IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. NO. 14-4569

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association; NATIONAL BASKETBALL ASSOCIATION, a joint venture; NATIONAL FOOTBALL LEAGUE, an unincorporated association; NATIONAL HOCKEY LEAGUE, an unincorporated association; OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL

v.

GOVERNOR OF THE STATE OF NEW JERSEY; DAVID L. REBUCK, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; FRANK ZANZUCCKI, Executive Director of the New Jersey Racing Commission; NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.; NEW JERSEY SPORTS & EXPOSITION AUTHORITY

STEPHEN M. SWEENEY, President of the New Jersey Senate;
VINCENT PRIETO, Speaker of the New Jersey General Assembly
(Intervenors In District Court)

New Jersey Thoroughbred Horsemen's Association, Inc.

Appellant

PETITION FOR REHEARING EN BANC FOR APPELLANT NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY AT CIVIL ACTION NO.: 3-14-cv-06450

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REQUIRED STATEMENT OF COUNSEL FOR REHEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that the panel's majority decision in this case is contrary to a decision of the United States Court of Appeals for the Third Circuit, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court, *i.e.*, the panel's majority decision is contrary to the decision of this Court in *National Collegiate Athletic Association v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013). In addition, this appeal involves questions of exceptional importance, *i.e.*, whether PASPA prohibits the State Legislature and the State Executive from fulfilling the desire of the people of New Jersey to repeal certain sports betting prohibitions and, if so, whether it is constitutional.

* * * *

Pursuant to Rule 35.2 of the Local Appellate Rules of the United States Court of Appeals for the Third Circuit, a copy of the panel's opinions and judgment are annexed hereto as Exhibits A and B, respectively.

INTRODUCTION

The Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701-3704, prohibits New Jersey from licensing or authorizing "by law" sports wagering. In *National Collegiate Athletic Association v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) (*Christie I*), New Jersey officials and the New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA")[1] argued that PASPA unconstitutionally coerces New Jersey to regulate private parties in violation of the Tenth Amendment's anti-commandeering doctrine. A divided panel of this Court rejected that constitutional challenge.

The majority in *Christie I*, in an opinion by Judge Fuentes, gave PASPA an interpretation that saved its constitutionality. The savings interpretation is rooted in the fundamental difference between state repeal of sports betting prohibitions, which is permitted under PASPA, and state authorization "by law" of sports betting, which PASPA prohibits. The foundation of the savings interpretation is that there is a false equivalence between repeal and authorization "by law". Relying on the reasoning and holding in *Christie I*, New Jersey did exactly what *Christie I* held PASPA allows and repealed ("Repealer" or "2014 Law") some prohibitions against sports wagering.

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[1] The NJTHA operates Monmouth Park Racetrack in Oceanport, New Jersey.

In this proceeding (*Christie II*) a different panel of this Court, also dividing 2-1, held that, despite following the path charted in *Christie I*, New Jersey's Repealer violates PASPA because it is an authorization "by law" of sports wagering. This is the exact opposite of the holding in *Christie I*. Judge Fuentes dissented. He wrote that the holding in *Christie II* is "precisely the opposite of what we held in *Christie I* … and why we found PASPA did not violate the anti-commandeering principle." There is now an intra circuit conflict. The holdings in *Christie I* and *Christie II* are "precisely the opposite." And no one is in a better position than Judge Fuentes, as the author of both the majority Opinion in *Christie I* and the dissent in *Christie II*, to point out this intra circuit conflict.

The effect of the decision in *Christie II* blocks New Jersey and the NJTHA from doing exactly what *Christie I* held PASPA allows. Trapped in the middle of the intra circuit conflict caused by *Christie II* are the people of New Jersey and their elected legislative and executive representatives. Compromised by *Christie II* are core principles of federalism. Frustrated by *Christie II* is the will of the people of New Jersey. And seriously hurt and undercut by *Christie II* is Monmouth Park Racetrack, which is now prevented from offering the sports wagering so badly needed for the Racetrack to survive as a self-sustaining Thoroughbred Racetrack.

The fact is the 2014 Law is invalid only if both of the following propositions are true: (a) PASPA is constitutional; and (b) the 2014 Law violates PASPA. But

not a single one of the five judges of this Court who decided *Christie I* or *Christie II* has endorsed both of these propositions. Rehearing *en banc* should be granted.

BACKGROUND

Christie I reviewed New Jersey's 2012 Sports Wagering Law (the "2012 Law"). The 2012 Law provided for state licensing and authorization "by law" of sports wagering pools at casinos and racetracks in New Jersey by establishing "a comprehensive regulatory scheme, requiring licenses for operators and individual employees, extensive documentation, minimum cash reserves, and Division of Gaming Enforcement access to security and surveillance systems." *Christie II* Maj. Op. at 8. The 2012 Law conflicted with PASPA's prohibition against state authorization "by law" of sports wagering. Thus, the central question in *Christie I* was whether PASPA violated the anti-commandeering doctrine of the Tenth Amendment and principles of federalism as set forth in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).

