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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *et al.*, **Plaintiffs,** **v.** **CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, *et al.*** **Defendants.**	**Civil Action No. 3:12-cv-04947** **Honorable Michael A. Shipp** Document Electronically Filed

MEMORANDUM IN SUPPORT OF THE CONSTITUTIONALITY OF THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

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INTRODUCTION

This case involves a direct conflict between the State of New Jersey's efforts to legalize sports gambling and a federal statute, the Professional and Amateur Sports Protection Act of 1992 ("PASPA"), which prevents the expansion of state-sponsored sports wagering. To avoid PASPA's restrictions, the New Jersey defendants (the Governor, the Director of the Division of Gaming and Enforcement, and the Executive Director of the Racing Commission) and a defendant-intervenor, the New Jersey Thoroughbred Horsemen's Association, have challenged PASPA on multiple constitutional grounds. Those parties, which favor the legalization of sports gambling in New Jersey, claim that PASPA violates commandeering principles of the Tenth Amendment; exceeds the scope of the Commerce Clause power; contravenes state sovereignty principles and the equal footing doctrine; and offends due process and equal protection principles. Each of those challenges fails: PASPA is a constitutional exercise of congressional authority, and it should be upheld.

First, PASPA does not violate anti-commandeering principles of the Tenth Amendment. Under that doctrine, Congress cannot require States to take affirmative actions to implement a federal regulatory program. But PASPA does not require New Jersey to take any affirmative action; rather, it merely prohibits

New Jersey from sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling.

PASPA is also a valid exercise of Congress' Commerce Clause authority because it is reasonable to believe that sports gambling has a substantial effect on interstate commerce. Moreover, PASPA's provisions, which prevent the expansion of state-sponsored sports gambling, are rational methods of achieving Congress' purposes of stopping the spread of sports wagering and of guarding the integrity of athletic competitions.

In addition, principles of equal sovereignty and the equal footing doctrine have no relevance here. Neither concept applies to congressional legislation under the Commerce Clause, such as PASPA. Furthermore, equal sovereignty principles and the equal footing doctrine ensure that new States are admitted to the Union on an equal footing with existing States. But PASPA was enacted in 1992, and its "grandfather" provisions extend back only as far as 1976, long after New Jersey (or any other State) was admitted to the Union.

The due process and equal protection challenges brought by the New Jersey defendants fail as well. The Fifth Amendment protects only "persons" and does not extend to States. Therefore, New Jersey does not have the ability to bring due process or equal protection challenges to PASPA's constitutionality. Even so, under rational basis review, PASPA does not offend either of those constitutional

principles. It is economic and social legislation that serves legitimate governmental purposes (stopping the spread of state-sponsored sports betting and promoting the integrity of athletic competitions) through rational means (preventing additional States from authorizing sports gambling).

STATUTORY BACKGROUND

Enacted in 1992, PASPA sought to stop the spread of state-sponsored sports gambling and to maintain the integrity of professional and amateur sports. *See* S. Rep. No. 102-248, at 4 (Nov. 26, 1991). Toward that end, PASPA applies to "a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." 28 U.S.C. § 3702. Under PASPA, governmental entities cannot "sponsor, operate, advertise, promote, license, or authorize by law or compact," such sports gambling. *Id.* PASPA is not limited to regulating States; it also makes it illegal for a person to "sponsor, operate, advertise, or promote, pursuant to law or compact" such sports gambling. *Id.*

There are four exceptions to PASPA's general prohibition of state-sponsored sports gambling. The first two exceptions are grandfather clauses that potentially exempt from PASPA's prohibition those States with pre-existing gambling

schemes. *See* 28 U.S.C. § 3704(a)(1)-(2).[1] As explained by the Senate Judiciary Committee, "[a]lthough 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." *See* S. Rep. No. 102-248, at 8. The third exception provided a one-year period (from PASPA's enactment date) for qualifying States to establish sports gambling. *See* 28 U.S.C. § 3704(a)(3). To qualify for this exception, a State had to have a municipality within its jurisdiction that had casinos in operation throughout the previous ten years. *See id.* New Jersey was the only State eligible for this exception, but it chose not to take advantage of it. *See* 138 Cong. Rec. S7274-02, 1992 WL 116822, at S7280 (daily ed. June 2, 1992) (statement of Sen. Grassley) (recognizing New Jersey was the only State eligible for the second grandfather clause exception); *In re Casino Licenses*, 633 A.2d 1050, 1051 (N.J. Super. Ct. App. Div. 1993) ("Earlier this year, the Legislature

