Nos. 16-476, -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.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE NEW SPORTS ECONOMY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE[1]

The New Sports Economy Institute ("NSEI") is a 501(c)(3) non-profit, tax exempt organization dedicated to personal empowerment through sports and finance. Consistent with this mission, NSEI (i) champions the socially beneficial union of sports, money, and purpose in the form of regulated financial products, (ii) envisions new programs that will lead to meaningful job creation, significant economic growth and increased tax revenues based on sports as an asset class, and (iii) advances financial literacy by teaching finance through sports. A key objective of this three-part mission is to end sports gambling.

NSEI and its predecessor entities have considerable expertise in the fields of sports and finance. Currently, NSEI operates AllSportsMarket, which enables users to trade stock-like instruments based on sports performance. In 2008, a sister entity of NSEI developed SportsRiskIndex, a proxy for valuing sports franchises and associated index futures. As a result, NSEI is in a unique position to identify issues not addressed by either party. NSEI offers a unique point of view, *viz.*, that there is a difference between 'gambling' and 'gaming,' which impacts the Constitutional roles of state and federal governments with regard to the issues herein.

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[1] Rule 37 statement: Letters evidencing consent to file amicus briefs have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus NSEI funded its preparation or submission.

SUMMARY OF ARGUMENT

To properly decide this case, the Court should dispel the myth that gambling and gaming are equivalent.

The Petitioners and their *amici* fundamentally posit that gambling is a matter reserved to the states: few powers are reserved to the federal government and, absent a federal law that preempts state law, states should be able to experiment and design their own gambling policies. This reasoning, while superficially sound, is a house of cards because as applied here it rests entirely on the fictitious equivalence of gambling and gaming.

What is gambling? What is gaming? Are they the same? In fact, gambling and gaming are not equivalent. Gaming, as properly defined, is traditionally a matter to be regulated by the States, while gambling is so only if it involves *gambling games*.

For something to constitute a "game," it must have boundaries and be disconnected from real life, a concept that the social sciences recognized a long time ago. *Amicus curiae* NSEI provides a critical insight not raised by either party: sports betting and daily fantasy sports ("DFS"), which rely entirely on "real life," are not games.

If sports betting and DFS are not games, they must be markets. If so, the contracts traded thereon are either (unregulated) securities or commodity contracts and subject to regulation as such. Congress has preempted the field with respect to listing and trading of such contracts. State law must yield to federal law as required by the Supremacy Clause.

Contrary to the assumptions made by Petitioners and their supporting *amici*, in fact there *is* a federal regulatory interest to protect and the matter *is* preempted by federal law. Because gambling contracts (such as sports betting and DFS) constitute financial instruments subject to regulation by the Securities and Exchange Commission ("SEC") and Commodity and Futures Trading Commission ("CFTC"), the federal regulatory interest clearly exists and Congress has preempted the field.

Indeed, the Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3701 *et seq.* ("PASPA") should be recognized as part and parcel of the dual regulatory regime that governs our nation's financial markets. By effectively outlawing sports betting nationwide through PASPA, Congress clearly recognized that sports gambling contracts do not serve any purpose whatsoever. We infer that instead of burdening the regulatory agencies with ruling on "purposeless products," Congress, through PASPA, simply chose to relieve the regulatory agencies from such endeavors.

Therefore, as a restriction on markets offering purposeless products, PASPA is a valid exercise of Congress under the Supremacy Clause consistent with the laws establishing the SEC and CFTC. A holding to the contrary would create lopsided incentives and a disjointed result: permitting creation of financial contracts with *no* purpose, hiding behind the veil of *state experimentation*, would permit a new financial market to escape federal regulation and could instantly become a better strategy than creating a product with *some* purpose.

ARGUMENT

I. The Court Should Define, and Distinguish Between, "Gambling" (a Matter for the Federal Government if it Involves Markets) and "Gaming" (a Matter for the States) to Properly Decide the Case

Definitions matter. The core premise that powers the Petitioners' argument is that gambling falls under the States' police power and, thus, sports betting and DFS are matters to be regulated by the States. However, the argument assumes that "gambling" and "gaming" are the same. As demonstrated below, they are not.

As an initial matter, there appears to be a fairly universal consensus that gambling and gaming are equivalent, and the terms are commonly used interchangeably. The American Gaming Association ("AGA") correctly observes that "[t]raditionally, gaming regulation has been a matter of state and local concern," but later asserts that PASPA, a law about sports *gambling*, is problematic because it "contradicts this tradition of federal deference to state gaming laws." Brief of the American Gaming Association as Amicus Curiae in Support of Petitioner at 18, *Gov. Christie et al.* v. *Nat'l Collegiate Athletic Ass'n et al.* (Nos. 16-476 and 16-477) (November 2016). The only case cited by AGA in support of its argument is *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999), which according to AGA asserted that: "Federal policy is 'to defer to, and even promote, differing gambling policies in different States.'" *Id.*, at 187. However, the full sentence shows that this Court made this statement in the context of lotteries and casino gaming: "That Congress

has generally exempted *state-run lotteries and casinos* from federal gambling legislation reflects a decision to defer to, and even promote, differing gambling policies in different States." *Id.*, at 187 (emphasis added).

The *amici* States also conflate the two terms, asserting that "[i]t is beyond doubt that the rights and obligations attending *sports wagering* fall within these reserved or 'police powers' of the States." (emphasis added). Brief of Amici Curiae States of West Virginia, Arizona, Louisiana, Mississippi, and Wisconsin in Support of Petitioners 19-20*, Gov. Christie et al. v. Nat'l Collegiate Athletic Ass'n et al.* (No. 16-476) (November 2016). They similarly cite a single case, *Ah Sin v. Wittman*, 198 U.S. 500 (1905), and cherry-pick a line: "The suppression of gambling is concededly within the police powers of a state." Yet *Ah Sin* involves gambling games such as cards and dice.

