

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

NATIONAL COLLEGIATE  
ATHLETIC ASSOCIATION et al.,

Plaintiffs,

v.

CHRISTOPHER J. CHRISTIE et al.,

Defendants.

Civil Action No. 3:12-cv-04947 (MAS)  
(LHG)

Honorable Michael A. Shipp, U.S.D.J.

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**DEFENDANTS' BRIEF IN RESPONSE TO UNITED STATES  
INTERVENOR'S BRIEF IN SUPPORT OF THE CONSTITUTIONALITY  
OF PASPA**

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When PASPA was proposed, the U.S. Department of Justice opposed its enactment, observing that the bill posed serious “federalism issues.” The Department’s opposition may have been informed by the basic structure of the Constitution, which PASPA contravenes. For, whereas under the original Articles of Confederation, Congress regulated only through the States, the major change instituted by the Constitution was that “Congress would exercise legislative authority directly upon individuals, without employing the States as intermediaries.” *New York v. United States*, 505 U.S. 144, 164 (1992). For that reason, the Supreme Court explained in *New York*, “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.” *Id.* at 166. That, however, is precisely what PASPA does: It compels the States to prohibit sports wagering.

Obligated to defend the constitutionality of even dubious congressional enactments, the Department now disregards its initial instinct. But those troubling “federalism issues” have not disappeared. To the contrary, several Supreme Court decisions since PASPA’s enactment have proven the Department more than prescient and compel rejection of the arguments the Department advances here.

**A. PASPA Impermissibly Commandeers The Legislative Authority Of The States**

When New Jersey argued that PASPA’s requirement that States prohibit sports wagering violated the Tenth Amendment’s anti-commandeering require-

ment, the Leagues asserted that PASPA did not preclude New Jersey from “*simply removing gambling prohibitions*.” MSJ Reply 12-13. New Jersey was free, the Leagues argued, to legalize sports wagering by “repealing existing sports gambling prohibitions,” so long as New Jersey did not “expressly *authoriz[e]* sports gambling” or “establish[] a licensing scheme to regulate such gambling.” *Id.* at 12, 13.

The Justice Department, of course, rejects the Leagues’ astonishing construction of PASPA in its brief, which makes plain its position that New Jersey would violate PASPA if it failed to maintain its “prohibitions” of sports wagering. *E.g.*, DOJ Br. 10.<sup>1</sup> Nothing in the congressional record even remotely supports the Leagues’ peculiar suggestion that PASPA implements a federal policy of “deregulat[ion]” of sports wagering. MSJ Reply 9. Rather, Congress’s intention to “stop the spread” of sports wagering, S. Rep. No. 102-248, at 4 (1991), would be undermined completely by a statute that permitted States to legalize that activity by removing their prohibitions, but at the same time precluded States from controlling related fraud and other abuses. This is why the Leagues, before they focused on

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<sup>1</sup> The Department in another recent case involving PASPA likewise explained that PASPA was intended to “restrict[] the states where sports betting could take place.” Fed. Defs.’ Mot. to Dismiss at 1, *Interactive Media Entm’t & Gaming Ass’n, Inc. v. Holder*, No. 3:09-cv-01301-GEB-TJB (D.N.J. Aug. 2, 2010); *see also id.* at 33 (under PASPA, “46 states and their citizens have clear notice that they may not sponsor or operate a gambling scheme based on amateur or professional sporting events”).

the commandeering problems PASPA presents, argued in their Complaint that PASPA “imposes a broad ban on sports betting.” Compl. ¶ 4.<sup>2</sup>

The reason the Leagues retreated to a manifestly irrational interpretation of PASPA when faced with a Tenth Amendment challenge is obvious: They realized that any interpretation of PASPA—such as that now offered by the Department—requiring States to implement a congressional decision to prohibit sports wagering would be patently unconstitutional and therefore would have to be struck down.<sup>3</sup>

1. The Department argues that, even though PASPA “regulat[es]” the States by requiring them to maintain existing prohibitions of sports wagering, it does not violate the anti-commandeering doctrine because it “imposes no affirmative duty

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<sup>2</sup> The Department accordingly ignores the Leagues’ argument that PASPA simply preempts state laws “that conflict with federal policy” of “deregulat[ion].” MSJ Reply 9. Indeed, the Department advances no preemption argument at all, presumably because the pertinent federal policy *permits* sports betting in “a State or foreign country where betting on that sporting event or contest is legal.” 18 U.S.C. § 1084(b); *see also id.* § 1955(b)(1)(i). New Jersey’s legalization of sports betting does not conflict with that policy.