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[1] The grandfather clauses apply to four states: Delaware, Oregon, Montana, and Nevada. *See* S. Rep. No. 102-248, at 8 (Nov. 26, 1991) (explaining that the 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); *id.* (explaining that 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); 138 Cong. Rec. S7274-02, 1992 WL 116822, at S7276 (daily ed. June 2, 1992) (statement of Sen. DeConcini) (recognizing that Montana law had long allowed sports pools and calcutta pools and had more recently permitted fantasy sports leagues and sports tab games).

chose not to vote on a joint resolution to place a referendum on the ballot permitting a proposed constitutional amendment authorizing casino betting on sports events."), *aff'd*, 138 N.J. 1 (N.J. 1993) (per curiam). Finally, parimutuel animal racing and jai-alai games are exempted from PASPA's prohibitions. *See* 28 U.S.C. § 3704(a)(4).

In addition to these prohibitions, PASPA provides enforcement mechanisms. The Attorney General can seek to enjoin violations of PASPA in federal court. *See* 28 U.S.C. § 3703. Professional and amateur sports organizations can also seek to enjoin violations of PASPA in federal court upon alleging that sports wagering is based on one of their competitive games. *See id.*

In the twenty-plus years since PASPA's enactment, there have been three other lawsuits challenging its provisions. Most recently, the constitutionality of PASPA was challenged in anticipation of New Jersey's efforts to legalize sports betting. *See Interactive Media Entm't & Gaming Ass'n, Inc. (iMEGA) v. Holder*, 2011 WL 802106 (D.N.J. Mar. 7, 2011). That lawsuit was brought by several plaintiffs, including a non-profit organization that disseminates information regarding electronic gaming, horsemen's associations in New Jersey who favor legalization of state-sponsored sports betting, and a New Jersey State Senator. Those plaintiffs raised eight challenges to the constitutionality of PASPA, but that lawsuit was dismissed for a lack of Article III standing without addressing the

substance of those constitutional challenges. *See id.* at *10. Before *iMEGA*, a New Jersey resident who sought to engage in sports gambling brought a *pro se* action, alleging that PASPA violated the Tenth Amendment. *See Flagler v. U.S. Attorney For Dist. of N.J.*, 2007 WL 2814657 (D.N.J. Sept. 25, 2007). That action, too, was dismissed for a lack of Article III standing, without reaching merits of the constitutional challenge. *See id.* at *2-3. The only other lawsuit implicating PASPA's provisions was between several sports leagues and the State of Delaware after Delaware sought to expand sports betting under one of PASPA's grandfather clauses. *See Office of Comm'r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009). Neither standing issues nor constitutional challenges were implicated in that litigation.[2] In short, the constitutional challenges to PASPA presented here have not been previously addressed by a court, and this case presents a matter of first impression.

FACTUAL BACKGROUND

New Jersey has taken several recent steps toward the establishment of state-sponsored gambling. In 2011, in response to a statewide ballot, New Jersey amended its constitution to authorize, with limited exceptions, wagering "on the results of any professional, college, or amateur sport or athletic event" at casinos

[2] The Supreme Court has also made reference to PASPA, but only as part of an overview of federal gambling and antigambling policies. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 179-80 (1999).

and racetracks throughout the state. *See* N.J. Const. art. IV, § VII, para. 2(D).[3] With that new constitutional authority, the New Jersey legislature enacted the Sports Gambling Law, which permits "wagering at casinos and racetracks on the results of certain professional or collegiate sports or athletic events." 2011 N.J. Sess. Law Serv. Ch. 231 (Jan. 17, 2012). To implement that statute, New Jersey has now promulgated regulations setting forth the procedures by which Atlantic City casinos and racetracks throughout New Jersey could obtain licenses and commence sports gambling. *See* N.J. Admin. Code § 13:69N (Oct. 15, 2012).[4]

In August 2012, several sports organizations initiated this litigation to oppose New Jersey's efforts to establish sports gambling. *See* Compl., ECF No. 1 (D.N.J. Aug. 7, 2012). Those sports organizations include one amateur sports league, the National Collegiate Athletic Association, and four professional sports leagues, the National Basketball Association, the National Football League, the National Hockey League, and the Office of the Commissioner of Baseball. Those

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[3] Those constitutional amendments still prohibit gambling "on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place." N.J. Const. art. IV, § VII, para. 2(D).

