

# Pace Intellectual Property, Sports & Entertainment Law Forum

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Volume 3  
Issue 1 *Spring 2013*

Article 2

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April 2013

## New Jersey vs. The Paragons of Society: I'll Bet on New Jersey Invalidating PASPA

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### Recommended Citation

Levi Glick, *New Jersey vs. The Paragons of Society: I'll Bet on New Jersey Invalidating PASPA*, 3 Pace. Intell. Prop. Sports & Ent. L.F. 23 (2013).

DOI: <https://doi.org/10.58948/2329-9894.1017>

Available at: <https://digitalcommons.pace.edu/pipself/vol3/iss1/2>

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## **New Jersey vs. The Paragons of Society: I'll Bet on New Jersey Invalidating PASPA**

### **Abstract**

Levi Glick writes an article on the Professional and Amateur Sports Protection Act ("PASPA"), which in effect prohibits state-sanctioned sports betting within the United States. His article addresses the efforts by the State of New Jersey to establish state-sanctioned sports betting within the state, and the subsequent legal challenges brought forth by the professional sports leagues. He focuses on the legal arguments that New Jersey leveled in challenging the leagues' alleged claims. He also focuses on the Constitutional arguments that weigh in favor of finding PASPA unconstitutional, as well as the public policy arguments for repealing it.

### **Keywords**

sports betting, professional and amateur sports protection act, New Jersey, sports wagering

**NEW JERSEY VS. THE PARAGONS OF SOCIETY: I'LL BET ON NEW JERSEY****INVALIDATING PASPA**

Levi Glick\*

**Introduction**

During the economic slowdown of the early 1990s several states were facing budgetary shortfalls, and state-sanctioned sports betting was perceived by states legislatures as a “panacea to their mounting deficits.”<sup>1</sup> At least thirteen states were considering “legislation to legalize state-sponsored sports betting.”<sup>2</sup> The professional sports leagues lobbied Congress to pass legislation that would prohibit state-sponsored sports betting.<sup>3</sup> In 1992, Congress bowed to the pressure and enacted the Professional and Amateur Sports Protection Act (“PASPA”).<sup>4</sup> PASPA “prohibits states from enacting, licensing, or operating any kind of wagering scheme on sporting events.”<sup>5</sup> However, Congress subsequently carved out an exception to the general rule of PASPA “for states that operated some form of sports wagering scheme between 1976 and 1990.”<sup>6</sup> Although the individual states were not identified, Nevada, Oregon, Montana and Delaware are the only states that benefit from the exception and are not as strictly regulated by PASPA.” In

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<sup>1</sup> Senator Bill Bradley, *The Professional and Amateur Sports Protection Act-Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 8 (1992).

<sup>2</sup> *Id.*

<sup>3</sup> Jason J. Ranjo, *Game Over?: The Potential Demise of the Professional and Amateur Sports Protection Act*, 42 RUTGERS L.J. 213, 214 (2010) (discussing imminent constitutional challenges against PAPSAs).

<sup>4</sup> *Id.*

<sup>5</sup> Anthony G. Galasso, Jr., *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post PASPA World*, 99 KY. L.J. 163, 163 (2010) (discussing discrimination among states on laws governing gaming).

<sup>6</sup> *Id.*

crafting the exception, Congress acknowledged that “sports betting is now legal in [these states] and that the elimination of such schemes . . . would work a harsh result.”<sup>7</sup>

The objective of the PASPA legislation was to “stop the spread of state-sponsored sports gambling, and to maintain the integrity of our national pastime.”<sup>8</sup> If the individual states had been allowed to enact sports betting schemes, it may have conveyed the message that sports are more about money than personal achievement and sportsmanship.<sup>9</sup> It was further argued that “legalized sports betting would teach young people how to gamble [and that] they would no longer love the game for the purity of the experience.”<sup>10</sup> These objectives are just several of the reasons cited by the leagues and their supporters in Congress for enacting PASPA.