<sup>3</sup> The Leagues’ construction of PASPA fails anti-commandeering analysis as well. Giving States a choice between prohibiting sports wagering or allowing it to take place without any controls does not cure the commandeering defect because the latter alternative is manifestly unacceptable and thus presents no “choice” at all. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (citing commandeering cases and explaining that, when “pressure turns into compulsion,” legislation “runs contrary to our system of federalism” (quotation marks omitted)). Where Congress lacks power to impose either of two alternatives, “it follows that Congress lacks the power to offer the States a choice between the two.” *New York*, 505 U.S. at 176. Otherwise, Congress in *New York* and *Printz* could have “cured” the constitutional difficulty by giving States the “choice” to leave nuclear waste (in *New York*) or firearms (in *Printz*) totally unregulated.

on States to take any action.” DOJ Br. 3, 10. This argument is wrong on the law and the facts. The anti-commandeering doctrine does not include an “affirmative duty” requirement; the federal government plainly can conscript a State’s sovereignty without imposing an “affirmative duty.” In any event, PASPA clearly does impose affirmative duties on States to maintain and enforce existing prohibitions.

a. There is no merit to the Department’s creative suggested re-definition of anti-commandeering doctrine to foreclose only federal laws that require States “to take affirmative action.” The Department cites no case that actually has adopted this approach. Certainly, the Supreme Court never has drawn such a distinction. Instead, from its earliest application, the Supreme Court has applied the doctrine to federal statutes that command that States maintain a certain state of affairs.

In *New York v. United States*, the Court reviewed its earlier anti-commandeering decisions and observed that they were “not innovations,” citing the 1911 decision of *Coyle v. Smith* for the proposition that “the Constitution has *never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.*” 505 U.S. 144, 162 (1992) (citing *Coyle*, 211 U.S. 559, 565 (1911)) (emphasis added).<sup>4</sup> *Coyle* involved a challenge to the federal law admitting Oklahoma into the Union, which provided that the location of Oklahoma’s state capital “shall not be changed” from its then-current lo-

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<sup>4</sup> The Department thus errs by describing the anti-commandeering doctrine as of “relatively recent origin, stemming from . . . *New York*[.]” DOJ Br. 9.

cation before 1913. *Id.* at 564. The Court struck down the provision, holding that Congress could not in this way “constitutionally restrict [Oklahoma’s] authority to the extent . . . of suspending its powers.” *Id.* at 565. *Coyle*—an early recognition that Congress cannot conscript a State’s sovereignty—thus refutes completely the Department’s contention here that the doctrine applies only when the federal law imposes on a State an affirmative duty to act; *Coyle* demonstrates it also applies when a federal law prohibits a State from changing its own laws.

This makes sense because, as *New York* observes, one of the core rationales for the anti-commandeering doctrine is to preserve the accountability of state governments to their citizens. “[W]hen, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate,” “[a]ccountability is thus diminished.” *New York*, 505 U.S. at 169. And that is true whether the “federal coercion” takes the form of a requirement to enact new regulations, or, as the Justice Department construes PASPA, a prohibition against repealing existing laws. It was this obfuscation of accountability—the fact that “the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision,” *id.*—that the Supreme Court actually found to be “the critical flaw” (DOJ Br. 9) with the statute at issue in *New York*.

The anti-commandeering doctrine thus turns not on whether the federal statute requires enactment of new laws, but on whether the federal government is per-

missibly “exercis[ing] its legislative authority directly over individuals rather than [impermissibly] over States.” *New York*, 505 U.S. at 165. The doctrine prohibits the federal government from “conscript[ing] state governments as its agents” to regulate individuals. *Id.* at 178; *Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may [not] issue directives requiring the States to address particular problems.”). Instead, it may regulate individuals only by exercising one of its enumerated powers to do it itself, or by encouraging States to do so by means “short of outright coercion.” *New York*, 505 U.S. at 166. Yet the Department itself admits that PASPA regulates private sports wagering by “regulating” the States—precisely what the anti-commandeering doctrine provides federal law cannot do. DOJ Br. 3.

