

## SPORTS BETTING HAS AN EQUAL SOVEREIGNTY PROBLEM

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### INTRODUCTION

Professor Thomas B. Colby's *In Defense of the Equal Sovereignty Principle* comprehensively examines the underpinnings of the Supreme Court's landmark *Shelby County v. Holder*<sup>1</sup> decision, which found one portion of the Voting Rights Act (VRA) to impermissibly differentiate between states in violation of the equal sovereignty doctrine.<sup>2</sup> Professor Colby also described the potential applicability of *Shelby County* to other federal statutes that treat states differently.<sup>3</sup> One of the impacted laws discussed by Professor Colby—and Justice Ruth Bader Ginsburg in her *Shelby County* dissent—is the Professional and Amateur Sports Protection Act (PASPA).<sup>4</sup> PASPA is the subject of litigation currently pending at the Supreme Court.<sup>5</sup> PASPA acts as

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1. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013). *Shelby County* extended the equal sovereignty doctrine as set forth four years earlier in *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009).

2. See generally Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087 (2016).

3. *Id.* at 1154–59.

4. Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–04 (2012).

5. See *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 832 F.3d 389 (3d Cir. 2016) (en banc) [hereinafter *Christie II*]; see also *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014) [hereinafter *Christie I*]. New Jersey's certiorari petition in *Christie II* was pending in the Supreme Court as of June 22, 2017. See Petition

a ban on state-sponsored sports gambling nationwide,<sup>6</sup> but it exempts Nevada and at least eight other states from its scope via a perpetual grandfathering clause.<sup>7</sup> PASPA's state-level differentiation is effectuated despite the fact that its text does not specify, by name, the states exempted from its blanket sports betting ban.<sup>8</sup>

In light of *Shelby County*, Professor Colby posited that “statutes like PASPA are constitutionally questionable.”<sup>9</sup> We agree.

We respond to Professor Colby and explain that the argument against PASPA on equal sovereignty grounds is even stronger than he described. With citations to PASPA's legislative history and a discussion about the permissibility of permanent grandfather clauses under *Shelby County*, we extend Professor Colby's analysis to the ongoing sports-betting dispute between New Jersey Governor Chris Christie and five sports leagues—the National Collegiate Athletic Association (NCAA), National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL), and the Office of the Commissioner of Major League Baseball (MLB). The five sports leagues (“Plaintiff Sports Leagues”) have twice sued Governor Christie under PASPA to prevent New Jersey from legalizing Nevada-style sports gambling.<sup>10</sup> The two cases are commonly

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for Writ of Certiorari, *Christie v. Nat'l Collegiate Athletic Association*, Nos. 16-476 & 16-477 (U.S. Oct. 7, 2016).

6. § 3702.

7. § 3704.

8. See §§ 3701–04.

9. Colby, *supra* note 2, at 1091.

10. Prior to PASPA's enactment in 1992, individual members of the Plaintiff Sports Leagues filed lawsuits against two other states in connection with sports gambling. First, the NFL and its twenty-eight member teams sued the Governor of Delaware in 1976 to stop the state from offering a football-themed lottery. *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1379 (D. Del. 1977) (“[T]here is the overwhelming evidence already reviewed that, in actual experience, widespread gambling, both illegal and state-authorized, has not hurt the NFL.”). Second, the NBA sued Oregon in 1989 over the state's “Sports Action” contest operated by the Oregon Lottery. *Complaint, Nat'l Basketball Ass'n v. Or. State Lottery*, No. 89-6470 (D. Or. Dec. 21, 1989). See *NBA Files Suit Against Oregon Lottery*, L.A. TIMES (Dec. 22, 1989), [http://articles.latimes.com/1989-12-22/sports/sp-792\\_1\\_oregon-lottery](http://articles.latimes.com/1989-12-22/sports/sp-792_1_oregon-lottery) [<https://perma.cc/Y3S9-W7HQ>]. Nevada-style sports wagering refers to the broadest legal offering of sports wagering contests in the United States including odds, totals, money line, and point spread betting, as well as betting on individual or combinations of games in the form of parlay bets. See *generally Sports Betting*, VEGAS.COM, <https://www.vegas.com/gaming/gaming-tips/sports-betting/> [<https://perma.cc/4DD-B-URMY>].

referred to as *Christie I* and *Christie II*. The Third Circuit Court of Appeals has ruled against New Jersey in both.<sup>11</sup>

In her *Shelby County* dissent, Justice Ginsburg asked whether PASPA would “remain safe given the Court’s expansion of equal sovereignty’s sway.”<sup>12</sup> We answer in the negative. PASPA’s discrimination between the states under the Commerce Clause fails both the heightened scrutiny standard of geography-based differential treatment under *Shelby County* and the lower standard found in the rational basis test typically used in Commerce Clause cases. Congress’s justification in treating states differently under PASPA was—and is—irrationally related to exemptions granted to Nevada, Delaware, Oregon, Montana, and no fewer than five other states.<sup>13</sup> As such, we are in accord with Professor Colby’s conclusion that “it is highly questionable whether such a justification can be found” for PASPA’s unequal treatment among the states.<sup>14</sup>

Beyond Professor Colby’s PASPA-specific discussion and Justice Ginsburg’s PASPA-related inquiry, our probe into the dubious constitutionality of PASPA is also motivated by the Supreme Court’s PASPA observation 18 years ago in *Greater New Orleans Broadcasting Association v. United States*.<sup>15</sup> Justice Stevens, in a unanimous decision, wrote that PASPA’s exemptions derived from “obscured Congressional purposes.”<sup>16</sup> Even Professor Leah M. Litman, whose academic analysis runs counter to Professor Colby’s work in several respects, acknowledged that “the Third Circuit had a somewhat puzzling explanation for why it rejected an equal sovereignty challenge” in *Christie I*.<sup>17</sup>

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11. New Jersey’s petition for a writ of certiorari in *Christie I* was denied in 2014. See *supra* note 5. New Jersey’s *Christie II* petition for a writ of certiorari was pending as of June 22, 2017. See *supra* note 5.

12. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2649 (Ginsburg, J., dissenting). A day after *Shelby County* was decided, one of the Third Circuit judges noted the relevance of Justice Ginsburg’s dissent in the course of questioning counsel for the DOJ during oral argument in *Christie I*: “On the other hand Justice Ginsburg in her dissent, the first statute she mentioned as perhaps being implicated by this [equal sovereignty] doctrine is PASPA.” Transcript of Oral Argument at 61, *Christie I*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714 & 13-1715).

13. See *infra* Part I.B.

14. Colby, *supra* note 2, at 1156.

15. *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999).

16. *Id.* at 179.

17. Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1210 n.21 (2016). Litman argues that the equal sovereignty doctrine was judicially invented “to justify independent determinations about federalism.” *Id.* at 1207.

We agree with Professor Colby's broad discussion of the equal sovereignty doctrine vis-à-vis PASPA but also contend that he did not go far enough. We likewise agree with the pointed PASPA observations of Justice Ginsburg, Justice Stevens, and Professor Litman. Our response here stretches the findings of each, pinpointing how the Supreme Court should address the issue if certiorari is granted in *Christie II* and PASPA's constitutionality is evaluated under an equal sovereignty lens. Part I details PASPA, and Part II summarizes the long-running New Jersey sports betting litigation. Part III outlines the equal sovereignty doctrine arguments furthered by the litigants. Part IV applies the principles of *Shelby County* to PASPA, concluding that one portion of PASPA—the exemption of certain states through a permanent grandfathering clause—runs afoul of the fundamental principle of equal sovereignty.

## I. OVERVIEW OF PASPA

PASPA got off to a rough start before it was even enacted. In 1991, the Department of Justice (DOJ) “oppose[d] enactment of [PASPA] as drafted.”<sup>18</sup> During a 1991 PASPA Congressional hearing, Representative Mazzoli said: “My reaction is that we’re trying to close the barn door here after it’s already been opened and a great many of the horses have escaped. I just don’t know whether we can corral those horses and put them back in the barn.”<sup>19</sup> Since then, PASPA has been described as “an unusual statute,”<sup>20</sup> an “oddity,”<sup>21</sup> “Orwellian,”<sup>22</sup>

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18. Letter from W. Lee Rawls, Assistant Attorney Gen., Dep’t of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Comm. on the Judiciary, U.S. Senate 2 (Sept. 24, 1991) (on file with the *Duke Law Journal*) (“The [DOJ] is concerned that, to the extent that [PASPA] can be read as anything more than a clarification of current law, it raises federalism issues. It is particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues.”).

19. See *Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Econ. & Commercial Law of the H. Comm. on the Judiciary*, 102d Cong. 92 (1991) (statement of Rep. Mazzoli).

20. Brief for Appellants Christopher J. Christie et al. at 9, *Christie I*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714 & 13-1715).

21. John T. Holden, Anastasios Kaburakis & Ryan M. Rodenberg, *Sports Gambling Regulation and Your Grandfather (Clause)*, 26 STAN. L. & POL’Y REV. ONLINE 1, 8 (2014).

22. Transcript of Oral Argument at 9–10, Nat’l Collegiate Athletic Ass’n v. Christie, 799 F.3d 259 (3d Cir. 2015) (Nos. 14-4546, 14-4568 & 14-4569). See *infra* note 93.

“peculiar and vague,”<sup>23</sup> and “facially unprecedented.”<sup>24</sup> PASPA’s legislative history has fared no better. Two years before the commencement of *Christie I*, the Plaintiff Sports Leagues described the legislative history pertaining to PASPA’s exemptions as “undeniably muddled” and “internally inconsistent,” in PASPA-driven litigation against the Governor of Delaware.<sup>25</sup> Tellingly, the DOJ and one of the *Christie I* Third Circuit judges do not even agree on whether PASPA regulates sports betting. In 2009, the DOJ posited that “Congress enacted PASPA . . . intending to further regulate interstate sports gambling.”<sup>26</sup> In contrast, the dissenting judge in *Christie I* wrote: “PASPA provides no federal regulatory standards or requirements of its own.”<sup>27</sup> Against this backdrop, we outline PASPA’s text and the legislative history behind its exemptions for certain states.

#### A. PASPA’s Text

PASPA § 3702 makes it unlawful for state governments to “sponsor, operate, advertise, promote, license, or authorize by law . . . [a] betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate . . . or on one or more performances of such athletes in such games.”<sup>28</sup> PASPA’s prohibition also attaches to sports betting offered by a private entity acting pursuant to “law or compact of a government entity.”<sup>29</sup> PASPA provides civil injunctive relief only, with both the DOJ and “a professional sports organization or amateur sports

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23. MASS. GAMING COMM’N, WHITE PAPER ON DAILY FANTASY SPORTS, at iv (Jan. 11, 2016), <http://massgaming.com/wp-content/uploads/MGC-White-Paper-on-Daily-Fantasy-Sports-1-11-16.pdf> [<https://perma.cc/8ZHD-GBYY>].

24. I. Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 687 (2012).

25. Brief in Opposition at 17, *Markell v. Office of the Comm’r of Baseball*, 559 U.S. 1106 (2010) (No. 09-914), *cert. denied*.

26. Federal Defendants’ Opposition to Governor Jon S. Corzine’s Motion to Intervene at 1, *Interactive Media Entm’t & Gaming Ass’n v. Holder*, No. 09-1301, 2011 WL 802106 (D.N.J. Mar. 7, 2011) [hereinafter *iMEGA*].

27. *Christie I*, 730 F.3d 208, 246 n.4 (3d Cir. 2013) (Vanaskie, J., dissenting) (“PASPA stands alone in telling the states that they may not regulate an aspect of interstate commerce that Congress believes should be prohibited.”). Judge Vanaskie continued: “[T]here is no federal regulatory or deregulatory scheme on the matter of sports wagering. Instead, there is the congressional directive that states not allow it.” *Id.* at 245 n.3 (Vanaskie, J., dissenting).

28. Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2012). PASPA does not specifically define “sports gambling” in § 3701’s definition section. *See id.* § 3701.

29. § 3702(2).

organization whose competitive game is alleged to be the basis of such violation” statutorily deputized to initiate a lawsuit.<sup>30</sup>

In § 3704, there is a multi-pronged exception to PASPA’s general ban on state-sponsored sports betting.<sup>31</sup> First, parimutuel animal racing and jai-alai games are completely exempted.<sup>32</sup> Second, New Jersey was provided a one year period to legalize sports gambling and, in turn, escape PASPA’s prohibition.<sup>33</sup> Finally, PASPA also includes a grandfathering scheme that differentiates states on two levels: (i) between exempt and non-exempt states, and (ii) among the sub-classes of exempted states, with some exempt states more constrained than other exempt states.<sup>34</sup> PASPA § 3704(a)(1) exempts any state-run sports lottery “to the extent that the scheme was conducted . . . at any time during the period beginning January 1, 1976, and ending August 31, 1990.”<sup>35</sup> PASPA § 3704(a)(2) carves out any sports gambling scheme that was “authorized by statute as in effect on October 2, 1991 [and] actually was conducted . . . at any time during the period

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30. § 3703. In *Christie II*, the Third Circuit sitting en banc misstated this portion of PASPA. The majority wrote: “[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.” 832 F.3d 389, 392 (3d Cir. 2016) (en banc) (emphasis added). The future tense phrase “or will be” is *not* part of § 3703’s text, which only includes the present tense “is.” § 3703.

31. § 3704(a).

32. § 3704(a)(4).

