearings included testimony that sports gambling would generate revenues for New Jersey's struggling casinos and racetracks. In 2011, the Legislature held a referendum asking New Jersey voters whether sports gambling should be permitted, and sixty-four percent voted in favor of amending the New Jersey Constitution to permit sports gambling. The constitutional amendment provided:

> It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college,

> or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place . . . .

N.J. Const. Art. IV, § VII, ¶ 2(D). The amendment thus permitted the New Jersey Legislature to "authorize by law" sports wagering at "casinos or gambling houses in Atlantic City," except that wagering was not permitted on New Jersey college teams or on any collegiate event occurring in New Jersey. An additional section of the amendment permitted the Legislature to "authorize by law" sports wagering at "current or former running and harness horse racetracks," subject to the same restrictions regarding New Jersey college teams and collegiate events occurring in New Jersey. N.J. Const. Art. IV, § VII, ¶ 2(F).

After voters approved the sports-wagering constitutional amendment, the New Jersey Legislature enacted the Sports Wagering Act in 2012 ("2012 Law"), which provided for regulated sports wagering at New Jersey's casinos and racetracks. N.J. Stat. Ann. §§ 5:12A-1 *et seq.* (2012). The 2012 Law established a comprehensive regulatory scheme, requiring licenses for operators and individual employees, extensive documentation, minimum cash reserves, and Division of Gaming Enforcement access to security and surveillance systems.

Five sports leagues[1] sued to enjoin the 2012 Law as violative of PASPA.[2] The New Jersey Parties did not dispute that the 2012 Law violated PASPA, but urged, instead, that PASPA was unconstitutional under the anti-commandeering doctrine. The District Court held that PASPA was constitutional and enjoined implementation of the 2012 Law.

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[1] The sports leagues were the National Collegiate Athletic Association ("NCAA"), National Football League ("NFL"), National Basketball Association, National Hockey League, and the Office of the Commissioner of Baseball, doing business as Major League Baseball (collectively, the "Leagues").

[2] The Leagues named as defendants Christopher J. Christie, the Governor of the State of New Jersey; David L. Rebuck, the Director of the New Jersey Division of Gaming Enforcement ("DGE") and Assistant Attorney General of the State of New Jersey; and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission ("NJRC"). The New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") intervened as a defendant, as did Stephen M. Sweeney, President of the New Jersey Senate, and Sheila Y. Oliver, Speaker of the New Jersey General Assembly ("State Legislators"). We collectively refer to these parties as the "New Jersey Parties." In the present case, the New Jersey Parties are the same, with some exceptions. NJTHA was named as a defendant (i.e., it did not intervene), as was the New Jersey Sports and Exposition Authority; the latter is not participating in this appeal. Additionally, Vincent Prieto, not Sheila Y. Oliver, is now the Speaker of the General Assembly.

The New Jersey Parties appealed, and we affirmed in *National Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) (*Christie I*).

Christie I rejected the New Jersey Parties' argument that PASPA was unconstitutional. In explaining that PASPA does not commandeer the states' legislative processes, we stated: "[n]othing in [PASPA's] words *requires* that the states keep any law in place. All that is prohibited is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law*' of gambling schemes." *Id.* at 232 (alterations in original). The New Jersey Parties had urged that PASPA commandeered the state because it prohibited the repeal of New Jersey's prohibitions on sports gambling; they reasoned that repealing a statute barring an activity would be equivalent to authorizing the activity, and "authorizing" was not allowed by PASPA. We rejected that argument, observing that "PASPA speaks only of 'authorizing *by law*' a sports gambling scheme," and "[w]e [did] not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Id*. We further emphasized that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law. The 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.* In short, we concluded that the New Jersey Parties' argument rested on a "false equivalence between repeal and authorization." *Id.* at 233.

The New Jersey Parties appealed to the United States Supreme Court, which denied certiorari. *Christie I* is now the law of the Circuit: PASPA is constitutional and does not violate the anti-commandeering doctrine.