*Reno v. Condon*, 528 U.S. 141 (2000), is not remotely to the contrary. The Supreme Court there rejected South Carolina’s anti-commandeering challenge because the statute at issue “regulate[s] state activities, rather than seek[ing] to control or influence the manner in which States regulate private parties.” *Id.* at 150. That is not the case with PASPA unless the Court adopts the State’s suggested saving construction and limits PASPA’s application to State-run gambling enterprises. *See* MSJ Opp. at 28-29. **Then**, *Reno*’s holding might preclude an anti-commandeering challenge. But because PASPA as construed by the Department “require[s] the States in their sovereign capacity to regulate their own citizens,”

*Reno* itself acknowledges that the anti-commandeering doctrine applies and invalidates the federal mandate. 528 U.S. at 151.<sup>5</sup>

In summary, as the Department of Justice unequivocally explained to the Supreme Court in *Printz* and *Reno*, “[a] constitutional problem exists when Congress, although identifying a national problem, chooses not to enact any federal solution,” but instead “dictates how the States regulate private conduct.” Br. for the United States, *Printz v. United States*, Nos. 95-1478+, 1996 WL 595005, at \*16 (Oct. 10, 1996); Br. for Petitioners, *Reno v. Condon*, No. 98-1464, 1999 WL 513843, at \*30 (July 15, 1999). Such a situation inadvisedly enables both federal and state officials ““to avoid being held accountable to the voters for their decisions.”” Br. for the United States, *Printz*, Nos. 95-1478+, 1996 WL 595005, at \*16 (quoting *New York*, 505 U.S. at 182).

**b.** Moreover, even if “[t]he commandeering prohibition [were to apply] only when a federal statute requires affirmative State action,” DOJ Br. 9, PASPA does just that. It requires States both to maintain their prohibitions on sports wagering, and, unless state officials violate their oaths of office and constitutionally com-

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<sup>5</sup> The Court in *Reno* rejected the action/inaction dichotomy the Department relies on here. In *Reno*, South Carolina argued that because the law at issue *did* require “affirmative action” by the State, the law constituted impermissible commandeering. 528 U.S. at 150. The Supreme Court “agree[d]” that the law “will require time and effort on the part of state employees,” but explained that the relevant inquiry is not whether the law requires action by the State, but whether the law seeks to “control or influence the manner in which States regulate private parties.” *Id.*

mandated duties, to take action to enforce those laws. The Department’s notion that Defendants are free to permit open and notorious violations of state law to flourish—in other words, to invite a limited form of anarchy—is antithetical to any form of government, but particularly one built on the rule of *law*.

When a State maintains existing law on the books, the State inescapably exercises coercive authority. The law imposes the State’s moral and persuasive force, and individuals rightly may hesitate to violate the law even if they believe it will not be enforced. The State’s maintenance of a prohibition of sports wagering also has undeniable effects on the rights and legal relations of individuals within the State, including under federal anti-gambling laws. *See* 18 U.S.C. § 1084(b). The State’s imposition of those effects constitutes “affirmative” state action. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) (application of already-existing state common law constituted “state action” for purposes of Fourteenth Amendment.).

Moreover, the Department errs when it claims that PASPA does not “require New Jersey affirmatively to enforce its prohibitions on sports gambling.” DOJ Br. 10. It is incorrect, first, as a matter of federal law under PASPA. If a State were to declare a formal policy of not enforcing its prohibition of sports wagering, the Department would surely argue that the policy “authorize[s]” such activity and triggers PASPA’s prohibition. Indeed, the verb “authorize” means “legalize.” *See Webster’s New International Dictionary* 186 (2d ed. 1955). A contrary reading

would render PASPA nonsensical, as it would require States to prohibit sports wagering but would not require States to give those prohibitions any force.

Beyond that, and perhaps more importantly, it disregards state law binding executive authorities in the States. Like many state executives, New Jersey's Governor acts under a constitutional obligation to "take care that the laws be faithfully executed." N.J. Const. art. V, § 1, cl. 11. There is no reason to presume (as the Department apparently does) that the Governor would view himself as having no obligation to enforce the State's laws. By requiring States to maintain laws prohibiting sports gambling, PASPA by operation of state law requires the affirmative enforcement of those same state-law prohibitions. The Department's proposed "affirmative"-state-action interpretation of the anti-commandeering doctrine thus cannot save PASPA.

2. The Department further suggests that there can be no commandeering where Congress acts under its "enumerated powers," but as the Department certainly knows the Supreme Court categorically rejected precisely that argument in *New York*. See 505 U.S. at 166. Were it otherwise, *New York* itself would have been wrongly decided, as the State in that case conceded that the federal government had authority to directly regulate the relevant conduct. See *id.* at 160.