33. § 3704(a)(3). The carve-out would have attached to Atlantic City, a municipality in New Jersey. New Jersey did not pass such a law by the cut-off date. See Joseph F. Sullivan, *How Politics Nipped a Sports Betting Bill*, N.Y. TIMES (Jan. 2, 1994), <http://www.nytimes.com/1994/01/02/nyregion/how-politics-nipped-a-sports-betting-bill.html> [<https://perma.cc/PJ5S-9UKB>]. Relatedly, the NFL, NBA, NHL, and MLB formally intervened in a post-PASPA legal case where the court found that the New Jersey Casino Control Commission “ha[d] no constitutional or statutory authority to authorize sports betting.” *In re* Petition of Casino Licensees, 268 N.J. Super. 469, 470 (1993). The fact that Congress opted to include a potential carve-out for a municipality—as opposed to an entire state—is noteworthy to the extent that other localities could claim to be exempt “sanctuary cities” under PASPA. See, e.g., NEB. REV. STAT. §§ 9-601–653 (2017) (permitting “any county, city, or village to conduct a lottery for community betterment purposes”). Beyond issues of state and local sovereignty, there is also the related issue of possible exemptions under PASPA for Indian tribes. See S. REP. NO. 102-248, at 10 (1991) (“An Indian tribe may conduct, and may allow to be conducted, on lands of the tribe in a State, only those particular sports gambling schemes that were in operation on such lands prior to August 31, 1990.”).

34. §§ 3704(a)(1)–(2). Former NBA executive David Stern described the practical impact of these exemptions: “[T]here’s a federal statute that gives [Nevada] a monopoly of types.” See Ian Thomsen, *Weekly Countdown: Stern Open to Legalized Betting, Rule Changes*, SPORTS ILLUSTRATED (Dec. 11, 2009), <https://www.si.com/more-sports/2009/12/11/weekly-countdown> [<https://perma.cc/6VM4-9ZJF>].

35. § 3704(a)(1). PASPA’s Senate Report suggested that this exemption attaches to Delaware and Oregon. S. REP. NO. 102-248, at 10 (1991).

beginning September 1, 1989, and ending October 2, 1991.”<sup>36</sup> PASPA’s state-specific grandfathering scheme makes no mention by name of the state(s) actually covered by any of the exemptions. Such ambiguity has fostered confusion about the statute’s scope for 25 years, stretching from PASPA’s inception to the Supreme Court’s pending review of New Jersey’s petition for a writ of certiorari in *Christie II*.

Prior to the New Jersey sports betting litigation in *Christie I* and *Christie II*, PASPA was the subject of litigation three times. In *Flagler v. United States Attorney for the District of New Jersey*, the district court dismissed the case for lack of standing, finding that the plaintiff failed to provide the court any “explanation of how a right to gamble on professional and amateur sports would be or could be a ‘legally protected right.’”<sup>37</sup> In *iMEGA*, the district court similarly dismissed the plaintiffs’ PASPA-related claims for lack of standing.<sup>38</sup> In *Office of the Commissioner of Baseball v. Markell*, the Third Circuit ruled against Delaware—one of PASPA’s exempted states—in its attempt to offer single-game betting on various sports.<sup>39</sup> The court concluded: “[A]ny effort by Delaware to allow wagering on athletic contests involving

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36. § 3704(a)(2). PASPA’s Senate Report suggested that this exemption attaches to Nevada. S. REP. NO. 102-248, at 10 (1991).

37. See *iMEGA*, No. 09-1301, 2011 WL 802106, at \*6 (D.N.J. Mar. 7, 2011) (citing *Flagler v. United States Attorney for the Dist. of N.J.*, No. 06-3699, 2007 WL 2814657, at \*2–3 (D.N.J. Sept. 25, 2007)). Interestingly, New Jersey Governor Christie was the U.S. Attorney in *Flagler*. See Letter from Christopher J. Christie, U.S. Attorney, Dist. of N.J., to the Honorable Joseph A. Greenaway Jr., U.S. Dist. Judge, Dist. of N.J. 2 (Feb. 20, 2007) (on file with authors) (“[PASPA] did not affect States that had already legalized sports betting, including Nevada, Oregon, and Delaware.”).

38. 2011 WL 802106, at \*1. While *iMEGA* was decided on standing grounds, the case included the first substantive discussion of PASPA by the DOJ since the DOJ’s 1991 letter to Congress. See generally Letter from W. Lee Rawls, *supra* note 18.

39. *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009), *cert. denied*, 559 U.S. 1106 (2010). The *Markell* case did not address the equal sovereignty doctrine directly. Tangentially, the litigants did argue over the relative importance of *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991), and whether its “plain-statement rule” impacted state sovereignty. The Plaintiff Sports Leagues opined that “the application of the plain-statement rule would not change the outcome because [PASPA’s statutory text] is unambiguous.” Brief in Opposition, *supra* note 25, at 16. In contrast, Delaware positioned *Gregory* to require “Congress to make ‘unmistakably clear’ its intent to constrain the States’ ‘substantial sovereign powers.’” Reply Brief at 1, *Markell*, 559 U.S. 1106 (No. 09-914) (citing *Gregory*, 501 U.S. at 460–61), *cert. denied*. Delaware also argued: “The Third Circuit’s cramped interpretation of Congress’s reservation of State authority cannot be reconciled with *Gregory* and its progeny.” Petition for Writ of Certiorari at 4, *Markell*, 559 U.S. 1106 (No. 09-914), *cert. denied*.

sports beyond the NFL would violate PASPA.”<sup>40</sup> *Christie I* was “the first case addressing PASPA’s constitutionality.”<sup>41</sup>

### B. *Impetus for PASPA*

The “purpose of [PASPA] is to prohibit sports gambling conducted by, or authorized under the law of, any State or other governments.”<sup>42</sup> As explained by PASPA’s Senate Report: “Sports gambling is a national problem. The harms it inflicts are felt beyond the borders of those states that sanction it. The moral erosion it produces cannot be limited geographically.”<sup>43</sup> Representative Bryant referenced “the deeply corrosive effect of sports gambling nationwide.”<sup>44</sup> According to Senator Hatch, “the bottom line is this: sports gambling is bad for the country. . . . [PASPA] is an important bill. We should not weaken it. We should not create loopholes in it.”<sup>45</sup> Representative Brooks mentioned another element: “The purpose of this legislation is to stop the spread of legalized gambling on sporting events.”<sup>46</sup> The Third Circuit was in accord: “PASPA’s purpose is to ‘stop the spread of State-sponsored sports gambling.’”<sup>47</sup> There was also

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40. *Markell*, 579 F.3d at 304. (“[E]xpanding the very manner in which Delaware conducts gambling activities to new sports or to new forms of gambling—namely single-game betting—beyond ‘the extent’ of what Delaware ‘conducted’ in 1976 would engender the very ills that PASPA sought to combat.”). Notably, the five plaintiffs in *Markell* are the same quintet making up the Plaintiff Sports Leagues in both *Christie I* and *Christie II*.

41. *Christie I*, 730 F.3d 208, 216 (3d Cir. 2013). Indeed, “*Markell* did not involve a challenge to the constitutionality of PASPA.” See *iMEGA*, 2011 WL 802106, at \*5 n.2.

42. S. REP. NO. 102-248, at 3 (1991). The Third Circuit elaborated: “PASPA’s text and legislative history reflect that its goal is more modest—to ban gambling pursuant to a state scheme—because Congress was concerned that state-sponsored gambling carried with it a label of legitimacy that would make the activity appealing.” *Christie I*, 730 F.3d at 237; see also Will Green, *The Scope of PASPA: Parsing the Intent of the Federal US Sports Betting Law*, LEGAL SPORTS REP. (Nov. 23, 2016, 8:06 PM), <http://www.legalsportsreport.com/12205/paspa-scope-and-intent-us-sports-betting/> [<https://perma.cc/J277-N3KL>].

43. S. REP. NO. 102-248, at 5. *Christie I* quoted this portion of the Senate Report with approval. 730 F.3d at 216. New Jersey Senator Bill Bradley explained further in a law review article: “Congress has undertaken the task of preventing what many members rightfully deem to be an evil affecting the nation at large. . . . [T]he Senate Judiciary Committee concluded that sports betting is a national problem.” See Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORTS & ENT. L. 5, 8-9 (1992).

44. See Jason Goldstein, *Take the Money Line: PASPA, Bureaucratic Politics, and the Integrity of the Game*, 11 VA. SPORTS & ENT. L.J. 362, 368 (2011) (quoting 137 CONG. REC. E41 (daily ed. Jan. 3, 1991) (statement of Rep. Bryant)).

45. 138 CONG. REC. 12,974 (1992) (statement of Sen. Hatch).

46. 138 CONG. REC. 32,438 (1992) (statement of Rep. Brooks).

47. *Christie I*, 730 F.3d at 216 (quoting S. REP. NO. 102-248, at 5 (1991)).



a “concern for ‘the integrity of, and public confidence in, amateur and professional sports.’”<sup>48</sup>

Congress made clear that the coverage of § 3702’s general prohibition on sports gambling was intended to be broad: “The prohibition of [§] 3702 applies regardless of whether the scheme is

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48. *Id.* (quoting S. REP. NO. 102-248, at 5 (1991)). The Plaintiff Sports Leagues claimed that “PASPA is also part and parcel of Congress’ efforts to protect [their] interstate activities. Congress viewed respondents’ sporting events as important interstate activities well worth protecting and viewed the spread of state-sponsored gambling as a threat to those games.” Brief in Opposition at 34, *Christie v. Nat’l Collegiate Athletic Ass’n*, Nos. 16-476 & 16-477 (U.S. Dec. 14, 2016). Whether Plaintiff Sports Leagues are injured by legalized sports gambling remains a contentious issue. Before the issue was litigated in *Christie I* and *Christie II*, it arose in the *Markell* case. The Plaintiff Sports Leagues argued that the district court “simply does not have discretion to override the express findings by Congress that violation of PASPA will cause harm to plaintiffs and the public.” Letter from Kenneth J. Nachbar, Counsel for Plaintiffs, to the Honorable Gregory M. Sleet, U.S. Dist. Judge, Dist. of Del. 10 (Aug. 3, 2009) (on file with authors). Delaware countered with: “The ties between sports teams and gambling interests are long-standing, and long have been recognized as mutually beneficial.” Appellees’ Answering Brief in Opposition to Appellants’ Appeal of the Denial of Their Motion for a Preliminary Injunction at 46, *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009) (No. 09-3297). In *Markell*, the district court concluded: “[T]he court is not certain that the plaintiffs have demonstrated irreparable harm.” *Office of the Comm’r of Baseball v. Markell*, No. 09-538, 2009 WL 2450284, at \*2 (D. Del. Aug. 10, 2009). For mainstream treatment of this issue, see Steve Fainaru, Paula Lavigne & David Purdum, *Betting on the Come: Leagues Strike Deals with Gambling-Related Firms*, ESPN.COM (Jan. 28, 2016), [http://a/www.espn.com/espn/otl/story/\\_id/14660326/nba-nfl-mlb-nhl-striking-various-business-deals-gambling-related-firms](http://a/www.espn.com/espn/otl/story/_id/14660326/nba-nfl-mlb-nhl-striking-various-business-deals-gambling-related-firms) [https://perma.cc/RJ9F-BASQ]; James Glanz, Agustín Armendariz & Jacqueline Williams, *N.F.L.’s Deal Over Data Blurs a Line on Gambling*, N.Y. TIMES (Dec. 19, 2015), <https://www.nytimes.com/2015/12/19/sports/sportradar-nfl-gambling.html> [https://perma.cc/MHA2-UU5U]; Dustin Gouker, *NBA Commish, NHL Owner Bullish on ‘In-Game’ Sports Betting in U.S.?*, LEGAL SPORTS REP. (Apr. 30, 2015, 5:00 PM), <http://www.legalsportsreport.com/1256/nba-commish-nhl-owner-bullish-on-in-game-sports-betting-in-u-s/> [https://perma.cc/8TDM-H2DY]; James Herbert, *Silver: Gambling ‘Good for Business, I Don’t Want to Hide from That,’* CBSSPORTS.COM (Apr. 20, 2015), <http://www.cbsports.com/nba/news/silver-gambling-good-for-business-i-dont-want-to-hide-from-that/> [https://perma.cc/XJJ7-LPMU]; Chad Millman, *Harm of Betting to Leagues Remains Unclear*, ESPN.COM (Mar. 1, 2013, 9:48 AM), [http://www.espn.com/insider/blog/\\_name/millman\\_chad/id/9002204/betting-new-jersey-ruling-harm-betting-sports-leagues-remains-unclear](http://www.espn.com/insider/blog/_name/millman_chad/id/9002204/betting-new-jersey-ruling-harm-betting-sports-leagues-remains-unclear) [https://perma.cc/5GED-7ZWQ]; David Purdum, *More Gambling Doesn’t Up Fixing*, ESPN.COM (Nov. 14, 2014), [http://www.espn.com/chalk/story/\\_id/11874940/betting-why-legalizing-gambling-increase-match-fixing](http://www.espn.com/chalk/story/_id/11874940/betting-why-legalizing-gambling-increase-match-fixing) [https://perma.cc/25EW-33GT]; ‘*Standing’ Up For the Federal Sports Betting Ban: New Quotes From NBA, NFL Execs Could Impact Cases Beyond New Jersey*, LEGAL SPORTS REP. (Apr. 4, 2017, 9:28 AM), <http://www.legalsportsreport.com/13596/nfl-nba-and-sports-betting-case/> [https://perma.cc/ZDZ3-L4SX]. For academic discussions of this issue, see Nick Burkhardt & Dylan Welsh, *The Legalization of Sports Gambling: An Irreparable Harm or the Beginning of Unprecedented Growth?*, 21 SPORTS L.J. 145 (2014); Brad R. Humphreys, Rodney J. Paul & Andrew P. Weinbach, *Consumption Benefits and Gambling: Evidence from the NCAA Basketball Betting Market*, 39 J. ECON. PSYCHOL. 376 (2013); Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 390 (2006); Steven Salaga & Scott Tainsky, *Betting Lines and College Football Television Ratings*, 132 ECON. LETTERS 112 (2015).