The practice of using the terms gambling and gaming interchangeably is widespread. Even two widely regarded gaming attorneys, one of whom actually trademarked the phrase Gambling and the Law® stated: "[T]he Nevada Supreme Court issued the amazing ruling that the regulation of legal gambling is purely a state legislative issue." Walter T. Champion, Jr. and I. Nelson Rose, *Gaming Law in a Nutshell* 89 (2012) (citing *State v. Rosenthal*, 93 Nev. 36, 559 P.2d 830 (Nev. 1977)). However, the *Rosenthal* case was about *gaming*, not gambling. "We view *gaming* as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution." *Rosenthal*, 559 P.2d at 836 (Emphasis added). In fact, the word "gaming" appears

55 times in the *Rosenthal* opinion, and the word "gambling" precisely once (in a cite from another case).

One law review article similarly took *Rosenthal* out of context. See Kathryn Keneally, *State Regulation of Casino Gambling: Constitutional Limitations and Federal Labor Law Preemption*, 49 Fordham L. Rev. 1038, 1041 (1981) (citing *Rosenthal* and stating that "*gambling* is 'a matter reserved to the states within the meaning of the Tenth Amendment'.") (emphasis added).

It might be impossible to know the full extent of such loose equivalence, but the fact that it has permeated through two amicus briefs in this case alone, and one of the leading books on gaming law, should be viewed as a substantial red flag.[2]

In order to properly evaluate the core premise that gambling is a matter of state law, we must first agree on how to define gambling and gaming.[3]

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[2] In May 2017, the House Energy and Commerce Committee released the Gaming Accountability and Modernization Enhancement Act (the "GAME Act") that is intended to remove the federal obstacles to legalized gambling at the state level (the GAME Act has a provision that repeals PASPA). Committee on Energy & Commerce, Press Release, "Pallone Unveils Comprehensive Gaming Bill & Solicits Feedback from Stakeholders" (May 25, 2017). It does not create a federal framework for gambling and instead allows states that choose to legalize and regulate sports betting and/or online gambling to do so. *Id.* The title of the Act could be seen as another instance where gambling would have been the more appropriate word to use.

[3] To the extent dictionary definitions treat gambling and gaming the same, *amicus curiae* argues that this Court should

A. Gaming is Separated from Real Life and Involves Precise Limits of Space

As early as 1950, a Dutch historian explained that "play is distinct from 'ordinary' life both as to locality and duration." Johan Huizinga, *Home Ludens: A Study of the Play-Element in Culture* 9 (1950). "We found that one of the most important characteristics of play was its spatial separation from ordinary life. A closed space is marked out for it … hedged off from the everyday surroundings." *Id.*, at 19.

Roger Caillois, a French sociologist, agreed: "In effect, play is essentially a separate occupation, carefully isolated from the rest of life, and generally is engaged in with precise limits of time and place. There is place for play: as needs dictate, the space for hopscotch, the board for checkers or chess, the stadium, the racetrack, the list, the ring, the stage, the arena, etc. Nothing that takes place outside this ideal frontier is relevant… In every case, the game's domain is therefore a restricted, closed, protected universe: a pure space." Roger Caillois, *Man, Play and Games* 6-7 (1961). Caillois consistently underlined the spatial separation as a foundational characteristic of a game: "[Games] certainly cannot spread beyond the playing field (chess or checkerboard, arena, racetrack, stadium or stage)." *Id.*, at 43.

It is true that advances in technology allow two people to play a game, say chess, even when they are not within a confined space. However, if they wished to bypass technology and play the game the old-fashioned way, they could do it. This is not true for

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look beyond such definitions and evaluate the terms within a broader context.

DFS and sports betting. The issue is not that these activities can be carried out online, or via an app. It is the fact that these alleged "games" could not conclude without having a connection to real life.[4] That fact was true even when fantasy sports was born at the New York French bistro La Rotisserie Francaise close to 50 years ago. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 Harvard Journal of Sports & Entertainment Law 1, 5-6 (2012).

In fantasy sports, something of value is risked and received, yet it is not a game.[5] To the contrary, it is a market. In markets, *multiple parties can engage in an economic transaction where outcomes are dependent on real-world events and / or information provided by those events*. Critically, without those events and the information provided by them, the final economic outcomes cannot be determined. In addition, the events will continue to take place regardless of whether somebody else is risking money on them. A farmer will harvest more oranges this year, an oil-rich country could decide to cut its supply, regulatory approval for a drug will be granted, and so

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[4] This point can be visualized by imagining the activity taking place on Mars. Lacking a connection to real life, the participants would be unable to track the real-life performance of the athletes. Therefore, the simple reality is that there cannot be a winner of a fantasy sports "game" on Mars, while in every other game, chess, card games, spelling bee, scribble etc., a winner can be identified based on a predetermined set of rules (assuming, of course, that the requisite game sets/pieces are available).

[5] As such, the question "Is DFS a game of skill?" is the wrong one because it cannot be a game of skill *if it is not a game in the first place*.

on. The actors within an economy will mind their own business, perhaps unaware of the fact that somebody, somewhere is speculating on whether such real-life endeavors will be successful.