An unforeseen consequence of the Bill’s passage has been to assist Nevada in developing a monopoly on sports wagering within the United States. Statistics show that \$2.5 billion [is] wagered annually in licensed sports books in Nevada, which results in \$120 million in net revenue for casinos each year.<sup>11</sup> Fast-forward to 2012, states are facing eerily similar budgetary shortfalls to the ones they faced in the early 1990s, and legislatures are once again looking for quick guaranteed sources of revenue.

### **New Jersey Referendum to Legalize Sports Betting**

As the New Jersey legislature began to explore legalized sports betting, Governor Chris Christie has demonstrated support for sports betting in the state of New Jersey.”<sup>12</sup> Governor Christie has stated he would like organize sports betting in Atlantic City and Monmouth

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<sup>7</sup> Bradley, *supra* note 1, at 9.

<sup>8</sup> Ranjo, *supra* note 3, at 214.

<sup>9</sup> Bradley, *supra* note 1, at 5.

<sup>10</sup> Bradley, *supra* note 1, at 7.

<sup>11</sup> Galasso, *supra* note 5, at 168.

<sup>12</sup> *The Case for Legal Sports Betting*, NEW JERSEY LAW JOURNAL, (Nov. 25, 2012, 5:38 PM), [http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202575706899&The\\_Case\\_for\\_\\_Legal\\_Sports\\_Betting](http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202575706899&The_Case_for__Legal_Sports_Betting).

racetrack, to provide revenue for both the city and the state.<sup>13</sup> In furtherance of that aim, a referendum to amend the state constitution to allow for sports betting in the state was placed on the ballot in November 2011.<sup>14</sup> The referendum passed, and in January 2012, the legislature “enacted a law that would legalize betting at Atlantic City and the four remaining racetracks.”<sup>15</sup>

Rather than requiring the Attorney General to file suit on behalf of the federal government, PASPA allows the professional sports leagues to file “a civil action to enjoin a violation.”<sup>16</sup> Before the legislation was to take effect, the professional sports leagues filed for an injunction, stating that New Jersey’s actions are “in clear and flagrant violation of [PASPA].”<sup>17</sup> This note will address the suit brought by the professional leagues and the responding legal arguments put forth by the State of New Jersey in their motion to dismiss the suit. The note will subsequently discuss potential constitutional challenges that can be brought against PASPA, and the merits of these legal arguments.

### **NCAA, NBA, NFL MLB Seek Injunction against Planned New Jersey Betting Scheme**

#### **I. Do The Plaintiffs Have Legal Standing to File Suit?**

Following the overwhelming approval of the referendum to legalize sports betting in the state, the New Jersey legislature passed legislation that would legalize sports betting at casinos

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<sup>13</sup> Donna Weaver, *Christie Addresses Taxes, Ethics, Asked about Sports Betting at Lacey Township Town-Hall Meeting*, THE PRESS OF ATLANTIC CITY (Sep. 28, 2012), [http://www.pressofatlanticcity.com/news/top\\_three/christie-addresses-taxes-ethics-asked-about-sports-betting-at-lacey/article\\_4737b1b4-08d4-11e2-8397-0019bb2963f4.html](http://www.pressofatlanticcity.com/news/top_three/christie-addresses-taxes-ethics-asked-about-sports-betting-at-lacey/article_4737b1b4-08d4-11e2-8397-0019bb2963f4.html).

<sup>14</sup> N.J. Law Journal, *supra* note 12.

<sup>15</sup> *Id.*

<sup>16</sup> 28 U.S.C.A. § 3703 (West 2012).

<sup>17</sup> Mary Pat Gallagher, *No Quick Resolution in Sight for Suit Challenging N.J. Sports-Betting Law*, NEW JERSEY LAW JOURNAL, (AUGUST 28, 2012) [http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202569356911&No\\_Quick\\_Resolution\\_in\\_Sight\\_for\\_Suit\\_Challenging\\_NJ\\_SportsBetting\\_Law](http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202569356911&No_Quick_Resolution_in_Sight_for_Suit_Challenging_NJ_SportsBetting_Law).

and racetracks; this legislation provided for a comprehensive system of regulation.<sup>18</sup> The professional sports leagues responded by filing suit to enjoin New Jersey from licensing sports betting in the state, and to protect their interests under PASPA.