based on chance or skill, or on a combination thereof. Moreover, the prohibition is intended to be broad enough to include all schemes involving an actual game or games, or an actual performance or performances therein.”<sup>49</sup> In contrast, Congress intended § 3704’s exemptions for certain states to be tightly construed: “The narrowness of [§ 3704(a)] reflects the committee’s policy judgment that sports gambling should be strictly contained.”<sup>50</sup> However, Congress did not specify the number or names of all the states exempted under PASPA: “It appears that Nevada, Oregon, Delaware, and possibly a few other states would be exempt from the ban.”<sup>51</sup>

Congress also addressed the motivation for PASPA’s exemptions: “Although the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively . . . or to prohibit lawful sports gambling schemes . . . that were in operation when the legislation was introduced.”<sup>52</sup> According to Senator DeConcini, one of PASPA’s primary sponsors, “[t]he intent of the legislation is not to interfere with existing laws, operations, or revenue streams.”<sup>53</sup> Senator Grassley disagreed: “There is simply *no rational basis*, as a matter of Federal policy, for allowing sports wagering in three States, while prohibiting it in the other 47, *nor any rational basis*, or support in the language of [PASPA], for the purported discrimination between Nevada, Oregon, and Delaware.”<sup>54</sup>

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49. S. REP. NO. 102-248, at 9 (1991). Relative measures of skill and chance have been how states historically determined whether an activity was gambling. There is a continuum of classifications used, with most states allowing contests where skill is the predominate factor, but others banning games with any degree of chance. See Ryan Rodenberg, *Why Do States Define Gambling Differently?*, ESPN.COM (Feb. 18, 2016), [http://www.espn.com/chalk/story/\\_/id/14799507/daily-fantasy-why-do-states-define-gambling-differently](http://www.espn.com/chalk/story/_/id/14799507/daily-fantasy-why-do-states-define-gambling-differently) [<https://perma.cc/A67A-A9ML>]. For example, the Plaintiff Sports Leagues have taken the position that

[s]ports gambling—particularly when it involves betting on the outcome of a single athletic contest—is an activity in which skill plays a significant role, as bettors gather and analyze information relating to the teams and sports on which they are betting and compare their own internal assessments with those generated by odds-makers.

Verified Complaint at 16, *Markell*, 2009 WL 2450284 (D. Del. 2009) (No. 09-538).

50. S. REP. NO. 102-248, at 10.

51. *Id.* at 11.

52. *Id.* at 8.

53. 138 CONG. REC. 12,973 (1992) (statement of Sen. DeConcini).

54. S. REP. NO. 102-248, at 13 (emphasis added). For a discussion of the status of PASPA under the rational basis test, see *infra* Part IV.B.

### C. *PASPA Exemptions and Legislative History*

PASPA was the subject of two Congressional hearings: a June 26, 1991 hearing in the Senate<sup>55</sup> and a September 14, 1991 hearing in the House of Representatives.<sup>56</sup> The 1992 Congressional Record indicates that PASPA was discussed on the record no fewer than three times—June 2, 1992 (Senate), October 5, 1992 (House), and October 7, 1992 (Senate). Both the 1991 hearings and 1992 floor debates strongly suggest that members of Congress were unsure of both the identity and the number of states subject to exemptions under PASPA's grandfathering scheme.<sup>57</sup> For example, Senator DeConcini said: "I agreed to provide an exemption from the legislation for those States which already have laws permitting them to conduct State gambling; namely, Nevada, Oregon, and Delaware. The Montana and South Dakota sports boards would be grandfathered as well."<sup>58</sup>

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55. See *Prohibiting State-Sanctioned Sports Gambling: Hearing on S.474 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 102d Cong. (1991).

56. See *Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Econ. & Commercial Law of the H. Comm. on the Judiciary*, *supra* note 19. The two 1991 hearings were predated by a tangentially-related Senate bill that would have amended the Lanham Act and addressed the use of professional sports' service marks by state lotteries. See *Legislation Prohibiting State Lotteries from Misappropriating Profl Sports Service Marks: Hearing on S. 1772 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 101st Cong. (1990).

57. The legislative history suggests that certain states were not the only entities extended an exemption under PASPA: "An Indian tribe may conduct, and may allow to be conducted, on lands of a tribe in a State, only those particular sports gambling schemes that were in operation on such lands prior to August 31, 1990." S. REP. NO. 102-248, at 10 (1991).

58. See *Prohibiting State-Sanctioned Sports Gambling: Hearing on S.474 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, *supra* note 55, at 2 (statement of Sen. DeConcini). Curiously, Senator DeConcini did not mention South Dakota less than a year later:

All of the States which are grandfathered by the bill have laws authorizing some type of sports betting scheme. Nevada has its sports books, Oregon has a sports lottery on football games, and Delaware conducted a sports lottery in the past and still has a law on the books. It has recently come to my attention that Montana also has legalized certain forms of sports betting. For years, Montana has permitted sports pools and [C]alcutta pools. In 1991, they passed new legislation that allows for fantasy sports leagues and sports tab games. These are limited-stakes sports wagering games played in bingo parlors. Because of this new Montana law, the committee substitute before us today changes the effective date of the grandfather to cover those gambling schemes authorized prior to October 2, 1991. Let me make clear that the grandfather provision only allows those States that have sports gambling authorized by State law to continue to do what they are doing now or could do under State law. For example, Nevada could not conduct a sports lottery and Oregon could not introduce other forms of sports betting. What this bill will do is stop the spread of sports gambling and the threat that gambling will spoil all the games involved.

138 CONG. REC. 12,973 (1992) (statement of Sen. DeConcini).

The presence of PASPA's grandfather clause and its tethered exemptions gave rise to a robust debate on the Senate floor, as the following verbatim excerpts from the Congressional Record reveal. The lone lawmaker to voice broad opposition to PASPA was Senator Grassley of Iowa, who proposed an amendment allowing any state to unilaterally opt-in as exempt upon enactment of a permissive state law before January 1, 1995.<sup>59</sup> Senator Grassley stated:

If this were a bill about banning gambling, I would probably have a different point of view. But that is not what this bill is about. This bill purports to restrict gambling on sporting events by prohibiting certain States from conducting sports lotteries, and it does so by discriminating against many States, including my State of Iowa, and preferring four States. In my judgment this is not a distinction [sic] that Congress should tolerate. And my amendment is intended to correct this deficiency.<sup>60</sup>

Senator Grassley then turned to a broader legal discussion of PASPA, closing with a prophetic warning:

It is true that the courts require a showing of only a rational basis to uphold a grandfather clause. But that rational basis must be substantiated by a valid legislative purpose. It could be a legitimate legislative purpose for Congress to ban gambling to protect the welfare of the people. But that is not what this bill is about. This bill, specifically, openly, and candidly, as stated by the sponsors, favors 4 States and penalizes the other 46. . . . [W]ithout my amendment this bill discriminates between states that already have this sort of gambling and the other 46 States that will be banned from it. Such discrimination, in my judgment, is just plain wrong and, as I pointed out from two court cases on grandfather clauses, arguably unconstitutional. . . . If we really believe sports gambling is bad, as I know we do, then we should have a nationwide consistent policy—it should be prohibited in Oregon, Nevada, Montana, and Delaware as well.<sup>61</sup>

Even one of the bill's most vocal supporters opined that there was a better alternative to PASPA's grandfathering scheme. Immediately following Senator Grassley's lengthy statement, Senator Hatch said:

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59. 138 CONG. REC. 12,974 (1992) (statement of Sen. Grassley) (seeking an amendment to provide for certain exemptions to prohibited state activities).

60. *Id.* at 12,974–75 (statement of Sen. Grassley) (“Mr. President, this bill exempts four States from its reach, and those are Delaware, Oregon, Montana, and Nevada.”).

61. *Id.* at 12,975 (statement of Sen. Grassley).

[W]e agreed to grandfathering because we had no choice. It would have been better off to have banned all State sponsored sports gambling. But the least we can do, it seems to me, is to stop the trend of such gambling. . . . [PASPA] allows a few exceptions, four States, in carefully circumscribed situations. . . . A vote for the Grassley amendment is a vote to gut this bill. The National Football League, the National Hockey League, the National Basketball Association, [M]ajor [L]eague [B]aseball, and the NCAA all oppose the Grassley amendment.<sup>62</sup>

PASPA sponsor Senator DeConcini voiced his opposition to the Grassley amendment, too:

This amendment is completely inconsistent with the goal of the legislation and would set a very bad precedent in the Congress. States should not be given the choice about whether or not they want to be covered by the law. . . . The Senator from Iowa is correct, there are four exemptions and they are very carefully crafted to only include those States and only include what the States have specifically, by legislation, been authorized to do. It does not permit those states to expand into other areas of sports gaming that they do not already involve themselves in. . . . I would like to have it effective on all 50 States, but that is not in the cards.<sup>63</sup>

Senator Grassley articulated his position one final time prior to a vote on his amendment:

[I]f what you propose is good for the country, then it also ought to be good for Oregon, Delaware, Nevada, and Montana; they should not have these exemptions. . . . I differ with the approach taken in this bill. There is not a prohibition on sports gambling; it is a piece of Swiss cheese. The bill contains loopholes that effectively exempt the States of Oregon, Delaware, Nevada, and Montana. So if sports leagues really want to end gambling on sporting events, they would seek a complete ban nationwide.<sup>64</sup>

Senator Grassley's proposed amendment to PASPA was rejected. Four months later, the House debated PASPA's exemptions. Representative Hughes said: "Under this legislation, legalized betting on amateur and professional sports would be prohibited in all states

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62. *Id.* at 12,976 (statement of Sen. Hatch).

63. *Id.* at 12,976–77 (statement of Sen. DeConcini).

64. *Id.* at 12,977 (statement of Sen. Grassley).

except Nevada, Oregon, Delaware, and Montana.”<sup>65</sup> Representative Fish’s take on the scope of PASPA differed wildly:

This legislation would prospectively prevent States from authorizing any new forms of sports gambling or expanding existing sports lotteries. S. 474 would not apply to the Oregon sports lottery, which [was] instituted prior to introduction of the legislation, to private sports gambling in Nevada, nor to parimutuel racing. In addition, this legislation would not preempt the State of Montana from conducting sports pools, which are capped at \$1,000; the State of North Dakota which allows sports pools based on the outcome of professional sporting events if conducted by qualified organizations; and the state of Arizona which allows social gambling to include wagering on the outcome of sporting events up to \$100.<sup>66</sup>

Two days later, the Senate opened its debate regarding PASPA. Senator Bradley provided another outlook on the number of states exempted: “[T]his bill bans sports betting outright in 44 States and given [sic] one state, New Jersey, only 1 year to act before it too would be prohibited from allowing sports betting.”<sup>67</sup> A subsequent exchange on the Senate floor between New Mexico Senator Domenici and Arizona Senator DeConcini is particularly illustrative of the apparent role the Plaintiff Sports Leagues played in at least one carve-out under PASPA. In relevant part:

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65. *Id.* at 32,438 (statement of Rep. Hughes). Representative Hughes was from New Jersey. The Congressional Record indicates that he played a role in § 3704(a)(3)’s one year carve-out for New Jersey. Before Representative Hughes spoke, he was introduced by Representative Brooks as follows: “I also want to note the contribution of the distinguished gentleman from New Jersey . . . who has worked hard to safeguard the interests of his home State within the framework of this legislation . . .” *Id.* (statement of Rep. Brooks). Upon being introduced, Representative Hughes provided insightful comments on the genesis of § 3704(a)(3)’s New Jersey-focused time-limited exemption:

The legislation also includes an amendment which I wrote which would exempt New Jersey from this ban until January 1, 1994. New Jersey and Nevada are in direct competition when it come [sic] to the gaming industry. It just would not be fair for Congress to give Nevada a virtual monopoly on sports betting, without first giving New Jersey residents the opportunity to vote on this proposal and decide for themselves.

*Id.* (statement of Rep. Hughes). In later comments, Rep. Hughes forecast the future litigation involving the State: “This is not a vote in favor or [sic] legalizing sports betting in New Jersey. Only the voters or [sic] New Jersey can do that. This bill would simply give them the chance to decide this issue on their own, and not have the Federal Government decide it for them.” *Id.* (statement of Rep. Hughes).

66. *Id.* at 32,439 (statement of Rep. Fish).

67. *Id.* at 33,823 (statement of Sen. Bradley). Senator Bradley did not identify the “44 states” by name. In an academic article published around the same time PASPA was enacted, Senator Bradley wrote: “That the prohibitions contained in the bills would vary among the states does not in and of itself render them unconstitutional.” *See* Bradley, *supra* note 43, at 6.