A divided panel in *Christie I* upheld the constitutionality of PASPA, but only after giving PASPA a savings interpretation. The majority in *Christie I* wrote that if PASPA was interpreted to prohibit New Jersey from "'repealing an existing law,'" it would violate the Tenth Amendment's anti-commandeering doctrine. *Christie I*, 730 F.3d at 232 (citing and quoting *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring)). Thus, to save PASPA from any

constitutional infirmity, the majority in *Christie I*, in an opinion authored by Judge Fuentes, gave PASPA its savings interpretation. That savings interpretation holds that PASPA is constitutional because it gives the states "much room" to "enforce the *laws they choose* to maintain," and to shape the "exact contours" of their prohibitions against sports betting. *Christie I*, 730 F.3d at 233-34 (emphasis added). Judge Fuentes explained that inasmuch as PASPA prohibited only an authorization "by law" of a sports gambling scheme, New Jersey was free to repeal "an affirmative prohibition of sports gambling." *Christie I*, 730 F.3d at 232.

Judge Vanaskie dissented in *Christie I*. He wrote that PASPA "violates the principles of federalism as articulated by the Supreme Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997)." 730 F.2d at 241.

In conformity with the savings interpretation given PASPA, New Jersey enacted the 2014 Law. The 2014 Law repeals all prohibitions on sports wagering and any rules authorizing the state to, among other things, license or authorize a person to engage in sports wagering at casinos and gambling houses in Atlantic City and current or former horse racetracks in New Jersey.

The majority in *Christie II* acknowledged that *Christie I* held PASPA to be constitutional and wrote that "we cannot and will not revisit that determination here." *Christie II* Maj. Op. at 15 n.5. But despite *Christie I*'s savings

interpretation holding that PASPA does not prohibit repeals of sports betting prohibitions, the majority in *Christie II* held that because the 2014 Law was only a "partial" repeal of the state's prohibitions on sports wagering it violates PASPA. The majority in *Christie II* reasoned that since the 2014 law "*essentially* provides that … casinos and racetracks shall hereafter be permitted to have sports gambling," the 2014 Law is "not a repeal; it is an authorization." *Christie II*, Maj. Op. at 18 (emphasis added).

In his dissenting opinion in *Christie II*, Judge Fuentes demonstrated that the "logic" of the majority in *Christie II* that "a partial repeal amounts to an authorization" "rests on the same false equivalence we rejected in *Christie I*." *Christie II*, Dis. Op. at 1-2. Judge Fuentes wrote:

> The 2014 Law … renders the previous prohibitions on sports gambling non-existent. After the repeal, it is as if New Jersey *never* prohibited sports gambling in casinos, gambling houses, and horse racetracks. Therefore, with respect to those areas, there are no laws governing sports wagering and the right to engage in such conduct does not come from the state. Rather, the right to do that which is not prohibited stems from the inherent rights of the people. The majority, however, states that "[a]bsent the 2014 Law, New Jersey's myriad laws prohibiting sports gambling would apply to the casinos and racetracks," and that, as such, "the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited." We have refuted this position before. In *Christie I*, we held that "the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law." Such an argument, we said, "rests on a false equivalence between repeal and authorization and reads the terms 'by law' out of the statute." We identified several problems in making this false equivalence – the most troublesome being that it "reads the term 'by law' out of the statute." The majority's position does just that. In holding that a partial repeal of prohibitions is state authorization, the majority must infer

> authorization. PASPA, however, contemplates more. … This is no less true of a partial repeal than it would be of a total repeal – which the majority concedes would not violate PASPA. Thus, to reach the conclusion that the 2014 Law, a partial repeal of prohibitions, authorizes sports wagering, the majority necessarily relies on this false equivalence. It concedes as much when stating "the 2014 Law" (the repeal) provides "the authorization" for sports wagering. Of course, this is the *exact* false equivalence we identified, and dismissed as a logical fallacy, in *Christie I.*

Christie II, Dis. Op. at 3-5 (emphasis in original, footnotes omitted).

