PAVING THE WAY FOR LEGALIZED SPORTS GAMBLING

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INTRODUCTION

Sports gambling, particularly Internet sports gambling, is a booming industry even during these lean economic times. Technology continues to advance at a rapid pace—Congress and the federal government also need to advance and embrace the modern world. Currently, the federal government regulates gambling as if we live in the world as it was between 1976 and 1990. Those dates are important in this context because the states that did not legalize sports gambling during that period are now barred from engaging in it because of the Professional Amateur Sports Protection Act of 1992 ("PASPA").[1] PASPA makes it illegal to bet on professional and amateur athletics.[2] Four states, Nevada, Oregon, Montana, and Delaware, were grandfathered in as exceptions because they had some form of sports betting at the time of enactment.[3] The Federal Wire Act ("Wire Act") prohibits the use of wire communications in betting on a sporting event.[4] The Act is likely to be construed as applying to Internet sports betting because the Internet involves some form of wire communication.[5] In combination, PASPA and the Wire Act amount to what appears to be a total prohibition on Internet sports betting.

It is estimated that $2.76 billion is wagered legally on sports in Nevada each year.[6] Add to that, the estimated $380 billion wagered

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1. Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (2006).

2. *Id.* § 3702.

3. *Id.* § 3704. Although not explicitly enumerated, the grandfather exception applied to states that had sports betting schemes between January 1, 1976 and August 31, 1990.

4. Federal Wire Act, 18 U.S.C. § 1084 (2006).

5. *See* United States v. Cohen, 260 F.3d 68, 74–75 (2d Cir. 2001).

6. *Sports Wagering*, AM. GAMING ASS'N, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering (last visited Oct. 23, 2012).

illegally on sports gambling annually and it is easy to see why the industry is booming.[7] Much of this money is bet through Internet sports books. Because sports gambling is illegal in much of the United States, most of the money is not taxed at all. Considering the hard economic times this country is facing, taxing profits generated from sports gambling, both Internet and brick-and-mortar, could generate significant revenue for both the federal government and individual states. The federal government through the use of arbitrary and capricious laws—namely PASPA—has deprived a majority of states of the ability to choose whether they want sports gambling, and if so, how to tax and regulate the revenue stream.

This commentary will explore the laws blocking the way to legalized sports gambling, both online and at brick-and-mortar establishments, namely PASPA, a set of federal statutes,[8] and finally the Unlawful Internet Gambling Enforcement Act ("UIGEA").[9] Part I will explain what PASPA is and why it was enacted. Part II will discuss recent challenges to PASPA, including New Jersey's current challenge, and discuss whether PASPA is constitutional. This part will raise the three best challenges to PASPA's constitutionality. Part III will discuss additional policy reasons for overturning PASPA, with a focus on PASPA's ineffectiveness and negative economic impacts. Part IV will discuss the federal statutes such as the Wire Act, Travel Act,[10] and the Illegal Gambling Business Prohibition[11] and their role in Internet sports betting. Part V will deal with the UIGEA and its role in Internet sports betting. Part VI will suggest basic regulations for sports books and the protection of consumers. Finally, in Part VII this commentary concludes that sports betting should be legalized for brick-and-mortar casinos as well as Internet-based providers.

I. PASPA: WHAT IS IT? AND WHY WAS IT ENACTED?

PASPA was enacted in 1992. The law consists of four sections. Section 3702, the main provision, provides that:

> [i]t shall be unlawful for[] (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote,

7. *Id.*

8. This paper will focus primarily on PASPA, the Federal Wire Act, 18 U.S.C. § 1084 (2006), the Travel Act, 18 U.S.C. § 1952 (2006), and the Illegal Gambling Business Act, 18 U.S.C. § 1955 (2006).

9. Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (2006).

10. 18 U.S.C. § 1952 (2006).

11. 18 U.S.C. § 1955 (2006).

> pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.[12]

PASPA carved out an exception for, and grandfathered in, states that had some form of sports betting prior to PASPA's passing.[13] These states included Nevada, Oregon, Delaware, and Montana. PASPA also granted New Jersey a one-year window in which to legalize sports gaming but New Jersey failed to do so.[14] An exception was also carved out for *pari-mutuel* animal racing and *jai-alai*.[15] The Act's expressly stated purpose is "to prohibit sports gambling conducted by, or authorized under the law of, any [s]tate or other governmental entity."[16] Additional goals are to maintain sport's integrity and reduce the promotion of gambling among the nation's youth.[17]

One of the biggest proponents of PASPA was Senator Bill Bradley, former professional basketball player and New Jersey senator.[18] Senator Bradley was concerned that state-sanctioned sports gambling would send the wrong message to children that sports revolve around gambling rather than achievement and sportsmanship.[19] Senator Bradley also believed that gambling would injure the integrity of sport by causing fans to question whether a missed shot or fumble was "fixed."[20] He "believed that 'the harm that state-sponsored sports betting causes'—that is, threatening the integrity of sports in the eyes of both fans and young people—'far outweigh[ed] the financial advantages received.'"[21] Senator Bradley was not the only person who shared these views. PASPA received support from the National Football League ("NFL"), the National

12. 28 U.S.C. § 3702 (2006).

13. *Id.* § 3704.

14. *Id.* § 3704(a)(2) (creating an exception if state had instituted sports gambling scheme as of October 2, 1991).

15. *Id.*

16. S. REP. NO. 102-248, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N 3553, 3553.

17. *Id.* at 5.

18. *See* Senator Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5 (1992).

19. *Id.* at 7.

20. *Id.* at 8.

21. Anthony G. Galasso, Jr., Note, *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 KY. L.J. 163, 166 (2011) (quoting Bradley, *supra* note 18, at 8).