Undeterred, in 2014, the Legislature passed the 2014 Law, SB 2460, which provided in part:

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

N.J. Stat. Ann. § 5:12A-7. The 2014 Law specifically prohibited wagering on New Jersey college teams' competitions and on any collegiate competition occurring in New Jersey, and it limited sports wagering to "persons 21 years of age or older situated at such location[s]," namely casinos and racetracks. *Id.*

II. Procedural History and Parties' Arguments

The Leagues filed suit to enjoin the New Jersey Parties from giving effect to the 2014 Law. The District Court held that the 2014 Law violates PASPA, granted summary

judgment in favor of the Leagues and issued a permanent injunction against the Governor of New Jersey, the Director of the New Jersey Division of Gaming Enforcement, and the Executive Director of the New Jersey Racing Commission (collectively, the "New Jersey Enjoined Parties").[3] The

[3] In the District Court, the New Jersey Enjoined Parties urged that the Eleventh Amendment gave them immunity such that they could not be sued in an action challenging the 2014 Law. The District Court rejected this argument, as do we, and we note that, while the issue was briefed, the New Jersey Enjoined Parties did not press—or even mention—this issue at oral argument. They contend that, because the 2014 Law is a self-executing repeal that requires no action from them or any other state official, they are immune from suit. This argument fails. The New Jersey Enjoined Parties are subject to suit under the *Ex parte Young* exception to Eleventh Amendment immunity, which "permit[s] the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting *Ex parte Young*, 209 U.S. 123, 160 (1908)). The New Jersey Enjoined Parties are not arguing that other state officials should have been named instead of them; they are arguing that *no* state official can be sued regarding the 2014 Law. We disagree. The Leagues named the state officials who are most closely connected to the 2014 Law, i.e., the Governor, the Director of the DGE, and the Executive Director of the NJRC. The Leagues did not name officials who bear no connection whatsoever to the 2014 Law. *See Young*, 209 U.S. at 156 (explaining that plaintiffs cannot name just any state official, such as a "state superintendent of schools" simply "to test the constitutionality" of a law). *See*

District Court interpreted *Christie I* as holding that PASPA offers two choices to states: maintaining prohibitions on sports gambling or completely repealing them. It reasoned that PASPA preempts the 2014 Law because the 2014 Law is a partial repeal that necessarily results in sports wagering with the State's imprimatur. The New Jersey Parties appealed.

On appeal, the New Jersey Parties argue that the 2014 Law complies with PASPA and is consistent with *Christie I* because the New Jersey Legislature effected a repealer as *Christie I* specifically permitted. The NJTHA argues that the District Court erred in granting injunctive relief to the Leagues because the Leagues have unclean hands from supporting sports gambling in other contexts, and that any injunctive relief should be limited to the Leagues' games and should not include games of entities who are not parties to this action.

The Leagues urge that the 2014 Law violates PASPA because it "authorizes" and "licenses" sports gambling. The United States submitted an amicus brief in support of the Leagues arguing that the 2014 Law impermissibly "licenses" sports wagering by confining the repeal of gambling prohibitions to licensed gambling facilities and thus, in effect, enlarging the terms of existing gaming licenses.

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also Rode v. Dellarciprete, 845 F.2d 1195, 1208 (3d Cir. 1988) (noting that a suit against the governor would be appropriate when challenging a "self-enforcing statute" because "[t]he plaintiff would have been barred from challenging the statute by the eleventh amendment unless it could name the Governor as a defendant").

We conclude that the District Court did not err in striking down the 2014 Law.