Senator Domenici: Shortly after the Senate-passage of [PASPA], I was made aware of a situation that could be interpreted to fall under the provisions of this bill. The New Mexico Legislature passed a law that would allow our State to be the first in the Nation to venture into what is a \$13 billion industry in Japan—parimutuel bicycle racing, or as it's known in Japan, Keirin. . . . I discussed this situation with my good friend from Arizona, Senator DeConcini. Upon reviewing a description of Keirin, the Senator from Arizona also noted the similarities between this sport and those exempted in the bill. I then suggested the possibility of including Keirin in this language. My good friend saw no initial reasons why that would be a problem.<sup>68</sup>

Senator DeConcini: That is correct.<sup>69</sup>

Senator Domenici: So, it is my understanding that my good friend from Arizona cleared the possibility of exempting Keirin from the provisions of this bill with our Nation's major sports organizations, the national [sic] Football League, the National Basketball Association, Major League Baseball, the National Hockey League, and the National Collegiate Athletic Association, to ensure that they had no concerns.<sup>70</sup>

Senator DeConcini: It is my understanding that the leagues and the NCAA do not object to this type of parimutuel bike racing and did not intend for the bill to cover such a sport.<sup>71</sup>

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68. 138 CONG. REC. 33,823 (1992) (statement of Sen. Domenici).

69. *Id.* (statement of Sen. DeConcini).

70. *Id.* The role of the Plaintiff Sports Leagues in gambling-related lawmaking and regulatory action before and after PASPA's enactment potentially raises constitutional issues under the private non-delegation doctrine. *See* Dep't of Transp. v. Ass'n of Am. R.R., 133 S. Ct. 1225, 1234 (2015); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); Brief of the Nat'l Football League as Amicus Curiae in Support of the Negative Position at 11–15, *In re* Request of the Governor for an Advisory Opinion, 12 A.3d 1104 (Del. 2009); Brief of Professor Ryan M. Rodenberg as Amicus Curiae in Support of Petitions for Writ of Certiorari at 4, *Christie v. Nat'l Collegiate Athletic Ass'n*, Nos. 16-476 & 16-477 (U.S. Nov. 4, 2016); James M. Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CALIF. L. REV. 539, 540 (2017). Relatedly, counsel for the Plaintiff Sports Leagues alluded to a sports governing body's capacity to bring suit under PASPA during a standing-related portion of the *Christie I* oral argument:

And PASPA actually responds to that very specifically because it gives the NFL the right to bring an action based on authorized gambling on NFL games. It gives the NBA standing to bring the challenge based on gambling on NBA games. So it's not like the NFL can bring a claim about NBA, gambling on NBA games. It's very specific to their legal entitlement to protect their product.

Transcript of Oral Argument, *supra* note 12, at 38. *See generally* Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. (forthcoming Dec. 2017).

71. 138 CONG. REC. 33,824 (1992) (statement of Sen. DeConcini).

Senator Domenici: Would the Senator from Arizona agree that [PASPA] was not designed to prohibit the State of New Mexico from sanctioning Keirin?<sup>72</sup>

Senator DeConcini: Yes, I agree.<sup>73</sup>

New Mexico's insertion into PASPA's exempt list was immediately followed—like a fight with the Hydra—by an exemption inquiry from Senator Wallop of Wyoming. In relevant part:

Senator Wallop: Mr. President, I would like to ask my colleague from Arizona, the sponsor of [PASPA] a question regarding his intent as to the effect of the bill on certain actions in my home State of Wyoming. . . . My concern centers in particular on the practice of [C]alcutta wagering. . . . Calcutta wagering means wagering on the outcome of amateur contests, cutter horse racing, professional rodeo events, or professional golf tournaments . . . .<sup>74</sup>

Senator DeConcini: I appreciate the Senator's point of view and I can assure him that the practices which are now authorized and conducted under Wyoming State law, including [C]alcutta wagering . . . will not be affect[ed] by enactment of [PASPA].<sup>75</sup>

Taken together, evidence from Congress indicates that the following states appear to be exempt in varying degrees under PASPA: (i) Nevada; (ii) Delaware; (iii) Oregon; (iv) Montana; (v) North Dakota; (vi) Arizona; (vii) South Dakota; (viii) New Mexico; and (ix) Wyoming.<sup>76</sup> This list differs markedly from the quartet of states (Nevada, Delaware, Oregon, and Montana) repeatedly referenced since 2012 by the judges and litigants in the New Jersey cases.<sup>77</sup> As such,

72. *Id.* (statement of Sen. Domenici).

73. *Id.* (statement of Sen. DeConcini).

74. *Id.* (statement of Sen. Wallop).

75. *Id.* (statement of Sen. DeConcini).

76. Beyond the states that were specifically mentioned by Congress, certain sports pools in Virginia, Colorado, and Iowa may be exempt too. See H. Wayne Clark Jr., *Who's In? The Bona Fide Future of Office Pools*, 8 GAMING L. REV. 202, 204 (2004). The Washington State Gambling Commission ("WSGC") has apparently taken the position that Washington is partially exempt under PASPA as well. According to the WSGC, "[b]oth businesses and individuals may offer 100 square sports pool boards." See WASH. STATE GAMBLING COMM'N, SPORTS WAGERING, (Aug. 2015), <http://www.wsgc.wa.gov/publications/brochures/5-206-sports-wagering.pdf> [https://perma.cc/856P-BBCJ].

77. Oddly, the October 2016 *Christie II* en banc majority decision omitted Montana in its synopsis: "Congress included in PASPA exceptions for state-sponsored sports wagering in Nevada and sports lotteries in Oregon and Delaware . . ." 832 F.3d 389, 392 (3d Cir. 2016) (en banc).



unlike other federal statutes with grandfather clauses listing exempt states by name or with reference to specific geographic locations (e.g. rivers or coastlines),<sup>78</sup> it is plausible to infer that Congress opted against such specificity in PASPA because Congress itself was unsure of the grandfather clause's scope. Such opaqueness and uncertainty have implications for PASPA when evaluated under both the rational basis test and the heightened level of scrutiny *Shelby County* seemingly requires for statutes that treat states differently.

## II. NEW JERSEY SPORTS BETTING LITIGATION

The New Jersey sports betting litigation has spawned two distinct PASPA cases. In the first iteration of the case—known as *Christie I*—the Plaintiff Sports Leagues sued Governor Christie on August 7, 2012 under PASPA after New Jersey enacted a new law that would permit regulated sports betting in licensed casinos and racetracks.<sup>79</sup> The Plaintiff Sports Leagues obtained an injunction at the district court level.<sup>80</sup> New Jersey appealed to the Third Circuit with three arguments: (i) the Plaintiff Sports Leagues lacked standing to bring the lawsuit; (ii) PASPA violated the Tenth Amendment and its anti-commandeering restrictions; and (iii) PASPA violated the equal sovereignty doctrine.<sup>81</sup>

In *Christie I*, a 2-1 Third Circuit majority reasoned that “while the guarantee of uniformity in treatment amongst the states cabins some of Congress’ powers, no such guarantee limits the Commerce Clause.”<sup>82</sup> In rejecting New Jersey’s equal sovereignty argument, the court held: “[F]ar from singling out a handful of states for disfavored treatment, PASPA treats *more favorably a single state*.”<sup>83</sup> The Third

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78. For examples, see Litman, *supra* note 17, at 1243–46.

79. See N.J.S.A 5:12A-1, *et seq*; see also Complaint for Declaratory and Injunctive Relief, Nat’l Collegiate Athletic Ass’n v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 12-4947). The DOJ later formally intervened in the case on the side of the Plaintiff Sports Leagues. See Memorandum in Support of the Constitutionality of the Professional and Amateur Sports Protection Act at 17, *Christie*, 926 F. Supp. 2d 551 (No. 12-4947).

80. *Christie*, 926 F. Supp. 2d at 554.

81. See generally Brief for Appellants Christopher J. Christie et al., *supra* note 20.

82. *Christie I*, 730 F.3d 208, 238 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014) (internal citations omitted).

83. *Id.* at 239. The court also differentiated between the underlying subject matter of *Christie I* and the statute at issue in *Shelby County*: “[T]he VRA is fundamentally different from PASPA. . . . The regulation of gambling via the Commerce Clause is . . . not of the same nature as the regulation of elections . . . .” *Id.* at 238.

Circuit ruled against New Jersey on its standing<sup>84</sup> and anti-commandeering arguments too.<sup>85</sup> New Jersey's petition for a writ of certiorari was denied on June 23, 2014.

The *Christie I* decision rested on a number of findings. The Third Circuit wrote that "it is self-evident that the activity PASPA targets, state-licensed wagering on sports, may be regulated consistent with the Commerce Clause."<sup>86</sup> The court continued: "Here, the method of regulation, banning an activity altogether (in this case the expansion of State-sponsored sports betting), is neither novel nor problematic."<sup>87</sup> In evaluating PASPA's grandfather clause, the court ruled: "PASPA's legislative history is clear as to the purpose behind its own exemptions."<sup>88</sup>

The Third Circuit also addressed New Jersey's "contention that PASPA violates the equal sovereignty of the states by singling out Nevada for preferential treatment."<sup>89</sup> New Jersey had asked that the court "strike down *all* of PASPA because it permits Nevada to license sports gambling."<sup>90</sup> The court flagged the weakness of this argument: "[I]t is noteworthy that [New Jersey] do[es] not ask us to invalidate § 3704(a)(2), the Nevada grandfathering provision that supposedly creates the equal sovereignty problem. Instead, we are asked to strike down § 3702, PASPA's general prohibition on state-licensed sports gambling. . . . [This] undermines [New Jersey's] invocation of the equal sovereignty doctrine."<sup>91</sup>

The Plaintiff Sports Leagues sued New Jersey again on October 20, 2014 after the state passed a new law designed to selectively repeal sports betting prohibitions applicable to casinos and racetracks.<sup>92</sup> In *Christie II*, the Third Circuit sitting en banc concluded that New Jersey's attempt to partially repeal its own sports betting prohibition

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84. *See id.* at 223–24 (holding that New Jersey's arguments "do not legally deprive the Leagues of standing and are insufficient to raise a genuine issue of material fact").

85. *Id.* at 237 ("We hold that PAPSAs does not violate the anti-commandeering doctrine.").

86. *Id.* at 224.

87. *Id.* at 226.

88. *Id.* at 240 n.18. For a detailed discussion of the status of PASPA's exemptions under *Del. River Basin Com'n v. Bucks Cty. Water & Sewer Auth.*, 641 F.2d 1087 (3d Cir. 1981), see *infra* Part IV.D.

89. *Christie I*, 730 F.3d at 237.

90. *Id.* at 238 (emphasis added).

91. *Id.* at 239.

92. Complaint for Declaratory and Injunctive Relief, Nat'l Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 3d 488 (D.N.J. 2014) (No. 14-6450).

“violates PASPA because it authorizes by law sports gambling.”<sup>93</sup> After a 9-3 Third Circuit en banc loss featuring two separate dissents, New Jersey filed a certiorari petition on October 7, 2016.<sup>94</sup> At the Supreme Court’s invitation, the Acting Solicitor General filed an amicus brief on May 23, 2017, recommending that the Supreme Court deny New Jersey’s petition for a writ of certiorari.<sup>95</sup> *Christie II* did not address the equal sovereignty issue directly, but does implicate *Shelby County* if PASPA is construed to prevent some states, but not others, from partially repealing their own sports gambling laws and regulations.<sup>96</sup>

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93. *Christie II*, 832 F.3d 389, 396 (3d Cir. 2016). Counsel for New Jersey described PASPA in colorful terms during *Christie II* oral arguments, illustrative of the state’s frustration with the statute: “This is an Orwellian concept . . . a statute that was enacted to prohibit the spread, or limit the spread, of sports betting is somehow constitutional only if you allow it to take place everywhere in the state.” Transcript of Oral Argument at 9–10, *supra* note 22 (three judge panel). Indeed, for states not exempted by PASPA’s safe harbor, the law results in a paradox—*Christie I* and *Christie II* suggest that states can either retain their sports gambling prohibition entirely or completely repeal such laws, with partial repeals in between each extreme perhaps running afoul of PASPA too. For example, counsel for the Plaintiff Sports Leagues opined that allowing up to \$1,000 bets between individuals would be a type of partial repeal in compliance with PASPA. Oral Argument at 35:15, *Christie II*, 832 F.3d 389 (Nos. 14-4546, 14-4568 & 14-4569) (en banc), <http://www2.ca3.uscourts.gov/oralargument/audio/14-4546NCAAv.GovernoroftheStateofNJetal.mp3> [<https://perma.cc/6R69-Y4DR>].

94. Petition for Writ of Certiorari, *supra* note 5.

95. See *Christie v. Nat’l Collegiate Athletic Association*, 137 S. Ct. 824, 824 (2017); see also Brief for the United States as Amicus Curiae, Nos. 16-476 & 16-477 (U.S. May 23, 2017). The DOJ did not intervene as a party in *Christie II*. However, the DOJ did file a statement of interest at the district court level and an amicus brief when the case was on appeal at the Third Circuit. See Statement of Interest of the United States at 9, *Christie*, 61 F. Supp. 3d 488 (No. 14-6450) (“PASPA reflects a considered congressional judgment that state sponsored sports wagering should not occur.”); Brief for the United States of America as Amicus Curiae in Support of Appellees at 9–10, *Christie II*, 832 F.3d 389 (Nos. 14-4546, 14-4568 & 14-4569) (“[B]ecause PASPA preempts state sports gambling legislation that ‘authorizes by law,’ New Jersey cannot repeal its restrictions on sports betting in a manner consistent with the state Constitution without running afoul of PASPA.”). *Christie II* pits two former Solicitor Generals against each other. New Jersey is represented by Ted Olson and the Plaintiff Sports Leagues are represented by Paul Clement.