Basketball Association ("NBA"), Major League Baseball ("MLB"), and the National Collegiate Athletic Association ("NCAA").[22] Paul Tagliabue, former commissioner of the NFL, testified before Congress that "[s]ports gambling threatens the integrity of, and public confidence in, amateur and professional sports. Widespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think 'the fix was in' whenever their team failed to beat the point-spread."[23]

PASPA received opposition from Senator Chuck Grassley of Iowa and the Department of Justice ("DOJ").[24] Both Senator Grassley and the DOJ felt that PASPA would be a "substantial intrusion" into states' rights.[25] Senator Grassley argued that it would discriminate among the states because the grandfathered states would have a monopoly on sports gambling.[26] The DOJ went on to say that "determinations of how to raise revenue have typically been left to the [s]tates."[27] The DOJ felt that PASPA raised federalism issues and expressed concern that sports leagues would be permitted to enforce its provisions.[28] The DOJ and Senator Grassley highlighted the hypocrisy of the leagues in supporting PASPA. Senator Grassley contended that "[i]f the professional sports leagues were truly concerned about the risk of 'fixed' games [and] the integrity of professional sports . . . they would [have sought] to prohibit th[e] $1.8 billion head-to-head sports wagering industry in Nevada."[29] Instead, the leagues supported legislation that allowed Nevada to be grandfathered in. Additionally, the NBA held exhibition games in Nevada during the four years leading up to PASPA and Nevada gaming laws allowed the NBA to prohibit wagering on the games, but instead, the NBA allowed wagering to take place.[30]

Ultimately, all arguments against PASPA fell on deaf ears. PASPA became law in 1992. In response to the question of why some states that were grandfathered in, proponents of PASPA said they did not want to threaten Nevada's economy, which had subsisted for decades on gambling revenue, while states such as Delaware and Oregon had instituted sports lotteries prior to the legislation.[31]

22. S. REP NO. 102-248, at 3,8.
23. *Id.* at 5.
24. *Id.* at 12.
25. *Id.*
26. *Id.* at 13.
27. *Id.*
28. *Id.*
29. *Id.* at 14.
30. *Id.*
31. *Id.* at 7.

II. CHALLENGES TO PASPA AND ITS CONSTITUTIONALITY

There have been recent challenges to PASPA. Some based on statutory grounds while others have alleged that PASPA violates the Constitution. None of these challenges have been successful.

In 2009 Delaware enacted legislation that allowed single-game wagering (head-to-head) in addition to its lottery parlay.[32] Despite the fact that Delaware maintained the option to allow sports betting under PASPA's grandfather exception, the major sports leagues, MLB, the NBA, NFL, National Hockey League ("NHL"), and the NCAA, all sought an injunction to prevent any type of wagering that went beyond the NFL parlay bets.[33] The Federal District Court ruled in favor of Delaware, however, the Third Circuit overturned the District Court and granted a permanent injunction, holding that "[b]ecause single-game betting was not 'conducted' by Delaware between 1976 and 1990, such betting is beyond the scope of the exception in [section] 3704(a)(1) of PASPA and thus prohibited under the statute's plain language."[34] This ruling was couched in statutory interpretation, while the most recent challenges have been constitutional in nature.

PASPA has been challenged based on claims that it violates the Constitution, most notably the Tenth Amendment, twice since its enactment. In *Flager v. United States Attorney*, a private citizen of New Jersey challenged PASPA on the grounds that it violated the Tenth Amendment because "the power to outlaw sports wagering was not expressly granted to the federal government" by the Constitution.[35] The court did not address the Tenth Amendment claim and dismissed the case holding that the plaintiff lacked standing.[36]

In *Interactive Media Entertainment and Gaming Association, Inc. v. Holder*, Interactive Media Entertainment and Gaming Association, Inc. ("iMEGA"), New Jersey state senator Raymond Lesniak, and the New Jersey horse-racing industry filed suit against the United States Attorney General, Eric Holder, claiming that PASPA was unconstitutional and violated the First, Fifth, Tenth, Eleventh, and Fourteenth Amendments in addition to the Commerce

32. *See* Office of the Comm'r of Baseball v. Markell, 579 F.3d 293, 295–96 (3d Cir. 2009).

33. *Id.* at 293.

34. *Id.* at 304.

35. Galasso, *supra* note 21, at 170–71; Flager v. U.S. Att'y, No. 06-3699, 2007 WL 2814657, at *1 (D.N.J. Sept. 25, 2007).

36. *Flager*, 2007 WL 2814657, at *2–3.

Clause and the Equal Protection Clause.[37] Senator Lesniak and iMEGA contended that "[r]aising revenue by means of state laws authorizing [s]ports [b]etting is a right reserved to the individual states."[38] Therefore, they argued, "PASPA violates the Tenth Amendment by unconstitutionally arrogating to the United States such express and implied reserved powers to the individual states to regulate matters affecting its citizens including the raising of revenue."[39] The government sought to dismiss the case for lack of standing and failure to state a claim.[40] The court ruled in favor of the government, holding that the plaintiffs had suffered no injury and therefore lacked standing.[41] Regarding the Tenth Amendment claim, the court briefly stated that a Tenth Amendment challenge is reserved for states and that since New Jersey was not a party to the lawsuit there was no standing.[42]

In November of 2011, the state of New Jersey, led by Senator Lesniak, passed a bill that would allow sports gambling of all kinds excepting sporting events that take place in New Jersey.[43] The bets could be placed at horse tracks throughout New Jersey and casinos in Atlantic City.[44] Governor Christie signed the bill which can take effect once PASPA has been overturned or repealed.[45] Governor Christie decided that rather than challenging PASPA in court and trying to overturn the law, New Jersey will implement sports gaming this fall.[46] However, this past August the NCAA along with the NFL, NBA, NHL, and MLB, filed a lawsuit in federal court seeking to prohibit New Jersey from implementing sports gambling.[47] This will

37. Interactive Media Entm't & Gaming Ass'n v. Holder, No. 09-1301, 2011 WL 802106, at *1–2 (D.N.J. Mar. 7, 2011).

38. Complaint and Demand for Declaratory Relief at 26, Interactive Media Entm't & Gaming Ass'n v. Holder, No. 09-1301 (D.N.J. Mar. 23, 2009), ECF No. 1.