[4] Despite New Jersey's imminent intentions as well as its recent constitutional amendments, statutory enactments, and issuance of regulations, sports gambling in New Jersey will be authorized only pursuant to a state-issued license. *See* N.J. Stat. Ann. § 5:12A-2. New Jersey has not issued any such sports-gambling license, and therefore, it does not yet sponsor, operate, advertise, promote, license, or authorize sports gambling.

sports leagues allege that sports gambling is a threat to the integrity of athletic competition, and they contend as a matter of law that New Jersey's efforts to expand sports gambling violate PASPA's prohibitions. For those reasons, the sports leagues sued three New Jersey officials (the Governor, the Director of the Division of Gaming and Enforcement, and the Executive Director of the Racing Commission) to enjoin New Jersey's efforts to institute sports gambling. Other parties have intervened in the litigation to join the New Jersey officials as defendants. Those intervening parties are the New Jersey Thoroughbred Horsemen's Association, Inc., New Jersey State Senate President Stephen M. Sweeney, and New Jersey Assembly Speaker Sheila Y. Oliver.

The New Jersey defendants and the Horsemen's Association have filed briefs challenging PASPA's constitutionality. *See* N.J. Br., ECF No. 76-1, at 22-38 (D.N.J. Nov. 21, 2012); Horsemen's Br., at 6-40, ECF No. 108 (D.N.J. Dec. 13, 2012). Those challenges prompted the United States to intervene to defend the constitutionality of PASPA.

ARGUMENT

I. PASPA DOES NOT VIOLATE ANTI-COMMANDEERING PRINCIPLES OF THE TENTH AMENDMENT.

The first constitutional challenge raised by the New Jersey defendants and the Horsemen's Association is that PASPA violates the Tenth Amendment's commandeering prohibition. *See* N.J. Br. at 23-32; Horsemen's Br. at 6-18. The

Tenth Amendment does not specifically reference commandeering, but instead provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The commandeering strain of Tenth Amendment jurisprudence is of relatively recent origin, stemming from the Supreme Court's decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).

The commandeering prohibition applies only when a federal statute requires affirmative State action. In *New York*, the Supreme Court addressed provisions of the Low-Level Radioactive Waste Act of 1985 that required States either to take title to low-level radioactive waste generated within their borders or to regulate low-level radioactive waste pursuant to congressional directive. *See New York*, 505 U.S. at 174-75. The Supreme Court struck down and severed those provisions because either option would commandeer "'the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 176 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)); *see also id.* at 186. In short, the critical flaw with the 1985 Act was that it required States to take affirmative action (either by taking title to low-level radioactive waste or by implementing a federal regulatory scheme).

Similarly, in *Printz*, the Supreme Court struck down provisions of the Brady Act that required state officers to administer a federal regulatory program. *See* 521 U.S. at 935. The specific provisions at issue required state law enforcement officers to perform certain tasks associated with handgun sales, such as determining whether the prospective purchaser could lawfully possess firearms. *See id.* at 902-03. As with the 1985 Act in *New York*, that provision of the Brady Act imposed a duty on States to take action, and thus violated the commandeering prohibition in the Tenth Amendment. *See id.* at 933.

By contrast, PASPA imposes no affirmative duty on States to take any action. Here, for instance, New Jersey has complied with PASPA for over twenty years, during much of which New Jersey took no action regarding its sports gambling laws. PASPA also does not require New Jersey to expend any funds. Nor does PASPA require New Jersey affirmatively to enforce its prohibitions on sports gambling. Thus, in marked contrast with the challenged statutes in *New York* and *Printz*, PASPA requires no affirmative action whatsoever by New Jersey, and therefore it does not offend the Tenth Amendment's commandeering prohibition. *See Hodel v. Va. Surface Mining*, 452 U.S. at 288 (finding no Tenth Amendment violation where a federal statute did not require States to enforce its provisions, to expend any State funds, or to participate in the federal regulatory program in any manner whatsoever).

