

INEVITABLE: SPORTS GAMBLING, STATE REGULATION, AND THE PURSUIT OF REVENUE

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“It’s inevitable that, if all these states are broke . . . there will be legalized betting in more states than Nevada and we will ultimately participate in that.”

- NBA commissioner Adam Silver, September 4, 2014¹

I. Introduction

Balancing the protection of private business interests against governmental regulation is one of the most significant legal frictions of the modern era. Over the course of the past twenty-eight months, this conflict has manifested itself through a federal sports gambling lawsuit involving New Jersey. However, the ongoing lawsuit between a plaintiff quintet of the most powerful sports entities in the United States—the National Collegiate Athletic Association (“NCAA”), the National Basketball Association (“NBA”), the National Football League (“NFL”), the National Hockey League (“NHL”), and the Office of the Commissioner of Major League Baseball (“MLB”) (collectively “sports leagues”)—and the Governor of New Jersey over the possibility of regulated sports wagering in the state is not about gambling. It is about control: control of events, control of data, control of marketing opportunities, and control of current and future revenue streams. This is a clash between sports leagues looking to reserve opportunities to monetize sporting events as commodities and cash-strapped states intent to raise tax

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¹ See Mason Levinson & Scott Soshnick, *NBA’s Silver Says Legal Sports Gambling in U.S. Is Inevitable*, BLOOMBERG (Sept. 4, 2014, 11:06 AM), <http://www.bloomberg.com/news/2014-09-04/nba-s-silver-says-legal-sports-gambling-in-u-s-is-inevitable.html>.

revenue via regulation of an industry with a massive volume of underground activity.²

The sports gambling industry, legal and illegal, is vast. The National Gambling Impact Study Commission estimated that up to \$380 billion was wagered illegally in the United States in 1999.³ The International Centre for Sport Security reports a range of \$250–650 billion gambled globally on both U.S. and international sports.⁴ The state of New Jersey and in effect forty-eight other states receive no taxable share of such revenue.

Sports betting economic activity in the U.S. is largely constrained by the Professional and Amateur Sports Protection Act (“PASPA”).⁵ Nevada is the main exception, and its licensed sports books generated a handle of \$3.45 billion in 2012.⁶ New Jersey has assumed a key role in challenging PASPA’s effective federal ban on sports betting by attempting to implement Las Vegas-style sports betting at casinos and racetracks.⁷ Should New Jersey ultimately prevail in its PASPA challenge, other states may follow in efforts to capture taxable portions of the presently elusive sports betting

² Indeed, the clash between the NCAA, NFL, NBA, MLB, and NHL and Governor Chris Christie is particularly noteworthy given that counsel for the same five sports leagues penned a July 30, 2007 letter to Congress positing: “whether you think gambling liberalization is a bad idea or a good one, the policy judgments of state legislatures and Congress must be respected.” See 153 CONG. REC. E1684 (daily ed. Aug. 2, 2007) (statement of Hon. Edolphus Towns of New York).

³ NAT’L GAMBLING IMPACT STUDY COMM’N, GAMBLING IN THE UNITED STATES, 2-14 (1999), available at <http://govinfo.library.unt.edu/ngisc/reports/2.pdf>.

⁴ INTERNATIONAL CENTRE FOR SPORT SECURITY, THE THREAT TO SPORT: THE FACTS AT A GLANCE 1–4 (2014), available at http://www.theicss.org/wp-content/themes/icss-corp/pdf/SIF14/Sorbonne-ICSS%20Report%20-%20Infographic_WEB.pdf.

⁵ See 28 U.S.C. §§ 3701–3704 (2012).

⁶ *Sports Wagering*, AMERICAN GAMING ASSOCIATION, <http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering> (last visited Nov. 11, 2014). PASPA, via a grandfathering clause, exempts the states of Nevada, Delaware, Montana, and Oregon, as they offered varying forms of sports betting prior to PASPA’s enactment. However, PASPA limits the gambling activities to states already offering certain forms of sports wagering. In 1992, only Nevada offered full-scale sports betting and, as a result, has enjoyed a near-monopoly in sports gambling. See John T. Holden, Anastasios Kaburakis & Ryan M. Rodenberg, *Sports Gambling Regulation and Your Grandfather (Clause)*, 26 STAN. L. POL’Y REV. ONLINE 1 (2014). Relatedly, Art Manteris, one of the foremost authorities in the sports gaming industry and veteran Nevada sports books executive, opined on PASPA: “The two greatest blunders in the history of U.S. gaming were the support of the [PASPA], which helped create the offshore online gaming industry, as well as prohibiting the expansion of legal sports wagering into other states.” See National Museum of Organized Crime & Law Enforcement, *Wednesday, January 21: Beating the line: The inside story on sports betting in America, Courtroom Conversation*, THE MOB MUSEUM (Dec. 14, 2014), <http://themobmuseum.org/archives/2014/12/14/wednesday-january-21-getting-a-fix-on-sports-betting/>.