96. For example, after PASPA was enacted, Nevada augmented its regulations to allow licensed sportsbooks to offer bets on in-state college teams such as the University of Nevada, Las Vegas. Such betting was previously barred. No PASPA lawsuit was filed following Nevada’s move to repeal its betting ban on in-state colleges, giving rise to the possibility of a laches defense under PASPA. See Ken Ritter, *Gaming Control Board Allows Betting on Nevada College Sports*, LAS VEGAS SUN (Jan. 25, 2001), <https://lasvegassun.com/news/2001/jan/25/gaming-control-board-allows-betting-on-nevada-coll/> [<https://perma.cc/D474-68K5>] (discussing the State Gaming Commission’s decision to lift the ban on gambling on college sports teams in Nevada); Darren Rovell, *UNLV: Betting Ban Removal Won’t Change Much*, ESPN.COM (Feb. 12, 2001), <http://www.espn.com/gen/s/2001/0210/1077033.html> [<https://perma.cc/NH78-M9T5>] (discussing Gaming Regulation 22.120(b), which lifted a ban on sports betting in Nevada); Matt Youmans,

## III. EQUAL SOVEREIGNTY AND PASPA

The Supreme Court decided *Shelby County* on June 25, 2013, one day before Third Circuit oral arguments in *Christie I*. All three litigants immediately filed same-day letters and positioned the decision with their existing equal sovereignty arguments. New Jersey's letter stated: "The Court's reasoning and decision compel the conclusion that PASPA's discrimination in favor of Nevada is likewise unconstitutional."<sup>97</sup> New Jersey also posited that "*Shelby County* definitively rejected the suggestion that discriminatory limitations on State Sovereignty are appropriately assessed under the rational basis test."<sup>98</sup> The Plaintiff Sports Leagues countered by pointing out what *Shelby County* did not say: "[N]ot one word in *Shelby County* casts any doubt . . . that Congress . . . may draw commerce-related distinctions [between states] as long as it acts rationally."<sup>99</sup> The Plaintiff Sports Leagues also flagged an important gap: "[E]ven if New Jersey's argument had merit—and it does not—*Shelby County* underscores that the only appropriate result would be to invalidate PASPA's preferences, not PASPA's general prohibition that New Jersey challenges."<sup>100</sup> The DOJ letter argued: "Permitting state-sponsored

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*Bookmakers Don't Expect Restrictions if Raiders Move to Las Vegas*, LAS VEGAS REVIEW-JOURNAL (Jan. 29, 2016), <https://www.reviewjournal.com/sports/betting/bookmakers-dont-expect-restrictions-if-raiders-move-to-las-vegas/> [<https://perma.cc/5LZK-9VV8>] (same).

97. Letter from Theodore B. Olson, Counsel for Defendants-Appellants, to Marcia M. Waldron, Clerk of the Court, U.S. Court of Appeals for the Third Circuit 1 (June 25, 2013) (on file with authors). New Jersey also refuted the DOJ's earlier assertion that the equal sovereignty doctrine is inapplicable to PASPA. *Id.*

98. *Id.* (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 193 (2009)). New Jersey elaborated: "[T]he asserted reliance interest of Nevada in continuing to permit sports wagering is not 'sufficiently related' to the State licensing and regulation of sports wagering that Appellees say PASPA targets." *Id.*

99. Letter from Paul D. Clement, Counsel for Plaintiffs-Appellees, to Marcia M. Waldron, Clerk of the Court, U.S. Court of Appeals for the Third Circuit 1 (June 25, 2013) (on file with authors). The Plaintiff Sports Leagues also argued that "federal laws trumping state regulations of commerce that conflict with federal policy are commonplace." *Id.*

100. *Id.* at 2. Counsel for the Plaintiff Sports Leagues elaborated on this point the following day during oral argument:

[I]f there is a problem with equal sovereignty, and we very much think it's not, then that equal sovereignty problem is with the exceptions in 3704 and not the basic prohibition in 3702 which is New Jersey's problem. And despite what Mr. Olson said, striking 3704 and not 3702 would be exactly analogous to what the Supreme Court did yesterday in [*Shelby County*]. It struck the provision, section four of the Voting Rights Act that distinguished among the states. If you look at [PASPA] the provision that distinguishes among states is 3704. It left in place, the Supreme Court that is, section five of the Voting Rights Act, all of the other things that by their terms apply neutrally to all states. That's 3702.

sports gambling to continue in States where it was already authorized, while prohibiting it in States where it had not yet commenced, made sense when Congress enacted PASPA, and it continues to ‘make sense in light of current conditions.’”<sup>101</sup> Beyond the trilogy of letters, the parties made a number of equal sovereignty arguments in briefs filed earlier. We summarize them below.

#### A. *Equal Sovereignty Doctrine Primer*

A synopsis of the Supreme Court’s equal sovereignty jurisprudence illustrates its relevance to PASPA. According to *Shelby County*: “Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past.”<sup>102</sup> *Shelby County* came four years after the Supreme Court addressed the equal sovereignty doctrine in *Northwest Austin*<sup>103</sup> and suggested a heightened level of scrutiny in equal sovereignty cases: “[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”<sup>104</sup> *Shelby County* and *Northwest Austin* made several other findings, all potentially relevant to PASPA: (i) “We concluded that the problems Congress faced when it passed the [VRA] were so dire that ‘exceptional conditions [could] justify legislative measures not otherwise appropriate;”<sup>105</sup> (ii) “[T]his extraordinary legislation was intended to be temporary, set to expire after five years;”<sup>106</sup> and (iii) “Our decision [to invalidate one portion of the VRA] in no way affects the permanent, nationwide ban on racial discrimination in voting found in [VRA] § 2.”<sup>107</sup> The Court’s analysis in *Shelby County*, coupled with Justice Ginsburg’s specific invocation of PASPA in her dissent and Colby’s forceful argument, suggests that

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Transcript of Oral Argument, *supra* note 12, at 51–52. Notably, both Justice Stevens in *Greater New Orleans* and Justice Ginsburg in *Shelby County* explicitly referenced PASPA’s § 3704’s exemptions—not § 3702’s blanket ban—as potentially troublesome.

101. Letter from Paul J. Fishman, Counsel for U.S., to Marcia M. Waldron, Clerk of the Court, U.S. Court of Appeals for the Third Circuit 1–2 (June 25, 2013) (on file with authors) (citing *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2629 (2013)). The DOJ described PASPA as “a conventional exercise of Congress’s authority over interstate commerce.” *Id.* at 2.

102. *Shelby Cty.*, 133 S. Ct. at 2629.

103. *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009).

104. *Id.* at 203.

105. *Id.* at 199–200 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 334–35 (1966)).

106. *Shelby Cty.*, 133 S. Ct. at 2625.

107. *Id.* at 2631.

equal sovereignty scrutiny would apply to *any* statute with explicit state-specific distinctions—not just voting rights legislation passed under Congress’s Fifteenth Amendment powers. Further, the language indicates that such scrutiny would carry with it a heightened level of review beyond the rational basis test typically applied in statutes passed under the Commerce Clause. Such a review deems that a “departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”<sup>108</sup>

### B. Professor Colby’s PASPA-Relevant Findings

According to Professor Colby, “[t]he equal sovereignty principle thus does not categorically preclude Congress from ‘treat[ing] States disparately’<sup>109</sup> in any manner whatsoever; it does not foreclose ‘all laws [that] affect different states differently.’”<sup>110</sup> Rather, “[i]t is a guarantee of equal *sovereignty*, not of equal treatment in all respects.”<sup>111</sup> Upon understanding “the limited nature of the equal sovereignty principle,”<sup>112</sup> Professor Colby found that most federal statutes “identified by Justice Ginsburg as imperiled by the equal sovereignty principle are not, in fact, threatened at all. But one of the laws that she invokes does indeed fit the bill: [PASPA,] which prohibits sports gambling, but exempts Nevada from its scope.”<sup>113</sup> Professor Colby also determined that PASPA “does not merely regulate private conduct; it curtails the regulatory and revenue-raising authority of the states. It precludes non-exempted states from legalizing sports gambling . . . . Nevada may derive enormous financial benefits from casino sports book betting, but other states may not.”<sup>114</sup>

Oral argument in *Christie I* took place one day after the Supreme Court ruled in *Shelby County*. Professor Colby found that both the

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108. *Nw. Austin*, 557 U.S. at 203.

109. Colby, *supra* note 2, at 1149 (citing *Shelby Cty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting)).

110. *Id.* (citing Eric Posner, *John Roberts’ Opinion on the Voting Rights Act is Really Lame*, SLATE (June 25, 2013, 1:44 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/supreme\\_court\\_on\\_the\\_voting\\_rights\\_act\\_chief\\_justice\\_john\\_roberts\\_struck.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_on_the_voting_rights_act_chief_justice_john_roberts_struck.html) [<https://perma.cc/VE2G-7M9B>]).

111. *Id.*

112. *Id.* at 1154.

113. *Id.* at 1154–55.

114. *Id.* at 1155 (alteration in original) (citing Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 250–52 (2005)).

parties' attorneys and Third Circuit judges "seemed uncertain of just what to make of" *Shelby County* in the context of sports gambling.<sup>115</sup> With the equal sovereignty principle "so surprisingly undeveloped," Professor Colby concluded that the Third Circuit "judges felt obligated to confine it to the narrow context of the Voting Rights Act."<sup>116</sup>

### C. Litigants' Equal Sovereignty Arguments

1. *New Jersey*. Lawyers for New Jersey focused their equal sovereignty arguments on how their state was treated differently than Nevada under PASPA.<sup>117</sup> New Jersey argued: "The [DOJ] does not contend that PASPA's coverage is in any way 'related to the problem it targets.' Nor could it, for PASPA exempted from its sweep the States in which sports betting was most prevalent."<sup>118</sup> New Jersey also addressed the current status of the sports gambling 'problem' nationwide: "Here, the supposed 'problem' of State-sanctioned sports wagering is not rationally addressed by a statute that categorically excludes the states (e.g., Nevada) that manifest that 'problem.'"<sup>119</sup>

New Jersey also devoted time to dissecting PASPA's grandfather clause: "In the Third Circuit, *permanent* exemptions for existing uses are disfavored. The degree of reliance does not alter the Third Circuit's suspicion of permanent grandfathering."<sup>120</sup> Similarly, the State pointed towards the absence of case law on the topic: "The [Plaintiff Sports] Leagues rest their defense on Nevada's 'reliance' interest, but fail to identify any case invoking reliance to authorize permanent discriminatory limitations on the sovereign legislative authorities of the

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115. *Id.* at 1090.

116. *Id.* at 1091.

117. New Jersey also provided background regarding PASPA's enactment: "The interest of Nevada, Delaware, Oregon, and Montana in obtaining a monopoly on sports wagering aligned with the interest of legislators who opposed sports wagering altogether." Brief for Appellants Christopher J. Christie et al., *supra* note 20, at 11. New Jersey continued: "The [DOJ] previously admitted that PASPA resulted from just such legislative horse-trading; the [DOJ] states that 'the decision to allow certain states to maintain their status quo reflects the reality of the bargaining process inherent in the passage of legislation.'" *Id.* at 11 n.6 (quoting Federal Defendants' Motion To Dismiss at 25, *iMEGA*, No. 09-1301, 2011 WL 802106 (D.N.J. Mar. 7, 2011)).

118. *Id.* at 13 (emphasis omitted).

119. Petition for Writ of Certiorari at 33, *Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014) (No. 13-967), *cert. denied*. New Jersey also addressed the Plaintiff Sports Leagues' embrace of daily fantasy sports: "For their part, the [Plaintiff Sports] Leagues clearly no longer view sports wagering as an evil; they actively sponsor wagering through 'fantasy' bets." Brief for Appellants Christopher J. Christie et al., *supra* note 20, at 11 n.7.

120. *Del. River Basin Comm'n v. Bucks Cty. Water & Sewer Auth.*, 641 F.2d 1087, 1098 (3d Cir. 1981).

States.”<sup>121</sup> New Jersey also highlighted PASPA’s different effect on grandfathered and non-grandfathered states: “PASPA plainly gives the disfavored States less sovereign power with respect to sports wagering than it gives to the favored States, because only the favored States have the power to decide whether to permit such wagering.”<sup>122</sup>

In its *Christie I* petition for a writ of certiorari, New Jersey also addressed the severability issue and rebutted the Third Circuit’s observation that PASPA’s exemptions in § 3704—not its general ban in § 3702—would be the focus of any finding that PASPA violated the equal sovereignty doctrine:

The Third Circuit’s suggestion that a proper remedy would be to invalidate Nevada’s preference, meanwhile, is not a justification for the Third Circuit having found no violation of equal sovereignty *at all*. And, of course, if it had found Nevada’s preference unconstitutional, it may also have concluded that the preference was not severable from the rest of PASPA.<sup>123</sup>

2. *Plaintiff Sports Leagues.* The Plaintiff Sports Leagues positioned New Jersey’s equal sovereignty challenge as “splitless and novel,” contending that it “would expand the equal sovereignty principle articulated in *Shelby County* beyond all recognition.”<sup>124</sup> The league quintet reiterated that the Supreme Court has “repeatedly reaffirmed that there is no ‘requirement of uniformity in connection with the commerce power.’”<sup>125</sup> The Plaintiff Sports Leagues also noted the lack of “any cases addressing the broader question of whether *Shelby County* has any bearing on Commerce Clause legislation.”<sup>126</sup> Most importantly, the Plaintiff Sports Leagues argued that New

121. Reply Brief for Appellants Christopher J. Christie et al. at 28, *Christie I*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714 & 13-1715) (emphasis omitted).