The Department also makes the dubious point that it is "exceptionally rare" for a statute to violate the anti-commandeering doctrine. DOJ Br. 11. That merely

proves that it is “rare” for Congress to enact a law that infringes the constitutionally protected sovereignty of the States in such an egregious fashion. Indeed, the Department of Justice itself opposed this law at the time of its enactment due to (among other concerns) “federalism issues.” *See* D.E. 29-1, at 35. Because PASPA seeks to harness the coercive power of State legislative authority to regulate private conduct, it cannot be sustained.

**B. PASPA’s Lack of Uniformity Exceeds Congress’s Commerce Clause Power by Depriving States of Equal Sovereignty**

The central purpose of the Commerce Clause was “to insure uniformity in regulation.” MSJ Opp. 33 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923)); accord Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 Va. L. Rev. 249, 270, 276 (2005). The Department does not contend otherwise, but instead advances the unlikely proposition that the Commerce Clause authorizes Congress to enact the very type of discriminatory legislation that it was adopted to prevent. While the Department invokes broad *dicta* that, if read out of context, could support that conclusion, none of the cases on which it relies involved a law that (as PASPA does) on its face, intentionally and blatantly discriminated *between* States; instead, they concern laws that discriminate within a single State or that unintentionally produce disparate geographic effects.

*Curriu v. Wallace*, 306 U.S. 1, 8, 14 (1939), the primary case on which the Department relies, involved intra-state discrimination. North Carolina tobacco warehousemen and auctioneers complained that federal requirements did not apply equally to “warehousemen on other tobacco markets in North Carolina.” *Id.* at 13. *Curriu*’s approval of intra-state discrimination is irrelevant to the constitutionality of a statute that, like PASPA, mandates intentional discrimination *between* States. *See Hodel v. Indiana*, 452 U.S. 314, 332 (1981) (approving statute that inflicted disparate *impact*, not disparate *treatment*); MSJ Opp. 34-35.

If PASPA is constitutional, Congress could enact an array of discriminatory laws that have never been thought to be within its authority. A majority in Congress could allocate critical industries among their respective States, then legislate to prohibit residents of other States from competing. Or a group of States encompassing all the competitors in an industry could cooperate to enact a law that barred companies in other States from entering the industry. This concern is not theoretical; PASPA is precisely such a statute. The interest of Nevada, Delaware, Oregon, and Montana in obtaining a monopoly on sports wagering aligned with the interest of legislators who opposed sports wagering altogether.<sup>6</sup> *See, e.g.*, 138 Cong. Rec.

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<sup>6</sup> Notwithstanding the Department’s current emphasis on “reliance” interests, the Department previously admitted that PASPA resulted from just such legislative horse-trading; the Department stated that “the decision to allow certain States to maintain their status quo reflects the reality of the bargaining process inherent in the passage of legislation.” Fed. Defs.’ Mot. to Dismiss at 25, *Interactive Media*

S7274-02, 1992 WL 116822, at \*S7281 (June 2, 1992) (statement of Sen. DeConcini) (explaining that “[w]e have talked to those States that do have a limited amount of gambling, and of course the State of Nevada” and that “that is what good legislation is all about, being understanding of the economic gains in each State”). Given the emphasis that the drafters of the Constitution placed on uniformity of national economic regulation, it is inconceivable that they intended the Constitution to permit this result.

PASPA discriminates not only between residents of different States, but also between the States themselves with respect to the exercise of their sovereign law-making and revenue-raising authority. As a result, it not only conflicts with the very purpose of the constitutional provision that purportedly authorizes it, but also violates the “fundamental principle of equal sovereignty.” *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). Contrary to the Department’s suggestion, this doctrine is not limited “to the conditions under which a State is admitted to the Union.” DOJ Br. 19. Well more than a century ago, the Supreme Court recognized that “[e]quality of constitutional right and power is the condition of *all* the States of the Union, old and new.” *Escanaba & Lake Mich. Transp. Co. v. Chicago*, 107 U.S. 678, 689 (1883) (emphasis added). Thus, in

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*Entm’t & Gaming Ass’n, Inc. v. Holder*, No. 3:09-cv-01301-GEB-TJB (D.N.J. Aug. 2, 2010).

*Northwest Austin*, the Court discusses the doctrine in a context (application of the Voting Rights Act, first enacted in 1965) that has nothing at all to do with entry of new States into the Union. *Nw. Austin*, 557 U.S. at 203.