⁷ See David Purdum, *NCAA, NFL seek to stop NJ betting*, ESPN.COM (Oct. 20, 2014, 11:58 AM), http://espn.go.com/espn/chalk/story/_id/11733844/ncaa-nfl-file-injunction-prevent-new-jersey-sports-betting.

marketplace.

II. Background and Current Status of Litigation

The complicated relationship between professional sports leagues and the gambling industry, modulated by government regulation, has recently become increasingly blurred. The global promise of capital generation from the gambling industry has increased the attractiveness of strategic partnerships for the professional sports leagues and gambling purveyors. For example, certain forms of “pay to play” fantasy sports have been exempted from the categorization of gambling under the 2006 Unlawful Internet Gambling Enforcement Act,⁸ a statute supported by the plaintiffs in the active New Jersey litigation.⁹ Weekly and daily fantasy sports leagues, generating over \$245 million in entry fees in 2013,¹⁰ are growing through commercial partnerships with the professional sports leagues and individual teams.¹¹ The result is a fine line between illegal sports gambling and permissible fantasy sports.¹² As the pursuit of revenue and

⁸ 31 U.S.C. § 5362(1)(E)(ix).

⁹ See H.R. REP. NO. 110-910, at 9 (2008).

¹⁰ See Adam Krejciak, *Daily Fantasy Sports: The Future of US Sports Wagering?* 18–19, EILERS RESEARCH (October 16, 2014), <http://eilersresearch.com/downloads/daily-fantasy-sports-the-future-of-us-sports-wagering/>.

¹¹ For a summary of this recent trend marking a policy shift for the professional leagues and the inherent conflicts therein, see generally Brent Schrottenboer, *Leagues see real benefits in daily fantasy sports*, USA TODAY (Jan. 1, 2015), <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>. The NBA and the NHL have recently allowed individual teams to negotiate with daily fantasy providers, with the Brooklyn Nets and the New Jersey Devils signing partnership agreements with FanDuel and Hotbox Sports respectively. John Brennan, *Nets, FanDuel Daily Fantasy Sports Company Announce Partnership*, NORTHJERSEY.COM (Oct. 24, 2014, 10:43 AM), <http://blog.northjersey.com/meadowlandsmatters/9918/nets-fanduel-announce-daily-fantasy-sports-partnership/>; see also Josh Lombardo & Eric Fisher, *With New Funds, FanDuel Looks at NBA Deals*, STREET & SMITH’S SPORTS BUSINESS J. (Sept. 8, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/09/08/Marketing-and-Sponsorship/FanDuel.aspx>. Major League Baseball’s official mini fantasy game provider is DraftKings. See Jonathan Bales, *Daily Fantasy Game a New Way to Play for Draft Kings*, MLB.COM (Mar. 24, 2014), <http://m.mlb.com/news/article/70013300/daily-fantasy-baseball-a-new-easy-way-to-play-from-draftkings>. On October 16, 2014, the New England Patriots became the first NFL team to sign with a daily fantasy sports provider, DraftKings. See Eric Fisher, *Fantasyland: Patriots become First NFL Team to Sign Deal with DraftKings*, STREET & SMITH’S SPORTS BUSINESS DAILY (Oct. 16, 2014), <http://www.sportsbusinessdaily.com/Daily/Issues/2014/10/16/Marketing-and-Sponsorship/DraftKings.aspx?hl=DraftKings&sc=0>.