III. Analysis[4]

A. The 2014 Law Violates PASPA

As a preliminary matter, we acknowledge New Jersey's salutary purpose in attempting to legalize sports gambling to revive its troubled casino and racetrack industries. The New Jersey Assembly Gaming and Tourism Committee chairman stated, in regards to the 2014 Law, that "[w]e want to give the racetracks a shot in the arm. We want to help Atlantic City. We want to do something for the gaming business in the state of New Jersey, which has been under tremendous duress . . . ." (App. 91.) New Jersey State Senator Ray Lesniak, a sponsor of the law, has likewise stated that "[s]ports betting will be a lifeline to the casinos, putting people to work and generating economic activity in a growth industry." (App. 94.) And New Jersey State Senator Joseph Kyrillos stated that "New Jersey's continued prohibition on sports betting at our casinos and racetracks is contrary to our interest of supporting employers that provide tens of thousands of jobs and add billions to our state's economy" and that "[s]ports betting will help set New Jersey's wagering facilities apart from the competition and strengthen

[4] "We review a district court's grant of summary judgment *de novo* . . . ." *Viera v. Life Ins. Co. of N. Am.*, 642 F.3d 407, 413 (3d Cir. 2011). "We review a district court's grant of a permanent injunction for abuse of discretion." *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 162 (3d Cir. 2011).

Monmouth Park and our struggling casino industry." (App. 138.) PASPA has clearly stymied New Jersey's attempts to revive its casinos and racetracks and provide jobs for its workforce.

Moreover, PASPA is not without its critics, even aside from its economic impact. It has been criticized for prohibiting an activity, i.e., sports gambling, that its critics view as neither immoral nor dangerous. It has also been criticized for encouraging the spread of illegal sports gambling and for making it easier to fix games, since it precludes the transparency that accompanies legal activities.[5] Simply put, "[w]e are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games' integrity and whether states should be permitted to license and profit from the activity—engender strong views." *Christie I*, 730 F.3d at 215. While PASPA's provisions and its reach are controversial and, some might say, unwise, "we are not asked to judge the wisdom of PASPA" and "[i]t is not our place to usurp Congress' role simply because PASPA may have become an unpopular law." *Id.* at 215, 241. We echo *Christie I* in noting that "New Jersey and any other state that may wish to legalize gambling

[5] It has also been criticized as unconstitutional, but we held otherwise in *Christie I* and we cannot and will not revisit that determination here. *See Christie I*, 730 F.3d at 240 ("[N]othing in PASPA violates the U.S. Constitution. The law neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment or anywhere else in our Constitutional structure.").

on sports . . . are not left without redress. Just as PASPA once gave New Jersey preferential treatment in the context of gambling on sports, Congress may again choose to do so or . . . may choose to undo PASPA altogether." *Id.* at 240-41. Unless or until that happens, however, we are duty-bound to interpret the text of the law as Congress wrote it.

We now turn to the primary question before us: whether the 2014 Law violates PASPA. We hold that it does. Under PASPA, it shall be unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports gambling. 28 U.S.C. § 3702(1). We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.

First, the 2014 Law authorizes casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities. Without the 2014 Law, the sports gambling prohibitions would apply to casinos and racetracks. Appellants urge that the 2014 Law does not provide authority for sports gambling because we previously held that "[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" and that "[w]e do not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Christie I*, 730 F.3d at 232. But this is not a situation where there are *no* laws governing sports gambling in New Jersey. Absent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks. Thus, the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited.

Second, the 2014 Law authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling. Under the 2014 Law, New Jersey's sports gambling prohibitions are specifically removed from casinos, gambling houses, and horse racetracks as long as the bettors are people age 21 or over, and as long as there are no bets on either New Jersey college teams or collegiate competitions occurring in New Jersey. The word "authorize" means, inter alia, "[t]o empower; to give a right or authority to act," or "[t]o permit a thing to be done in the future." Black's Law Dictionary 133 (6th ed. 1990).[6] The 2014 Law allows casinos and racetracks and their patrons to engage, under enumerated circumstances, in conduct that other businesses and their patrons cannot do. That selectiveness constitutes specific permission and empowerment.