B. Our Nation has Two Different Frameworks to Distinguish Between Gambling in Games and Gambling in Markets

What is gambling? The answer depends on whether we are within the domain of games or markets. Gambling cuts across both domains – there can be gambling games and gambling markets – but the test that is used to answer "what is gambling?" is completely different depending on the domain.

On the one hand, in the context of games and contests, the skill-chance spectrum is determinative of the question. The greater the level of chance, the more likely the game will be deemed gambling.

For example, roulette is 100% chance; therefore, it is gambling. On the other hand, chess is 100% skill and therefore is not gambling. Poker is arguably somewhere in the middle, which makes the determination difficult. For games in the middle, the question is i) how much skill is involved; and ii) what is the level of chance needed that would tip the game toward the gambling end of the scale. Significant uncertainty may exist on both dimensions and the ensuing debate could go on forever.

The markets have an entirely different spectrum. In *any* market, skill is simply a prerequisite to get ahead, but it does *not* determine whether a market is characterized as gambling or not. We submit the relevant spectrum is "public interest." At

one end, contracts that clearly serve a purpose are not gambling and, at the other end, contracts that are pure entertainment vehicles are clearly gambling.

For example, the securities markets help with capital formation and price discovery, and offer investors a menu of assets for portfolio management purposes. Similarly, the derivatives markets are socially useful because they facilitate hedging and/or price discovery. These, then, are not gambling.

Some prediction markets arguably stand somewhere in the middle on the spectrum of public interest. For example, a proposed domestic box office receipt derivative survived a 3-2 vote at the CFTC, but was later rejected by Congress with the passage of the Financial Reform Act. Jeremy A. Gogel, *The Case for Domestic Box Office Receipt Derivatives*, 14 Chapman L. Rev. 415, Winter 2011. Political event contracts proposed by the North American Derivatives Exchange, on the other hand, were prohibited by the CFTC as essentially against the public interest. Order Prohibiting the Listing or Trading of Political Event Contracts, CFTC, April 2, 2012.

Sports gambling, *i.e.* sports betting and DFS, are clearly at the other end of spectrum. They are entertainment vehicles that do not serve a purpose. Sports gambling proponents have never argued otherwise. Instead, they took an element inherent in any market – skill – and used that as justification to avoid the gambling characterization. However, a critical step was missed and an *assumption* was made. Sports betting and DFS are not themselves games and should have been analyzed within the framework of markets.

While a clear demarcation between games and markets has apparently never been explicitly established, at least one State has captured the essence of the difference. New York Penal Law provides: "A person engages in gambling when he stakes or risks something of value *upon the outcome of a contest of chance* ***or*** *a future contingent event not under his control or influence*, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." (emphasis added). N.Y. Penal Law § 225.00(2).

The lawmakers in New York had excellent foresight because they saw early on that gambling can occur in two different ways, through gambling games *or* through gambling markets, and codified that into law. The "skill vs. chance" part of the test is meant to capture gambling games and the "future contingent event" language is intended to capture the gambling markets.[6]

Why has this crucial regulatory distinction between games and markets not been more clearly recognized? We can only speculate, but two main trends emerge.

First, some gambling markets, at least initially, "mimicked" games to some extent from a spatial

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[6] Notwithstanding an erroneous legislative finding that DFS is not a "wager on future contingent event not under the contestant's control or influence" in N.Y. Senate Bill S8153 (*See* State of New York, 8153, in Senate at 1 (June 14, 2016)) (signed into law in August 2016), DFS is clearly gambling under that definition. S8153 not only identifies DFS incorrectly as a "game" but may indeed be unconstitutional under the New York State Constitution.

separation perspective. Betting on horses occurred at the racetrack where the horses ran. Fantasy sports was "played" in a restaurant with the gamblers being in the same room even though the sports games took place elsewhere. Gambling happened in a closed space, and gambling markets looked and felt like gambling games.

Second, excessive speculation, actual or perceived, gave the capital markets a bad reputation. The concept of Wall Street as a casino found broad appeal with progressives, supported by a skeptical media. The phrase "playing the market" has firmly entrenched itself into the American zeitgeist. A well-regarded figure in both Las Vegas *and* Wall Street recently referred to both sports betting and the stock market as "games." Edward O. Thorp, *A Man for All Markets: From Las Vegas to Wall Street, How I Beat the Dealer and the Market* 129 (2017). Even in legal circles, it is not uncommon to see financial markets referred to as "gambling." "[T]here are no comparable barriers to the investment markets — thereby allowing access to 'legalized gambling' for all." Thomas Lee Hazen, *Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance*. Annual Review of Banking and Financial Law, 24 Ann. Rev. Banking & Fin. L. 375, 377-78 (2004). In short, financial markets looked and felt like gambling games.

As the line between games and markets blurred, any distinction between what constitutes gambling versus gaming likewise became obscured. This definitional ambiguity is not a minor matter, because it can provide precisely the framework needed

to delineate the boundaries of federalism in this case. The Court has an opportunity to clear up the confusion by defining gambling and gaming.

II. PASPA is Part of a Broader, Preemptive Federal Regulatory Regime

In 1992, Congress enacted PASPA "to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime." Senate Report 102-248 (1991). PASPA effectively outlawed sports betting nationwide, excluding a few states.

Petitioners ask the Court to declare PASPA, the biggest obstacle to legalized, nationwide sports gambling, unconstitutional. A world without PASPA would be an uneven one: people would be able to speculate on the outcome of a sports game as they wish, but not on the outcome of an election. In early 2016, if one wanted to speculate that Donald Trump would win the presidential elections and risk $10,000, he could not do it, at least not legally. Faced with a submission regarding the self-certification of various political event contracts by the North American Derivatives Exchange, the CFTC has found that "political event contracts are contrary to the public interest" and ordered that such contracts shall not be listed or made available for clearing or trading on the Exchange." Order Prohibiting the Listing or Trading of Political Event Contracts, CFTC, April 2, 2012.