This result is confirmed by the Supreme Court's unanimous rejection of the commandeering challenge in *Reno v. Condon*, 528 U.S. 141 (2000). There, based on *New York* and *Printz*, the State of South Carolina disputed the constitutionality of the Driver's Privacy Protection Act of 1994 ("DPPA"), which prohibits States from selling personal information obtained in connection with a motor vehicle record. The Supreme Court upheld the DPPA over a commandeering challenge because the DPPA "does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno*, 528 U.S. at 151. The same can be said of PASPA: New Jersey does not need to enact any laws to be PASPA-compliant, and no New Jersey officials need assist in PASPA's enforcement.

Finally, it is exceptionally rare for a federal statute to offend the anti-commandeering principles articulated in *New York* and *Printz*. For instance, *New York* and *Printz* are the only instances in which the Supreme Court has invalidated federal statutes on commandeering grounds. *See, e.g., Reno*, 528 U.S. at 150-51. Moreover, no court in the Third Circuit has stricken a statute on that basis. *See, e.g., United States v. Parker*, 108 F.3d 28, 31 (3d Cir. 1997) (rejecting a Tenth Amendment challenge to a statute because the statute did not '"threaten[ ] the existence or significance of the states or interfere[ ] with the existence of their

powers"' (quoting *United States v. Sage*, 92 F.3d 101, 107 (2d Cir. 1996) (alterations in original))); *United States v. Shenandoah*, 572 F. Supp. 2d 566, 584 (M.D. Pa. 2008); *Se. Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n*, 826 F. Supp. 1506, 1519 (E.D. Pa. 1993). In fact, the law in the Third Circuit, even after *New York* and *Printz*, is that the Tenth Amendment is not violated by federal statutes that are valid exercises of Congress' constitutionally enumerated powers. *See Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 413 (3d Cir. 2012) ("'If Congress acts under one of its enumerated powers . . . there can be no violation of the Tenth Amendment.'" (quoting *Parker*, 108 F.3d at 31 (omission in original))); *Shenandoah*, 572 F. Supp. 2d at 584 (rejecting a commandeering challenge when the challenged statute was a valid exercise of Congress' enumerated powers). In sum, because PASPA *prohibits* New Jersey from sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling, but it *does not impose* any affirmative duties on New Jersey, PASPA does not constitute an exceptional instance in which a federal statute commandeers State action in violation of the Tenth Amendment.

II. CONGRESS WAS FULLY WITHIN ITS COMMERCE POWER IN ENACTING PASPA.

The New Jersey defendants and the Horsemen's Association both assert that PASPA is unconstitutional on Commerce Clause grounds. *See* N.J. Br. at 33-36; Horsemen's Br. at 27-40. Those challenges fail because Congress may regulate

sports gambling as part of its Commerce Clause authority, and PASPA's specific provisions are rational means of achieving legitimate legislative purposes.

A. PASPA'S REGULATION OF SPORTS WAGERING IS A PERMISSIBLE EXERCISE OF CONGRESS' COMMERCE CLAUSE AUTHORITY.

The Commerce Clause permits Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. When combined with the Necessary and Proper Clause, the Commerce Clause provides Congress with broad legislative authority. *See Hodel v. Va. Surface Mining*, 452 U.S. at 276-77; *Fry v. United States*, 421 U.S. 542, 547 (1975); *see also United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) ("[T]he Necessary and Proper Clause grants Congress broad authority to enact federal legislation."); *United States v. Pendleton*, 636 F.3d 78, 87 (3d Cir. 2011) (upholding the Sex Offender Registration and Notification Act as a necessary and proper exercise of the commerce power). As explained below, there are two requirements for Congress to regulate commerce: (i) a reasonable belief that the legislation will regulate activities related to commerce and (ii) a reasonable fit between the means chosen and the desired end of the legislation.