Appellants place much stock in our statement in *Christie I* that their argument there rested on a "false equivalence between repeal and authorization." 730 F.3d at 233. They claim that the 2014 Law does not authorize sports gambling because it is only a "repeal" and, in *Christie I*, we stated that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law." *Id.* at 232. In other words, they argue that, because the 2014 Law is only a repeal removing prohibitions against sports gambling, it is not an "affirmative authorization" under *Christie I*. We agree that, had the 2014 Law repealed all

[6] We cite the version of Black's Law Dictionary that was in effect in 1992, the year PASPA was passed.

prohibitions on sports gambling, we would be hard-pressed, given *Christie I*, to find an "authorizing by law" in violation of PASPA. But that is not what occurred here. The presence of the word "repeal" does not prevent us from examining what the provision actually does, and the Legislature's use of the term does not change the fact that the 2014 Law selectively grants permission to certain entities to engage in sports gambling. New Jersey's sports gambling prohibitions remain and no one may engage in such conduct save those listed by the 2014 Law. While artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is not a repeal; it is an authorization.

Third, the exception in PASPA for New Jersey, which New Jersey did not take advantage of before the one-year time limit expired, is remarkably similar to the 2014 Law. The exception states that PASPA does not apply to "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos . . . , but only to the extent that . . . any commercial casino gaming scheme was in operation . . . throughout the 10-year period" before PASPA was enacted. 28 U.S.C. § 3704(a)(3)(B). The exception would have permitted sports gambling at New Jersey's casinos, which is just what the 2014 Law does. We can easily infer that, by explicitly excepting a scheme of sports gambling in New Jersey's casinos from PASPA's prohibitions, Congress intended that such a scheme would violate PASPA. 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 New Jersey exception. In other words, if sports gambling in New Jersey's casinos does not violate PASPA, then PASPA's

one-year exception for New Jersey would have been superfluous. We will not read statutory provisions to be surplusage. *See Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). In order to avoid rendering the New Jersey exception surplusage, we must read the 2014 Law as authorizing a scheme that clearly violates PASPA.[7]

As support for their argument that the 2014 Law does not violate PASPA, Appellants cite the 2014 Law's construction provision, which provides that "[t]he provisions of this act . . . are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. N.J. Stat. Ann. § 5:12A-8. This conveniently mirrors PASPA's language providing that states may not "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. 28 U.S.C. § 3702(1).

The construction provision does not save the 2014 Law. States may not use clever drafting or mandatory construction provisions to escape the supremacy of federal law. *Cf. Haywood v. Drown*, 556 U.S. 729, 742 (2009) ("[T]he Supremacy Clause cannot be evaded by formalism.");

[7] Granted, the 2014 Law applies to horse racetracks as well as casinos, while the PASPA exception for New Jersey refers only to casinos, but that does not change the significance of the New Jersey exception because it refers to gambling in places that already allow gambling, and the racetracks fall within that rubric.

Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 382-83 (1990) ("[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of" a particular word). In the same vein, the New Jersey Legislature cannot use a targeted construction provision to limit the reach of PASPA or to dictate to a court a construction that would limit that reach. The 2014 Law violates PASPA, and the construction provision cannot alter that fact.

Appellants also draw a comparison between the 2014 Law and the 2012 Law, which involved a broad regulatory scheme, as evidence that the 2014 Law does not violate PASPA. It is true that the 2014 Law does not set forth a comprehensive scheme or provide for a state regulatory role, as the 2012 Law did. However, PASPA does not limit its reach to active state involvement or regulation of sports gambling. It prohibits a range of state activity, the least intrusive of which is "authorization" by law of sports gambling.