39. *Id.*

40. *Interactive Media*, 2011 WL 802106, at *2.

41. *Id.*at *6–8, 10.

42. *Id.* at *8–10.

43. Press Release, New Jersey Senate Democrats, Lesniak-Van Drew Bill To Implement Sports Wagering Signed Into Law (Jan. 18, 2012) [hereinafter Sports Wagering Press Release], *available at* http://www.njsendems.com/release.asp?rid=4306; N.J. Stat. Ann § 5:21A-1 to -6 (West 2012).

44. § 5:12A-2.

45. Sports Wagering Press Release, *supra* note 43.

46. *New Jersey To Allow Betting this Fall*, ESPN.COM (Mar. 25, 2012), http://espn.go.com/espn/story/_/id/7970130/new-jersey-defy-federal-law-move-forward-sports-betting.

47. Complaint for Declaratory and Injunctive Relief, NCAA v. Christie, No. 3:12-cv-04947 (D.N.J. Aug. 7, 2012); *see also New Jersey Sued Over Sports Betting*, ESPN.COM (Aug. 7, 2012), http://espn.go.com/espn/story/_/id/8243013/ncaa-4-pro-leagues-sue-new-jersey-sports-betting.

set the stage for PASPA to be challenged in federal court.

As can be seen above, PASPA raises constitutional concerns. In the next section I will examine New Jersey's three strongest possible constitutional challenges to PASPA. Those arguments are that: (1) PASPA violates the Tenth Amendment; (2) PASPA violates the Eleventh Amendment; and (3) PASPA violates the Commerce Clause.

A. Whether PASPA Violates the Tenth Amendment

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[48]

New Jersey may argue that PASPA violates the Tenth Amendment by imposing an affirmative mandate on the state, meaning a state would be required to prohibit sports gambling,[49] which would thereby restrict the state's right to raise revenue through gambling—something states have always been able to do.[50]

The Supreme Court has recently revived the Tenth Amendment to strike down federal legislation and limit the Commerce Clause. In *New York v. United States* and *Printz v. United States*, the Court developed an anti-commandeering rule, which prohibits the federal government from compelling the "[s]tates [or state officials] to enact or administer a federal regulatory program."[51] However in *Reno v. Condon*, the Court upheld the Driver's Privacy Protection Act of 1994 ("DPPA")[52] as constitutional under the Tenth Amendment because it

48. U.S. Const. amend. X.

49. Jeffery Standen, *PASPA Under Fire*, SPORTS L. PROFESSOR (Mar. 25, 2009), http://thesportslawprofessor.blogspot.com/2009/03/papsa-under-fire.html ("[A] state (other than Nevada or one of the other exempted ones) in passing a lottery law must include a provision prohibiting games based on sports contents.").

50. Senator Lesniak and iMEGA alleged this in their complaint in *Interactive Media Entm't & Gaming Ass'n v. Holder*. Complaint and Demand for Declaratory Relief, *supra* note 38, at 26–28. Senator Grassley made a similar argument prior to the passing of PASPA, that PASPA would be a "substantial intrusion into [s]tates' rights and would restrict the fundamental right of [s]tates to raise revenue to fund critical [s]tate programs." S. REP. NO. 102-248, at 12 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3562. The Senator continued by further arguing that "Lotteries and gaming have been traditionally state issues, and that "Congress should not be telling the [s]tates how they can or cannot raise revenue." *Id.*

51. New York v. United States, 505 U.S. 144, 188 (1992) (holding the Constitution "does not . . . authorize Congress simply to direct the [s]tates to provide for the disposal of the radioactive waste generated within their borders"); Printz v. United States, 521 U.S. 898 (1997). *Printz* held "that congressional commandeering of state administrative activity violates both of the central structural features of our Constitution, federalism and separation of powers." Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 206 (1979).

52. 18 U.S.C. §§ 2721-2725 (2006).

"does not require the [s]tates in their sovereign capacity to regulate their own citizens."[53] The Court distinguished *Reno* from *New York* and *Printz* on the basis that the DPPA did not require the states to enact any laws or regulations, and did not require that state officials assist in the enforcement of federal statutes regulating private individuals.[54]

It appears the issue would turn on whether PASPA is held to be an affirmative mandate banning sports gambling to states that currently do not have sports gambling. Proponents of PASPA will contend that PASPA, like the DPPA, does not require states to enact legislation. In fact, PASPA prohibits states from making legislation regarding sports betting.[55] Proponents will also argue that PASPA is a valid use of the Commerce Clause.[56] Opponents of PASPA, like New Jersey, will contend that PASPA does in fact create an affirmative mandate because it requires states to accommodate the provisions of PASPA, which effectively commandeer the state government by restricting its avenues to raise revenue.[57] The Court in *New York,* pointed out that "the Tenth Amendment confirms that the power of the [f]ederal [g]overnment is subject to limits that may, in a given instance, reserve power to the [s]tates."[58] States have the police power to maintain the health and welfare of their citizens.[59] Gambling is a health and welfare issue,[60] and has traditionally been left to the states to regulate on their own.[61] PASPA infringes upon

53. Reno v. Condon, 528 U.S. 141, 151 (2000).

54. *Id.*

55. Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2006).