¹² The exemption for fantasy sports is premised, in part, on a finding that certain fantasy sports fall on the legal side of the “skill versus chance” determination. With most states following the “dominant factor” test on this issue, it is possible that the legality of traditional forms of sports wagering may be tested in a way akin to the recent analysis specific to poker in *United States v. DiCristina*, 726 F.3d 92 (2d Cir. 2013). See generally Anthony N. Cabot, Glenn J. Light & Karl Rutledge, *Alex Rodriguez, A Monkey, and*

added value to customers becomes more fruitful, conceivably leading to growth of the professional sports leagues' fan base and acquisition of new clients for the gambling sector, new avenues for business collaboration are explored. The NFL, NBA, and NHL have also allowed teams to solicit sponsorship revenue from gambling providers.¹³

Congress passed PASPA in 1992 with the express purpose of stopping the spread of state-sanctioned sports gambling.¹⁴ PASPA's language grants a joint right of enforcement to the Department of Justice ("DOJ") as well as to professional and amateur sports leagues "whose competitive game" is subject to the statute's scope.¹⁵ This conferral of power from Congress to sports leagues in particular encompasses a *de jure* acknowledgment of leagues' proprietary interest in "their" competitive games and the translation of such interest to standing. Granting the sports leagues ownership rights over the games they organize is also constitutionally suspect under the Constitution's Intellectual Property Clause.¹⁶ Nonetheless, the sports leagues have successfully undertaken to enforce the statute on three occasions.

The first case arose in 2009, against Governor Jack Markell of Delaware, who had signed legislation instituting single-game sports gambling.¹⁷ District Court Judge Gregory M. Sleet denied plaintiff sports leagues' motion for a preliminary injunction to halt Delaware's plans.¹⁸ The Third Circuit reversed and interpreted PASPA to only allow for

the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance, 57 DRAKE L. REV. 383 (2008–09) (discussing the Court's treatment of skill versus chance-based games). Indeed, in prior litigation and lobbying, the NFL posited that certain forms of sports wagering were skill-based. *See, e.g., Nat'l Football League v. Gov. of Del.*, 435 F. Supp. 1372, 1383 (D. Del. 1977); Covington & Burling, *Memorandum of Law: The Delaware Constitution Prohibits Sports Gambling* (Apr. 29, 2003), available at http://finance.delaware.gov/publications/Gaming/Exhibit_H.pdf.

¹³ The New York Rangers have a partnership with WSOP.com, an online poker website that allows real money poker games for New Jersey residents. The New Jersey Devils have a partnership with PartyPoker, an online poker company owned by Bwin.Party Digital Entertainment, one of the largest global providers of online sports gambling. *See* Mason Levinson, *NHL's Rangers Following Devils in Partnering with Gambling Site*, BLOOMBERG (Mar. 25, 2014, 2:30 PM), <http://www.bloomberg.com/news/2014-03-25/nhl-s-rangers-following-devils-in-partnering-with-gambling-site.html>.

¹⁴ *See Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 473 and S. 474 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 102d Cong. 1 (1991) (opening statement of Dennis DeConcini, Chairman S. Comm. on Patents, Copyrights & Trademarks); *Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Econ. and Commercial Law of the H. Comm. on the Judiciary*, 102d Cong. 74 (1991).

¹⁵ 28 U.S.C. § 3703.

¹⁶ *See* Ryan M. Rodenberg, Anastasios Kaburakis & John T. Holden, "Whose" Game Is It? *Sports-Wagering and the Intellectual Property Clause*, 60 VILL. L. REV. TOLLE LEGE 1, 2 (2014).

¹⁷ *Office of Comm'r of Baseball v. Markell*, 579 F.3d 293, 295 (3d Cir. 2009).

¹⁸ *Office of Comm'r of Baseball v. Markell*, No. 09-538, 2009 U.S. Dist. LEXIS 69816, at *10 (D.

the same types of gambling as were offered prior to the enactment of PASPA; any new form of gambling was thereby prohibited.¹⁹

The second instance of a challenge to PASPA came in 2012 when Governor Chris Christie of New Jersey signed a law authorizing New Jersey's racetracks and casinos to offer sports gambling.²⁰ In *National Collegiate Athletic Association v. Christie* ("Christie I"),²¹ the sports leagues filed suit challenging the law and were successful in asserting that they had standing, that PASPA was a constitutional exercise of the Commerce Clause, and that PASPA did not run afoul of equal sovereignty and anti-commandeering principles.²² The Third Circuit affirmed the district court decision, and the Supreme Court denied certiorari on June 23, 2014.²³

The third case ("Christie II") focuses on the 2014 New Jersey Sports Wagering Law repeal of state prohibitions on gambling and revolves around certain PASPA interpretations in *Christie I*, particularly regarding N.J.S.A. 5:12A-1. Therein, the DOJ, the sports leagues, and the Third Circuit posited that, if New Jersey simply repealed laws criminalizing sports gambling, the state would not be in violation of PASPA's prohibition.²⁴ On October 17, 2014, Governor Christie signed State Senate Bill S2460

Del. Aug. 10, 2009).