ARGUMENT

I. EN BANC REVIEW SHOULD BE GRANTED IN ORDER TO SECURE AND MAINTAIN THE UNIFORMITY OF THIS COURT'S HOLDINGS.

A. Securing And Maintaining Uniformity Of This Court's Holdings Is Essential To This Court's Institutional Integrity.

Under Rule 35 of the Federal Rules of Appellate Procedure "*en banc* consideration is necessary to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35. Pursuant to Third Circuit Internal Operating Procedure ("IOP") 9.1, "[i]t is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels." Moreover, under IOP 9.1, "no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court *en banc* consideration is required to do so." *Id.*

The reason for *en banc* review, pioneered years ago by this Court, is to preserve the Court's institutional integrity. As Judge Maris explained:

> The principal utility of determinations by the courts of appeal in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure

> uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court. Without the procedure in banc it would be possible for different panels of the court to reach and apply in individual cases diametrically opposite conclusions upon important questions of law or practice. Not only would this confuse the law but it might also result in serious strains in the court when subsequently a panel of judges who individually disagreed with one of these decisions was called upon to decide the same question in a later case.

Albert B. Maris, Hearing and Rehearing Cases In Banc: The Procedure of the United States Court of Appeals for the Third Circuit, 14 F.R.D. 91, 96 (1953).

B. There Is A Clear Conflict Between The Holdings In *Christie I* And *Christie II*.

The majority in *Christie I* held that the only reason PASPA is constitutional and does not violate the anti-commandeering doctrine is the savings interpretation it gave to PASPA. Under that savings interpretation, PASPA is not violated if a state repeals state laws prohibiting sports wagering. The reasoning underlying the savings interpretation is that the conduct of people after a repeal does not "derive[] from the authority of the state but from the inherent rights of the people" to do that which is no longer prohibited. *Christie I*, 730 F.3d at 232. Once there is a repeal, there can be no state authorization "by law" because the people are merely exercising their inherent liberty to do that which is not prohibited by law.

The majority in *Christie II* held that inasmuch as the 2014 Law was only a partial repeal of sports betting prohibitions and not a total repeal, it violated

PASPA. But, as repeatedly pointed out by Judge Fuentes in his dissent in *Christie II*, the Court's savings interpretation in *Christie I* makes no distinction between a partial repeal and a total repeal. There is certainly no person better situated than Judge Fuentes, the author of the majority opinion in *Christie I*, to understand and explain the conflict between the holdings in *Christie I* and *Christie II*.

The majority in *Christie II* acknowledged, without question, the result of *Christie I* that PASPA was constitutional, but rejected the reasoning that supported that result. Indeed, the reasoning of the majority in *Christie II* is remarkably similar to the reasoning of the dissent in *Christie I*, but without reaching the conclusion of unconstitutionality to which that reasoning inevitably leads. However, as this Court has previously observed, "[o]ur system of precedent or stare decisis is … based on adherence to both the reasoning and result of a case, and not simply to the result alone." *Planned Parenthood v. Casey*, 947 F.2d 682, 692 (3d Cir.1991), *aff'd in part and rev'd in part*, 505 U.S. 833 (1992). Accordingly, rehearing *en banc* is necessary to address the conflict between the holdings in *Christie I* and *Christie II*.

II. THIS PROCEEDING INVOLVES EXCEPTIONALLY IMPORTANT QUESTIONS OF FEDERALISM AND INSTITUTIONAL INTEGRITY.

New Jersey's economy and environment are at risk in this case. As to this fact there is no dispute. If Monmouth Park closes, it will likely mean the end of New Jersey's equine industry, taking with it the jobs that this industry provides and

the open space that it preserves. A similar fate may befall Atlantic City as casinos continue to close. But the legal issues are, if anything, even more important than these economic and environmental realities, for they are central to our constitutional federalism.

The national government is one of limited and enumerated powers, and those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. When Congress acts within its enumerated powers, the requirements it imposes on the people are binding, state law to the contrary notwithstanding. U.S. Const. art. VI. In deference to our federalism and state sovereign rights, there is a judicial presumption against federal preemption of state law. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' … we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

While Congress has power to regulate the people directly, it has no power to coerce the states to regulate the people. The "Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not

States. * * * The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York v. United States*, 505 U.S. 144, 166 (1992). "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.* at 178. Any attempt by Congress to "circumvent" this limitation should be guarded against and rejected. *Printz v. United States*, 521 U.S. 898, 935 (1997). The Constitution "'simply does not give Congress the authority to require the States to regulate.' That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own." *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J., joined by Breyer and Kagan, JJ.) (quoting *New York*, 505 U.S. at 178).

These core principles of constitutional federalism are designed both to protect the democratic accountability of the government, and to preserve the liberty of the governed. "[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *New York v. United States*, 505 U.S. 144, 168 (1992). The Constitution "divides authority between federal and state governments for the protection of individuals. State

sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, 181 (1992) (internal quotation marks and citation omitted).

All these core constitutional principles are at stake in this case.