56. Bradley, *supra* note 18, at 6.

57. PASPA bans state governments from sponsoring sports gambling. *See* 28 U.S.C. § 3702.

58. New York v. United States, 505 U.S. 144, 156–157 (1992).

59. Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ("States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."); Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (noting that "[t]hroughout our history the several [s]tates have exercised their police powers to protect the health and safety of their citizens"). A plain language argument could be made that since sports gambling is not in the constitution it should be left to the states to police.

60. *See* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 354 (1986) ("The Court nevertheless sustains Puerto Rico's advertising ban because the legislature could have determined that casino gambling would seriously harm the health, safety, and welfare of the Puerto Rican citizens.").

61. *See* I. Nelson Rose, *Betting on New Jersey's Sports Betting*, GAMBLING L. BLOG (Nov. 7, 2011), http://www.gamblingandthelaw.com/blog/316-betting-on-new-jerseys-sports-betting.html; *see also* Chun v. New York, 807 F. Supp. 288, 292 (S.D.N.Y.1992) (holding that authority over gambling was reserved to the states through the Tenth Amendment).

the states' police power by restricting the types of gambling they can offer. Many states use gambling revenues to fund education and other programs aimed at helping their citizens.[62] PASPA takes this option away from the states.

The Tenth Amendment challenge to PASPA is viable. Based on recent case law, it is hard to predict how the Court will rule. If the Court takes a federalist approach and strictly analyzes the issue within the four corners of the Tenth Amendment, it should rule that PASPA unconstitutionally restricts the state's ability to raise revenue and infringes on the rights of states to regulate gambling—something states have traditionally regulated.

B. Whether PASPA Violates the Eleventh Amendment

New Jersey will likely assert that PASPA violates the Eleventh Amendment because it "permits the commencement of a civil action against the State of New Jersey in a Federal Court by any professional sports organization or amateur sports organization . . . [where] New Jersey has not waived its sovereign immunity."[63]

The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[64]

The Supreme Court has carved out three exceptions in which a state can be sued. First, a state official may be sued in his individual capacity for injunctive relief when a state acts unconstitutionally.[65] In *Seminole Tribe of Florida v. Florida*, the Court noted that *Ex parte Young* was inapplicable because the act in question set forth a detailed remedial scheme.[66] The Court said that the *Ex parte Young* "doctrine allows a suit against a state official to go forward, notwithstanding the Eleventh Amendment's jurisdictional bar, where the suit seeks prospective injunctive relief in order to end a

62. *See, e.g.*, *How Lottery Funds Are Allocated*, OREGON LOTTERY, http://www.oregonlottery.org/About/Lottery101/HowareFundsAllocated.aspx (last visited Oct. 23, 2012) (fifty-nine percent of Oregon lottery funds allocated to public education); Douglas McIntyre, *The 10 States That Pay Out the Biggest Lottery Jackpots*, DAILY FINANCE (May 3, 2011, 11:00 AM), http://www.dailyfinance.com/2011/05/03/lottery-states-biggest-jackpots/ (nine out of the ten biggest lotteries in the country are used to help fund education).

63. Complaint and Demand for Declaratory Relief, *supra* note 38, at 28.

64. U.S. Const. amend. XI.

65. Ex parte Young, 209 U.S. 123, 191 (1908).

66. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 44–45 (1996).

continuing federal-law violation."[67] Second, a state can waive its immunity and consent to being sued.[68] Finally, Congress can abrogate a state's sovereign immunity when acting pursuant to a valid exercise of power with an unequivocal expression of intent to abrogate the immunity.[69]

PASPA's only remedial scheme, found in Section 3703, allows a sports organization or the United States Attorney General to seek injunctive relief if Section 3702 is violated.[70] Section 3703 does not say whom the suit may be brought against.[71] The *Seminole Tribe* exception to *Ex parte Young*, which requires that there be an actual remedial scheme set forth[72] would not apply here because PASPA's only remedial scheme is to sue for injunctive relief,[73] which is what *Ex parte Young* allows. It would appear that as long as a plaintiff is seeking only prospective injunctive relief by enjoining a state official for PASPA violations, it will be constitutional under *Ex parte Young*.

New Jersey has not expressly waived its sovereign immunity. Therefore, the only way Congress can abrogate New Jersey's sovereign immunity is pursuant to an act containing an (1) unequivocal expression of intent to abrogate the immunity that is (2) passed as a valid exercise of congressional power.[74]

Congress's intent to abrogate the states' immunity from suit must be obvious from a clear legislative statement.[75] It is unclear from the language of PASPA if Congress intended states to waive their sovereign immunity. The statute does not say whom the suit may be brought against.[76]

Sovereign immunity is vested in the Constitution and can therefore only be abrogated pursuant to a constitutional provision granting Congress the power to abrogate.[77] Only Section 5 of the Fourteenth Amendment grants Congress this power.[78] Congress's power under Section 5, however, extends only to "enforcing" the

67. *Id.* at 45.

68. Hans v. Louisiana, 134 U.S. 1, 17 (1890).

69. Green v. Mansour, 474 U.S. 64, 68 (1985).

70. U.S.C. § 3703 (2006).

71. *See Id.*

72. *Seminole Tribe of Fla.*, 517 U.S. at 44–45.

73. *See* U.S.C. § 3703.

74. *See Seminole Tribe of Fla.*, 517 U.S. at 59.

75. Blatchford v. Native Noatak, 501 U.S. 775, 786 (1991).

76. *See* U.S.C. § 3703 (PASPA fails to identify who the sports leagues can seek to enjoin).