¹⁹ *Markell*, 579 F.3d at 304. ("[E]xpanding the very manner in which Delaware conducts gambling activities to new sports or to new forms of gambling—namely single-game betting—beyond 'the extent' of what Delaware 'conducted' in 1976 would engender the very ills that PASPA sought to combat."). The Third Circuit's decision in *Markell* could leave Gov. Brian Sandoval of Nevada vulnerable to possible action by the same plaintiff quintet, based on Nevada's move into "real-time" in-game wagering made possible by recent technological advances. See generally Michael Kaplan, *Cantor Fitzgerald: The First Wall Street Firm to Become a Bookie in Vegas*, DAILY FINANCE (July 3, 2010, 7:53 PM), <http://www.dailyfinance.com/2010/06/30/cantor-fitzgerald-the-first-wall-street-firm-to-become-a-bookie/>; *In-Running Wagering Extended by Cantor Gaming for NFL games*, MOBILECASINOS.CO (Nov. 11, 2014), <http://www.mobilecasinos.co/in-running-wagering-extended-by-cantor-gaming-for-nfl-games/>.

²⁰ N.J. STAT. ANN. § 5:12A-1 (West 2012) (repealed 2014).

²¹ 926 F. Supp. 2d 551 (D.N.J. 2013).

²² *Id.* at 558–76.

²³ *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 241 (3d Cir. 2013), *cert. denied*, *Christie v. NCAA*, 134 S. Ct. 2866 (2014). Footnote 18 in the Third Circuit's opinion, which states that the purpose of the exemptions is clear from the legislative history, represents some low-hanging fruit for New Jersey in that the footnote is inconsistent with the Supreme Court's decision in *Greater New Orleans Broadcasting Ass'n v. United States*, where Justice Stevens, writing for a unanimous court, found some of PASPA's exemptions to derive from "obscured congressional purposes." See 527 U.S. 173, 179–80 (1999).

²⁴ See Brief for Appellee United States of America at 29, *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714, 13-1715), 2013 WL 2904910 at *29; *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 233. During oral arguments before the Third Circuit, the United States also opined that PASPA did not prevent New Jersey from repealing its prohibitions on sports

(“S2460”), partially repealing state prohibitions on sports betting as applied to casinos and racetracks.²⁵ On October 20, 2014, the sports leagues brought suit seeking declaratory and injunctive relief against the Governor’s plan.²⁶ The complaint includes several counts: (i) defendants are in violation of § 3702 of PASPA;²⁷ (ii) S2460 violates New Jersey’s own constitution;²⁸ and (iii) the New Jersey Sports and Exposition Authority (“NJSEA”) and the New Jersey Thoroughbred Horsemen’s Association (“NJTHA”) are violating PASPA § 3702.²⁹

After a flurry of briefs filed during a three-day period, on October 24, 2014, District Court Judge Michael A. Shipp granted the plaintiffs a Temporary Restraining Order (“TRO”). Judge Shipp found: (a) a likelihood of success on the merits (“the Court cannot read the Third Circuit’s opinion in *Christie I* in such a way as to render the purpose of PASPA null”);³⁰ (b) irreparable harm (“reputational injury may constitute irreparable harm . . . plaintiffs’ association with gambling is stigmatizing”);³¹ (c) the balance of equities favored the plaintiffs; and (d) the public interest was served by the issuance of the TRO.³² Two important procedural clarifications accompanied Judge Shipp’s TRO decision: (a) plaintiffs must post a \$1,700,000 bond,³³ and (b) in an addendum correcting prior communication by Judge Shipp to counsel for NJTHA, the TRO’s scope was expanded and “NOT limited to the games sponsored by the plaintiffs’

gambling. Transcript of Oral Argument at 67, Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714, 13-1715).

²⁵ S. 2460, 216th Leg., Reg. Sess. (N.J. 2014) (repealing regulations applying to licensed casinos and racetracks in New Jersey, to wagers placed by persons over twenty-one, excluding collegiate sporting contests taking place in New Jersey or involving New Jersey collegiate athletic teams).