Sports gambling lacks an identifiable purpose. Political event markets, as opposed to sports gambling, can at least claim *some* purpose. It is widely acknowledged that they "yielded very accurate predictions and also outperformed large-scale polling

organizations." Justin Wolfers and Eric Zitzewitz, *Prediction Markets*, Journal of Economic Perspectives 18 (Spring): 103, 112 (2004). Sports gambling offers no purpose whatsoever, nor do its proponents claim otherwise.

Petitioners would create an incongruous world where entrepreneurs are at the mercy of federal regulation only so long as their products contain *some* purpose. But strip *all* purpose from your product, and under their argument there is a chance that federal law will not reach you, to the delight of a State such as New Jersey. PASPA successfully preempted this result for decades. We suggest that as such PASPA is best understood as part of our nation's federal laws governing securities and commodities. Equally importantly, PASPA conclusively demonstrates Congress has preempted the field.

A. Congress Preempted the Field with Respect to Financial Contracts

The SEC was created shortly after the stock market crash in 1929 through the Securities Act of 1933 and the Securities Exchange Act of 1934 ("the 1934 Act") to "restore investor confidence in our capital markets by providing investors and the markets with more reliable information and clear rules of honest dealing." https://www.sec.gov/Article/whatwedo.html. The mission of the SEC is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." *Id.*

Initially, it was understood that the SEC supplements and does not totally preempt states' blue-sky laws. Over time, however, preemption was made stronger. Congress modified the 1934 Act's

preemptive powers in 1975. *Securities Acts Amendments of 1975*, Pub. L. No. 94-29, 89 Stat. 97 (1975). Then, "in the National Securities Markets Improvement Act ('NSMIA') in 1996, in contrast to the prior federal securities laws, Congress explicitly preempted vast areas of state regulation." Speech by SEC Staff: Remarks at the F. Hodge O'Neal Corporate and Securities Law Symposium, by Stephen M. Cutler, February 21, 2003, accessed at http://www.sec.gov/news/speech/spch022103smc.htm. In adopting NSMIA, Congress expressed its intent to "further advance the development of national securities markets" by establishing the SEC as "the exclusive regulator of national offerings of securities." *Id.*

Similarly, the CFTC was created by Congress through the Commodity Futures Trading Commission Act ("CFTC Act") of 1974, which also expanded the definition of a commodity to reflect the shifts in the U.S. economy away from its agricultural roots. The CFTC Act of 1974 also introduced the public interest standard for designation of commodity futures contracts and included an Economic Purpose Test, which permitted listing and trading of contracts that could be used for hedging and price basing on a more than occasional basis.

The CFTC has "exclusive jurisdiction" to regulate "transactions involving swaps or contracts of sale of a commodity for future delivery." 7 U.S.C. § 2(a)(1)(A). The legislative history of the CFTC Act of 1974 also makes clear that Congress intended to preempt state jurisdiction over the transactions that the CFTC Act covers: "[u]nder the exclusive grant of jurisdiction to the Commission, the authority in the

Commodity Exchange Act (and the regulations issued by the Commission) would preempt the field insofar as futures regulation is concerned. Therefore, if any substantive State law regulating futures trading was contrary to or inconsistent with Federal law, the Federal law would govern. In view of the broad grant of authority to the Commission to regulate the futures trading industry, the Conferees do not contemplate that there will be a need for any supplementary regulation by the States." *S. Conf. Rep. No. 93-1383, 93rd Cong., 2nd Sess.*, reprinted in 1974 U.S. Code Cong. & Adm. News, p. 5843, 5897.

The Commodity Futures Modernization Act ("CFMA") of 2000 retained the broad definition of commodity but introduced additional categories, and excluded some commodities to further modernize the Commodity Exchange Act and reflect the increased need for financial instruments used in risk management. With the CFMA, Congress also reiterated its intent to preempt state gaming statutes with respect to those transactions subject to CFMA's provisions.

Petitioners and their supporting *amici* do not – because they cannot – dispute the power of the Supremacy Clause. Instead, they hang their hat entirely on the alleged non-existence of a federal regulatory regime that preempts state law. "Because there is no system of 'federal regulation' of sports wagering, States do not have the option of ceding the field to the federal government." Brief for Petitioners at 19 (No 16-476). "There is no Federal regulatory regime for States to default to in the case of sports gambling," Brief of Amicus Curiae Researcher John T. Holden In Support of Petitioners at 3 (Nos. 16-476, 16-

477). "But this Court has never recognized that the Supremacy Clause Permits Congress to merely prohibit States from repealing their laws *when there is no affirmative federal regime to protect*." Brief of Amici Curiae States of West Virginia, Arizona, Louisiana, Mississippi, and Wisconsin in Support of Petitioners at 5*, Gov. Christie et al. v. Nat'l Collegiate Athletic Ass'n et al.*, No. 16-476 (November 2016) (emphasis added).

The alleged lack of preemption was also identified as a threshold issue by the American Gaming Association ("AGA"): "The fundamental legal question presented by these Petitions is whether a federal court can, consistent with federalism and dual sovereignty, enjoin a State from passing a law that neither violates the Constitution nor addresses *any matter preempted by federal law*." Brief of the American Gaming Association as Amicus Curiae in Support of Petitioner at 3, *Gov. Christie et al.* v. *Nat'l Collegiate Athletic Ass'n et al.* (Nos. 16-476 and 16-477) (November 2016) (emphasis added).

