Nos. 16-476 and 16-477

IN THE

Supreme Court of the United States

CHRISTOPHER J. CHRISTIE,
GOVERNOR OF NEW JERSEY, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR EUROPEAN SPORTS SECURITY ASSOCIATION, THE IDEVELOPMENT AND ECONOMIC ASSOCIATION, AND THE REMOTE GAMBLING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are the European Sports Security Association ("ESSA"), the iDevelopment and Economic Association ("iDEA"), and The Remote Gambling Association ("RGA"). ESSA is a Brussels-based non-profit gaming security organization. iDEA, located in Washington, D.C., is a trade association acting on behalf of the online interactive entertainment industry, including sports betting. The RGA's members include most of the world's largest and most respected gaming companies (terrestrial and online) based in Europe; it strives to protect the integrity of sports, working with government and regulators to develop anti-corruption guidelines and consistent sanctions.[1]

Amici's members comprise several dozen businesses that offer sports gaming, including many based in the United States. Members have deep and broad experience in sports gaming, regulating it to protect the sports industry, and experimenting with the approaches of different jurisdictions. In this sense, the U.S.-based members have worked with many states to conduct the "social and economic experiments without risk to the rest of the country" that make them "laboratories of democracy". *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). They, and their European counterparts, have built their businesses around the practical—if severe—limitations PASPA has imposed on *legal* businesses in the quarter century since Congress enacted it.

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1. All parties have consented to the filing of this brief. Amici affirm that no counsel for any party authored this brief in whole or in part and that no party or counsel for a party made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Professional and Amateur Sports Protection Act ("PASPA" or the "Act") is unconstitutional and the Court should vacate the ruling of the court below.[2]

First, PASPA violates the "fundamental principle of equal sovereignty" articulated by the Court in *Northwest Austin Municipal Utility District Number One v. Holder,* 557 U.S. 193, 203 (2009), and adopted in *Shelby County, Alabama v. Holder,* 133 S. Ct. 2612 (2013).

Congress enacted PASPA on October 28, 1992. *See* Pub. L. No. 102-559, 106 Stat. 4227 (codified at 28 U.S.C. §§ 3701 *et seq.*). It prohibited approximately 45 state legislatures from authorizing sports gambling. *See* 28 U.S.C. §§ 3701 *et seq.* Even though gaming regulation had been a traditional state regulatory function, Congress intervened on the theory that sports gaming had become a moral hazard of interstate proportions. Yet despite that determination, Congress chose *not* to ban sports gaming on a nationwide basis. It added so-called "grandfathering clauses" to PASPA that exempted four states from the ban, and eventually additional states. *See* 28 U.S.C. § 3704. Congress permitted *those* states to grow their sports gaming businesses. As we show below, however, both the record and facts of which the Court may take judicial notice make it clear that (i) PASPA's statutory scheme violates the principle of equal sovereignty and

2. Amici agree with the arguments set forth in Petitioners' merits briefs in all respects. Should the Court not strike down PASPA in its entirety on the grounds articulated by Petitioners, amici offer the Court the alternative doctrinal basis to do so.

(ii) Congress had no factual basis to justify it (and the evidence against the statute has grown in the years since).

Congress is not permitted to decide how to license an entire industry *de facto,* choosing those few states who will have the chance to succeed and those who will not. Under *Shelby County*, it may *not* do so, at least where it has no factual justification. At a minimum, Congress must make *some* effort to justify treating sovereign states disparately. It must do so, moreover, in light of *current* social, economic and cultural conditions. *See Shelby County,* 133 S. Ct. at 2629–30 (requiring Congress to explain why disparate treatment "makes sense in light of current conditions" and takes account of "current needs"); *cf. Citizens United v. Federal Election Commission*, 558 U.S. 310, 370 (2010).[3] *Whatever* the standard of review to which the Court subjects PASPA under the equal sovereignty principle, PASPA cannot survive it because it cannot meet the evidentiary burden of either level of scrutiny.

If anything, the evidence of "current" conditions adds to finding PASPA unconstitutional. When Congress enacted PASPA, Americans had yet to elect Bill Clinton; the iPhone would not be introduced for another 15 years. In the last quarter century, massive cultural and social and technological changes have rendered sports gambling demonstrably regulable; amici's member-businesses have extensive expertise and experience doing so. They have

3. "[M]any of Congress' findings in passing BCRA were premised on a system without adequate disclosure. With the advent of the Internet, prompt disclosure . . . can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable." (citation omitted).

devoted massive resources to addressing all concerns with sports gambling. They have done so successfully. (In fact, the most discernible change in the sports betting business that PASPA has produced is to have driven the market for *illegal* sports gambling to those jurisdictions most willing to tolerate it but not permitted to legalize it. New Jersey, of course, is not one of those jurisdictions.). For these and other reasons, PASPA's so-called "grandfathering clauses" exempting some states from certain kinds of sports gaming, 28 U.S.C. § 3704, are unconstitutional.