²⁶ Complaint for Declaratory and Injunctive Relief, Nat’l Collegiate Athletic Ass’n v. Christie, No. 3:14-cv-06450 (MAS)(LHG) (D.N.J. filed Oct. 20, 2014), 2014 WL 5395199. The DOJ did not file suit nor did it intervene in the case. New Jersey made no effort to implead the DOJ either. The DOJ did file a statement of interest supporting the plaintiffs’ argument that S2460 was not compliant with PASPA. *See* Statement of Interest of the United States, Nat’l Collegiate Athletic Ass’n v. Christie, No. 3:14-cv-06450 (MAS) (LHG) (D.N.J. filed Nov. 19, 2014). The DOJ was also present at oral arguments, though it did not participate with the exception of noting its appearance and offering to answer any questions the court had regarding its statement of interest. The court had none. *See* Transcript of Oral Argument at 17, Nat’l Collegiate Athletic Ass’n v. Christie, Nos. 3:12-cv-04947 (MAS) (LHG), 3:14-cv-14-06450 (MAS) (LHG) (D.N.J. Nov. 20, 2014).

²⁷ *Id.* at 19.

²⁸ *Id.* at 19–20.

²⁹ *Id.* at 20–22.

³⁰ Transcript of Oral Decision at 12, Nat’l Collegiate Athletic Ass’n v. Christie, Nos. 3:12-cv-04947 (MAS)(LHG), 3:14-cv-14-06450 (MAS)(LHG) (D.N.J. Oct. 24, 2014).

³¹ *Id.* at 13–15.

³² *Id.* at 17.

³³ *Id.* at 19.

leagues.”³⁴ On November 21, 2014, Judge Shipp issued a permanent injunction against New Jersey,³⁵ agreeing with both the Third Circuit’s majority and Judge Vanaskie’s dissent in *Christie I*, whereby New Jersey was deemed to be either obligated by PASPA to prohibit all sports gambling in the state, or allowed to completely repeal all prohibitions.³⁶ Any *partial* repeal of sports wagering laws, however, as in the case of New Jersey’s S2460, would be preempted by PASPA.³⁷ As anticipated, immediately upon issuance of Judge Shipp’s opinion, defendants filed an appeal to the Third Circuit.³⁸

III. Standing

In this battle for control of sports wagering’s economic activity between the sports leagues and the state, legal standing remains a pivotal issue. While New Jersey may still be violating PASPA via S2460’s partial repeal of the state’s existing prohibitions on sports gambling, the problem is that the sports leagues are the wrong plaintiffs.³⁹ The DOJ should be bringing any suit to enforce PASPA, not the sports leagues. While the district court and the Third Circuit in *Christie I* found the sports leagues to have standing,⁴⁰ at least partly because the leagues were the object of the sports wagering law, it could also be extracted by the Third Circuit’s decision that sports leagues need not have a proprietary interest in underlying sporting events for standing purposes.⁴¹ Nonetheless, this matter was not deemed worthy of further analysis by the Third Circuit, as the leagues

³⁴ *Id.* at 21.

³⁵ Nat’l Collegiate Athletic Ass’n v. Christie, Nos. 12-4947 (MAS)(LHG), 14-6450 (MAS)(LHG) (D.N.J. Nov. 21, 2014).

³⁶ *Id.* at 15–20.

³⁷ *Id.* at 22–27.

³⁸ Notice Of Appeal, Nat’l Collegiate Athletic Ass’n v. Christie, No. 3:14-6450 (MAS)(LHG) (D.N.J. Nov. 21, 2014).

³⁹ It is somewhat ironic to note that S2460 was passed, at least in part, to conform to the legal position advanced by the sports leagues and the DOJ, and adopted by the Third Circuit, in *Christie I*. The sports leagues noted in their brief opposing the writ of certiorari that a repeal of sports wagering prohibitions did not violate PASPA. *See* Brief in Opposition at 7, *Christie v. Nat’l Collegiate Athletic Ass’n*, 134 S. Ct. 2866 (2014) (Nos. 13-967, 13-979, 13-980), 2014 WL 1989124 at *7. Likewise, the DOJ stated: “New Jersey is free to repeal those prohibitions in whole or in part” in reference to New Jersey’s sports gambling prohibitions. Brief for the United States in Opposition at 11, *Christie v. Nat’l Collegiate Athletic Ass’n*, 134 S. Ct. 2866 (2014) (Nos. 13-967, 13-979, 13-980), 2014 WL 1989100 at *11.

⁴⁰ *See* Nat’l Collegiate Athletic Ass’n v. Christie, No. 12-4947 (MAS)(LHG) (D.N.J. Dec. 21, 2012), 2012 WL 6698684 at *9. Judge Shipp’s decision rested, in part, on: (i) several redacted or sealed depositions of five sports league commissioners; (ii) a number of plaintiff-funded studies sealed subject to a protective order; and (iii) a moderately redacted expert report prepared by Robert Willig on behalf of Gov. Christie. *Id.* at *6.