New Jersey took an unanticipated approach in responding to the challenge put forth by the leagues. The state chose not to challenge the constitutionality of PASPA, as many had anticipated, but instead challenged the legal standing of the leagues to bring suit.<sup>19</sup> In order to establish the legal standing necessary “to seek injunctive relief, a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural and hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.”<sup>20</sup> A plaintiff is required to establish that he has suffered an injury-in-fact that is both specific and particularized, and actual or imminent, not conjectural or hypothetical.<sup>21</sup>

The first challenge pertains to the alleged injury put forth by the leagues in their complaint, and in their motion in opposition to New Jersey’s motion for summary judgment. It is asserted by the leagues that they have “a personal interest in producing and marketing their athletic contests and in how those athletic contests are perceived by their fans.”<sup>22</sup> In essence, the leagues are concerned with how their fans will perceive their games and contend that an increase in legalized sports betting will lead fans to question the outcome of close games. However, New Jersey counters that this threat is unrealistic and that “the leagues’ conclusory suggestion that

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<sup>18</sup> Reply Br. in Supp. of Def.’s Mot. to Dismiss, Pursuant to Fed. Rule of Civil Procedure 12(b)(1), *NCAA v. Christie*, No. 3:12-cv-04947 (MAS) (LHG) (D.N.J. Sept. 7, 2012) (2012 WL 5231455 (D.N.J.)).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)).

<sup>21</sup> *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

<sup>22</sup> Pl.’s Mem. of Law in Opp’n, Def.’s Mot. to Dismiss the Compl., *NCAA v. Christie*, No. 3:12-cv-04947 (MAS) (LHG) (D.N.J. Oct. 1, 2012) (2012 WL 4804067 (D.N.J.)).

fans will suddenly change their views of the leagues' games as a result of tightly regulated sports betting in New Jersey is a contrivance of a legal brief".<sup>23</sup>

Although New Jersey's assertion seems trivial and nitpicky, it highlights the fact that the leagues' alleged injury is largely based upon conjecture. A plaintiff is required to plead an injury-in-fact, and an assertion regarding another's changed perception does not seem to fit that criterion for two reasons. First, it is rather difficult to determine whether one's perception has changed. Second, any alleged change in perception would not occur until after the alleged action occurs, which is indicative of a potential future harm. The leagues cannot definitively point to an actual injury that has occurred. Rather, they can only assert in their complaint that the injury is sure to occur and the court should trust their assessment that it will occur. It is evident that New Jersey has met its burden on this aspect, and the leagues have failed to plead an injury-in-fact.

It appears that the leagues are acutely aware of the flaws regarding their alleged injury, and cite the congressional committee's findings that "widespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think 'the fix was in' whenever their team failed to beat the point-spread."<sup>24</sup> The inference to be drawn is that Congress has recognized the inherent harm sports betting will cause the leagues, and the courts should accept the committee's findings regarding injury. However, as New Jersey rightfully counters, "Congress's constitutional voice is ... [not] a committee report which was neither voted on, nor presented, nor signed ... and which may or may not have even been read by the members who voted on the bill itself."<sup>25</sup> Therefore, the findings by the committee have no legal

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<sup>23</sup> Reply Br. in Supp. of Def.'s Mot. to Dismiss, *supra* note 19 (citing *Friends of the Earth, Inc. v. Laidlaw Env't'l Servs.(TOC), Inc.*, 528 U.S. 167, 184 (2000)).

<sup>24</sup>Br. in Supp. of Pl.'s Mot. of Summ. J and, if Necessary, to Preserve the Status Quo, *NCAA v. Christie*, No. 3:12-cv-04947 (MAS) (LHG) (D.N.J. Aug. 10, 2012) (2012 WL 3964728 (D.N.J.) (citing S. Rep. No. 102-248, at 5 (1991)).