Contrary to the assumptions made by Petitioners and their supporting *amici*, in fact there *is* a federal regulatory interest to protect and the matter *is* preempted by federal law. The CFTC was born with preemptive powers, and SEC gradually obtained them over time. Either way, Congress has clearly preempted the field with respect to listing and trading of financial contracts, which should include the gambling contracts at issue here.

B. Sports Gambling Contracts Are (Unregulated) Securities or Commodity Contracts

Sports gambling contracts can potentially be characterized as either (unregulated) securities or, alternatively, as commodity contracts.

Sports gambling affords no margin of safety (one can lose his entire principal within a matter of hours, even minutes), and cannot be an investment if one adopts a classic definition: "An investment operation is one which, upon thorough analysis, promises safety of principal and a satisfactory return." Benjamin Graham, *The Intelligent Investor: The Definitive Book of Value Investing* (2005).

On the other hand, sports gambling is commonly *presented* as an investment opportunity. Mark Cuban, entrepreneur and owner of Dallas Mavericks, floated the idea of a "gambling hedging fund" that "only places bets", including sports bets. *Blog Maverick, My New Hedge Fund*, http://blogmaverick.com/2004/11/27/my-new-hedge-fund/. His vision became real; UK-based Galileo Fund (folded), UK-based Stratagem (raising money) and Australia-based Priomha Capital (operational) are all variations of the same idea.

There is more – right in our backyard. In 2015, Senate Bill 443 was passed in Nevada, which legalizes sports betting investment funds, similar to traditional mutual funds, that are registered and managed in Nevada but which could include participants from outside the state. *Nevada Legalizes Sports Betting Investment Funds*, www.espn.com/chalk, June 3, 2015. One company, incredulously, even positioned

sports gambling as a *superior* investment, and has effectively acknowledged that sports betting is a market: "Traditional investment options (bonds, stock market, real estate) are typically long-term and offer inadequate returns. Athletics Investments is a registered entity that operates like a traditional mutual fund, pooling investor's funds into a common hedge fund and investing them in the sports betting *marketplace*." https://www.athleticsinvestments.com/ (emphasis added).

Tellingly, FanDuel, a DFS operator, likens DFS to investing: "Like investors who make selections for their portfolios, or commodity or energy traders who have to anticipate weather impact on crops and demand for power, FanDuel contestants base their player selections on historical performance, statistics, research, matchups, and trends." *FanDuel Inc., and Head2Head Sports LLC vs. Lisa Madigan,* Complaint for Declaratory Judgment at 10, December 24, 2015.

One of SEC's main missions is to protect investors. Whether or not the opportunity presented to a potential investor is a true investment, or a highly speculative opportunity masquerading as an investment is not controlling. "Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called." *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990) (emphasis original). "To that end, it enacted a broad definition of 'security,' sufficient 'to encompass virtually any instrument that might be sold as an investment.'" *SEC v. Edwards*, 540 U.S. 389, 393 (2004) (citing *Reves*, 494 U.S. at 61 (1990)). "An investment contract thus came to mean a contract or scheme for "the placing of capital or laying

out of money in a way intended to secure income or profit from its employment.'" *SEC v. Howey Co.*, 328 U.S. 293, 298 (1946) (internal citations omitted). Sports gambling contracts are not true investments, but they could reasonably be characterized as investment contracts under the Howey test developed by this Court. *Id.*

In addition to investment contracts, some commentators have argued that sports bets could potentially be characterized as "notes" to be regulated under the existing federal securities laws. Michael C. Macchiarola, *Securities Linked to the Performance of Tiger Woods? Not Such a Long Shot*, 42 Creighton L. Rev. 29, 43 (2008).

Sports gambling contracts can also potentially be classified as commodity contracts. In relevant part, the Commodity Exchange Act defines the excluded commodity as an occurrence, extent of an occurrence, or contingency … that is (I) beyond the control of the parties to the relevant contract, agreement, or transaction; and (II) associated with a financial, commercial, or economic consequence. 7 U.S.C. § 1a (19). "A broad interpretation of 'excluded commodity' might include betting transactions on sporting and other events. Wagers on sporting events might satisfy the definition because, absent chicanery, the occurrence or contingency is not within the control of the parties to the relevant contract and the outcome may be 'associated with an economic consequence,'" Paul Architzel, *Event Markets Evolve: Legal Certainty Needed*, Futures Industry, March/April 2006.

In addition, the legislative history of Dodd-Frank Act includes the example of a Super Bowl event contract as a contract that would not serve any commercial purpose. "[CFTC] needs the power to, and should, prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed 'event contracts.' It would be quite easy to construct an 'event contract' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament. These types of contracts would not serve any real commercial purpose. Rather, they would be used solely for gambling." *Congressional Record, Proceedings and Debates of the 111th Congress, 2nd Sess., Senate*, July 14, 2010.

If the Court decides that sports gambling is a gambling *market,* then sports gambling contracts are either (unregulated) securities or commodity contracts, and there is strong evidence that Congress, through creation of the SEC and CFTC, has occupied the field of sports gambling.

C. State Police Powers Are Hopelessly Inadequate with Respect to Sports Gambling

Almost a century ago, security transactions were reserved to the police powers of the state. In 1920, the Minnesota Supreme Court stated: "It is a proper and needful exercise of the police power of the state and should not be given a narrow construction, for it was the evident purpose of the legislature to bring within the statute the sale of all securities not specifically exempted." *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 55 (Minn. 1920).