Second, PASPA must be struck down in its entirety. The grandfathering clauses are integral to the entire PASPA statutory scheme. If they fall, the whole statute must fall. They are not severable from PASPA.

Finally, amici urge the Court to rule on the merits of PASPA *now*. First, the constitutional issues this matter raises transcend sports gambling; they involve fundamental questions of federalism. Second, numerous states have contemplated, and currently are evaluating, whether to enact sports gambling-related legislation. Particularly given the many years this litigation has continued, amici respectfully submit that the Court render a complete ruling on the merits. Otherwise, future litigation on the merits of PAPSA's constitutionality will continue indefinitely, in this case or in some other jurisdiction.

ARGUMENT

I. PASPA Only Bans Some States from Authorizing Sports Gambling or Wagering Schemes.

PASPA's Section 3702 purports to make it unlawful for *any* "governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" any form of sports gambling. 28 U.S.C. § 3702. However, the Act carves out a series of exemptions that grant preferential treatment to some states while discriminating against the majority of states. *Id.* § 3704(a).

First, PASPA states that its nationwide ban does not apply to lotteries or other wagering schemes "conducted by [a] State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." *Id.* § 3704(a)(1). Second, the Act exempts wagering schemes that were both "authorized by a statute as in effect on October 2, 1991" and were conducted between September 1, 1989 and October 2, 1991. *Id.* § 3704(a)(2). Third, Congress exempted any wagering scheme "conducted exclusively in casinos located in a municipality" to the extent that the scheme "was authorized, not later than one year after the effective date of this chapter" and where "any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on [the effective date of this chapter]." *Id.* § 3704(a)(3). Finally, "parimutuel animal racing or jai-alai games" are also exempt. *Id.* § 3704(a)(4).

The effect of these exemptions—known also as the grandfathering clauses—is to ensure that a few states can provide sports gambling while the majority of states

are forever prohibited from legalizing sports gambling. While PASPA does not identify which states are permitted to offer sports gambling within their borders, Congress made no secret of its desire to protect Nevada and other, select states while drafting and debating PASPA. For example, in February 1991, Senator Dennis DeConcini of Arizona, who introduced the bill that would become PASPA, stated: "I feel it is unfair to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of this legislation" and "I have no intention of threatening the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry." 137 Cong. Rec. S2256-04, S2257 (daily ed. Feb. 22, 1991) (statement of Sen. DeConcini). This same sentiment persisted throughout the legislative process. When the Senate Committee on the Judiciary issued its reports on the bill, the Committee stated that they had "no wish to apply this new prohibition retroactively to Oregon or Delaware," had no "desire to threaten the economy of Nevada," and did not want to "prohibit lawful sports gambling schemes in other States that were in operation when the legislation was introduced." S. Rep. No. 102-248, at 8 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559.

Senator Chuck Grassley of Iowa objected to the bill's grandfathering provisions and noted that "[t]here 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." *Id.* at 13, *reprinted in* 1992 U.S.C.C.A.N. at 3563. In response, Senator DeConcini answered simply: "[T]he Senator from Iowa makes an argument that this bill is not fair. Well, the world is not always fair, I must

admit, and I think he will admit it is not fair." 138 Cong. Rec. S7274-02, S7281 (daily ed. June 2, 1992) (statement of Sen. DeConcini).

Ultimately, PASPA accomplishes exactly what Congress set out to do. It imposes a regulatory scheme that prevents some states, *but not all*, from authorizing sports wagering.

II. PASPA's Grandfathering Clauses Are Unconstitutional Because They Violate the Principle of Equal Sovereignty by Treating States Differently without Justification.

PASPA was intended to treat states unequally. Without justification, that disparate treatment violates the equal sovereignty doctrine. *See Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 434 (1892) ("There can be no distinction between the several states of the Union in the character of the jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits."). Congress did not enact PASPA to remedy some "local evil[]", *Nw. Austin Mun. Util. No. One v. Holder*, 557 U.S. 193, 203 (2009) ("The doctrine of the equality of States does not bar remedies for *local* evils which have subsequently appeared." (emphasis in original, internal quotation marks omitted)); rather it simply decided to take an entire industry into its hands and pick winners and losers among states of otherwise equal status.[4]

4. Unlike the Voting Rights Act, for example, PASPA did not target individual states where sports gambling was an acute problem. The reverse is true. PASPA *exempts* states where

In *Shelby County, Alabama v. Holder*, the Court affirmed that "[n]ot only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty among the States." 133 S. Ct. 2612, 2623 (2013) (internal quotation marks omitted); *see also Escanaba & Lake Mich. Transp. Co. v. Chicago*, 107 U.S. 678, 689 (1883) ("Equality of constitutional right and power is the condition of all the states of the Union, old and new."). This principle of equal sovereignty is "highly pertinent in assessing subsequent disparate treatment of States." *Shelby County*, 133 S. Ct. at 2624. If Congress wants to treat the states unequally, it "must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions." *Id.* at 2629. More specifically, "[a] statute's current burdens must be justified by current needs, and any disparate geographic coverage must be sufficiently related to the problem that it targets." *Id.* at 2627 (internal quotation marks omitted).