Congress has wide latitude to exercise its commerce power to regulate "activities that substantially affect interstate commerce," *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *see also id.* (explaining that the Commerce Clause

also provides Congress with the authority to regulate "the use of the channels of interstate commerce" and "the instrumentalities of interstate commerce, or persons or things in interstate commerce"); *Perez v. United States*, 402 U.S. 146, 150 (1971). This power "may be exercised in individual cases without showing any specific effect upon interstate commerce; it is enough that the individual activity when multiplied into a general practice is subject to federal control, or that it contains a threat to the interstate economy that requires preventive regulation." *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (citations omitted); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). The determination whether legislation has a substantial effect on commerce does not involve a factual inquiry; rather, the dispositive question is whether Congress could reasonably believe that the regulated activity would have a substantial effect on interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *Pierce Cnty., Wash. v. Guillen*, 537 U.S. 129, 147 (2003). Moreover, in regulating under the Commerce Clause, Congress is not limited to addressing purely economic matters – it may also seek to remedy social or moral concerns that substantially affect interstate commerce. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (explaining that it was permissible under the Commerce Clause for Congress to prohibit racial discrimination because "Congress was not restricted by the fact that the particular

obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong."); *see also United States v. Darby*, 312 U.S. 100, 114 (1941) ("Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.").

The Commerce Clause also requires a reasonable means-end fit between the legislation's provisions and its purpose. *See Hodel v. Va. Surface Mining*, 452 U.S. at 276; *see also Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964) ("But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."); *Darby*, 312 U.S. at 118, 121. *See generally McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("The sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are

appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

In sum, "[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." *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981).

PASPA satisfies those standards. First, there is no dispute that it is reasonable to conclude that sports betting has a substantial effect on interstate commerce. Wagering on professional and amateur sports generates a large number of transactions, sometimes of significant dollar amounts. As the Senate Judiciary Committee concluded, "[s]ports gambling is a national problem. The harms it inflicts are felt beyond the borders of those States that sanction it." S. Rep. No. 102-248, at 5.

Second, there is a reasonable means-ends fit for PASPA. Congress' goals were to limit the spread of sports gambling and to ensure the integrity of professional and amateur sporting events. PASPA's means are rationally related to those ends. As the Senate Judiciary Committee concluded, "[w]ithout Federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum," *id.*, and "legalized sports gambling would

likely draw new recruits to illegal gambling," *id.* at 7. PASPA also preserves the integrity of sporting events because "[w]idespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think that 'the fix was in' whenever their team failed to beat the point-spread." *Id.* at 5.

In sum, it is reasonable for Congress to have concluded that sports wagering would substantially affect interstate commerce, and by limiting the expansion of lawful sports gambling, Congress acted rationally.

B. DEFENDANTS' CONCERNS REGARDING EQUAL SOVEREIGNTY AND THE EQUAL FOOTING DOCTRINE ARE MISPLACED.

Related to their Commerce Clause challenges, the New Jersey defendants and the Horsemen's Association both claim that PASPA is unconstitutional because it treats New Jersey less favorably than those States that are permitted to sponsor sports betting. The New Jersey defendants make this argument in the vocabulary of "equal sovereignty," *see* N.J. Br. at 33-36, while the Horsemen's Association references the "equal footing doctrine," *see* Horsemen's Br. at 19-24. Neither challenge has merit.

Equal sovereignty principles do not apply to legislation under the Commerce Clause. Rather, as the Supreme Court has explained, there is no uniformity requirement for Commerce Clause legislation, though there is for other enumerated powers:

> To hold that Congress in establishing its regulation is restricted to the making of uniform rules would be to impose a limitation which the Constitution does not prescribe. There is no requirement of uniformity in connection with the commerce power such as there is with respect to the power to lay duties, imposts and excises.

Currin v. Wallace, 306 U.S. 1, 14 (1939) (citations omitted); *see also Hodel v. Indiana*, 452 U.S. at 332 ("A claim of arbitrariness cannot rest solely on a statute's lack of uniform geographic impact."); *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950) (explaining that it is permissible under the Commerce Clause for Congress to devise "a national policy with due regard for the varying and fluctuating interests of different regions").