We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.[8]

[8] Because we conclude that the 2014 Law authorizes by law sports gambling, we need not address the argument made by Appellees and Amicus that the 2014 Law also licenses sports gambling by permitting only those entities that already have gambling licenses or recently had such licenses to conduct sports gambling operations. We also do not address the argument of the State Legislators and the NJTHA that, to the extent that any aspect of the 2014 Law violates PASPA, we should apply the 2014 Law's severability clause. The State Legislators and the NJTHA offer no proposals regarding what

B. Injunctive Relief

The NJTHA argues that the injunction should apply only to the parties who brought this suit and that gambling on the athletic contests of other entities, who are not parties to this suit, should be permitted. But PASPA does not limit its prohibition to sports gambling involving only entities who actually bring suit. PASPA provides that "[a] civil action to enjoin a violation of section 3702 . . . may be commenced . . . by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation." 28 U.S.C. § 3703. The NJTHA conflates the Leagues' right to bring suit with the remedy they may obtain. PASPA provides that the Leagues may "enjoin a violation of section 3702," without any limiting language. The 2014 Law violates PASPA in all contexts, not simply as applied to the Leagues, and, therefore, the District Court properly enjoined its application in full.

Finally, we need not dwell on the NJTHA's argument that the Leagues should not be entitled to equitable relief because they have unclean hands. The NJTHA contends that the Leagues are essentially hypocrites because they encourage and profit from sports betting, noting that the NFL has been scheduling games in London where sports gambling is legal, that the NCAA holds events in Las Vegas where sports gambling is legal, and that the Leagues sanction and encourage fantasy sports betting. These allegations fail to rise to the level required for application of the unclean hands doctrine. "The equitable doctrine of unclean hands applies

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provisions should be severed from the 2014 Law, and we do not see how we could sever it.

when a party seeking relief has committed an unconscionable act immediately related to the equity the party seeks in respect to the litigation." *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 174 (3d Cir. 2001). It is not "unconscionable" for the Leagues to support fantasy sports and hold events in Las Vegas or London, nor is doing so "immediately related" to the 2014 Law. We cannot conclude that the Leagues acted unconscionably, i.e., amorally, abusively, or with extreme unfairness, in relation to the 2014 Law.

IV. Conclusion

The 2014 Law violates PASPA because it authorizes by law sports gambling. We will affirm.

FUENTES, *Circuit Judge*, dissenting.

In response to *Christie I*, where we held that New Jersey's 2012 Sports Wagering Law ("2012 Law") violated PASPA, the New Jersey Legislature passed the 2014 Law. In addition to repealing the 2012 Law in full, the 2014 Law also repealed all prohibitions on sports wagering and any rules authorizing the State to, among other things, license or authorize a person to engage in sports wagering, with respect to casinos and gambling houses in Atlantic City and horse racetracks in New Jersey. The repealer also maintained prohibitions for persons under 21 and for wagering on New Jersey collegiate teams or any collegiate competition occurring in New Jersey. Likewise, the 2014 Law stripped New Jersey of *any* involvement in sports wagering, regulatory or otherwise. In essence, the 2014 Law renders previous prohibitions on sports gambling non-existent.

The majority, however, takes issue with what it terms the "selective" nature of the partial repeal. First, that the repeal applies to specific locations. That is, under the 2014 Law, wagering may only take place at casinos, gambling houses, and horse racetracks. Next, the restriction against betting by persons under the age of 21 would remain, and finally, restrictions against betting on New Jersey collegiate teams or any collegiate competition in New Jersey would remain. These restrictions, the majority concludes, amount to "authorizing" a sports-wagering scheme and, therefore, the 2014 Law must also violate PASPA. I disagree. As I see it, the issue is whether a partial repeal amounts to authorization.

Because this logic rests on the same false equivalence[1] we rejected in *Christie I*, I respectfully dissent.