At issue in *Shelby County* was that portion of the Voting Rights Act ("VRA"), 52 U.S.C. §§ 10101 *et seq.*, that imposed more stringent requirements on some states in enacting election-related laws. "Covered" states—states subject to the more stringent requirements—were prohibited from changing their voting procedures without first obtaining "preclearance" from the federal government. *Shelby County*, 133 S. Ct. at 2620. Because the formula for determining which states qualified as "covered" had remained unchanged since 1975, the Court

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sports gambling already existed. Indeed, rather than banning sports gambling nation-wide, PASPA grants the chosen states a legislation-sanctioned monopoly in an industry and market that PASPA bans in a majority of the country.

held that Congress had not sufficiently justified the disparate treatment of "covered" states under the VRA in a way that made sense "in light of current conditions," adding that Congress could not "rely simply on the past." *Id.* at 2629. As a result, the Court held unconstitutional the VRA provision determining what states qualified as "covered." *Id.* at 2631.

In this case, PASPA raises similar problems. PASPA's selective exemption of specific states from an otherwise nationwide ban (1) is not related to the problem that PASPA targets and (2) places an unjustified burden on non-exempt states in light of current conditions and needs. PASPA therefore violates the equal sovereignty doctrine.

A. PASPA's Grandfathering Clauses Are Unrelated to the Problem that PASPA Targets and Undermine the Act's Effectiveness.

PASPA's grandfathering clauses do not address the problem that Congress sought to resolve in passing PASPA: banning (or limiting) sports gambling in America. In introducing the Act, Senator DeConcini stated that he and a co-sponsor "feel strongly it is inappropriate for the States to trade on the good will of professional and amateur sports and in the process risk causing serious harm to the integrity of sports," adding that "[PASPA] represents a different, and broader, approach to the *problem of sports gambling*." 137 Cong. Rec. S2256-04, S2257 (daily ed. Feb. 22, 1991) (statement of Sen. DeConcini) (emphasis added). Later, the Senate Committee on the Judiciary wrote that "[s]ports 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." S. Rep. No. 102-248, at 5, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556 (emphasis added). PASPA therefore "represents a judgment that sports gambling—whether sponsored or authorized by a State or other governmental entity—is a problem of legitimate Federal concern for which a Federal solution is warranted." *Id.* at 6–7, *reprinted at* 1992 U.S.C.C.A.N. at 3557–58.

Despite these findings, Congress chose to include grandfathering clauses in PASPA so that "Oregon and Delaware may conduct sports lotteries on any sport" and "casino gambling on sports events may continue in Nevada." *Id.* at 10, *reprinted at* 1992 U.S.C.C.A.N. at 3561; 28 U.S.C. § 3704(a). However, the grandfathering clauses create geographic exemptions to a solution for a problem that "cannot be limited geographically" and undermine PASPA's intent and power to deal with the problem of sports gambling. S. Rep. No. 102-248, at 5, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556 (emphasis added). And while Congress urged that the "narrowness" of the grandfathering clauses reflected a "policy judgment that sports gambling should be strictly contained," their inclusion nevertheless diminishes PASPA's power to deal with a problem that can inflict harm "beyond the borders of those States that sanction it." *Id.* at 5, 10, *reprinted at* 1992 U.S.C.C.A.N. at 3556, 3561.

Moreover, Congress recognized that the grandfathering clauses undermined PASPA's purpose. Senator Orrin Hatch of Utah stated that Congress "agreed to grandfathering because we had no choice" and that it "would have been better off to have banned all State sponsored sports gambling." 138 Cong. Rec. S7274-02,

S7278 (daily ed. June 2, 1992) (statement of Sen. Hatch). Senator DeConcini echoed the same sentiment, noting that "I would like to have it effective on all 50 States but that is not in the cards." *Id.* at S7280 (statement of Sen. DeConcini). As Senator Grassley put it: "[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 . . . . There is not a prohibition on sports gambling; it is a piece of Swiss cheese." *Id.* (statement of Sen. Grassley).

In *Shelby County*, the Court found that the VRA's formula for determining which states were required to obtain "preclearance" was no longer relevant to addressing the problem of voting discrimination. 133 S. Ct. at 2627–28 ("The coverage formula met that test in 1965, but no longer does so."). The Court therefore struck down the VRA's formula provision because Congress had failed to make the necessary "showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.* at 2622.

Here, PASPA's grandfathering clauses have *never* addressed the problem that Congress sought to prevent—in fact, as discussed more fully in Section II.B below, they have undermined Congress' efforts. The grandfathering clauses are therefore not "sufficiently related" to the problem of sports gambling in America. *Cf. Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 179 (1999) ("[PASPA] includes a variety of exemptions, some with obscured congressional purposes . . . ."). As a result, PASPA's grandfathering clauses violate the fundamental principle of equal sovereignty and are unconstitutional.