<sup>25</sup> Reply Br. in Supp. of Def.'s Mot. to Dismiss, *supra* note 19 (citing *Szehinskyj v. Atty. Gen. of U.S.*, 432 F.3d 253, 260 (3d Cir. 2005)).

value, and cannot be used to establish that the leagues have suffered an injury-in-fact. Even if the leagues were to establish that state-sponsored sports betting in New Jersey does in fact alter fan perception, they would likely fail on standing grounds as the “challenged action ‘must threaten to cause a direct injury to the plaintiffs’ that is ‘distinct and palpable.’”<sup>26</sup> As a change in perception does not necessarily lead to actual harm, it does not constitute a distinct and palpable injury. In order to establish that actual harm has occurred as a result, the leagues would have to show that fans have reacted negatively in some harmful manner to New Jersey’s actions. In sum, the leagues are required to assert that a change in perception will lead to some eventual harm to have standing, but have failed to stipulate what exactly the harm would be at this time.

The arguments put forth by New Jersey challenging the leagues’ assertion of an injury-in-fact appear somewhat circular, but the general principle is that any alleged injuries at this stage in time are merely speculative. While the leagues may wish to prevent harm that they perceive will occur, they cannot seek injunctive relief in the courts until the injury occurs.<sup>27</sup> The party “invoking federal jurisdiction bears the burden of establishing these elements,”<sup>28</sup> and the leagues have failed to do so.

## **II. Does PASPA Grant The Plaintiffs Any Substantive Rights?**

An alternative argument put forth by the leagues is that under PASPA, “the standing requirement is an easy one, as the invasion of the statutory right Congress has afforded *a fortiori* satisfies Article III’s injury-in-fact requirement – not because Congress has created an injury where there was none, but because Congress has recognized the distinct interest of sports organizations in preventing the spread of state-sponsored gambling on their events and provided

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<sup>26</sup> Reply Br. in Supp. of Def.’s Mot. to Dismiss, *supra* note 19 (citing *Meese v. Keene*, 481 U.S. 465, 472 (1987)).

<sup>27</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>28</sup> *Id.* at 561.



legal protection against the invasion of that interest.”<sup>29</sup> In other words, Congress did not grant them a new cause of action, but did in fact recognize an ongoing injury and provided the leagues with a cause of action to correct it. As the Supreme Court has held, the “actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’”<sup>30</sup> Therefore, even if the injury claimed by the leagues is deemed to be conjecture, they can still establish injury under PASPA and can seek injunctive relief.

The State of New Jersey argues that the leagues misinterpreted the applicable case law, stating that “the leagues’ confusion lies in a misunderstanding of the interaction between two entirely reconcilable principles: (1) that ‘the requirement of injury is a hard floor of Article III jurisdiction that cannot be removed by statute,’<sup>31</sup> and (2) that ‘the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.’”<sup>32</sup> Based upon the leagues’ interpretation, so long as Congress “confers a cause of action on an entity or group of entities, the courts must presume the prospective plaintiffs ‘already has a concrete and particularized interest’ in its enforcement.”<sup>33</sup> However, as the Court stated in *Summers v. Earth Island Inst.*, “it makes no difference ... that the procedural right has been accorded by Congress.”<sup>34</sup> As courts use a constitutional analysis to rule on issues of standing, Congress does not have the authority to simply bypass the relevant requirements via statute.

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<sup>29</sup> Pl.’s Mem. of Law in Opp’n Def.’s Mot. to Dismiss the Compl, *supra* note 23.

<sup>30</sup> Pl.’s Mem. of Law in Opp’n Def.’s Mot. to Dismiss the Compl., *supra* note 23 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982); (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

<sup>31</sup> Reply Br. in Supp. of Def.’s Mot. to Dismiss, *supra* note 19 (citing *Summers*, 555 U.S. at 497).

<sup>32</sup> *Id.* (citing *Warth* 422 U.S. at 500).