77. *Seminole Tribe of Fla.*, 517 U.S. at 59.

78. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

provisions of the Fourteenth Amendment.[79]

PASPA does not attempt to protect any of the fundamental rights outlined in the Fourteenth Amendment. Therefore, private citizens cannot bring a PASPA claim against the states even if Congress had made a clear expression to abrogate states' sovereign immunity because PASPA was not passed pursuant to a valid exercise of Section 5 of the Fourteenth Amendment. A suit, therefore, can only be brought by a sports organization against a state official under *Ex parte Young* and not against the state itself. The United States Attorney General always has the right to bring suit against a state.[80] If a sports organization were to pursue an *Ex parte Young* suit against a government official of a state like New Jersey, it would likely be successful so long as PASPA was found to be constitutional. The *Ex parte Young* exception requires that the injunctive relief being sought be to enjoin a state official from doing something unconstitutional.[81] Therefore if PASPA were to be deemed constitutional, an *Ex parte Young* suit would likely succeed against a state official. PASPA would therefore not violate the Eleventh Amendment.

C. Whether PASPA Violates the Commerce Clause

New Jersey will likely argue that PASPA violates the Commerce Clause because sports gambling does not substantially affect interstate commerce and thus Congress cannot regulate it.[82]

The Commerce Clause states that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[83] The Court interpreted the Commerce Clause broadly starting with the New Deal cases and did not strike down legislation as violating the Commerce Clause until 1995.[84] In *United States v. Lopez*, the Supreme Court limited Congress's power to regulate commerce to three categories: (1) "the use the of channels of interstate commerce"

79. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

80. United States v. Mississippi, 380 U.S. 128, 140–41 (1965).

81. Ex parte Young, 209 U.S. 123, 123 (1908).

82. Complaint and Demand for Declaratory Relief, *supra* note 38, at 18–21.

83. U.S. Const. art. I, § 8, cl. 3.

84. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 124 (1942) (holding that Congress could regulate activities that would have a cumulative substantial economic effect on interstate commerce, in this case preventing a farmer from growing extra wheat for personal consumption); United States v. Darby, 312 U.S. 100, 113 (1941) (holding that Congress has authority to regulate employment requirements of lumber manufacturer because manufacturing goods that will be shipped across state lines is interstate commerce).

(roads, waters, etc.), (2) the "instrumentalities of interstate commerce" (goods sold across state lines), and (3) the "activity substantially affects interstate commerce."[85]

In *Gonzales v. Raich*, the Court began again to broadly interpret the Commerce Clause. The Court held that Congress may regulate an intrastate activity if it concludes that there is a rational basis that it will "substantially affect interstate commerce."[86] The Court also stated that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[87]

When considered together, the test from *Raich* and the findings of Congress in 1992 that "sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum,"[88] constitute a rational basis for regulating sports gambling. Therefore, it is likely that a challenge under the Commerce Clause based on the claim that PASPA does not substantially affect interstate commerce will fail.

III. OTHER POLICY RATIONALES FOR OVERTURNING PASPA

If the Court finds that PASPA is constitutional, there are other policy justifications for repealing PASPA. PASPA should be repealed because it has proven to be ineffective in achieving its goals. PASPA should also be repealed because states and the federal government stand to benefit greatly from the potential tax revenue.

A. PASPA Has Been Ineffective

PASPA has three primary goals: (1) "to prohibit sports gambling conducted by, or authorized under the law of, any [s]tate or governmental entity," (2) maintain sport's integrity, and (3) reduce the promotion of gambling to youth.[89] It can be argued that PASPA has failed to achieve all of these goals.

1. Has PASPA Stopped the Spread of Sports Gambling?

PASPA has stopped the spread of state-run sports gambling because it explicitly restricts it.[90] PASPA has in fact reversed the

85. United States v. Lopez, 514 U.S. 549, 557–58 (1995).
86. Gonzales v. Raich, 545 U.S. 1, 17 (2005).
87. *Id.*
88. S. REP. NO. 102-248, at 5 (1992).
89. *Id.* at 3–5.
90. U.S.C. § 3702 (2006).

trend of sports gambling amongst states. As of 2007, Oregon no longer operates a sports lottery.[91] Arguably, however, PASPA's bigger goal was to stop the overall spread of sports gambling. With regards to this goal, it most certainly has failed.

Sports gambling has increased dramatically in America since 1992. America's biggest sporting event, the Super Bowl, has seen drastic increases in the amounts bet on it since PASPA's inception. In 1992, $50.3 million was wagered on the Super Bowl in Nevada.[92] In 2011, by contrast, $81.2 million was wagered on the Super Bowl.[93] The FBI currently estimates that $2.5 billion is wagered illegally each year on March Madness, another major sporting event in the United States.[94] The Internet was in its infancy in 1992 and has since grown into a powerful source of information that provides users with access to nearly anything within a matter of seconds. The sports gambling industry has found a comfortable home on the Internet, with revenue projected as high as $100 billion by 2015.[95] A quick online search for sports books will yield a number of different Internet sports books on which a person can place wagers on any team for any sport.[96] Currently there is no federal law that punishes the person who places the bet. It is obvious that PASPA's goal—to stop the spread of sports gambling by making it illegal to supply sports gambling—has ultimately failed because demand has increased. Illegal Internet sports books and neighborhood bookies will continue to profit from this prohibition as long as there is such a strong demand.

PASPA is clearly an outdated law. Much has changed in the

91. David D. Waddell & Douglas L. Minke, *Why Doesn't Every Casino Have a Sports Book? An Overview of the Professional and Amateur Sports Protection Act,* GLOBAL GAMING BUSINESS, July 9, 2008, at 34, *available at* http://www.ggbmagazine.com/articles/Why__Doesn___t_Every_Casino_Have__a_Sports_Book_.