B. PASPA's Exemptions Place an Unjustifiable Burden on Non-Exempt States in Light of Current Conditions and Needs.

Because PASPA's grandfathering clauses bear no relation to the problem of sports gambling, they place an unjustifiable burden on non-exempt states in light of current conditions and needs. Furthermore, PASPA's discriminatory regime remains in perpetuity. As a result, it cannot be said that PASPA takes into account current societal views on sports gambling, the recognizable spread of illegal sports gambling markets, or the harm that non-exempt states have suffered and will continue to suffer. PASPA's grandfathering clauses violate the Court's admonition that Congress "cannot rely simply on the past" when it treats states differently. *Shelby County*, 133 S. Ct. at 2629.

Current conditions only underscore the failure of the grandfathering clauses to limit the spread of sports gambling. Nevada's sports gambling business has grown exponentially in the twenty-five years since PASPA was enacted, attracting customers from across the United States. According to one analysis, in the last decade alone, Nevada's sports betting business grew from $2.4 billion in 2006 to a projected $5 billion in 2016.[5] This is a marked departure from the late 1990s when "casinos were plotting to downsize sports books." *Id.* Nevada has even gone so far as to pass a law "authorizing business

5. *See* Matt Youmans, *Nevada sports betting could be a $5 billion industry*, Las Vegas Review-Journal (May 8, 2016), *available at* https://www.reviewjournal.com/sports/sports-columns/matt-youmans/nevada-sports-betting-could-be-a-5-billion-industry/.

entities in Nevada to place wagers on behalf of investors from around the world." *Id.*

This great expansion of sports gambling in Nevada is fueled, in part, by changes in technology and culture. *Id.* ("Mobile phone apps and increased mainstream media coverage of sports betting are two major parts of the equation."). Today, Americans have access to high-speed internet, mobile phones, and almost ubiquitous wireless connectivity. In 1992, by contrast, the Internet as it is known today did not yet exist—the "World Wide Web" software was still a year away from being in the public domain, America Online was still only available for MS-DOS, consumers used dial-up modems, and the iPhone was still more than a decade away.[6]

Culturally, too, things have changed. For example, the major professional sports organizations currently recognize the importance of Nevada (and legal sports gambling) to the sports industry:

- The National Hockey League recently formed a team called the Vegas Golden Knights in Nevada that is set to debut during the 2017–2018 season, while the Oakland Raiders of the National Football League will relocate to Nevada and be rebranded as the Las Vegas Raiders within a few years.[7]

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6. *See, e.g.*, *The birth of the web*, CERN, http://home.cern/topics/birth-web (last visited Aug 27, 2017).

7. Cody Paul Laska, *Las Vegas' hockey expansion team is a test of the sport's appeal*, CNBC (Feb. 12, 2017), *available at* https://www.cnbc.com/2017/02/10/las-vegas-hockey-expansion-team-is-a-test-of-the-sports-appeal.html; Adam Stites, *Raiders*

- In April 2017, when asked about the Oakland Raiders' planned move to Las Vegas, National Football Association commissioner Roger Goodell said that the League did not plan to exercise their right under Nevada law to request that Nevada sports gambling operations not take bets on the Raiders' games. According to Goodell, the NFL was not considering the option "in large part because you have the regulatory environment there, which actually could be beneficial in this case."[8]

- The National Basketball Association conducts part of its Summer League in Nevada and has a minor league team in Nevada.[9]

- In a New York Times editorial, NBA commissioner Adam Silver stated that legalizing sports gambling would move betting "out of the underground and into the sunlight where it can be appropriately monitored and regulated."[10]

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will relocate from Oakland to Las Vegas, SBNation (Mar. 27, 2017), *available at* https://www.sbnation.com/2017/3/27/15060642/las-vegas-raiders-relocation-move-oakland-nfl-vote.

8. David Purdum, *Roger Goodell says NFL still opposed to legalized sports betting*, ESPN (Apr. 7, 2017), *available at* http://www.espn.com/chalk/story/_/id/19027576/nfl-commissioner-roger-goodell-says-league-opposed-legalized-sports-betting-raiders-moving-las-vegas; *see also* Nev. Gaming Reg. 22.120(1)(d).

9. *See 2017 NBA Summer League*, NBA, http://www.nba.com/summerleague/ (last visited Aug. 27, 2017).

10. Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. Times (Nov. 13, 2014), *available at* https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html.

- Major League Baseball commissioner Rob Manfred, likewise, has noted that the league is "reexamining [their] stance on gambling."[11]

- Four college basketball conference championships are held in Las Vegas: Mountain West, Pac-12, Western Athletic, and West Coast.[12]

- In a recent interview about the prospect of holding the NCAA March Madness tournament in Las Vegas, Dan Gavitt, the NCAA's "senior vice president for basketball who runs the NCAA Tournament," expressed a belief that Las Vegas could work as a regional or Final Four site, adding that he thinks "there's some interest within the membership to host championships given there's four conferences that play their championships in Las Vegas."[13]

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11. Matt Bonesteel, *While Trump mulls it over, MLB's Rob Manfred continues to soften stance on legalized sports gambling*, Wash. Post (Feb. 8, 2017), *available at* https://www.washingtonpost.com/news/early-lead/wp/2017/02/08/while-trump-mulls-it-over-mlbs-rob-manfred-continues-to-soften-stance-on-legalized-sports-gambling.