Today, it is evidently clear that police powers are still needed to some extent. The Pennsylvania Supreme Court found that the 1934 Act did not preempt Pennsylvania state-law tort claims arising from a stock trader's assault of another trader on the floor of a national securities exchange. *Dooner v. DiDonato*, 971 A.2d 1187 (Pa. 2009). Referring to NSMIA, the SEC also clearly delineated when police powers may still be needed. "Specifically, under the legislation, the states were to 'continue to exercise their police power to prevent fraud and broker-dealer sales practice abuses,' but abstain from regulation of 'the securities registration and offering process.'" Speech by SEC Staff: Remarks at the F. Hodge O'Neal Corporate and Securities Law Symposium, by Stephen M. Cutler (February 21, 2003). Clearly, there is still a role for the state's police powers, but it is much narrower.

The demarcation between the federal and State police powers and the critical role that physical space plays in drawing those boundaries is quite sensible. If a game is played in a game parlor, any dispute would likely involve the people playing the game, the owners of that game parlor, or the residents nearby, and the state police power could regulate and protect the public health, safety, morals of the inhabitants of the State. The federal government would be relatively helpless in that situation and absolutely must rely on the police powers of an individual State.

In delineating federal and State power over gambling, Congress has declared 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)

(emphasis added). Other than the observation that using the word "gaming" would have been more appropriate (see section I *supra*), this finding is noteworthy for invoking the importance of spatial boundaries. Their existence is precisely what makes an activity a game.

A useful analogy can be made with the regulation of marijuana. This Court has found that "regulation is squarely within Congress' commerce power because production of [marijuana] meant for home consumption has a substantial effect on supply and demand in the national market for that commodity." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). While there may very well exist reasons that call for the federal government's intervention, marijuana consumption's *immediate* impact would arguably be on someone who shares the same physical space. If a casino patron at the poker table is bothered by a neighbor, it could be because the neighbor had a drink one too many, consumed too much marijuana, or was not following the gaming establishment's rules. Thus, it is not so much the morals and/or the libertarian arguments that bind alcohol, marijuana and gaming in the context of police powers. Rather, it is the *physical space*.

Sports gambling is different. Today, a resident of Illinois can bet on the outcome of a sports game, and not only does he not need to be in a Nevada casino (if betting through a mobile app), amazingly he does not even need to be in Nevada at all (if betting through a Nevada sports betting investment fund). On the other side of the bet could be a resident from New Jersey, sitting in a Nevada casino, sitting on the bench in a Nevada park, or sitting in his couch at home. The

game on which the gambler bet could be a game between a football team based in California and another one in Texas, organized subject to the rules of the National Football League, an organization headquartered in New York. The game would take place, in almost all cases outside Nevada, and in fact it may very well take place in a different country, such as the UK. Deciding that there is money to be made in sports betting, a fixer residing in Florida could decide to impact the outcome of a game by approaching a player or a referee in or around the sports arena.

Where does that leave us? The counterparties to the sports gambling contract, the teams, the players, the organizing entity of the games, and the potential fixer are all outside the State boundaries. The possibility of remote wagering can be attributed to advances in technology, but the primary issue is the fact the wagers cannot conclude without a connection to real life, i.e., sports games taking place outside a close space. Because no spatial separation exists, it is extremely difficult if not impossible, to see why this matter should be reserved to the police powers of the State at all.

D. This Case is Distinguishable from *Brown and Williamson* because the Relevant Regulatory Agencies Have Signaled Jurisdictional Intent

This Court has previously decided a similar jurisdictional issue in ruling on whether FDA could regulate tobacco. "Congress has not given the FDA the authority to regulate tobacco products as customarily marketed." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In doing so, the Court assigned substantial weight to FDA's own earlier

statements that it lacked jurisdiction. "This tobacco-specific legislation … was adopted against the backdrop of the FDA *consistently and resolutely stating that it was without authority* under the FDCA to regulate tobacco products as customarily marketed." *Id.* at 122 (emphasis added).

This case is clearly distinguishable because both the SEC and the CFTC have already asserted jurisdiction with respect to a variety of similar, relevant products. For example, the SEC has regulated one sports market, Fantex, where investors buy and sell tracking stocks that track a star athlete's future income. *Fantex Inc., Form S-1*, October 17, 2013. In the case of Arian Foster, the athlete was paid $10 million upfront, but parted with 20% of all of his future contract and endorsement income. *Id.* In the eyes of the average speculator, it is quite likely that the product was primarily perceived as a mechanism to speculate on the performance of an athlete. Fantex, Inc. has said as much in its prospectus: "[t]he value of our Arian Foster Brand is dependent upon the performance of, and to a lesser extent, the popularity of Arian Foster in the NFL." *Id.*, at 10. Therefore, the SEC has already accepted responsibility to regulate a sports contract that is essentially a proxy for an individual athlete's performance.

The SEC has also taken action with respect to two daily fantasy platforms. In early 2015, an obscure site, called Stock Battle, was running a "fantasy contest" where participants were picking stocks. Stock Battle identified itself as the first fantasy gaming stock market competition. Stock Battle even cited (on a now-defunct website) the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA") as its

legal basis, just like DFS operators. The SEC sent Stock Battle a cease-and-desist letter and said the firm's games amounted to dealing in "unregulated security-based swaps." *Will Regulators Sideline Fantasy Stock-trading Games?*, Yahoo Finance (May 13, 2015). Stock Battle promptly closed its operations.