<sup>33</sup> *Id.* (citing N.C.A.A. Mem. in Opp’n, 16:493– 12).

<sup>34</sup> *Id.* (citing *Summers*, 555 U.S. at 497).

The State of New Jersey further challenges the constitutionality of PASPA by claiming that “when analyzing a claim of standing based on a statute, the appropriate inquiry is whether the statute grants the plaintiff individual a substantive right against the defendant.”<sup>35</sup> The analysis is “conducted by examining the particular language of the statute at issue to determine whether the statute creates an obligation on the part of the defendant to take (or withhold) action with respect to the plaintiff, such that the defendant’s violation of its obligation would impose on the plaintiff a concrete and particularized injury.”<sup>36</sup> These types of statutes create legal rights, and when the legal rights are invaded it provides the plaintiff standing to press a case for the loss of rights.<sup>37</sup> However, PASPA does not meet the above-mentioned criteria, as it “simply prohibits certain governmental entities from authorizing a sports ‘wagering scheme,’<sup>38</sup> [but it] does not obligate those states to take or withhold any action with respect to the leagues.”<sup>39</sup> Consequently, PASPA does not qualify as a statute that creates standing on its own.

The arguments put forth by New Jersey serves to undercut the leagues’ assertion that PASPA by itself grants it standing to seek an injunction, as PASPA does not create any obligation on the part of the states with regard to the leagues. PASPA acts a prohibition on the states, which differs from the statutes in the cases cited by the leagues in support of their position. The statutes in those cases placed an obligation on the defendant, and the resulting breach of that obligation gave rise to an injury-in-fact. A federal prohibition does not by extension create a private right to protect that interest, rather “discretion lies solely in the Executive Branch to decide when and how to enforce the statute ... Congress has no authority to circumvent the important discretionary role of the Executive Branch in interpreting and

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<sup>35</sup> *Id.* at 9.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (citing *Warth*, 422 U.S. at 500).

<sup>38</sup> *Id.* at 10 (citing 28 U.S.C. § 3702).

<sup>39</sup> *Id.*

enforcing such laws.”<sup>40</sup> New Jersey is not denying that it is acting in violation of PASPA, but merely that the leagues lack the standing to seek an injunction. On that ground, it would appear that New Jersey has the stronger legal arguments and should prevail.

### **Did Congress have the Authority to Enact PASPA?**

#### **I. PASPA Fails to Satisfy the Uniformity Requirement of the Commerce Clause**

Since the Commerce Clause is the basis for the enactment of PASPA, a direct challenge purely on general Commerce Clause grounds is likely to fail. However, a successful challenge to PASPA can be mounted based upon its discriminatory language and effects on the non-excepted States. It was of paramount concern to the founders that the power to regulate commerce be applied uniformly, as evidenced by General Pickney’s statement that if “the regulation of trade is to be given to the Genl. Government, they will be nothing more than overseers for the Northern States.”<sup>41</sup> The Northern States were equally concerned, as shown by Gouverneur Morris’s proclaimed desire “to provide some defence for the N[orthern] States’ from the ‘oppression of commerce’ that would result if the South and West were to gain the upper hand in Congress.”<sup>42</sup> Both sides feared that the other would eventually come to dominate the federal government, and would subsequently use the power of the Commerce Clause to their own advantage, or even worse, to subjugate the other.

In recognition of the importance of this issue, a committee was established with representation by each state to draft a proposal addressing the issue. The resulting resolution stated “nor shall any regulation of commerce or revenue give preference to the ports of one state

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<sup>40</sup> *Id.*

<sup>41</sup> Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 276 (2005).