122. *Id.* at 56.

123. Petition for Writ of Certiorari, *supra* note 119, at 33 n.8.

124. Brief in Opposition at 28, *Christie v. Nat’l Collegiate Athletic Ass’n*, 134 S. Ct. 2866 (2014) (Nos. 13-967, 13-979 & 13-980), *cert. denied*.

125. *Id.* at 35 (quoting *Currin v. Wallace*, 306 U.S. 1, 14 (1939)). The Plaintiff Sports Leagues provided background:

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

Response Brief of Plaintiffs-Appellees at 57–58, *Christie I*, 730 F.3d 208 (Nos. 13-1713, 13-1714 & 13-1715).

126. Brief in Opposition, *supra* note 124, at 29.



Jersey's equal sovereignty argument—even if it was accepted—was adverse to its goal:

[New Jersey's] argument is largely academic, as it would not entitle them to the remedy they seek. As the [Third Circuit] correctly noted . . . even assuming PASPA's grandfathering clause were constitutionally infirm, at most, that would support invalidation of [§ 3704], not invalidation of PASPA in its entirety. If there were a problem with the favorable treatment of four states, the logical remedy would be to treat them like the other 46, not vitiate PASPA *in toto*. Thus, even if [New Jersey] prevailed on [its] equal sovereignty argument, PASPA would still prohibit operation of New Jersey's sports gambling scheme.<sup>127</sup>

3. *Department of Justice.* The DOJ's take on equal sovereignty differed somewhat from the Plaintiff Sports Leagues' position. The DOJ concluded that “[e]qual sovereignty principles do not apply to legislation under the Commerce Clause,”<sup>128</sup> explaining that equal sovereignty principles “appl[y] only to the terms upon which States are admitted to the Union.”<sup>129</sup> The government argued that a Commerce Clause-enacted grandfather clause is permissible “as long as it satisfies the two-part rationality standard.”<sup>130</sup> The DOJ explained PASPA's grandfather clauses as follows:

[T]he first grandfather clause, § 3704(a)(1), permitted Oregon and Delaware to ‘conduct sports lotteries on any sport,’ because sports lotteries were previously conducted by those states . . . the second grandfather clause, § 3704(a)(2), permitted casino gambling on sporting events to continue (but not expand) in Nevada to the extent that it was previously conducted.<sup>131</sup>

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127. *Id.* at 30–31.

128. Memorandum in Support of the Constitutionality of the Professional and Amateur Sports Protection Act, *supra* note 79, at 17.

129. *Id.* at 51 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966)) (emphasis omitted).

130. Brief for Appellee United States of America at 49, *Christie I*, 730 F.3d 208 (Nos. 13-1713, 13-1714 & 13-1715). The DOJ elaborated: “The doctrine of equal sovereignty is not an impediment to the constitutionality of PASPA, which, even with its grandfather clauses, is permissible Commerce Clause legislation.” *Id.* at 56.

131. Memorandum in Support of the Constitutionality of the Professional and Amateur Sports Protection Act, *supra* note 79, at 4 n.1. Curiously, the DOJ mentioned the Supreme Court's reference to PASPA in *Greater New Orleans*, but did not include the Court's finding that PASPA “includes a variety of exemptions, some with obscured congressional purposes.” *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 179 (1999); see Memorandum in Support of

Montana's exemption received special mention too: "Montana law had long allowed sports pools and [C]alcutta pools and had more recently permitted fantasy sports leagues and sports tab games."<sup>132</sup>

The DOJ looked to Supreme Court precedent in defending PASPA's grandfather clause generally: "PASPA's specific exceptions do not undermine its rationality. . . . [I]t is permissible for the legislature to proceed by 'adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.'"<sup>133</sup> The DOJ continued: "[I]t was reasonable for Congress to create exceptions for pre-existing sports gambling operations, as a means of accounting for the reliance interests that certain States had in the legality of those operations."<sup>134</sup>

#### IV. ANALYZING PASPA UNDER THE EQUAL SOVEREIGNTY DOCTRINE

PASPA's exemptions for Nevada and at least eight other states are unconstitutional under *Shelby County's* equal sovereignty standard. PASPA's general ban on sports gambling in § 3702, in contrast, does not trigger an equal sovereignty doctrine violation. This conclusion does not render PASPA unconstitutional in its entirety, only the severable grandfather clauses in § 3704(a)(1) and § 3704(a)(2). Indeed, our conclusion highlights New Jersey's misplaced emphasis on the equal sovereignty doctrine during the ongoing litigation. We reach our conclusion by analyzing PASPA under the rational basis test and *Shelby County's* heightened "sufficiently related" standard of review. Like the Third Circuit in *Christie I*, we also evaluate PASPA's grandfather clause outside the parameters of *Shelby County*. All modes of analysis push us towards finding PASPA's § 3704(a)(1) and § 3704(a)(2) exemptions to run afoul of the equal sovereignty doctrine.

##### A. *New Jersey's Misplaced Argument*

For understandable reasons—the state was trying to negate PASPA's broad prohibition directed at it—New Jersey put all of its equal sovereignty argument eggs in the § 3702 basket. But New Jersey's

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the Constitutionality of the Professional and Amateur Sports Protection Act, *supra* note 79, at 6 n.2.

132. Memorandum in Support of the Constitutionality of the Professional and Amateur Sports Protection Act, *supra* note 79, at 4 n.1.

133. *Id.* at 23 (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 306 (1976)).

134. *Id.* at 23–24.

§ 3702 equal sovereignty argument was misplaced. PASPA's potential unconstitutionality under the equal sovereignty doctrine falls to § 3704's discriminatory exemption of certain states, not § 3702's prohibition.<sup>135</sup> Indeed, § 3704's grandfathering provision for Nevada and other states creates the equal sovereignty problem, not the blanket ban in § 3702. This result is bad news for New Jersey *and* Nevada, but good news for a proper interpretation of PASPA under the equal sovereignty doctrine.

The remedy New Jersey sought—a complete invalidation of PASPA's § 3702 ban—was more than the equal sovereignty doctrine allowed. Like *Shelby County's* narrowly tailored ruling pertaining solely to its coverage formula in VRA § 4(b), but not its broader provisions, a similar surgical result is appropriate in the case of PASPA. Supreme Court precedent establishes that severability is appropriate when only a portion of a statute is unconstitutional. *United States v. Booker*<sup>136</sup> concluded that courts should “refrain from invalidating more of the statute than is necessary.”<sup>137</sup> Likewise, *Regan v. Time, Inc.*<sup>138</sup> found a “presumption . . . in favor of severability.”<sup>139</sup> Finally, the Supreme Court opined:

The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operational law.<sup>140</sup>

This is the cruel irony of New Jersey's use of the equal sovereignty argument. PASPA has severe constitutional infirmities when put under equal sovereignty scrutiny. But attacking PASPA on equal sovereignty grounds is self-defeating for a state like New Jersey that wants to be involved in sports gambling. Weaponizing the equal sovereignty doctrine against PASPA is best suited for a state—like Utah, perhaps—that does not want sports gambling.

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135. Section 3704 references the time-limited exemptions for certain sports betting schemes; whereas § 3702 provides for an across-the-board ban on sports wagering schemes.

136. *United States v. Booker*, 543 U.S. 220 (2005).

137. *Id.* at 258.

138. *Regan v. Time, Inc.*, 468 U.S. 641 (1984).

139. *Id.* at 652.

140. *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987).

### B. PASPA and Rational Basis Review

Congress is required to provide a “clear statement” explaining federal statutes, such as PASPA, that involve matters typically left for the states.<sup>141</sup> Indeed, Congress explicitly stated that “the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders.”<sup>142</sup> Federal courts have recognized the same: “Throughout our history, the regulation of gambling has been largely left to the state legislatures.”<sup>143</sup> According to the DOJ in 1991, “it is left to the states to decide whether to permit gambling activities based upon sporting events [and] we note that determinations of how to raise revenue have typically been left to the states.”<sup>144</sup> By positioning sports gambling as a “national problem” with harms that “cannot be limited geographically,”<sup>145</sup> PASPA’s text and legislative history clearly indicate that Congress was motivated to invoke the Supremacy Clause and ban sports gambling.<sup>146</sup> What is

141. *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (noting that Congress must provide an “unmistakably clear” explanation whenever it “alter[s] the usual constitutional balance between the States and the Federal Government”).

142. 15 U.S.C. § 3001(a)(1) (2012); *see also* Bruce P. Keller, *The Game’s the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1576 (1999) (“Gambling legislation is largely a matter of state law and, as a result, varies considerably.”).

143. *United States v. King*, 834 F.2d 109, 111 (6th Cir. 1987).

144. Letter from W. Lee Rawls, *supra* note 18, at 1–2.

145. S. REP. NO. 102-248, at 5 (1991).

146. The preemption doctrine can be traced to *McCulloch v. Maryland*, 17 U.S. 316 (1819), with modern iterations emerging during the New Deal era. Congress has broad powers to act within its enumerated powers (e.g. the Commerce Clause) to preempt state regulations that interfere with federal objectives, subject to the Necessary and Proper Clause. *See* EDWIN MEESE, *THE HERITAGE GUIDE TO THE CONSTITUTION* 382–84 (2d ed. 2014). In *Christie I*, the District Court judge wrote: “[I]f PASPA is held to be constitutional, then the [New Jersey] Sports Wagering Law must be stricken as preempted by the Supremacy Clause.” *Nat’l Collegiate Athletic Ass’n v. Christie*, 926 F. Supp. 2d 551, 556 (D.N.J. 2013). The District Court found PASPA to be a constitutional exercise of federal power. *Id.* During oral arguments at the Third Circuit, New Jersey posited that the DOJ had disavowed a suggestion that PASPA preempts state laws. *See* Transcript of Oral Argument, *supra* note 12, at 12. In contrast, the Plaintiff Sports Leagues argued:

But if I read PASPA, one way to characterize it is it’s an express preemption provision. It says that a state can’t pass a particular kind of law. Why is that? Because the federal government in PASPA itself has announced a federal policy that it doesn’t want state-sponsored [sports] gambling.

*See id.* at 42. The Plaintiff Sports Leagues’ assertion that PASPA is an example of express preemption was at odds with the DOJ’s stance: “Is it preemption? Technically I don’t know the answer to that question.” *See id.* at 56. The Third Circuit *Christie I* majority described § 3702’s blanket ban on sports gambling as “classic preemption language that operates[] via the Constitution’s Supremacy Clause.” 730 F.3d at 226. In arguing that PASPA impermissibly

unclear, however, is how harms that “are felt beyond the borders of States that sanction [sports gambling]” are addressed by exceptions to the general ban for states where sports gambling already legally takes place.<sup>147</sup>

PASPA’s shortcomings under *Gregory v. Ashcroft*’s clear statement rule are illustrative of broader problems when scrutinized under the rational basis test used in Commerce Clause actions. The Supreme Court set forth a two-part test in *Hodel v. Indiana*: “A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.”<sup>148</sup> PASPA almost certainly meets the first prong.<sup>149</sup> However, PASPA fails the second part of this test for two reasons. First, PASPA does not include any federal regulatory apparatus. PASPA is solely a directive towards the non-exempt states, with an

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regulates how states regulate sports gambling, Judge Vanaskie in dissent argued that unlike other preemption cases

in which federal legislation limits the actions of state governments, in this case, there is no federal scheme regulating or deregulating sports gambling by which to preempt state regulation. PASPA provides no federal regulatory standards or requirements of its own. Instead, it simply prohibits states from ‘sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing]’ gambling on sports.

*Id.* at 247 (Vanaskie, J., dissenting) (alterations in original) (quoting 28 U.S.C. § 3792(1) (2012)). Judge Vanaskie noted that Congress has the power to preempt state sports gambling regulations; however, that is not what PASPA does because it provides no regulatory (or deregulatory) scheme. *Id.* (Vanaskie, J., dissenting). In fact, the dissent cited various federal sports gambling statutes such as the Wire Act, 18 U.S.C. § 1084 (2012), and the Sports Bribery Act, 18 U.S.C. § 224 (2012), that are deferential to the states and predicate a violation on individual state laws. *Christie I*, 730 F.3d at 247 (Vanaskie, J., dissenting).

147. S. REP. NO. 102-248, at 5.

148. *Hodel v. Indiana*, 452 U.S. 314, 323–24 (1981).