In a similar case, on October 13, 2016, SEC announced that Forcerank LLC, a New York-based company, had agreed to pay a $50,000 penalty for illegally offering complex derivatives products to retail investors through mobile phone games that were described as "fantasy sports for stocks." *Company to Pay Penalty for Stock Picking Game that was an Unregistered Swap*, SEC Press Release 2016.

In both cases, the underlying commodity was stocks, not sports performance, yet the markets otherwise operated in identical ways and even claimed relief under the same federal law, UIGEA. 31 U.S.C. § 5362. FanDuel even aligned itself with such platforms trying to justify its own existence. "[N]o one contends … that a stock-picking contest is not a *bona fide* competition." *FanDuel Inc., and Head2Head Sports LLC vs. Lisa Madigan,* Complaint for Declaratory Judgment at 10, December 24, 2015.

The SEC clearly disagrees that such sites are legal. It does not make sense that stock-picking fantasy offerings amount to unregulated security-based swaps and athlete-picking fantasy offerings amount to games with skill. The alternative – that daily fantasy contracts are financial contracts – is much more plausible and the fact that the SEC took action with respect to the two examples cited above indicates jurisdictional intent.

Finally, more recently, the SEC has subpoenaed at least three Nevada entity wagering funds and demanded various pieces of information, which is, again, indicative of the SEC at least considering whether Senate Bill 443 potentially clashes with securities laws. https://www.legalsportsreport.com/12049/sec-subpoenas-nevada-entity-wagering-funds-for-information/.

CFTC has also been clearly considering similar jurisdictional issues. As early as 2008, CFTC solicited comments on the appropriate regulatory treatment of financial agreements offered by markets commonly referred to as event, prediction, or information markets. *Concept Release on the Appropriate Regulatory Treatment of Event Contracts,* Federal Register, 73 Fed. Reg. 25669 (May 7, 2008). CFTC asked, *inter alia*, "[w]hat objective and readily identifiable factors, statutorily based or otherwise, could be used to distinguish event contracts that could appropriately be traded under Commission oversight from transactions that may be viewed as the functional equivalent of gambling?" and "[w]hat are the implications of possibly preempting state gaming laws with respect to event contracts and markets that are treated as Commission-regulated or exempted transactions?" *Id.* This inquiry shows that CFTC clearly contemplates that the issues raised by DFS and sports gambling could fall within its regulatory jurisdiction.

One amicus asserts that Congress could task CFTC with oversight, but Congress has not done so. Brief of Amicus Curiae Researcher John T. Holden In Support of Petitioners at 6. That view is misinformed.

In 2010, Congress made it clear that the CFTC *has* the authority over *all types* of markets (unless SEC has jurisdiction), including sports markets. "[CFTC] needs the power to, and should, prevent derivatives contracts that are contrary to the public interest because they exist predominantly to enable gambling through supposed 'event contracts.' It would be quite easy to construct an 'event contract' around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament." *Congressional Record, Proceedings and Debates of the 111th Congress, 2nd Sess., Senate*, July 14, 2010. Clearly, Congress, unlike in *Brown & Williamson*, intended to give CFTC the requisite authority to regulate (or ban if they are purposeless) at least a subset of sports market contracts.

E. This Case is Also Distinguishable from *Brown and Williamson* Based on Congressional Intent

The case before the Court is also distinguishable from *Brown & Williamson* based on the congressional intent. With respect to tobacco, Congress has made a conscious choice and "directly spoken to the issue." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Among other things, Congress "foreclosed the removal of tobacco products from the market," choosing instead to create "a distinct regulatory scheme focusing on the labeling and advertising of cigarettes and smokeless tobacco," and created an "express policy … to protect commerce and the national economy while informing consumers about any adverse health effects. *Id.*

With PASPA, Congress also spoke directly on the issue before it, but decided to remove sports

gambling products from the market rather than follow the domestic tobacco model, or the UK sports gambling model, of "regulate, but warn."

Gambling supporters often claim that sports gambling integrity issues are exaggerated or that sport gambling can be remedied through proper monitoring. In that context, the UK is generally cited as a model country. The UK experiment is indeed instructive – but as a cautionary example. Recently, a soccer midfielder was discovered to have bet on 1,260 games over 10 years, busting the myth of the virtues of monitoring. http://www.bbc.com/sport/football/38421182. Shortly thereafter, the UK Football Association ended all sponsorship deals with betting companies, including terminating a long-term deal with Ladbrokes, one of the major sports betting operators. http://www.thedrum.com/news/2017/06/22/fa-ends-sponsorships-with-betting-firms-it-looks-move-beyond-gambling-controversy.

Congress made a conscious choice in 1992 by enacting PASPA and, despite the rhetoric, not much has changed since. That choice should be respected. The social ills of gambling are alive and well as much as they were when Congress enacted PASPA "to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime." Senate Report 102-248 (1991).

F. PASPA is an Extension of the Dual Regulatory Regime Governing Our Nation's Financial Markets and Therefore, State Law Is Preempted

PASPA does not make reference to securities and commodities laws. However, "[n]ot every silence is pregnant." *Burns v. United States*, 501 U.S. 129, 136 (1991) (quoting *Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)). "A court must … interpret the statute 'as a symmetrical and coherent regulatory scheme,' and "fit, if possible, all parts into a harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (internal citations omitted). "Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Id.*, at 133. With or without the reference, PASPA is best understood as an extension of the dual regulatory regime that governs our nation's financial markets. The alternative, that PASPA is a stand-alone statute disconnected from the laws governing our nation's capital markets creates a disjointed and implausible result that would not create a "harmonious whole". *Id.*, at 133 (internal citations omitted).