⁴¹ *See Nat’l Collegiate Athletic Ass’n*, 730 F.3d at 220.

“do not complain of an invasion of any proprietary interest.”⁴² Perhaps they should. Missed opportunities to clarify this crucial issue for ensuing monetization of such proprietary interest, which presumably PASPA grants, may prove detrimental (conceivably in other jurisdictions, as per cases discussed *infra* adjudicating “rights to games”) for strategic objectives, seeds of which have already been expressed publicly.⁴³

The standard test for Article III standing is derived from the Constitution’s “cases” and “controversies” provision.⁴⁴ In order for the plaintiffs to establish Article III standing, they must demonstrate: (i) “injury in fact,” (ii) “causation,” and (iii) “redressability.”⁴⁵

The injury in fact requirement for standing has grown out of a number of Supreme Court decisions in the period since the 1970’s to ensure that plaintiffs assert claims based on their own personal rights.⁴⁶ The Third Circuit established that harm must be “based in reality,” meaning that there must be some basis for determining that the injury may occur.⁴⁷ *Christie I* held that the “stigmatizing effect of having sporting contents associated with gambling” was sufficient to grant standing.⁴⁸ The basis for the court’s decision rested on the proposition that the 2012 New Jersey Sports Wagering Law is directed at the sports leagues.⁴⁹

Causation is a requirement that must be shown by plaintiffs in order for a court to

⁴² *Id.*

⁴³ In a New York Times op-ed, NBA commissioner Adam Silver argued for an overhaul of the federal prohibition of sports gambling. Silver advocated for a complex regulatory system that would allow for legalized sports betting provided it protects and ensures the integrity of the game. See Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 14, 2014), http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0. Mark Cuban, owner of the NBA’s Dallas Mavericks, stated that he envisions a partnership with casinos where “[w]e’ll [the NBA] charge the casinos for information sources [and] video sources.” See Tim MacMahon, *Mark Cuban: No Betting ‘Hypocritical’*, ESPN.COM (Nov. 23, 2014), http://espn.go.com/dallas/nba/story/_/id/11921944/mark-cuban-agrees-adam-silver-sports-betting-legalized-united-states. The Ultimate Fighting Championship (UFC) has similarly come out in favor of legalized sports gambling, noting a hypothesis that legalized sports gambling will actually enhance the integrity and perception of games. See David Pudum, *UFC Backs Betting Expansion in U.S.*, ESPN.COM (Oct. 31, 2014), http://espn.go.com/espn/chalk/story/_/id/11792598/ufc-exec-lawrence-epstein-backs-expanded-legalized-sports-betting-us.

⁴⁴ See U.S. CONST. art. III, § 2, cl. 1.

⁴⁵ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

⁴⁶ See F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 300 (2008).

⁴⁷ See *Doe v. Nat’l. Bd. of Medical Examiners*, 199 F.3d 146, 153 (3d Cir. 1999).

⁴⁸ *Nat’l Collegiate Athletic Ass’n*, 730 F.3d at 224.

⁴⁹ See *id.* at 219–220.

be able to redress the injury suffered.⁵⁰ In addressing causation, *Christie I* found that reputational harm is sufficient to support a cause-and-effect relationship.⁵¹ In so holding, the Third Circuit accepted the argument that the leagues suffered harm in the form of adverse public perception as a result of gambling.⁵² That the leagues may not have a proprietary interest in certain sporting events did not factor in the court's finding of standing.⁵³ Thus, the Third Circuit, perhaps unintentionally, has expanded the ability of sports leagues to be granted standing.

Christie I concluded that the sports leagues have standing, by virtue of two findings: “that the Sports Wagering Law makes *the Leagues’ games* the object of state-licensed gambling and that they will suffer reputational harm if such activity expands.”⁵⁴ However, despite the court's characterization, some uncertainty remains surrounding the issue of ownership rights associated with sporting events. Without an explicit proprietary interest in such games, it is unsettled whether the sports leagues are suffering sufficiently specific harm to support standing. Not only other jurisdictions as discussed below, but another Third Circuit panel itself may assume a different position on the matter of sports wagering stigmatizing the leagues and causing reputational harm, particularly as more professional sports executives publicly question PASPA's purposes and welcome a federal sports wagering policy.⁵⁵ Absent such a federal regulatory solution, however, PASPA will continue deputizing sports leagues, which according to *Christie I* may enforce the current federal ban on sports wagering.