<sup>42</sup> *Id.* at 276-77 (quoting 1 Max Farrand, *The Records of the Federal Convention of 1787* 604 (Max Farrand ed., 1911)).

over those of another ... and all tonnage, duties, imposts, and excises, laid by the legislature, shall be uniform throughout the United States.”<sup>43</sup> This is a clear indication that the founders intended for commerce related regulations to be applied uniformly to the individual states, and as the Supreme Court acknowledged the “words ‘but all such duties, imposts and excises shall be uniform throughout the United States’ ... became separated only in arranging the Constitution for the purpose of style.”<sup>44</sup> So while the ‘Uniformity Clause’ was eventually separated from the wording granting Congress the power to regulate commerce, it was done purely for stylistic reasons and not for any substantive purpose. Accordingly, any Commerce Clause related regulations would conceivably need to be applied uniformly.

PASPA cannot be defended under such a challenge, as it explicitly discriminates against the states that did not have a sports betting scheme in effect prior to its enactment, and forbids them from doing so at any time in the future. The Court has restricted the reach of the Commerce Clause piecemeal in its recent holdings, and it is not beyond the realm of possibility that it will continue to place limits on the Commerce Clause powers wielded by Congress.

Additionally, the Court in *Gonzalez v. Raich* held that “Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”<sup>45</sup> An argument can be made that Congress cannot regulate sports betting, as there is no interstate market for sports betting, nor is it a ‘commercial commodity’ in any sense of the word. A commodity connotes something tangible, a physical product or something of substance. When an individual places a bet on a game, there is no exchange of goods occurring, so in that sense sports betting is not a commodity in the pure sense of the term. The argument

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<sup>43</sup> *Id.* at 280.

<sup>44</sup> *Id.* at 281-82 (citing *Knowlton v. Moore*, 178 U.S. 41, 105-106 (1900)).

<sup>45</sup> *Gonzalez v. Raich*, 545 U.S. 1, 18 (2005) (quoted in *Ranjo*, *supra* note 3, at 220).

focuses on the meaning of the term and is largely of a semantic nature, but it does raise the issue of what type of activities can be regulated by Congress under the Commerce Clause. Does the Commerce Clause pertain to physical goods strictly, or does the Commerce Clause extend to services or in essence any exchange of currency between individuals?

The strongest argument that can be put forth regarding the unconstitutionality of PASPA is the uniformity requirement envisioned by the founders, which would in effect be applicable to all commerce related regulations passed by Congress. Under the uniformity rubric, PASPA on its face is unconstitutional, as it clearly discriminates against the states that didn't have sports betting schemes in effect at the time of passage. In fact, only states that had previously had a sports betting scheme were provided a one-year window in which to apply for an exemption. A state that has never had a state-sponsored sports betting scheme is prohibited from ever doing so in the future. Such is the discriminatory effect of PASPA, and in complete contravention of the effects envisioned by the founders in adopting the Commerce Clause, which was to harmonize trade between the states.

## **II. PASPA Infringes on State Authority, and Violates the Tenth Amendment**

The Tenth Amendment 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.”<sup>46</sup> It is here that PASPA can be challenged on Tenth Amendment grounds, as it is an overreaching power grab by Congress in an area that is strictly within the States' power to regulate. As the Court has stated, “the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”<sup>47</sup> The Court has further stated that while “we have always understood that even where Congress has the authority

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<sup>46</sup> U.S. CONST. amend. X.

<sup>47</sup> *New York v. United States* 505 U.S. 144, 163 (1992) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)).

under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts.”<sup>48</sup> Applying the Court’s holding to the facts at hand, would imply that Congress does not have the authority to compel the states to enforce PASPA, even if Congress has the authority to pass legislation prohibiting sports betting on a state level.

PASPA is in direct conflict with the Court’s limitations regarding what Congress can compel the States to do, as it instructs the States that they are prohibited from enacting a sports betting scheme. The Court drew a distinction with regard to spending, where “Congress may attach conditions on the receipt of federal funds,”<sup>49</sup> and an attempt by Congress to compel the States to act via its Commerce Clause powers. Congress, it held, could use its spending power to encourage the States to act, but the Tenth Amendment prohibited Congress from imposing direct regulations on the States.<sup>50</sup> The “Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States...neither government may destroy the other nor curtail in any substantial manner the exercise of its powers.”<sup>51</sup>

The individual states that began to explore the possibility of enacting a sports betting scheme had done so on account of budgetary shortfalls. Taxes are by and large a local issue, with state and local governments collecting a majority of taxes. PASPA is an attempt to curtail the powers that are reserved to the states, namely the fees and taxes that sports betting schemes would generate for the states and municipalities involved. It would appear Congress has overstepped its authority in enacting PASPA, as it clearly interferes with the individual states ability to raise revenues and levy taxes against its citizens. The federal government cannot

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<sup>48</sup> *Id.* at 166.