PASPA prohibits New Jersey from authorizing "by law" sports betting, but does not itself directly impose a regulatory (or deregulatory) federal scheme on the people. Through all the years and all the briefs filed in this litigation, no one has identified any other federal law that displaces or preempts state law without also imposing a federal scheme of some kind in its place. *See Christie I*, 730 F.3d at 247 n.5 (Vanaskie, J., dissenting) ("Significantly, the majority opinion does not cite any case that sustained a federal statute that purported to regulate the states under the Commerce Clause where there was no underlying federal scheme of regulation or deregulation. In this sense, PASPA stands alone in telling the states that they may not regulate an aspect of interstate commerce that Congress believes should be prohibited."). Nevertheless, and despite the absence of a "clear and manifest purpose" (*Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks and citation omitted)), the result of the decisions in *Christie I* and *II* is that PASPA preempts both the 2012 Law and 2014 Law.

In *Christie I*, the New Jersey law that was preempted was a comprehensive licensing and regulatory scheme. In *Christie II*, the 2014 Law that has now been

preempted partially repeals state law criminal prohibitions. Today, the only reason New Jersey law prohibits sports betting by adults at Monmouth Park is that the federal government has so decreed. This result cannot be reconciled with the anti-commandeering principle.

The democratic accountability protected by our federalism has also been undermined. The people of New Jersey elected representatives who, by overwhelming bipartisan margins, repealed certain criminal prohibitions against sports betting. Yet those state law prohibitions still stand because the federal government has so decreed.

The people's liberty protected by our federalism has been denied. Neither Monmouth Park nor its customers are free to exercise their liberty to choose to engage in sports betting because that activity remains subject to criminal punishment under New Jersey law solely because the federal government has so decreed.

If this result is allowed to stand, Congress will have received this Court's authority to act unconstitutionally by requiring states to regulate according to Congress's directions, thereby evading the anti-commandeering principle, avoiding democratic accountability, and abridging the people's liberty. All Congress needs to do is prohibit the states from authorizing an activity that Congress disfavors. Consider the growing political movement to legalize marijuana: Congress could

repeal the existing direct federal prohibition on an individual's possession of marijuana and replace it with a prohibition against state authorization "by law" of the possession of marijuana. Under *Christie I* and *Christie II*, a state must either (a) prohibit all possession of marijuana or (b) permit all possession of marijuana (whether for medical or for recreational purposes), by any person (children as well as adults), and in any place (playgrounds as well as homes).

It is difficult to see how these absurd results can be correct under the substantive law, and no judge of this Court has explained how they could be correct. The situation facing New Jersey and Monmouth Park can be substantively correct only if two propositions are true: First, PAPSA must, contra Judge Fuentes, prohibit a partial repeal of state laws prohibiting sports gambling. Second, PASPA must, contra Judge Vanaskie, be constitutional. Yet not a single circuit judge has endorsed both propositions. Judge Fuentes and Judge Vanaskie obviously have not; indeed Judge Vanaskie specifically contemplated the interpretation of PASPA now applied in *Christie II*, *i.e.*, one that leaves states only the choice between prohibition or elimination of all prohibitions, and he found that interpretation unconstitutional (*Christie I*, 730 F.3d at 241). Nor has Judge Fisher, who joined Judge Fuentes's savings interpretation of PASPA in *Christie I*. Nor have Judges Rendell and Barry, who did not consider the constitutional question at all, viewing it as settled by *Christie I*. *En banc* review is necessary to consider the

question whether PASPA is constitutional under the *Christie II* majority's construction of it.

Some seventy-five years ago, as this Court grew to more than three members, it created the *en banc* proceeding to make sure that it maintained its institutional integrity as a single Court, speaking with one voice while, for efficiency reasons, hearing the vast majority of cases in three-judge panels. *See Commissioner of Internal Revenue v. Textile Mills Securities Corp.*, 117 F.2d 62 (1940) (*en banc*); *Oughton v. NLRB*, 118 F.2d 486 (1940) (*en banc*); *see also Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). At least in a case of this magnitude, presenting legal issues of this importance, when the panel system creates a result that no member of this Court has endorsed, and that all members may reject, it is necessary for the "integrity" of the Court to gather as one Court and speak with one voice.

CONCLUSION

The 2014 Law is valid if *either* Judge Fuentes's statutory analysis *or* Judge Vanaskie's constitutional analysis is correct. If a majority of this Court concludes that *both* Judge Fuentes's statutory analysis *and* Judge Vanaskie's constitutional analysis are wrong, it should find the 2014 Law invalid. But to date, far from a majority concluding that both are wrong, not a single judge of this Court has

concluded that both are wrong. Thus this case presents the unusual situation where the *en banc* Court might agree unanimously on a different outcome than the one produced by separate panels. To leave a case of this magnitude – with the conflict between the holdings of the two *Christie* panels and presenting legal issues of this importance – in such a posture would be an embarrassment to our judicial system. *En banc* review must be granted.

Dated: September 8, 2015

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on this 8th day of September, 2015, the foregoing Petition for Rehearing En Banc was electronically filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system.

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