Further, this grant of standing comes in stark contrast to the DOJ's position in a September 24, 1991 letter expressing concerns before the Senate Committee on the Judiciary in view of PASPA's adoption.⁵⁶ Next to raising federalism issues and confirming that revenue generation determinations have traditionally been reserved for the states, the DOJ found it “particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues.”⁵⁷ Still, PASPA passed by a wide margin in Congress, deputizing certain sports leagues and associations to bring suit, and granting such entities unprecedented protections, by which they could expand their sphere of

⁵⁰ See *Lujan*, 504 U.S. at 562.

⁵¹ *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 220.

⁵² *Id.* at 217–224.

⁵³ *Id.*

⁵⁴ *Id.* at 219 (emphasis added).

⁵⁵ See *Silver supra* note 46; *MacMahon supra* note 46; *Purdum supra* note 46.

⁵⁶ See Letter from W. Lee Rawls, Assistant Att'y Gen., Dep't of Justice, to the Hon. Joseph R. Biden, Jr., Chairman, Comm. on the Judiciary (Sept. 24, 1991).

⁵⁷ *Id.* at 2.

control over athletic competitions and any revenue streams resulting therefrom.

IV. Rights to Games

The root of the friction between the sports leagues and New Jersey over revenue generation rests on the yet-to-be definitively decided issue of whether a sporting event itself can be owned and, if so, by whom.⁵⁸ In *National Football League v. Governor of Delaware*,⁵⁹ Judge Stapleton found that NFL schedules and scores are available by public sources, and once disseminated the league may no longer have an expectation of generating revenue. Closely, in *National Basketball Association v. Motorola*,⁶⁰ the Second Circuit found that underlying basketball games do not fall within the subject matter of copyright, as they are not original works of authorship. The “real-time” scores updates and statistics *derived from* the broadcasts constitute factual information, rather than copyrightable content.⁶¹ Only the *broadcasts* of the games themselves qualify for copyright protection.⁶² The court explained the “fact-expression dichotomy is a bedrock principle of copyright law that limits severely the scope of protection in fact-based works.”⁶³

In *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP*,⁶⁴ the Eighth Circuit decided that combinations of names and statistics for commercial purposes were deemed protected by the First Amendment. The court concluded: “the information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment [sic] right to use information that is available to everyone.”⁶⁵ More recently,

⁵⁸ Indeed, in unrelated litigation, Fox Broadcasting Company, a broadcast partner of the MLB and NFL, posited that the dissemination of information related to sporting events is one in the public interest and analogous to “a parade, a natural disaster, a March on Washington, or a government shutdown.” See Brief of *Amici Curiae* Fox Broadcasting Company and Big Ten Network, LLC in Support of Defendant NCAA’s Motion for Summary Judgment at 18, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-CV-01967 CW (NC) (N.D. Cal. Sept. 17, 2012), 2012 WL 4111728. Such a position runs counter to one where sporting events are treated as a commercially exploitable commodity. Intriguingly, this position has been espoused by the major media partners of all five *Christie II* plaintiff sports leagues; ABC, CBS, Fox, and NBC have acknowledged that “sports broadcasts concern matters of public interest.” See Brief of A&E Television Networks, LLC, in Support of Appellant NCAA and Reversal at 6, *Edward C. O’Bannon, Jr. v. NCAA*, Nos. 14-16601, -17068 (9th Cir. 2014).

⁵⁹ 435 F. Supp. 1372 (D. Del. 1977).

⁶⁰ 105 F.3d 841 (2d Cir. 1997).

⁶¹ *Id.* at 847.

⁶² *Id.* at 845.

⁶³ *Id.* at 847 (citing *Feist Publications, Inc. v. Rural Tel. Service Co.*, 499 U.S. 340 (1991)).

⁶⁴ 505 F.3d 818 (8th Cir. 2007).

⁶⁵ *Id.* at 823.

in an amicus brief submitted in *American Broadcasting Cos., Inc. v. Aereo, Inc.*,⁶⁶ the Solicitor General posited, “when a television network broadcasts a live sporting event, no underlying performance precedes the initial transmission—the telecast itself is the only copyrighted work.”⁶⁷