The majority, however, maintains that the 2014 Law "authorizes" casinos and racetracks to operate sports gambling while other laws prohibit sports gambling by all other entities.[2] According to the majority, "this is not a situation where there are *no* laws governing sports gambling in New Jersey" and "[a]bsent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks."[3] Yet, the majority is mistaken as to the impact of a partial repeal. Repeal is defined as to "rescind" or "an abrogation of an existing law by legislative act."[4] When a statute is repealed, "the repealed statute, in

[1] A false equivalence is a logical fallacy which describes a situation where there is a logical and apparent equivalence, but when in fact there is none. This fallacy is categorized as a fallacy of inconsistency. Harry Phillips & Patricia Bostian, *The Purposeful Argument: A Practical Guide, Brief Edition* 129 (2014). In *Christie I*, we held that there was a false equivalence between repeal and authorization. 730 F.3d at 233.

[2] For brevity, I refer to the repeal of prohibitions as applying to casinos, gambling houses, and horse racetracks, with the understanding that the repeal applies to casinos and gambling houses in Atlantic City and horse racetracks in New Jersey for those over 21 not betting on New Jersey collegiate teams or any collegiate competition occurring in New Jersey.

[3] Maj. Op. 16-17.

[4] Black's Law Dictionary 1325 (8th ed. 2007).

regard to its operative effect, is considered as if it had never existed."[5] A repealed statute is treated as if it never existed; a partially repealed statute is treated as if only the remaining part exists.[6]

The 2014 Law, then, renders the previous prohibitions on sports gambling non-existent. After the repeal, it is as if New Jersey *never* prohibited sports gambling in casinos, gambling houses, and horse racetracks. Therefore, with respect to those areas, there are no laws governing sports wagering and the right to engage in such conduct does not

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[5] 73 Am. Jur. 2d Statutes § 264.

[6] *See, e.g.*, *Ex Parte McCardle*, 74 U.S. 506, 514 (1868) ("[W]hen an act of the legislature is repealed, it must be considered . . . as if it never existed." (internal quotation marks omitted)); *Anderson v. USAir, Inc.*, 818 F.2d 49, 55 (D.C. Cir. 1987) ("Common sense dictates that repeal means a deletion. This court would engage in pure speculation were it to hold otherwise."); *In re Black*, 225 B.R. 610, 620 (Bankr. M.D. La. 1998) ("Can a statute use a repealed statute? Is a repealed statute something or is it nothing? We think the answers are 'no' and 'nothing.'"); *Kemp by Wright v. State*, 687 A.2d 715, 723 (N.J. 1997) ("In this State it is the general rule that where a statute is repealed and there is no saving[s] clause or a general statute limiting the effect of the repeal, the repealed statute . . . is considered as though it had never existed, except as to matters and transactions passed and closed." (quoting *Parsippany Hills Assocs. v. Rent Leveling Bd. of Parsippany-Troy Hills Twp.*, 476 A.2d 271, 275 (N.J. Super. 1984)).

come from the state. Rather, the right to do that which is not prohibited stems from the inherent rights of the people.[7] The majority, however, states that "[a]bsent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks," and that, as such, "the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited."[8] We have refuted this position before. In *Christie I*, we held that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law."[9] Such an argument, we said, "rests on a false equivalence between repeal and authorization and reads the term 'by law' out of the statute."[10] We identified several problems in making this false equivalence—the most troublesome being that it "reads the term 'by law' out of the statute."[11] The majority's position does just that. In holding that a partial repeal of prohibitions is state authorization, the majority must infer authorization. PASPA, however, contemplates more. In *Christie I*, we pointed to the fact that New Jersey's 2012 amendment to its constitution, which gave the Legislature power to "authorize by law" sports wagering was insufficient to "authorize [it] by law."[12] We explained, "that the Legislature needed to enact the [2012 Law] itself belies any

[7] *Christie I*, 730 F.3d at 232.

[8] Maj. Op. 16-17.

[9] *Christie I*, 730 F.3d at 232.

[10] *Id.* at 233.