12. *NCAA Basketball Conference Tournament Schedule*, CBS Sports, https://www.cbssports.com/collegebasketball/schedules/conference-tournament (last visited Sept. 1, 2017).

13. Steve Carp, *Las Vegas still on outside looking in for hosting NCAA championships*, Las Vegas Review-Journal (April 2, 2017), *available at* https://www.reviewjournal.com/sports/basketball/ncaa-tournament/las-vegas-still-on-outside-looking-in-for-hosting-ncaa-championships/.

Moreover, Congress' attempt to curb the problem of sports gambling in the United States has led to the rise of a well-entrenched industry of illegal and unregulated sports gambling. In 1991, according to one estimate, the illegal sports betting market was $40 billion per year.[14] Now, the market for illegal sports betting has ballooned to an estimated $400 billion—a ten-fold increase since PASPA was signed into law. *Id.*

And while in a legalized sports-betting market States could have established regulatory protections for vulnerable citizens (*e.g.*, problem gamblers and children), PASPA—and particularly the Third Circuit's reading of PASPA—prevents States from doing so. Without PASPA, States could enforce age restrictions, *see, e.g.*, Nev. Rev. Stat. § 463.350 (prohibiting wagering by persons under twenty-one years of age); *see also* Gambling Act, 2005, c. 19, pt. 4 (U.K.) ("Protection of Children and Young Persons"), and provide protections for problem gamblers, *see* Nev. Gambling Reg. 5.170 (requiring casinos to establish programs to address problem gambling). Similarly, they could establish mechanisms to investigate allegations of wrongdoing, *see* Nev. Rev. Stat. § 463.310 (providing for investigations by Gaming Control Board), and provide protections against fraud and abuse that customers enjoy in any legal transaction.

In all, Congress' 1992 determination of which states should be subject to a ban on sports gambling legislation

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14. Michelle Minton, *Take a Gamble on Sports Betting*, U.S. News (Feb. 3, 2017), *available at* https://www.usnews.com/opinion/op-ed/articles/2017-02-03/on-super-bowl-sunday-americans-will-break-the-law-against-sports-gambling.

is unjustifiable in light of current needs and conditions. All that PASPA accomplished (and continues to accomplish) is to grant Nevada a monopoly over legalized sports gambling while doing nothing to curb the growth of illegal sports betting throughout the United States. Worse, PASPA does not expire or contain any mechanism by which Congress could reassess its determination of which states are or should be exempt from the nationwide ban. *See, e.g.*, *Shelby County*, 133 S. Ct. at 2620 (noting that Congress had to reauthorize the VRA).

"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." *Shelby County*, 133 S. Ct. at 2629. Instead of accounting for current conditions, however, PASPA continues to restrict state legislatures based on an analysis that is a quarter-century old. This violation of the equal sovereignty doctrine renders PASPA unconstitutional; PASPA imposes "current burdens and must be justified by current needs." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009); *cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

III. PASPA Must Be Struck in Its Entirety Because the Grandfathering Clauses are Not Severable.

When part of a statute is unconstitutional, the Court "tr[ies] to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*,

561 U.S. 477, 508 (2010) (internal quotation marks omitted). The method for determining whether portions of a statute are severable is "well established." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). "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 operative as a law." *Id.* at 685 (internal quotation marks omitted). The critical question for severability is "whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* Here, it is clear that Congress would never have enacted PASPA without the grandfathering clauses. As a result, the grandfathering clauses cannot be severed, and PASPA must be struck down in its entirety.

Although PASPA contains a blanket prohibition on states legalizing sports gambling, the grandfathering clauses ensure that states like Nevada, Oregon, Delaware, and Montana are exempt from this prohibition. PASPA's legislative history reveals that the grandfathering clauses are necessary components of PASPA. When PASPA was first introduced for debate in the Senate, its co-sponsor, Senator DeConcini, stated that he had "no intention of threatening the economy of Nevada" or applying the proposed law "retroactively to Oregon or Delaware." 137 Cong. Rec. S2256-04, S2257 (daily ed. Feb. 22, 1991) (statement of Sen. DeConcini). The Senate Committee on the Judiciary stated its intent not to "threaten the economy of Nevada" or "apply this new prohibition retroactively to Oregon or Delaware." S. Rep. No. 102-248, at 8, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559. The reason for these exemptions was clear: Congress did not want to "prohibit lawful sports gambling schemes . . . that were in operation when the legislation was introduced." *Id.*

The grandfathering clauses are critical to the statutory scheme to prevent harm to the exempt states. For example, severing the grandfathering clauses and leaving the prohibition in place would destroy Nevada's $5 billion sports gambling industry. In addition, it would result in an unconstitutional taking against those private businesses who engaged in legal sports gambling prior to the grandfathering clauses being removed. *See, e.g.*, *Eastern Enters. v. Apfel*, 524 U.S. 498, 522–23 (1998). Without the clauses, PASPA is "legislation that Congress would not have enacted." *Alaska Airlines*, 480 U.S. at 686.