The cases relied upon by the New Jersey defendants do not upset that conclusion. Two of the cases, *Ward v. Maryland*, 79 U.S. 418 (1870), and *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), *see* N.J. Br. at 33, do not implicate congressional action under the Commerce Clause; rather, they arose in the context of protectionist State laws affecting commerce. *See Ward*, 79 U.S. at 419-21 (striking down a Maryland statute that imposed greater taxes on out-of-state traders than in-state traders); *Pennsylvania*, 262 U.S. at 600 (invalidating a West Virginia statute that gave a preference to in-state purchasers of natural gas over out-of-state purchasers). Thus, those cases' emphasis on uniformity is in the context of preventing "conflicting or hostile state laws" in light of the primacy of the federal government's role in regulating interstate commerce. *See*

Pennsylvania, 262 U.S. at 596. Furthermore, neither case held that congressional enactments under the Commerce Clause must treat all States identically.

A third case relied upon by the New Jersey defendants, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), *see* N.J. Br. at 33-34, is no more relevant: it also does not address legislation under the Commerce Clause. Instead, its statements regarding uniformity come in the context of legislation authorized by the Enabling Clause of the Fifteenth Amendment, U.S. Const. amend. XV, § 2. In addition, the critical quotation from *Northwest Austin* upon which the New Jersey defendants rely, *see* N.J. Br. at 34, is abridged from *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966). A full recitation of that selection from *South Carolina* makes clear that the doctrine of equal sovereignty does not bar geographical limitations on legislation, and that equal sovereignty principles apply only with respect to the conditions under which a State is admitted to the Union:

> In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. The doctrine of equality of States, invoked by South Carolina, does not bar this approach, *for that doctrine applies only to the terms upon which States are admitted to the Union*, and not to the remedies for local evils which have subsequently appeared.

South Carolina v. Katzenbach, 383 U.S. at 328-29 (emphasis added).

The New Jersey defendants' citation to *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892), *see* N.J. Br. at 33-34, suffers from a similar flaw.

That case addressed only the equal sovereignty to which Illinois was entitled upon its entry to the Union, and it has no bearing on this dispute, which does not involve the conditions under which New Jersey became a State. *See Ill. Cent.*, 146 U.S. at 434 (explaining that "Illinois was admitted into the Union in 1818 on an equal footing with the original states, in all respects").

The challenge by the Horsemen's Association under the related equal footing doctrine has even less applicability. The equal footing doctrine requires only that new States be "admitted to the Union on an 'equal footing' with the original 13 Colonies." *United States v. Alaska*, 521 U.S. 1, 5 (1997). The equal footing doctrine is not a limitation on Congress' commerce power after a State is admitted to the union. *See Montana v. United States*, 450 U.S. 544, 551 (1981). Moreover, the equal footing doctrine does not impose any requirements of economic equality among States. *See United States v. Texas*, 339 U.S. 707, 716 (1950) ("The 'equal footing' clause has long been held to refer to political rights and to sovereignty. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense." (citation omitted)). Because PASPA is economic legislation enacted under the Commerce Clause after New Jersey's admission to the Union, it cannot be challenged under the equal footing doctrine. More fundamentally, only subsequently admitted States may bring challenges under the equal footing doctrine. *See United States v. Alaska*,

521 U.S. at 5; *cf. Coyle v. Smith*, 221 U.S. 559, 579 (1911) (comparing the conditions of Oklahoma's admission to the Union with those of the thirteen colonies). Because New Jersey was one of the original thirteen colonies and has been continuously admitted to the Union, the equal footing doctrine is inapplicable.

III. PASPA DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION PRINCIPLES.

The New Jersey defendants' final constitutional challenge is that PASPA violates the due process and equal protection guarantees of the Fifth Amendment.[5] *See* N.J. Br. at 36-38. But the Fifth Amendment's Due Process Clause protects only "persons" – and not States – from actions of the federal government: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Supreme Court has explained definitively that "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court." *South Carolina v. Katzenbach*, 383 U.S. at 323-24; *see also In re*

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[5] The text of the Fifth Amendment contains no equal protection clause, but, after the enactment of the Fourteenth Amendment, the Fifth Amendment's Due Process Clause has been extended to ensure equal protection of the laws. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups."); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316-17 (3d Cir. 2001).