<sup>49</sup> *Id.* at 167 (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

<sup>50</sup> *Id.* at 176.

<sup>51</sup> *Id.* at 163 (internal citations omitted).

dictate to the states what forms of taxes or fees it may levy, which in effect, is what PASPA does.

### **Public Policy Rationale for Repealing PASPA**

The public policy critique against PASPA pertains to fantasy sports, and the professional sports leagues complete embracement of this phenomenon. Roughly “34.5 million people in North America have played fantasy sports at some point in their lives, [which roughly equates to] ten percent of the U.S. population.”<sup>52</sup> It is an enormous business, which the leagues have been all happy to exploit. One who wishes to set up a fantasy league can easily do so via the various websites that host such leagues, and the ‘commissioner’ of the league is tasked with collecting the entrance fee from the other players to create a cash prize for the winner.<sup>53</sup> The players select their teams via a draft, and the objective is to select a team of players that will excel statistically in select categories throughout the season.<sup>54</sup> It is worth noting these statistics are made available by the individual sports leagues. In fact, the National Football League has directed its “teams to display appropriate statistics on their Jumbotrons during games.”<sup>55</sup>

Fantasy sports were initially shunned by the professional sports leagues as a form of gambling, but the growing popularity of fantasy sports and the potential for financial gain prompted a change in attitude.<sup>56</sup> Starting in the “early 1990s, professional sports leagues began charging licensing fees for fantasy sports leagues to use their players’ names and statistics

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<sup>52</sup> Geoffrey T. Hancock, Note, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law*, 31 T. JEFFERSON L. REV. 317, 324-25 (2009).

<sup>53</sup> *Id.* at 325.

<sup>54</sup> *Id.* at 326.

<sup>55</sup> Jonathan Mahler, *The NCAA is Fighting New Jersey and Chris Christie to Protect the Sanctity of Illegal Underground Amateur Sports Gambling*, DEADSPIN (Nov 25, 2012, 6:03 PM), <http://deadspin.com/5958588/the-ncaa-is-fighting-new-jersey-and-chris-christie-to-protect-the-sanctity-of-illegal-underground-amateur-sports-gambling>.

<sup>56</sup> Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1198 (2007).

necessary to conduct games.”<sup>57</sup> Fantasy sports leagues have ballooned so much as an industry in such a short amount of time that fantasy sports leagues were estimated in 2005 to have “become a billion-dollar industry.”<sup>58</sup> The value of these licenses is readily apparent, as evidenced by Major League Baseball’s agreement “to pay fifty million dollars over five years to its players as their share of the fees from fantasy baseball.”<sup>59</sup>

The professional sports leagues have arguably embraced fantasy sports for other reasons as well; fantasy sports have increased the popularity of the individual leagues. An individual who is part of a fantasy sports league now has a keen interest beyond his home team. He or she suddenly has an interest in a team they may dislike, because a player on that team happens to be on his fantasy team.<sup>60</sup> The end result is “increased viewership on television and on internet websites ... [which] translates to increased revenues through advertising and other sales.”<sup>61</sup> Predictably, the professional sports leagues have encouraged the growth of fantasy sports. In particular, the National Football League is continuously “fine-tuning its mobile application to maximize its value to the estimated 24 million people who play fantasy football every year.”<sup>62</sup> As Jonathan Mahler wryly noted, it’s “surely just for fun, what’s more fun than winning a few thousand bucks off a group of friends and acquaintances?”<sup>63</sup>

In 2006, Congress passed the Unlawful Internet Gambling Enforcement Act (UIGEA), which sought to criminalize illegal online betting.<sup>64</sup> The National Football League engaged in what may be termed chicanery to secure an exemption for fantasy sports, and thus allowing it to continue somewhat unfettered. Several members of Congress were opposed to the bill, so the

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1198-99.