[11] *Id.*

[12] *Id.* at 232.

contention that the mere repeal of New Jersey's ban on sports gambling was sufficient to 'authorize [it] by law' . . . . [T]he . . . Legislature itself saw a meaningful distinction between repealing the ban on sports wagering and authorizing it by law, undermining any contention that the amendment alone was sufficient to affirmatively authorize sports wagering."[13] This is no less true of a partial repeal than it would be of a total repeal—which the majority concedes would not violate PASPA. Thus, to reach the conclusion that the 2014 Law, a partial repeal of prohibitions, authorizes sports wagering, the majority necessarily relies on this false equivalence. It concedes as much when stating "the 2014 Law" (the repeal) provides "the authorization" for sports wagering. Of course, this is the *exact* false equivalence we identified, and dismissed as a logical fallacy, in *Christie I*.[14]

The majority does not believe it makes this false equivalence. To support its position, the majority relies on the "selective" nature of the 2014 Law contending that "the Legislature's use of the term ['repeal'] does not change the fact that the 2014 Law selectively grants permission to certain entities to engage in sports gambling."[15] First, it does not. There is no explicit grant of permission in the 2014 Law for *any* entity to engage in sports wagering. Second, not only does the majority fail to explain why such a partial repeal is equivalent to granting permission (by law) for these locations, but the very logic of such a position fails. If withdrawing prohibitions on "some" sports wagering is the equivalent to

[13] *Id.*

[14] *Id.* at 233.

[15] Maj. Op. 18.

authorization by law, then withdrawing prohibitions on *all* sports wagering must be considered authorization by law.[16] Under this logic, New Jersey is left with no choice at all—it must uphold all prohibitions on sports wagering in perpetuity or until PASPA is no more. This is precisely the opposite of what we held in *Christie I*—"[n]othing in these words *requires* that the states keep any law in place"[17]—and why we found PASPA did not violate the anti-commandeering principle.

The majority, along with the United States, conceded that a complete repeal does not violate PASPA. Indeed, in its brief in opposition to New Jersey's petition for certiorari, the United States went as far as to concede that New Jersey could repeal its prohibitions in whole or in part.[18] Simply put, there is nothing special about a partial repeal and it, too, does not violate PASPA. The 2014 Law is a self-executing deregulatory measure that repeals existing prohibitions and regulations for sports wagering and requires the State to abdicate *any* control or involvement in sports wagering. I do

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[16] 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.

[17] 730 F.3d at 232.

[18] Br. for the United States in Opp'n at 11, *Christie v. Nat'l Collegiate Athletic Ass'n*, Nos. 13-967, 13-979, and 13980 (U.S. May 14, 2014).

not see, then, how the majority concludes that the 2014 Law authorizes sports wagering, much less in violation of PASPA.

The majority equally falters when it analogizes the 2014 Law to the exception Congress originally offered to New Jersey in 1992. The exception stated that PASPA did not apply to "a betting, gambling, or wagering scheme . . . conducted exclusively in casinos[,] . . . but only to the extent that . . . any commercial casino gaming scheme was in operation . . . throughout the 10-year period" before PASPA was enacted.[19] Setting aside the most obvious distinction between the 2014 Law and the 1992 exception, that it contemplated a *scheme* that the 2014 Law does not authorize,[20] the majority misses the mark with this comparison when it states: "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 New

[19] 28 U.S.C. § 3704(a)(3)(B).

[20] For example, "[Division of Gaming Enforcement ("DGE")] now considers sports wagering to be 'non-gambling activity' . . . that is beyond DGE's control and outside of DGE's regulatory authority." App. 416. At oral argument, Appellants conceded they would have no authority or jurisdiction over sports wagering. *See, e.g.*, Tr. 14:12-15 ("Q: Sports betting is going to take place in the casino with no oversight whatsoever; A: That's right."); Tr. 21:15-20 ("All of the state and federal laws that deal with consumer protection, criminal penalties and the like remain in full force and effect at the sports betting venue. The only thing that doesn't get regulated is the sports betting itself.").