Accordingly, because Congress never intended to universally ban sports gambling in the United States, PASPA should be struck down in its entirety.[15]

IV. PASPA Fails To Achieve Congress' Objective and Fails Even Under Rational Basis Review.

As suggested above, PASPA is wholly inadequate to address what Congress considered to be the problem of sports gambling in the United States. More than that, it fails to adequately accomplish its purpose of stopping the spread of sports gambling. In this way, PASPA not only fails under an equal sovereignty analysis, *see* discussion *supra*, but also cannot be justifiably defended under a rational basis review.

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15. If PASPA is struck in its entirety, there will be little to no immediate change. States will need to decide whether to legalize sports gambling within their borders and, if they do, they will need to implement a regulatory framework before sports gambling can occur.

Arguably, Congress had two legitimate objectives in enacting PASPA: First, to stop the spread or curtail the presence of sports gambling in the United States. Second, to maintain the integrity of professional sports. In both instances, the Act (and its mechanism of simply freezing in place state legislation on sports gambling) is not rationally related to these intended objectives. *See Quinn v. Millsap*, 491 U.S. 95, 107 (1989) (striking down a state statute that fails under "rationality review"); *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (noting that the "traditional test" is "whether the challenged [statute] rests on grounds wholly irrelevant to the achievement of a valid state objective").

A. PASPA is not rationally related to stopping the spread or curtailing the presence of sports gambling in the United Sates.

As has already been noted, the Senate committee report acknowledged that sports gambling is a problem that causes harm "beyond the borders of those States that sanction it" and "cannot be limited geographically." S. Rep. No. 102-248, at 5, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556. It is not rational, therefore, that Congress sought to curb and/or eliminate sports gambling in the United States by explicitly allowing some states — Nevada being the obvious example — to maintain their sports gambling regimes.

In fact, PASPA has enabled the existing legalized sports gambling regimes to grow exponentially into multi-billion-dollar endeavors such as Nevada's $5 billion sports betting market for 2016.[16] This, in turn, affects out-

16. *See* Matt Youmans, *Nevada sports betting could be a $5 billion industry*, Las Vegas Review-Journal (May 8, 2016), *available*

of-state residents as well. Not only can residents of other States travel to Nevada to engage in sports betting, but there are an increasing number of ways for out-of-state residents to place bets (or at least profit from placed bets). For example, Nevada has enacted legislation "authorizing business entities in Nevada to place wagers on behalf of investors from around the world."[17] Likewise, Nevada enacted legislation that allowed out-of-state investors to pool their money into "entity wagering" funds and place bets in Nevada's legalized sports betting market.[18] While investors cannot dictate what bets the fund ultimately makes, it is another way that sports betting has spread throughout the United States.

This is to say nothing of PASPA's failure to prevent the spread of *illegal* sports gambling, which has grown its influence and reach by leaps and bounds since PASPA was signed into law. Indeed, Americans have shown an interest in betting on sports whether legal or not; for example, placing approximately $10 Billion in bets on the "March Madness" college basketball tournament in 2017, only $300 Million of which (just 3%) was in the form of *legal* wagers.[19] In 1976, the Commission on the Review of the

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at https://www.reviewjournal.com/sports/sports-columns/matt-youmans/nevada-sports-betting-could-be-a-5-billion-industry/.

17. *Id.*

18. Ben Mathis-Lilley, *Betting on Sports With Out-of-State Investors' Money Is Now Legal in Nevada*, Slate (June 4, 2015), *available at* http://www.slate.com/blogs/the_slatest/2015/06/04/nevada_sports_betting_investment_funds_out_of_state_entity_wagering_allowed.html.

19. Press Release, *March Madness Betting to Top $10 Billion*, Am. Gaming Ass'n (Mar. 13, 2017), *available at* https://www.americangaming.org/newsroom/press-releasess/march-madness-betting-top-10-billion.

National Policy Towards Gambling noted that "[g]ambling is inevitable. No matter what is said or done by advocates or opponents in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans." Comm'n on the Review of the Nat'l Policy Toward Gambling, *Gambling in America: Final Report of the Commission on the Review of the National Policy Toward Gambling* 1 (1976). Nothing has changed in the public's attitude since the Commission's pronouncement in 1976, but the availability of gaming has exploded with the ubiquity of the Internet.

Overall, the market for illegal sports betting and betting conducted through off-shore websites (that might otherwise be legal under their locals laws) accounts for upwards of $400 billion and allows residents of *any* state to wagers on sport events.[20] Based on the amount of money illegally wagered on sports each year, estimates place the United States as potentially the largest sports gambling market in the world.[21] Of course, PASPA was never designed to effectively prevent the spread of illegal sports gambling since it did not affirmatively criminalize sports gambling on a federal (or even state) level; it instead made it unlawful for *States* to legislate effectively on the matter.