To the extent that *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), could have been read to limit the doctrine's application, *Northwest Austin* rejected that reading. Instead, *Northwest Austin* interpreted the Court's admonition in *Katzenbach*, that the equal sovereignty doctrine only permits discrimination for "remedies for local evils which have subsequently appeared," to mean the doctrine is violated unless "a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at 203 (quoting *Katzenbach*, 383 U.S. at 328-29). The Department does not contend that PASPA's coverage is in any way "related to the problem it targets."<sup>7</sup> Nor could it, for PASPA exempted from its sweep the States in which sports betting was *most* prevalent.<sup>8</sup>

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<sup>7</sup> For their part, the Leagues clearly no longer view sports wagering as an evil; they actively sponsor wagering through "fantasy" bets made legal by the NFL-sponsored Federal Unlawful Internet Gambling Enforcement Act. See D.E. 76-2, at 5-6; Geoff Earle, *NFL Makes Fantasy Pass*, N.Y. Post (Oct. 10, 2006), available at [http://www.nypost.com/p/item\\_EShPk9HrxYtWNiYRJLaBLJ](http://www.nypost.com/p/item_EShPk9HrxYtWNiYRJLaBLJ).

<sup>8</sup> The Department's only other attempt to distinguish *Northwest Austin* relies on the fact that it is a Fifteenth Amendment case. But, if anything, the principle of equal sovereignty might arguably have *less force* in the context of the subsequently-adopted Fifteenth Amendment. Moreover, *Northwest Austin* addressed the Voting Rights Act, which was enacted to address a particular evil that was unevenly distributed. *Nw. Austin*, 557 U.S. at 198-99. In contrast, history demonstrates that the Commerce Clause was designed to promote uniformity, not to remedy local evils.

The Department instead offers a single justification for the statute: the asserted reliance interests of the favored States. But the Department cites no case that approves grandfathering in the context of a federal law that discriminates between States, much less one that discriminates with respect to core sovereign powers. *New Orleans v. Dukes* does not aid the Department; that case upheld a *city ordinance* that favored existing private pushcart owners. *See Dukes*, 427 U.S. 297, 303, 306 (1976). And *Dukes* explicitly distinguished classifications that “trammel[ ] fundamental personal rights” or reflect “inherently suspect distinctions.” *Id.* at 303. Nothing in *Dukes* supports upholding grandfathering that impinges on the “fundamental principle of equal sovereignty.” *Nw. Austin*, 557 U.S. at 203.

### **C. PASPA Violates Due Process and Equal Protection Rights**

The Department suggests New Jersey lacks standing to raise due process and equal protection challenges to PASPA because it is not a “person” under the Fifth Amendment. This ignores the fact that New Jersey has asserted both direct standing and *parens patriae* standing on behalf of its citizens. *See* MSJ Opp. 38 n.14. And, in any event, Defendant-Intervenors undoubtedly have standing.

The Department’s purported rational bases for PASPA—“stopping the spread of sports gambling and . . . guarding the integrity of athletic competitions,” DOJ Br. 23—are not served by the discrimination Defendants challenge. The Department’s only justification for that discrimination—“accounting for the reliance

interests that certain States had in the legality of those operations,” DOJ Br. 23-24—is likewise insufficient. In the Third Circuit, *permanent* exemptions for existing uses are disfavored, and are distinguishable from the permissible grandfathering in *Dukes*, 427 U.S. 297. *Del. River Basin Comm’n v. Bucks Cnty. Water & Sewer Auth.*, 641 F.2d 1087 (3d Cir. 1981); MSJ Opp. 35, 38.

The Department’s answer to *Delaware River Basin* is to claim greater reliance interests by the favored States in this case. DOJ Br. 24 n.6. But the degree of reliance does not alter the Third Circuit’s suspicion of permanent grandfathering. *Del. River Basin*, 641 F.2d at 1098. Moreover, if PASPA were really about reliance, it would limit the favored States to the amount of sports wagering that existed in 1991, rather than permitting the exponential increase that has occurred in those States since PASPA was enacted.

## CONCLUSION

PASPA is a very unusual statute. It purports to implement a federal policy aimed at stopping the spread of sports wagering by commanding States to implement that policy at their expense and with their authority, but it exempts certain favored States, and has allowed a vast and uncontrolled illegal sports gambling industry massively greater than when PASPA was enacted, which the States are helpless to restrict or oversee. PASPA is an unconstitutional monument to the laws of unintended consequences.

Dated: February 8, 2013

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