<sup>60</sup> *Id.* at 1195-96.

<sup>61</sup> *Id.* at 1196.

<sup>62</sup> Mahler, *supra* note 55.

<sup>63</sup> *Id.*

<sup>64</sup> Prohibition on Funding of Unlawful Internet Gambling, 31 U.S.C. §§ 5361-5367 (2006).



NFL sought to have “the legislation attached to the Defense Appropriations bill, which was then being considered by a joint committee of the Senate and House in the closing days before the 2006 fall adjournment.”<sup>65</sup> When that effort failed, its champion in the senate, Senator Bill Frist, “turned to another joint committee ... none of the members of the committee objected to [its] inclusion.”<sup>66</sup> The NFL had achieved its aim, as members of Congress “were unable to vote against the amendment without voting down the bill in its entirety.”<sup>67</sup>

What emerges from the posturing by the professional sports leagues is a somewhat disjointed and disingenuous opposition to state-sponsored sports betting. Fantasy sports leagues are a billion dollar industry that have bestowed a financial windfall on the leagues, and they are determined to protect that source of revenue, as evidenced by the NFL’s actions. However, it is difficult to draw a distinction between betting on statistics and betting on a point spread as they are in essence one and the same. If the professional sports leagues encourage fantasy sports leagues and the gambling that accompanies it, there is no rational basis for federal legislation barring state-sponsored sports betting schemes. PASPA is an ill-advised bill that should be repealed.

## **Conclusion**

The State of New Jersey faces a daunting task as it attempts to circumvent PASPA, which has largely withstood the legal challenges brought against it. However, New Jersey has tactfully chosen not to challenge the constitutionality of PASPA, but rather the leagues’ standing to file for an injunction. On the procedural ground, New Jersey should prevail as the leagues have ostensibly failed to meet the injury-in-fact element of standing.

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<sup>65</sup> Cabot & Csoka, *supra* note 59, at 1200.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

PASPA can also be challenged on Commerce Clause grounds, and while it has been predicted that such a challenge will fail, this note argues otherwise. In recent years the Court has begun to claw back at the broad powers it has granted Congress under the Commerce Clause, and many laws facing challenges are not as blatantly discriminatory as PASPA is. Opponents of PASPA should emphasize the uniformity requirement that undergirds the Commerce Clause, and the express reasons the founders deemed such a requirement necessary. PASPA is the embodiment of the concerns that plagued the founders, and its complete disregard for these concerns should provide the Court a basis for finding it unconstitutional. It is unlikely that the Court will endorse such blatant discrimination between the states under the Commerce Clause.

The constitutionality of PASPA can be further challenged on Tenth Amendment grounds as well. It is a direct violation of the States' rights to manage their own affairs, as the Court has held the Constitution does not empower Congress to curtail the rights of the states. The individual states that have considered enacting state-sponsored sports betting schemes have done so to raise revenues. States have the power to levy and raise taxes, which Congress is in effect seeking to curtail via PASPA. The effect of PASPA is what is at stake, not the alleged intent underlying the legislation, and should therefore not withstand a legal challenge.

A constitutional challenge to PASPA will likely prevail, and such a challenge will undoubtedly happen in the near future. If New Jersey prevails in its suit, it is unlikely that the professional sports leagues will simply walk away, but rather will presumably lobby the Justice Department to seek an injunction against New Jersey's infringement of PASPA. Based upon that assumption of events, New Jersey will be forced to challenge the constitutionality of PASPA, and it should not shy away from such a confrontation. The weight of legal precedent and the

founders' vision weigh heavily against the constitutionality of PASPA, and it's high time that this bad piece of legislation is relegated to the annals of history.