Jersey exception."[21] Congress, however, did not perceive, or intend, for private sports wagering in casinos to violate PASPA. Instead, Congress prohibited sports wagering pursuant to state law. That the 2014 Law might bring about an increase in the amount of private, legal sports wagering in New Jersey is of no moment and the majority's reliance on such a possibility is misplaced. The majority is also wrong in an even more fundamental way: the exception Congress offered to New Jersey was exactly that, an exception to the proscriptions of PASPA. That is to say, with this exception, New Jersey could have "sponsor[ed], operate[d], advertise[d], promote[d], license[d], or authorize[d] by law or compact" sports wagering. Under the 2014 Law, of course, New Jersey cannot and does not aim to do any of these things.

The majority fails to illustrate how the 2014 Law results in sports wagering *pursuant to state law* when there is no law in place as to several locations, no scheme created, and no state involvement. A careful comparison to the 2012 Law is instructive. The 2012 Law lifted New Jersey's ban on sports wagering and provided for the licensing of sports-wagering pools at casinos and racetracks in the State. Indeed, New Jersey set up a comprehensive regime for the licensing and close supervision and regulation of sports-wagering pools. For instance, the 2012 Law required any entity that wished to operate a "sports pool lounge" to acquire a "sports pool license." To do so, a prospective operator was required to pay a $50,000 application fee, secure DGE approval of all internal controls, and ensure that any of its employees who were to be directly involved in sports wagering obtained individual licenses from DGE and the Casino Control

[21] Maj. Op. 19.

Commission. In addition, the regime required entities to, among other things, submit extensive documentation to DGE, to adopt new "house" rules subject to DGE approval, and to conform to DGE standards. This violated PASPA in the most basic way: New Jersey developed an intricate scheme to both authorize (*by law*) and license sports gambling. The 2014 Law repealed this entire scheme.

Without more, the majority is simply left calling a tail a leg—which, as the adage goes, does not make it so. Because I do not see how a partial repeal of prohibitions is tantamount to "authorizing by law" a sports-wagering scheme in violation of PASPA, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

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

_____

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

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

STEPHEN M. SWEENEY, President of the New Jersey Senate; VINCENT PRIETO, Speaker of the New Jersey General Assembly (Intervenors in District Court),
Appellants in 14-4568

Governor of New Jersey; David L. Rebuck; Frank Zanzucki,
Appellants in 14-4546

New Jersey Thoroughbred Horsemen's Association, Inc.,
Appellant in 14-4569

_____

On Appeal from the United States District Court
for the District of New Jersey
(District Court No.: 3-14-cv-06450)
District Judge: Honorable Michael A. Shipp

_____

Argued on March 17, 2015

Before: RENDELL, FUENTES and BARRY, Circuit Judges

JUDGMENT

This case came to be heard on the record from the United States District Court for the District of New Jersey and was argued on March 17, 2015.

On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the order of the District Court dated November 21, 2014 is hereby **affirmed**.

All of the above in accordance with the Opinion of this Court.

ATTEST:

s/Marcia M. Waldron
Clerk

Dated: August 25, 2015

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on this 8th day of September, 2015, the foregoing Petition 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. Service was accomplished on the following by the CM/ECF system:

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Dated: September 8, 2015

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CERTIFICATE OF BAR MEMBERSHIP, DIGITAL SUBMISSION AND ANTI-VIRUS SCAN

I hereby certify that the signatories to this petition, Jeffrey S. Jacobson and Theodore B. Olson, are members of the bar of this Court and/or have filed an application for admission.

I further certify that no privacy redactions were necessary for this filing. I have scanned the Portable Document Format version of the attached document for viruses using Microsoft System Center Endpoint Protection (version 1.205.1807.0, updated September 7, 2015), and according to that program, the document was free of viruses.

Dated: September 8, 2015

s/ Jeffrey S. Jacobson
Jeffrey S. Jacobson