92. Jimmy Boyd, *How Much Money is Bet on the Super Bowl,* JIMMY BOYD'S LOCKSMITH SPORTS PICKS (Jan. 20, 2009), http://www.locksmithsportspicks.com/super-bowl-how-much-bet/.

93. *Sports Wagering*, AM. GAMING ASS'N, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering (last visited Oct. 23, 2012). Of the total amount bet on the Super Bowl only 1.5% was wagered legally. *Id.*

94. *Id.*

95. *Online Sports Betting*, BETTINGSITES.COM, http://www.bettingsites.com/online-sports-betting/ (last visited Oct. 23, 2012) (stating Merrill Lynch Predicts that online gambling will grow to $177 billion in revenue by 2015 and $100 billion in revenue will come from online sports betting).

96. Spectrum Gaming Grp., *Internet Gambling Developments in International Jurisdictions: Insights for Indian Nation,* 27 (Oct. 4, 2010), http://www.indiangaming.org/info/alerts/Spectrum-Internet-Paper.pdf (stating as of June 30, 2010 there were 516 sports or race-betting sites).

gambling world since 1992 when very few states had casinos.[97] Today casinos can be found in several states, which is evidence that gambling has become more accepted in society.[98] In 1992 the Internet was virtually non-existent whereas today almost everything can be done online. The Internet allows sports gambling to take place from the comfort of one's own home. Sports gambling is a pursuit that has become more acceptable in society as there are several magazines, radio shows, and other media outlets that openly discuss sports gambling.[99] Stopping the spread of sports gambling is clearly an unrealistic goal. PASPA should be repealed, not only because it has failed to stop the spread of sports gambling, but because state and federal governments should be able to take advantage of the potential tax revenue and regulate the sports gambling industry.

2. Has PASPA Maintained the Integrity of Sports?

Professional and Amateur sports leagues have complained that sports gambling ruins the integrity of their sports.[100] They do not want fans to think that the "fix was in" when a controversial play occurs.[101] However, since PASPA's enactment, there have been several episodes of point shaving that would lead one to believe the integrity of sport will always be challenged, regardless of whether sports gambling is legal.[102] Ironically, Nevada's sports books have

97. *Gambling in America – Casino Gambling*, LIBRARYINDEX.COM, http://www.libraryindex.com/pages/2001/Gambling-in-America-CASINO-GAMBLING.html (last visited Oct. 23, 2012) (stating only two states had casinos in 1990).

98. *Id.* In 2004 eleven states had commercially run casinos, twenty-eight had Indian operated casinos, and six had casinos at racetracks. *Id.*

99. *See ESPN's Colin Cowherd Believes His Picks Move Vegas Lines,* COVERS (Oct. 18, 2011), http://www.covers.com/articles/articles.aspx?theArt=250320 (discussing ESPN radio personality claiming his on-air picks affect the lines in Las Vegas); Mike Greenberg & Mike Golic, *Stone Cold Lead Pipe Locks*, ESPN.COM (Dec. 21, 2009, 4:10 PM), http://sports.espn.go.com/espnradio/story?id=4482028 (discussing ESPN radio personalities' NFL picks against the spread); Bill Simmons, *The Sports Guy's Week 11 Picks,* GRANTLAND (Nov. 18, 2011, 5:04 PM), http://www.grantland.com/blog/the-triangle/post/_/id/10242/the-sports-guys-week-11-picks. (giving Bill Simmons' weekly NFL picks against the spread).

100. S. REP NO. 102-248, at 3, 8 (1992).

101. *Id.* at 5.

102. *See, e.g.*, Yang-Ming Chang & Shane Sanders, *Corruption on the Court: The Causes and Social Consequences of Point-Shaving in NCAA Basketball*, 5:1 REV. L. & ECON. 272 (2009), *available at* http://pilotwebmail.kstate.edu/economics/staff/websites/chang/publications/RLE-09%20Corruption%20on%20the%20Court.pdf (noting the Arizona State and Northwestern men's basketball point shaving scandals); *Pleas Expected in Toledo Scandal*, ESPN.COM (Dec. 8, 2010, 7:02 PM), http://sports.espn.go.com/espn/news/story?id=5899329 (discussing Toledo football and basketball point-shaving allegations); Michael McKnight, *An Inside Look at Alleged*

played a role in detecting and reporting to the NCAA and FBI unusual betting patterns that could indicate point-shaving.[103] In 2007 game fixing made its way to the NBA, only this time instead of players fixing games, it was an NBA referee. Federal officials discovered that NBA referee Tim Donaghy, who had officiated games for thirteen years, was placing bets on NBA games, including games he officiated.[104] Donaghy was ultimately sentenced to fifteen months in prison for his role in the scheme.[105]

Some people view the leagues' stance towards gambling as hypocritical, including Delaware Governor Jack Markell. Governor Markel criticized the NFL on its stance toward gambling in a letter to NFL Commissioner Rodger Goodell stating:

> [T]he NFL negotiates contracts with all of the principal broadcast networks and those contracts generate billions of dollars in revenues for the NFL and the team owners. Importantly, each of these companies owns and operates websites that provide the betting lines which are viewed by bettors in every state in the nation, regardless of whether the viewers in that State can legally wager on the games . . . . In short, the notion that the NFL has aggressively and actively fought against betting on its games is belied by the very programming the NFL indirectly endorses and from which it handsomely profits.[106]

Interestingly, several months after participating as a plaintiff in a lawsuit to prevent Delaware from expanding sports gambling within the state,[107] NBA commissioner David Stern waivered on his

Point Shaving Scheme at U of San Diego, SPORTS ILLUSTRATED.COM (Jan. 25, 2012, 11:27 AM), http://sportsillustrated.cnn.com/2012/writers/the_bonus/01/24/operation.hookshot/index.html (noting star player for University of San Diego men's basketball team accused of fixing games in 2010).