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20. Michelle Minton, *Take a Gamble on Sports Betting*, U.S. News (Feb. 3, 2017), *available at* https://www.usnews.com/opinion/op-ed/articles/2017-02-03/on-super-bowl-sunday-americans-will-break-the-law-against-sports-gambling.

21. David Purdum, *Research shows U.S. could dominate global legalized sports betting market*, ESPN.com (Sept. 9, 2015), *available at* http://www.espn.com/chalk/story/_/id/13614240/research-shows-united-states-dominate-global-legalized-sports-betting-market.

The reason that PASPA has done little in the way of accomplishing Congress' goal of curbing the spread and presence of sports gambling, of course, is that Congress' chosen solution—a ban on sports gambling legislation in select states—is not rationally related to the ultimate goal. Thus, while "[t]he Constitution does not prohibit legislatures from enacting stupid laws," it does prohibit enacting laws that cannot even withstand a rational basis review. *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring).

B. PASPA is not rationally related to safeguarding the integrity of professional sports.

As with the spread of sports gambling (both legal and illegal), PASPA does little to prevent corruption or malfeasance in professional sports. Indeed, a selective ban on sports gambling legislation at the state level is not designed—nor rationally related—to safeguarding the integrity of professional sports. A plausible (let alone rational) basis for enacting such a ban exists only if *legalized* sports gambling actually leads to increased corruption. But this is far from a demonstrable fact.

To begin with, setting aside recent controversies such as "Deflate-Gate," corruption exists in professional sports despite PASPA:

- Several players—including at the college basketball level—were found to have received payments to influence the final scores of their games.[22]

22. Mike Fish, *Six ex-players charged with conspiracy*, ESPN (May 6, 2009), *available at* http://www.espn.com/college-

- An NBA referee admitted to betting on games that he was officiating and passing tips regarding those games to associates in exchange for money.[23]

- Players on a college basketball team were caught providing tips and information to their former coach and his bookie in exchange for money.[24]

Indeed, a study of score differentials in college basketball games found a high likelihood that point-shaving is rampant in the NCAA, but that may not be indicated by Las Vegas betting trends that only account for legal bets.[25] Similar trends appear to exist elsewhere where gambling is illegal and happens only underground. *See* Kevin Carpenter, *Match-Fixing—The Biggest Threat to Sport in the 21st Century?*, Sweet & Maxwell's Int'l Sports L. Rev., iss. 2, 2012 at 13, 19.

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sports/news/story?id=4146980; Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 Seton Hall J. Sport L. 5, 7 (1992).

23. Michael S. Schmidt & Howard Beck, *Donaghy Pleads Guilty in N.B.A. Betting Case*, N.Y. Times (Aug. 15, 2007), *available at* http://www.nytimes.com/2007/08/15/sports/basketball/15cnd-NBA.html.

24. Shaun Assael, *Portrait of a point shaver*, ESPN (Mar. 6, 2014), *available at* http://www.espn.com/mens-college-basketball/story/_/id/10624031/former-assistant-tj-brown-brandon-johnson-center-university-san-diego-point-shaving-scandal-espn-magazine.

25. *See* Pete Thamel, *Suspected Point-Shaving Scheme Shows Gambling Remains Persistent Issue*, N.Y. Times, April 1, 13, 2011, at B16, *available at* http://www.nytimes.com/2011/04/13/sports/ncaabasketball/13gamble.html; *see also* David Leonhardt, *Sad Suspicions About Scores in Basketball*, N.Y. Times (Mar. 7, 2006), *available at* http://www.nytimes.com/2006/03/08/business/08leonhardt.html.

These practices exist because of *illegal* gambling exists. When gambling is legal, sports gaming organizations and businesses, such as amici, operate as checks on the industry and are economically self-interested to reduce corruption; what good, after all, is offering legal gambling if the fix is in?[26] Europe has long provided a perfect example. Amici ESSA acts as its international betting integrity body. ESSA requires that its members keep records of all transactions and track data as part of an "early warning system" intended to detect unusual betting patterns and alert its members to trends and suspicious betting activity.[27] ESSA also works in partnership with gambling regulators, law enforcement authorities and sports bodies to share this information and punish match-fixing. Likewise, the United Kingdom mandates that sports bookmakers monitor for suspicious activity and provide relevant information to the UK's Gambling Commission, which maintains a Sports Betting Intelligence Unit dealing "with reports of betting-related corruption."[28] Indeed, the United Kingdom is home to the Sports Betting Integrity Forum (formerly the Tripartite Forum), which aims to coordinate "efforts in developing

26. *See, e.g.*, Bill Wilson, *Sport bookmakers seek safety in numbers against cheating*, BBC News (Nov. 10, 2010), *available at* http://www.bbc.com/news/business-11692179.