149. In 1903, the Supreme Court held that Congress has the power to ban gambling under the Commerce Clause. *Champion v. Ames*, 188 U.S. 321, 326–30 (1903). Counsel for New Jersey conceded this point during the *Christie II* three judge panel oral argument. See Transcript of Oral Argument, *supra* note 22, at 62 (acknowledging, in response to a question from the panel, that Congress could “have simply banned all sports betting”). Further, the Supreme Court found “[g]ambling . . . implicates no constitutionally protected right; rather, it falls into a category of ‘vice’ activity that could be, and frequently has been, banned altogether.” *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993). The Plaintiff Sports Leagues also posited that the statute at issue in *Christie I* “gives rise to a presumption of invalidity under the dormant Commerce Clause” because of the law’s “protectionist exclusion of collegiate games held in-state or involving in-state colleges from the reach of its unlawful gaming scheme.” Brief in Support of the Plaintiffs’ Motion for Summary Judgment and, if Necessary, to Preserve the Status Quo, a Preliminary Injunction at 13 n.7, *Nat’l Collegiate Athletic Ass’n v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 12-4947).

accommodating carve-out for favored exempt states. Second, if Congress's goal was to address a national problem and stop the spread of gambling, it would not have allowed sports gambling to continue to expand in Nevada and elsewhere via a permanent exemption. Rather, Congress could have: (i) banned such gambling entirely; (ii) included a temporary "phase-out" period for then-existing sports betting; or (iii) definitively "frozen in time" the scope and type of sports betting that is allowed in exempt states with enforcement mechanisms and penalties that compel compliance.

As discussed above in Part I.B., PASPA was also motivated to stop the spread of sports gambling nationwide. PASPA has failed on this metric too. A contemporary example—the rise of so-called "daily fantasy sports"—is illustrative in this regard. With the underlying money staked "on one or more performances of . . . athletes in . . . games,"<sup>150</sup> daily fantasy sports are subject to PASPA's coverage scheme. To date, neither the DOJ nor the Plaintiff Sports Leagues (or any other sports leagues for that matter), have filed a PASPA lawsuit to limit state authorization of such fantasy betting platforms in Indiana, Mississippi, Virginia, Tennessee, New York, Massachusetts, Missouri, or Colorado—all states that recently enacted fantasy-friendly laws but are not exempt under PASPA.<sup>151</sup> As discussed *supra*,<sup>152</sup> Senator DeConcini and the DOJ specifically referenced Montana's fantasy sports legislation, indicating that both considered fantasy sports to fall within PASPA's purview. On a different issue, the Plaintiff Sports Leagues explained Nevada's special status as follows: "[Congress was]

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150. Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2012).

151. See Chris Grove, *States Passing Fantasy Sports Bills May Be Authorizing Far More Sports Betting Than They Realize*, LEGAL SPORTS REP. (Feb. 19, 2016, 2:37 P.M.), <http://www.legalsportsreport.com/8421/dfs-bills-authorize-sports-betting/> [<https://perma.cc/T96T-7Q2S>]; see also David Purdum, *Future of Sports Betting: Fantasy Sports*, ESPN.COM (May 4, 2017), [http://www.espn.com/chalk/story/\\_/id/19309213/chalk-why-fantasy-sports-sports-betting-collision-course-us](http://www.espn.com/chalk/story/_/id/19309213/chalk-why-fantasy-sports-sports-betting-collision-course-us) [<https://perma.cc/J27D-463C>] ("The line between traditional sports betting and fantasy sports is blurring rapidly and soon may be erased altogether."). Indeed, the expansion of fantasy sports-friendly legislation in non-exempt states runs counter to the Solicitor General's conclusion that "[n]o other State has enacted legislation claimed to conflict with PASPA." See Brief for the United States of America as Amicus Curiae in Support of Appellees, *supra* note 95, at 22. Betting on video game competitions may implicate PASPA too. See Sara Friedman, *Beyond Nevada, E-Sports May Challenge PASPA Rules*, GAMBLING COMPLIANCE (Oct. 19, 2016), [https://gamblingcompliance.com/premium-content/news\\_analysis/beyond-nevada-e-sports-may-challenge-paspa-rules](https://gamblingcompliance.com/premium-content/news_analysis/beyond-nevada-e-sports-may-challenge-paspa-rules) [<https://perma.cc/VEJ2-Q3S3>].

152. See 138 CONG. REC. 12,973 (1992) (statement of Sen. DeConcini); see also Memorandum in Support of the Constitutionality of the Professional and Amateur Sports Protection Act, *supra* note 79, at 4 n.1.

willing to allow, to grandfather in Nevada, not because they thought that was great, but because I think they made the kind of measured judgment that Congresses make, which is that there's reliance interests in Las Vegas."<sup>153</sup> PASPA's exemptions were by no means a measured judgment, as a review of the legislative history and Congressional Record demonstrably show. Congress was unaware of the exact number or identity of the states exempted.<sup>154</sup> The Supreme Court found PASPA's exemptions to derive from "obscured congressional purposes."<sup>155</sup> Even the Plaintiff Sports Leagues described PASPA's exemption-related legislative history as "undeniably muddled" and "internally inconsistent."<sup>156</sup>

PASPA's legislative sausage-making was devoid of a rational basis between the identified problem and legislative remedy. Addressing a "national problem" with an undefined grandfathering clause makes little sense. Indeed, the first sentence of the Third Circuit's *Christie I* decision is revealing—and unintentionally ironic—on this point: "Betting on sports is an activity that has unarguably increased in popularity over the last several decades."<sup>157</sup> While the DOJ posited that "PASPA does not permit any of the States in which sports gambling were already taking place to authorize or license new sports gambling schemes in the future,"<sup>158</sup> the practical reality is far different. Betting volume in Nevada has nearly tripled since PASPA's enactment, with a

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153. Transcript of Oral Argument, *supra* note 22, at 36. New Jersey rebutted the 'reliance' explanation as follows: "If PASPA were really about reliance, it would limit the favored States to the amount of sports wagering that existed in 1991, rather than permitting the exponential increase that has occurred in those States since PASPA was enacted." Brief for Appellants Christopher J. Christie et al., *supra* note 20, at 15 n.7.

154. See *supra* Part I.C.

155. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 179 (1999).

156. Brief in Opposition, *supra* note 25, at 17.

157. *Christie I*, 730 F.3d 208, 214 (3d Cir. 2013).

158. Brief for the United States in Opposition at 22 n.10, *Christie I*, 730 F.3d 208 (3d Cir. 2014) (Nos. 13-967, 13-979 & 13-980.), *cert. denied*, 134 S. Ct. 2866 (2014) ("The line drawn by PASPA's grandfathering provisions is thus not a line between favored and disfavored States, but rather a line between one class of sports gambling schemes (those already in existence) and another (future ones).").

plethora of new schemes not available or authorized in 1992.<sup>159</sup> Further, daily fantasy sports now takes place in about 38 states nationwide.<sup>160</sup>

### C. PASPA Under Heightened Scrutiny

According to Professor Colby, a “federal statute that contravenes the equal sovereignty principle should simply trigger some form of heightened scrutiny, requiring the federal government to justify the disparate treatment.”<sup>161</sup> Indeed, *Northwest Austin* declared that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”<sup>162</sup> Professor Colby said this would “require Congress to provide a strong justification for treating the states as unequal sovereigns” and PASPA may be deficient:

In the case of PASPA, it is highly questionable whether such a justification can be found. Even Congress admitted that the problem that the law addresses is national in scope. The only possible justification for treating the states differently is a desire to ‘grandfather’ existing state laws that had relied to a substantial degree on the lack of contrary federal regulation. Whether that is a sufficient justification for permanently favoring some states over others in their ability to regulate an important subject is, at the very least, a dubious proposition.<sup>163</sup>

More broadly, *Shelby County* stands for the proposition that, when a court evaluates a federal statute that facially discriminates between the states, the court must undertake a careful review to discern whether the state-level differentiation is “sufficiently related to

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159. In 1992, the total amount legally bet on sports in Nevada was \$1.8 billion. DAVID G. SCHWARTZ, CTR. FOR GAMING RESEARCH, UNIV. OF NEV. LAS VEGAS, NEVADA SPORTS BETTING TOTALS: 1984–2016, at 6 (2017), [http://gaming.unlv.edu/reports/NV\\_sportsbetting.pdf](http://gaming.unlv.edu/reports/NV_sportsbetting.pdf) [<https://perma.cc/AL5P-YFQA>]. In 2016, the total amount legally bet on sports in Nevada was \$4.5 billion. *Id.* Nevada also offers a host of betting options that were neither authorized nor offered upon PASPA’s enactment. Examples include real-time betting, entity betting, player draft selection wagers, mobile betting, wagering on in-state colleges, and “eSports” betting. See Anastasios Kaburakis, Ryan M. Rodenberg & John T. Holden, *Inevitable: Sports Gambling, State Regulation, and the Pursuit of Revenue*, 5 HARV. BUS. L. REV. ONLINE 27, 31 n.19 (2015).

160. Dustin Gouker, *Legislative Tracker: Daily Fantasy Sports, Sports Betting*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-bill-tracker/> [<https://perma.cc/DW4M-F35J>].

161. Colby, *supra* note 2, at 1156.

162. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

163. Colby, *supra* note 2, at 1156–57 (internal citations omitted).



the problem that it targets.”<sup>164</sup> The Supreme Court did that in *Shelby County*, painstakingly reviewing all the factors that went into Congress’s determinations about the (continuing) need to treat states differently. The Third Circuit never undertook such an analysis in connection with PASPA’s exemptions.

For example, in *Christie II*, the court wrote: “we are not asked to judge the wisdom of PASPA.”<sup>165</sup> *Shelby County* requires otherwise when state equal sovereignty is implicated. The Third Circuit in *Christie I* made a critical error in concluding that PASPA’s legislative history was “clear.”<sup>166</sup> PASPA’s disparate treatment of some states is not sufficiently related to the problem it targets, a problem exacerbated by the statute’s “undeniably muddled” and “internally inconsistent”<sup>167</sup> legislative history pertaining to PASPA’s carve-outs, which the Supreme Court found derived from “obscured Congressional purposes.”<sup>168</sup>

PASPA’s permanent geographic-based grandfathering subsections in § 3704(a)(1) and § 3704(a)(2) are subject to equal sovereignty scrutiny.<sup>169</sup> Unlike the enactment of the Voting Rights Act in the 1960’s, there were no “exceptional circumstances” involving sports betting in certain geographic locations 25 years ago when PASPA was enacted. Sports betting was—and is—“as widespread as air.”<sup>170</sup> In 1992, sports betting was easily accessible via phone, in Nevada sportsbooks, and at various bars, restaurants, and street corners nationwide. In 2017, sports betting is available in all the same places, as well as online via a computer or smartphone app. Sports betting did not have any meaningful geographic nexus in 1992 and does not have any in 2017.

In 1991, Congress relied on testimony from certain executives working for the Plaintiff Sports Leagues, all of whom spoke of how

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164. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2627 (2013) (quoting *Nw. Austin*, 557 U.S. at 203).

165. *Christie II*, 832 F.3d 389, 396 (3d Cir. 2016) (en banc) (quoting *Christie I*, 730 F.3d 208, 215 (3d Cir. 2013)).

166. *Christie I*, 730 F.3d at 240 n.18.

167. Brief in Opposition, *supra* note 25, at 17.

168. *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 179 (1999).

169. Neither § 3704(a)(3) nor § 3704(a)(4) would trigger the equal sovereignty doctrine, as the former has expired due to the lapse of time and the latter does not differentiate between states.

170. Michael Rosenberg, *Newsflash: There’s Gambling in Sports; Time To Regulate, Not Ban It*, SPORTS ILLUSTRATED (Aug. 14, 2012), <https://www.si.com/more-sports/2012/08/14/gambling> [<https://perma.cc/SLS9-93FK>].

their employers were injured by legalized sports betting.<sup>171</sup> Some of the current executives of the Plaintiff Sports Leagues plainly disagree with their predecessors. For example, NBA executive Adam Silver penned a *New York Times* op-ed that touched on many of the issues relevant to PASPA under an equal sovereignty analysis. According to Silver: (i) “[i]n light of . . . domestic and global trends, the laws on sports gambling should be changed;” (ii) “I believe we need a different approach;” and (iii) “[t]imes have changed since PASPA was enacted.”<sup>172</sup> In another example, NFL executive Roger Goodell described Nevada’s sports betting regulatory apparatus as potentially “beneficial” in the context of the Oakland Raiders upcoming relocation to Las Vegas.<sup>173</sup>

Under *Shelby County*, federal statutes that differentiate between the states must take “current conditions” into consideration. PASPA falls short in this inquiry, as the law is “outdated.”<sup>174</sup> As pre-Internet legislation, PASPA wholly fails to take into account the online presence of sports betting nationwide—illegally through offshore websites and legally via smartphone apps with Nevada sportsbooks and daily fantasy operators. More broadly, Nevada’s considerable expansion of *legal* sports gambling since 1992, coupled with widespread illegal internet-fueled sports betting domestically and via offshore websites, have exacerbated PASPA’s equal sovereignty problems. Congress may have desired for sports gambling to be “strictly contained”<sup>175</sup> in § 3704(a)’s exemptions to § 3702’s general ban, but this has proven illusory.

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171. See *Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Econ. & Commercial Law of the H. Comm. on the Judiciary*, *supra* note 19, at 92; see also *Prohibiting State-Sanctioned Sports Gambling: Hearing on S.474 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, *supra* note 55, at 2.

172. Adam Silver, Opinion, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 14, 2014), <https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html> [https://perma.cc/59SX-WVMD].

173. David Purdum, *Roger Goodell Says NFL Still Opposed to Legalized Sports Betting*, ESPN.COM (Apr. 7, 2016), [http://www.espn.com/chalk/story/\\_id/19027576/nfl-commissioner-roger-goodell-says-league-opposed-legalized-sports-betting-raiders-moving-las-vegas](http://www.espn.com/chalk/story/_id/19027576/nfl-commissioner-roger-goodell-says-league-opposed-legalized-sports-betting-raiders-moving-las-vegas) [https://perma.cc/4S7K-N54Q].