103. Neil H. Huffey, College Sports Wagering: A Case Study About Gambling on College Athletics and the Motivation and Consequences Surround Legislation Wanting to Ban Wagering On College Sports, (Apr. 1, 2001) (unpublished M.P.A. thesis, University of Nevada, Las Vegas) (on file with University Libraries, University of Nevada, Las Vegas); *See also Sources: Two Players Plead Guilty in ASU Point-Shaving Scandal*, CNNSI.COM (Dec. 5, 1991, 10:05 AM), http://sportsillustrated.cnn.com/basketball/college/news/1997/12/04/asu_update/ (noting unusual betting patterns in ASU basketball game led Las Vegas casinos to investigate and tip off Pac-10 commissioner).

104. *60 Minutes: Personal Foul* (CBS television broadcast Dec. 3, 2009), *available at* http://www.cbsnews.com/video/watch/?id=5914330n.

105. *Donaghy Sentenced to 15 Months in Prison in Gambling Scandal*, ESPN.COM (July 30, 2008, 1:53AM), http://sports.espn.go.com/nba/news/story?id=3509440.

106. Letter from Jack A. Markell, Delaware Governor, to Rodger Goodell, NFL Commissioner, (Mar. 26, 2009) *available at* http://www.delawareonline.com/assets/pdf/BL131701329.PDF.

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

stance concerning sports gambling.[108] Even going as far as to say that "we have moved to a point where th[e] leap [of accepting legalized sports gambling on NBA games] is a possibility."[109] Stern's reasoning was centered on the fact that "gambling has gone mainstream" and become more accepted and widespread than it was at the time that PASPA was enacted.[110]

If the NBA commissioner is now open to sports gambling, Congress should reconsider PASPA and sports gambling in general. Additionally, the blatant hypocrisy of the NFL doing business with companies that promote gambling relative to professional football should call into question the league's support of PASPA and whether the NFL is really concerned with maintaining the integrity of the game. As long as illegal gambling takes place, the integrity of sports will always be called into question. Furthermore people already call into question the integrity of sports like baseball,[111] cycling,[112] and track-and-field[113] with so many athletes allegedly using steroids and performance enhancing drugs. The integrity of regular season games in sports such as football and basketball are called into question each year when teams begin to rest their starters for the playoffs or to try to improve their draft status, which signals to the fans that the team is not trying to win night in and night out.[114] A team resting its

108. Ian Thomsen, *Inside the NBA, Weekly Countdown: Stern Open to Legalized Betting, Rule Changes,* SI.COM (Dec. 11, 2009, 2:26 PM), http://sportsillustrated.cnn.com/2009/writers/ian_thomsen/12/11/weekly.countdown/index.html. Commissioner Stern did acknowledge that acceptance of legalized sports betting was "not [the NBA's] current position." *Id.*

109. *Id.*

110. *Id.*

111. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 8 (2007) (stating that "the illegal use of performance enhancing substances poses a serious threat to the integrity of the game") The report gives an eye opening account to the use of steroids in baseball.

112. Juliet Macur, *New Finding Challenges Landis's Claim*, N.Y. TIMES, Aug. 1, 2006, at D1 (stating Floyd Landis, winner of the 2006 Tour de France was found to have levels of synthetic testosterone in his system when he won); *Alberto Contador Handed Two-Year Drugs Ban*, BBC NEWS (Feb. 6, 2012, 3:20 PM), http://www.bbc.co.uk/sport/0/cycling/16905217 (discussing 2010 Tour De France winner Alberto Contador's positive test for doping and title loss).

113. Lance Pugmire, *Jones Admits Using Steroids: Track and Field Star, who had Denied Doping for Years Pleads Guilty to Lying to Federal Investigators*, L.A. TIMES, Oct. 6, 2007, at 1 (detailing track star Marion Jones admission that she used performance enhancing drugs during her participation in the Olympic games).

114. *See* Walter Cherepinsky, *Colts Resting Their Starters – My Take,* WALTERFOOTBALL.COM , http://walterfootball.com/coltsrestingstarters.php (last visited October 23, 2012) (stating the Indianapolis Colts rested their starters against the Jets

starters can impact who makes the playoffs and ultimately who can compete for championships.[115] The fact that numerous point-shaving scandals, including a referee game fixing, have occurred since PASPA's enactment, makes clear that the integrity of sports will continue to be called into question. It should be abundantly clear that PASPA's blanket prohibition has failed to maintain the integrity of sports. As a result, Congress should consider repealing PASPA.

3. Has PASPA Reduced the Promotion of Sports Gambling Among the Youth?

When PASPA was enacted, Congress was concerned that "[s]tate-sanctioned sports gambling [would] promote gambling among the [n]ation's young people."[116] Congress felt that "[g]overnments should not be in the business of encouraging . . . young people . . . to gamble."[117]

Congress did not anticipate the explosion of the Internet. The Internet has made everything more accessible, including gambling. A British study found that teenagers spend on average thirty-one hours per week on the Internet.[118] It is fairly easy to deduce that teenagers and youths have ample time and opportunity to gamble online. Furthermore, an expert on problem gambling among young people has indicated that sports gambling is an epidemic among high school students.[119] Terry Elman, the education coordinator for the Council on Compulsive Gambling of New Jersey states that out of a high school population with 1,000 students, two are found to be bookmakers.[120] Statistics have also shown that one-in-three high school students gamble on a regular basis.[121] A blanket prohibition,

instead of trying to go undefeated); J. Michael Falgoust, *Playoff-bound NBA Teams Value Health Over Seeding,* USA TODAY (Apr. 23, 2012, at 9:13 PM), http://www.usatoday.com/sports/basketball/nba/story/2012-04-23/Playoff-bound-NBA-teams-value-health-over-seeding/54492764/1 (noting NBA teams rest their starters towards the end of the regular season after clinching a playoff spot).