27. *About ESSA*, ESSA: Sports Betting Integrity, *available at* http://www.eu-ssa.org/about-essa/ (last visited August 31, 2017).

28. *Sports Betting Intelligence Unit (SBIU)*, UK Gambling Commission, *available at* http://www.gamblingcommission.gov.uk/news-action-and-statistics/Match-fixing-and-sports-integrity/Sports-Betting-Intelligence-Unit.aspx (last visited Sept. 1, 2017).

Britain's Action Plan for protecting integrity in sport and sports betting."[29]

PASPA and its effects therefore run *counter* to Congress' intended purpose; the opposite of being "rationally related." As a result, PASPA cannot survive rational basis review and the Court should hold that the law is unconstitutional in its entirety.

C. PASPA is not rationally related to any federal legislative scheme regulating gambling.

PASPA also is wholly without any rational link to any other aspect of federal gambling legislation. The regulation of gambling and lotteries is "a matter of predominantly state concern." *Chun v. N.Y.*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (citation omitted); *see also Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988) ("Licensed gaming is a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution."). Federal statutes have been enacted to address interstate or truly federal gambling issues and to assist states with the enforcement of their own laws. But PASPA stands alone as the only instance of federal regulation of wholly in-state gambling activity.

Unlike all other federal gambling laws, PASPA seeks to direct the content of state law by requiring that "no governmental entity . . . sponsor, operate, advertise, promote, license, or authorize by law or compact" any "lottery, sweepstakes, or other betting, gambling, or wagering scheme . . . on one or more competitive games

29. *More on the Group*, Sports Betting Integrity Forum, *available at* http://www.sbif.uk/About-the-SBIF/More-on-the-Group.aspx (last visited Sept. 1, 2017).

in which amateur or professional athletes participate" 28 U.S.C. § 3702(2). Also unlike other federal gambling laws, there are no criminal remedies for violation of PASPA; instead, PASPA allows sports leagues to seek an injunction of any alleged violation of Section 3702. 28 U.S.C. § 3703. PASPA's outlier status carries with it constitutional and practical infirmities.

V. The Court Should Address the Important Constitutional Question of Whether PASPA Violates the Equal Sovereignty Doctrine.

PASPA has been a controversial piece of legislation from the moment it was enacted. Due in no small part to the grandfathering clauses, it burdens states in a way that not only lacks a connection to current conditions but also fails to accomplish the Act's purpose: to curb sports gambling in the United States. Since PASPA was enacted, legal sports gambling in Nevada has seen tremendous growth (including outside its border)—approximately $60.7 billion in legal wagers have been made in Nevada alone on football, basketball, and baseball.[30] This is to say nothing of the rise and spread of the illegal and unregulated sports gambling market.

The repeated challenges to PASPA—and New Jersey's attempts to pass sports gambling legislation—have only added to the questions surrounding the Act's constitutionality. In fact, the dissent in *Shelby County* questioned PASPA's continuing constitutionality in light of the equal sovereignty clause. 133 S. Ct. at 2649

30. David G. Schwartz, University of Nevada, Las Vegas: Center for Gaming Research, *Nevada Sports Betting Totals: 1984-2016* (2017).

(Ginsburg, J., dissenting) ("Federal statutes that treat States disparately are hardly novelties. *See, e.g.*, 28 U.S.C. § 3704 . . . . Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?" (citations omitted)). Shortly thereafter, Petitioners, relying on *Shelby County*, raised equal sovereignty arguments in their earlier 2013 appeal to the Third Circuit. *See Nat'l Collegiate Athletic Ass'n v. Gov. of New Jersey*, 730 F.3d 208, 237–40 (3d Cir. 2013).

All this has left states in an uncertain position with respect to their own potential sports gambling laws. As of June 27, 2017, for example, ten states in addition to New Jersey have enacted or are considering enacting sports gambling legislation.[31] In West Virginia, for example, the proposed legislation defiantly declares that "federal law prohibiting sports betting in West Virginia is unconstitutional." *Id.* It is no surprise that these states seek to enact sports gambling legislation. Congress long ago determined that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1) (enacted in 1978). PASPA deviates from this historical federal policy and strips most states of their historical authority to regulate sports gambling.

Despite the principle that "[c]onstitutional issues are generally to be avoided," *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997), the Court has noted that concerns for judicial economy may outweigh constitutional avoidance concerns, *id.* at 525. Those concerns are compelling here given PASPA's murky legislative history, failure to achieve

31. Ryan Rodenberg, *Sports betting bill tracker*, ESPN (Jul. 26, 2017), *available at* http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states.

its objectives, and violation of the fundamental equal sovereignty doctrine.

Consequently, if the Court does not accept Petitioners' arguments in full, the Court should address the important issue of the equal sovereignty doctrine to provide clarity to States and to prevent future litigation about the legality of PASPA.

CONCLUSION

For the reasons discussed above, the Court should hold that PASPA violates the equal sovereignty doctrine, vacate the injunction, and reverse the decision below.

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