174. Darren A. Heitner, *The Plight of PASPA: It's Time to Pull the Plug on the Prohibition*, 14 GAMING L. REV. & ECON. 249, 249 (2010).

175. S. REP. NO. 102-248, at 10 (1991).

#### D. Permanent Grandfathering Clauses and PASPA

Senator Grassley's 1992 criticism of PASPA's grandfather clause on the Senate floor carried strong legal overtones, anticipating the inevitable litigation to be spawned by PASPA. Senator Grassley cited two cases to support his position—the Supreme Court's decision in *Mayflower Farms v. Eyck*<sup>176</sup> and the Third Circuit's ruling in *Delaware River Basin v. Bucks County*.<sup>177</sup> In *Mayflower Farms*, the Court found a mandatory milk pricing law with a grandfathered cut-off date to be “arbitrary and unreasonable” and “an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date.”<sup>178</sup> PASPA functions much the same way, but is more extreme than *Mayflower Farms*' overturned milk pricing law in that PASPA mandates compliance by non-favored states, not merely disfavored private companies. In *Delaware River Basin*, the Third Circuit found: “[F]avoritism of this sort might often appear the product of a political arrangement that does no more than favor one interest at the expense of another rather than the result of a reasoned judgment about a socially beneficial policy.”<sup>179</sup>

Indeed, the Third Circuit made a critical error when applying the *Delaware River Basin* case to PASPA's grandfather clause. The *Christie I* court wrote: “PASPA's legislative history is clear as to the purpose behind its own exemptions, and thus survives *Delaware River Basin*.”<sup>180</sup> This conclusion is flatly contradicted by Supreme Court precedent and the Plaintiff Sports Leagues' own pleadings. Fourteen years before *Christie I*, *Greater New Orleans* found PASPA's exemptions to derive from “obscured Congressional purposes.”<sup>181</sup> Likewise, in *Markell*, the Plaintiff Sports Leagues described the legislative history surrounding PASPA's grandfather clause as “undeniably muddled” and “internally inconsistent.”<sup>182</sup> As such, especially when viewed in light of *Shelby County*'s elevated level of review, PASPA's state-level discrimination is problematic.

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176. *Mayflower Farms v. Eyck*, 297 U.S. 266 (1936).

177. *Del. River Basin v. Bucks Cty. Water & Sewer Auth.*, 641 F.2d 1087 (3d Cir. 1981).

178. 297 U.S. at 274.

179. 641 F.2d at 1095–96 (internal citations omitted).

180. *Christie I*, 730 F.3d 208, 240 n.18.

181. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 179 (1999).

182. Brief in Opposition, *supra* note 25, at 17.

PASPA's carve-outs have broader problems. PASPA stands alone in permanently allowing an activity deemed problematic to continue in certain states, but not others.<sup>183</sup> By doing so, PASPA turns the commonly accepted justification for grandfathering clauses on its head. Unlike the Clean Air Act<sup>184</sup>—a federal statute that treats California differently than the other 49 states in the furtherance of more stringent and environmentally-beneficial automobile emissions standards—PASPA “encourages the continuation of a purportedly undesirable activity in certain jurisdictions forever.”<sup>185</sup> Containment-based grandfather clauses like PASPA's typically include some termination date, as permanent exemptions with the effect of preserving and furthering identified problems forever are disfavored and likely barred.<sup>186</sup>

The DOJ revealingly previewed why PASPA's exemptions give rise to equal sovereignty problems when *Christie I* was still at the district court level.<sup>187</sup> In distinguishing PASPA from the problematic

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183. Holden, Kaburakis & Rodenberg, *supra* note 21, at 3 (“Ameliorative legislation is that which allows for the continuation of programs with perceived positive effects. Containment-based legislation is that which seeks to stop the spread of purportedly undesirable activity.”).

184. 42 U.S.C. §§ 7401–7671q (2012).

185. Holden, Kaburakis & Rodenberg, *supra* note 21, at 7–8 (“[T]here is no recognizable legislative precedent for perpetually allowing purportedly undesirable behavior in certain jurisdictions, but not others.”).

186. *Id.*

187. For example, the DOJ cited *Haves v. Miami*, 52 F.3d 918, 922 (11th Cir. 1995), as follows: “A state may legitimately use grandfather provisions to protect property owners’ reliance interests.” Memorandum in Support of the Constitutionality of the Professional and Amateur Sports Protection Act, *supra* note 79, at 24. Appealing to *Haves* is particularly problematic in the context of PASPA. Not only did *Haves* pertain to city houseboat ordinances, an activity wildly different than state-level restrictions on sports betting, but the DOJ would tread into unprecedented territory if it suggests that Nevada and other grandfathered states have a property interest in offering different forms of sports wagering, an activity described as a vice by the Supreme Court in *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993). Further, in justifying PASPA's exceptions, neither the DOJ nor the Plaintiff Sports Leagues cite any case for the proposition that an ownership interest vests in the ability of some states—but not others—to offer sports betting. Relatedly, there is a similar lack of authority for the proposition that sports leagues can be the arbiters of which states can offer betting propositions. While sports leagues have property interests in the copyrighted broadcasts and various protected marks associated with leagues and teams, vast swaths of data and information that comprise betting propositions have historically been found to be within the public domain. See generally Ryan M. Rodenberg, John T. Holden & Asa Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J. L. TECH. & ARTS 63 (2015) (discussing the tension between sports leagues’ attempts to monetize information and the broad availability of sports data in the public domain); see also Brief for the United States as Amicus Curiae Supporting Petitioners at 26, *Am. Broad. Cos. Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461) (“When a television network broadcasts a live sporting event,

grandfather clause in *Delaware River Basin*, the DOJ wrote: “By contrast, with PASPA, but for the reliance interests of certain States, Congress might have *eliminated* the object of the grandfather clause (sports gambling) . . . .”<sup>188</sup> The DOJ thus suggests that “reliance interests” are the *only* reason purportedly justifying PASPA’s carve-outs for Nevada and other states. This moves into dangerous ground for PASPA’s continuing constitutional viability under the equal sovereignty doctrine. As PASPA’s name makes clear, PASPA was justified as a means to *protect* sports leagues from a “national problem” that has an impact beyond geographic borders.<sup>189</sup> At no time did Congress state that PASPA’s sole purpose was to protect sports gambling reliance interests in Nevada and other states. Tellingly, neither Congress nor the DOJ explained how a “national problem” could simultaneously be a reliance interest as a *legal* activity in some states, while completely banned in others. Further, the DOJ’s reasoning here gives rise to the possibility that any such reliance interest would trigger a Takings Clause issue or property claim if revoked.<sup>190</sup>

Congress could have structured PASPA’s carve-outs as sunset provisions that would expire or be reevaluated after a predetermined number of years, like Congress did for the statute at issue in *Shelby County*. Congress opted instead to make PASPA’s grandfather clause perpetual, pushing the statute beyond the extent of the statute invalidated by *Shelby County*. As such, the Third Circuit’s failure to evaluate whether PASPA “makes sense in light of current conditions”<sup>191</sup> is even more glaring under *Shelby County*’s equal sovereignty review.<sup>192</sup>

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no underlying performance precedes the initial transmission—the telecast itself is the only copyrighted work.”).

188. Memorandum in Support of the Constitutionality of the Professional and Amateur Sports Protection Act, *supra* note 79, at 24 n.6.

189. S. REP. NO. 102-248, at 5 (1991).

190. The specter of a Takings Clause issue is not an academic hypothetical, as it was raised during Congressional hearings about amending PASPA to ban betting on college sports nationwide, with no exceptions. S. REP. NO. 107-16, at 18 (2001) (“S. 718’s prohibition on state regulated college sports wagering without compensation violates the Takings Clause.”).

191. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2629 (2013).

192. In *Christie I*, the Third Circuit cited *City of New Orleans v. Dukes*, 420 U.S. 297 (1976), and *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981), for the proposition that grandfathering schemes in economic legislation were permissible. *Christie I*, 730 F.3d 208, 239–40 (3d Cir. 2013). The Third Circuit’s analysis was dismissive of New Jersey’s contention that PASPA is distinct because the PASPA grandfathering scheme is permanent instead of temporary like the grandfathering scheme in *Dukes*. The court stated that the state was misguided because there was

## CONCLUSION

With *Shelby County* establishing the equal sovereignty doctrine as a “fundamental principle” of constitutional law,<sup>193</sup> its role in the current PASPA lawsuit involving New Jersey is important. But its impact in *future* PASPA litigation involving other disfavored states that want to permit (or ban) sports betting may be even more meaningful. Indeed, counsel for the Plaintiff Sports Leagues foreshadowed the possibility of imminent litigation in this area during oral argument: “[O]n behalf of my clients, I’m really trying to prohibit, you know, prevent there from being a *Christie III*.”<sup>194</sup> Absent Congressional repeal or amendment,<sup>195</sup> the next PASPA lawsuit seems inevitable. No fewer than six other states have introduced sports betting legislation.<sup>196</sup> Even New Jersey has “full nuclear” legislation proposed that would completely repeal the state’s sports betting prohibitions.<sup>197</sup> Such a complete repeal would result in unregulated—yet legal—sports betting everywhere in the Garden State.

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no indication that the *Dukes* scheme was temporary. *Id.* The Third Circuit, however, is incorrect as *Dukes*’ grandfathering scheme would end when the last pushcart vendor of New Orleans either traded in her pushcart for retirement, sought another job, or died. Similarly, the Supreme Court’s decision in *Clover Leaf Creamery* involved a scheme that was narrowly designed to affect one particular type of dairy container that the Minnesota legislature determined to pose an environmental burden on the state. While the case references “grandfathered” paper-based containers, the loose use of the term grandfathering is quite different than in PASPA, as the Minnesota statute banned the sale of milk in a particular type of plastic container, it did not ban the sale of milk in all containers. See *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 458–60 (1981). In order for PASPA to be properly analogous to *Clover Leaf Creamery* and justify the Third Circuit’s conclusion, Congress would have had to propose a scheme making sports betting impermissible at casinos, but freely available at locations where lottery tickets are sold. By analogy to the subject matter of *Clover Leaf Creamery*, a PASPA-like scheme would ban the sale of milk in certain plastic containers, but allow nine stores throughout the state of Minnesota to continue selling milk in the otherwise banned plastic containers.

193. *Shelby Cty.*, 133 S. Ct. at 2623.

194. Transcript of Oral Argument, *supra* note 22, at 41 (three judge panel).

195. Congress is currently undertaking a review of federal sports gambling laws. See David Purdum, *Congress Reviewing ‘Obsolete’ Federal Gambling Laws, To Introduce New Legislation*, ESPN.COM (Oct. 26, 2016), [http://www.espn.com/chalk/story/\\_/id/17848529/congressional-committee-reviews-federal-gambling-laws-plans-introduce-new-legislation](http://www.espn.com/chalk/story/_/id/17848529/congressional-committee-reviews-federal-gambling-laws-plans-introduce-new-legislation) [https://perma.cc/A952-RAZB].

196. Dustin Gouker, *If Other States Want to Challenge Federal Law on Sports Betting, Now Might Be a Good Time*, LEGAL SPORTS REP. (Jan. 24, 2017), <http://www.legalsportsreport.com/12713/challenges-to-us-sports-betting-law/> [https://perma.cc/J2KE-MH8T]; see also Gouker, *Legislative Tracker*, *supra* note 159.

197. David Purdum, *New Jersey to Continue Fight for Sports Betting*, ESPN.COM (Nov. 1, 2016), [http://www.espn.com/chalk/story/\\_/id/17945197/chalk-new-jersey-continues-fight-legalize-sports-betting](http://www.espn.com/chalk/story/_/id/17945197/chalk-new-jersey-continues-fight-legalize-sports-betting) [https://perma.cc/LJ6X-KUM5].

According to Professor Colby, “PASPA contravenes the principle of equal state sovereignty.”<sup>198</sup> We agree. Like Professor Colby, we find PASPA’s partial and non-uniform ban on state-sponsored sports wagering to run afoul of the equal sovereignty doctrine’s general constraints as set forth in *Shelby County* and *Northwest Austin*. PASPA also fails equal sovereignty scrutiny for two other narrower reasons. First, for a law motivated to address a “national problem” with no geographic borders, PASPA’s various carve-outs for no fewer than nine states are irrational. Not only does the discrimination manifest itself between grandfathered states and non-grandfathered states, but there is also an unconstitutional differentiation between Nevada and the other exempt states. Second, PASPA’s grandfathered exceptions are perpetual in nature, making them more suspect than the temporary provisions of the Voting Rights Act ruled unconstitutional by the Supreme Court in *Shelby County*. If the equal sovereignty question is presented to the Supreme Court in the current *Christie II* litigation or a later sports gambling-specific dispute, Professor Colby—and Justice Ginsburg—will likely be proven correct in questioning the validity of PASPA.<sup>199</sup> However, the appropriate remedy would be to sever out § 3704’s differential grandfather clause, not eviscerate § 3702’s blanket ban. Such a remedy would be an unwelcome result for New Jersey and Nevada, but a correct application of the equal sovereignty doctrine vis-à-vis PASPA.

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198. Colby, *supra* note 2, at 1155; *see also Shelby Cty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting).

199. Likewise, Justice Stevens will be validated in flagging the “obscured Congressional purposes” underpinning PASPA’s exemptions. *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 179 (1999).