Quite often, sports gambling, political election markets and box office contracts are mentioned in the same breath. "But what of *markets* listing contracts in attendance at movies, or political or legal events or in sporting events? [I]t is crucial that *market organizers or potential market organizers* are able to understand whether they are covered by CFTC requirements." Paul Architzel, *Event Markets Evolve: Legal Certainty Needed*, Futures Industry, March/April

2006 (emphasis added). "A small sampling of predictive market betting includes … PredictIt, a real-money political prediction market, … Hollywood Stock Exchange, which allows players to bet on actors, movies, and more, … Smarkets, a United Kingdom-based online betting company which gained popularity for political bets and also ranges in sports and current events." The Report of the Special Commission to Conduct a Comprehensive Study Relative to the Regulation of Online Gaming, Fantasy Sports Gaming and Daily Fantasy Sports at 36 (July 31, 2017). Without a doubt, the CFTC has jurisdiction over political and box office contracts. Why should sports gambling be any different?

It is also noteworthy that integrity was a shared concern for both the CFTC and Congress in enacting the PASPA. "In the case of political event contracts, the CFTC evaluated how the proposed contracts impact the integrity of elections." *Order Prohibiting The Listing Or Trading of Political Event Contracts*, CFTC, April 2, 2012. Similarly, Congress enacted PASPA "to maintain the integrity of our national pastime." *Senate Report 102-248* (1991).

The historical and current case against sports gambling remains so clear-cut, that the Court should welcome Congress' occupation of the field through PASPA, which settles the matter by declaring sports gambling illegal instead of clogging the regulatory agency pipeline via delegation. Under PASPA, no purposeless sports gambling contract can be listed and traded. Thus, PASPA is part of the same regulatory regime that governs securities and

commodities, which is the very regime that preempts state law.[7]

Striking PASPA would lead to lopsided incentives and a disjointed result: creating a contract with *no* purpose would instantly become a better strategy than creating a product with *some* purpose. Stripping all purpose, hiding behind the veil of *state experimentation,* and pushing a narrative around jobs and tax revenues would become the dominant and obvious strategy. There will always be some States that want to be a laboratory after all. If this is how our society is incentivized, entrepreneurs will purposely strip purpose from their contracts and hope to keep dry under the State umbrella.

States are free to experiment, but cannot do so in financial markets. "The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71

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[7] Even the tangential matter of the grandfathering of certain states is reconcilable when PASPA is viewed through that lens. Volume matters, and the best evidence comes from CFTC: the agency was not comfortable with full-scale election markets but is comfortable with the exact same contract on a smaller scale. Similarly, with PASPA, Congress became comfortable with a limited amount of sports gambling. The only difference is the implementation channels: in the case of election markets, CFTC limited the volume through contract size, and under PASPA, Congress limited the volume through geographical limitations. In both cases, the *economic* outcome is the same: curbing excessive speculation. To the extent small-scale friends and family wagering is permissible under PASPA, it would reflect the same principle: volume matters.

(2006). Clearly, the same principal applies to commodities as well.

Congress gave federal financial regulators broad authority to regulate securities and commodities. Preemption in both fields is well established. The remaining issue is drawing the boundaries. This case is an ideal vehicle for delineating the boundaries because it involves a certain class of financial contracts, sports gambling, that sits at the purposeless edge of the market spectrum.

PASPA is not unconstitutional, and does not need to be redrawn in order to correct any apparent infirmities. Indeed, to the extent the Court considers PASPA to be problematic, the "sports gambling as markets view" advanced by *amicus curiae* provides a potential reconciliation. PASPA's language is, ultimately, one of the many ways the longstanding confusion around gambling vs. gaming may have manifested itself. In substance, however, PASPA is part of the dual federal regulatory regime that governs our nation's financial markets, and therefore a valid exercise of Congress under the Supremacy Clause.

CONCLUSION

For most people, sports gambling is arguably nothing more than "fun and games." It might be fun, but it is not a game.

This subtle, yet crucial insight leads to clear definitions for gambling and gaming, something that has arguably long eluded lawmakers, scholars and

other key stakeholders. These definitions, in turn, help place a clear wedge between games and markets. As to what constitutes gambling in either domain, clear regulatory frameworks already exist: skill vs. chance for the former, and purpose vs. entertainment for the latter.

More importantly for the dispute at issue, the responsibility to regulate each domain is entrusted to different governments: state governments for games and the federal government for markets, through clear preemption by Congress.

This case is distinguishable from *Brown and Williamson* in two key aspects. First, the regulatory agencies have signaled jurisdictional intent. Second, Congress recognized that the sports gambling market serves no purpose, and therefore banned it through PASPA.

Eliminating PASPA would burden the regulatory agencies and the judiciary, forcing them to deal with purposeless contracts which as shown above do not serve the public interest. Equally importantly, it would create lopsided incentives and incongruous results: creating a contract with *no* purpose would become a better strategy than creating a product with *some* purpose. Stripping all purpose and hiding behind the veil of *state experimentation* – while pushing a narrative around jobs and tax revenues – would become the obvious and dominant strategy for budding entrepreneurs and inventors, whose behaviors would most likely be welcome by *some* state, as New Jersey's persistence has shown.

The Court can prevent this inequitable and incongruous result by acknowledging that PASPA,

above all, is part of the regulatory regime that governs our nation's financial markets and holding PASPA to be a valid exercise of Congress under the Supremacy Clause.

Respectfully submitted,

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