Earlier decisions featured conflicting results. In *National Football League v. McBee & Bruno’s, Inc.*,⁶⁸ the Eighth Circuit concluded that “the game . . . constituted the work of authorship . . . the game, the game action . . . [and] the noncommercial elements of the game [are copyrightable].”⁶⁹ The same year, 1986, in *Baltimore Orioles, Inc., v. Major League Baseball Players Association*,⁷⁰ the Seventh Circuit adjudicated whether players’ performances contained the necessary “modicum of creativity” for copyrightability.⁷¹ The Seventh Circuit ultimately acknowledged competitive games’ copyrightability, *as it pertained to the broadcast and recording of a game*.⁷² To further complicate matters, in a case of first instance, the Eleventh Circuit held that a professional golf association may preempt a media organization from disseminating time-sensitive information such as compilations of golf scores.⁷³ Nonetheless, the court acknowledged that “facts, such as golf scores, and compilations of facts are generally not a proper subject for copyright protection,”⁷⁴ and that, “copyright law does not protect factual information, like golf scores.”⁷⁵

Sports leagues, as evident from the above adjudication of relevant data and key intellectual property issues, likely lack the necessary locus of control over the entire universe of material information, which may be utilized for sport wagering purposes. They maintain ownership of copyrighted broadcasts, may monetize streaming athletic competitions via mobile and tablet devices and ensuing technological means, and may customize the viewing experience.⁷⁶ However, sports leagues almost certainly cannot

⁶⁶ 134 S. Ct. 2498 (2014).

⁶⁷ Brief for the United States as *Amicus Curiae* Supporting Petitioners at 26, *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 828079 at *26.

⁶⁸ 792 F.2d 726 (8th Cir. 1986).

⁶⁹ *Id.* at 732 (internal quotation marks omitted).

⁷⁰ 805 F.2d 663 (7th Cir. 1986).

⁷¹ *Id.* at 699 n.7.

⁷² *Id.* (“[E]ven if the Players’ performances were not sufficiently creative . . . the cameramen and director contribute creative labor to the telecasts. The work that is the subject of copyright is not merely the Players’ *performances*, but rather the *telecast* of the Players’ performances. The creative contribution of the cameramen and director alone suffices for the telecasts to be copyrightable.”).

⁷³ *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1291 (11th Cir. 2004).

⁷⁴ *Id.* at 1292 n.6.

⁷⁵ *Id.* at 1298 n.15.

⁷⁶ See Richard Sandomir, *ESPN Will Stream Out-of-Market Games on Web as Part of N.B.A. Deal*,

preempt the use of factual information in the public domain (i.e. names, statistics, scores, real-time data)—the exact information state regulators are looking to commodify in the offering of taxable sports wagering options for interested citizens.

V. Conclusion

The trilogy of PASPA-specific cases brought by the sports leagues have been used as the vehicle to further claims of valuable commercial rights that potentially go far beyond the scope of sports wagering. In this way, the sports leagues' victories in *Markell*, *Christie I*, and the on-going *Christie II* case may far exceed the ability to restrict sports gambling in Delaware and New Jersey. However, none of these three cases undertook a pointed analysis as to whether sports leagues can monetize aspects of underlying athletic competitions. It bears repeating: these cases are not about gambling—they are about *control*.

A resolution of this control issue is inevitable.⁷⁷ In the monolith that is the sports industry, determining whether leagues possess exploitable rights in the underlying games represents a core issue that will guide future revenue growth for sports leagues operating in the shadow of state regulation over a lucrative sector of consumer spending and interest. NBA commissioner Adam Silver explained the importance in an interview:

If you have a gentleman's bet or a small wager on any kind of sports contest, it makes you that much more engaged in it. That's where we're going to see it pay dividends. If people are watching a game and clicking to bet on their smartphones . . . then it's much more likely you're going to stay tuned for a long time.⁷⁸

N.Y. TIMES (Oct. 6, 2014), http://www.nytimes.com/2014/10/07/sports/basketball/espn-will-stream-out-of-market-games-on-web-as-part-of-nba-deal-.html?_r=1; Joan E. Solsman, *NBA, ESPN deal drafts streaming-only service for cord-cutters*, CNET.COM (Oct. 6, 2014, 8:44 AM), <http://www.cnet.com/news/nba-espn-deal-drafts-streaming-only-service-for-cord-cutters/>.

⁷⁷ New Jersey State Senator Raymond J. Lesniak apparently sees the inevitable resolution happening soon and has been quoted as saying: “[the sports leagues] want a monopoly – they want to have their gambling through fantasy sports. They are not against us having sports betting, they just want to control it and run it. They are going to fight through the end – and I believe this is the end.” Liz Robbins, *Sports Betting in New Jersey Challenged*, N.Y. TIMES (October 21, 2014), http://www.nytimes.com/2014/10/21/nyregion/sports-betting-in-new-jersey-is-challenged.html?_r=0.

⁷⁸ Levinson & Soshnick, *supra* note 1.