Real Estate Title & Settlement Servs. Antitrust Litig., 869 F.2d 760, 765 n.3 (3d Cir. 1989) (explaining that "the Supreme Court has held that states are not persons within the meaning of the Fifth Amendment and thus are not entitled to due process protections"); *Delaware v. Cavazos*, 723 F. Supp. 234, 243-44 (D. Del. 1989). Because New Jersey does not constitute a "person" within the protection of the Fifth Amendment, it cannot challenge PASPA's constitutionality on due process or equal protection grounds.

Although nothing more is required to dismiss New Jersey's due process and equal protection challenges, PASPA does not offend either of those doctrines. As economic and social legislation, PASPA would be subject to rational basis review for due process and equal protection challenges. *See generally FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."). Rational basis review examines whether "there is a rational relationship between the disparity of treatment and some legitimate governmental

purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 277 (3d Cir. 2007). Under that standard, the challenged statute is "accorded a strong presumption of validity," *Heller*, 509 U.S. at 319, and for a challenger to prevail, it must establish that there is no conceivable instance in which the statute would be valid. *See United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) ("A party asserting a facial challenge 'must establish that no set of circumstances exists under which the Act would be valid.'" (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))); *Lighthouse Inst.*, 510 F.3d at 277. PASPA survives rational basis review because (i) it serves the legitimate purposes of stopping the spread of sports gambling and of guarding the integrity of athletic competitions, and (ii) as explained above, its provisions are rationally related to that purpose by preventing state-sponsored sports gambling.

PASPA's specific exceptions do not undermine its rationality. As the Supreme Court explained, it 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." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 306 (1976) (upholding the City of New Orleans' use of grandfather clauses to limit pushcarts to preserve the appearance and customs of the French Quarter). Thus, it 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. *See Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992) ("[C]lassifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws."); *Dukes*, 427 U.S. at 305 (recognizing reliance interests as a valid basis for a grandfather clause); *Haves v. City of Miami*, 52 F.3d 918, 922 (11th Cir. 1995) ("A state may legitimately use grandfather provisions to protect property owners' reliance interests.").[6] Accordingly, PASPA's prohibitions and its exceptions are rational approaches for achieving legitimate goals.

CONCLUSION

For the foregoing reasons, PASPA does not violate any provision of the Constitution, and it should be upheld.

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[6] In addition to the reasons identified by the sports leagues, *see* Sports Leagues' Br. at 18-20, these reliance interests are readily distinguishable from the grandfather clauses at issue in *Bucks County*, *see* N.J. Br. at 35 (citing *Del. River Basin Comm'n v. Bucks Cnty. Water & Sewer Auth.*, 641 F.2d 1087 (3d Cir. 1981)). In *Bucks County*, the grandfather clauses governed the *supply* of an object (free water), and there was no affirmative harm in requiring payments for water going forward. *See Bucks Cnty.*, 641 F.2d at 1089, 1099. By contrast, with PASPA, but for the reliance interests of certain States, Congress might have *eliminated* the object of the grandfather clause (sports gambling) much as it has done by criminalizing all bribery associated with sporting events, *see* 18 U.S.C. § 224. *See* S. Rep. No. 102-248, at 8. Along with this critical difference, the continuing vitality of the *Bucks County* holding must be questioned in light of the *Nordlinger* decision, in which the Supreme Court upheld lower tax rates for longer term property owners than for newer owners of comparable properties. *See Nordlinger*, 505 U.S. at 12-13.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *et al.*,	
Plaintiffs,	**Civil Action No. 3:12-cv-04947**
v.	**Honorable Michael A. Shipp**
CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, *et al.*	Document Electronically Filed
Defendants.	

CERTIFICATE OF SERVICE

I hereby certify that the Memorandum in Support of the Constitutionality of the Professional and Amateur Sports Protection Act, and this Certificate of Service were filed electronically, with copies to be provided to all counsel of record.

February 1, 2013

/s/ *Peter J. Phipps*
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