115. Cherepinsky, *supra* note 114.

116. S. REP NO. 102-248, at 5 (1992).

117. *Id.*

118. Nicholas Deleon, *How do you compare? Teens Spend 31 Hours a Week Online*, TECH CRUNCH (Feb. 10, 2009), http://techcrunch.com/2009/02/10/how-do-you-compare-teens-spend-31-hours-a-week-online/.

119. Brian Chan, *Problem Gambling Experts Say Sports Betting a Teen Crisis*, ONLINE CASINO SPHERE (Dec. 6, 2009), http://www.onlinecasinosphere.com/news/reports/gambling-law/high-school-gambling-increasing-with-sports-betting-5655.php.

120. *Id.*

121. *Recognizing Teen Gambling Addiction,* GAMBLING ADDICTIONS, http://www.gambling-addictions.com/teen-gambling.html (last visited Oct. 23, 2012).

like PASPA, will not stop these activities from taking place. If states were allowed to regulate sports gambling they would be able to impose strict age restrictions that would help alleviate the teenage gambling problem as well as provide education regarding the potential harms of teenage gambling.

It is clear that PASPA has failed to curb the promotion of sports gambling amongst the nation's youth. The explosion of the Internet has greatly contributed to this failure. While teenage gambling is a problem, PASPA does not effectively address the issue. The federal and state governments need to think of new ways to fix the problem. PASPA is not the answer. Imposing a blanket prohibition and assuming it will deter teens from gambling has proven ineffective.

B. Tax Reasons for Repealing PASPA

It is estimated that $380 billion is wagered illegally on sports gambling each year.[122] There are very few illegal $380 billion industries in the United States. If sports gambling (both Internet and brick-and-mortar) became legal, states and the federal government would stand to receive a huge pay day.

States that currently allow legalized sports gambling have an advantage over the rest of the states. In 2011 Nevada's casinos paid $10.4 million in taxes with profits from sports gambling.[123] Delaware collected $2.1 million in its second year of its sports lottery.[124] Club CalNeva, a Las Vegas based company that operates over thirty sports books forecasts that sports gambling will bring in $1.3 billion in gross revenues and $220 million in tax revenues for New Jersey on an annual basis.[125] Most states with lotteries use the revenue to fund public education, economic development, state parks, and problem gambling treatment.[126] Revenue from sports gambling can be used in the same way. States would be free to set up their own tax schemes. Nevada and Delaware could be used as models for taxing sports gambling revenue.

PASPA should be repealed for these economic reasons. Given the United States' current economic predicament and shrinking state

122. *Sports Wagering*, AM. GAMING ASS'N, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering (last visited Oct. 23, 2012).

123. Pamela M. Prah, *States Ponder Sports Betting as Source of New Revenue*, STATELINE (Nov. 3, 2011), http://www.stateline.org/live/details/story?contentId=610930.

124. *Id.*

125. *See* Sports Wagering Press Release, *supra* at note 44.

126. *See* McIntyre, *supra* at note 63; *see also Where to Play*, MEGA MILLIONS, http://www.megamillions.com/whereto/ (click on any state to see how lottery funds are distributed) (last visited Oct. 23, 2012).

budgets, tax revenue from sports gambling could help solve many problems and keep vital state funded programs afloat.

IV. FEDERAL ACTS: THE WIRE ACT, TRAVEL ACT, AND ILLEGAL BUSINESS GAMBLING PROHIBITION

In 1961 a set of federal laws, including the Federal Wire Act and the Travel Act, were enacted in an attempt to curb organized crime and racketeering.[127] In 1970 the Illegal Gambling Business Act ("IGBA") was passed to support the Wire and Travel Acts.[128] There are questions as to the applicability of all three of the acts today to Internet gaming.

The Federal Wire Act prohibits the use of a wire communication facility for the transmission of bets or wagers on any sporting event or contest.[129] The Wire Act only applies to businesses and not the individuals that place bets.[130] The Wire Act has been interpreted to only apply to sports gambling;[131] the Department of Justice recently confirmed this.[132]

The Travel Act prohibits the distribution of proceeds, the promotion, management, establishment, carrying on, or facilitation of the promotion, management, establishment, or carrying on of an unlawful act in the travel of interstate commerce.[133] An unlawful act is a "business enterprise involving gambling" that is in violation of state or federal law.[134]

The IGBA makes it unlawful to operate a gambling business in violation of state law.[135] In order to violate IGBA, the business must consist of five or more persons who conduct, finance, manage, supervise, direct, or own part of the business, which has been continuously open for thirty days or had gross revenue of $2,000 in any single day.[136]

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127. ANTHONY N. CABOT & KEITH C. MILLER, THE LAW OF GAMBLING AND REGULATED GAMING 448 (2011).

128. *Id.* at 458.

129. Federal Wire Act, 18 U.S.C. § 1084(a) (2006).

130. *Id.*

131. In re Mastercard Int'l Internet Gambling Litig., 313 F.3d 257 (5th Cir. 2002) (stating Wire Act's prohibition applied only to betting on sports gambling).

132. *See* I. Nelson Rose, *A Present from the DOJ: Internet Lotteries (and Poker?) Are Legal,* CALVIN AYRE (Dec. 24, 2011), http://calvinayre.com/2011/12/25/legal/present-from-doj-internet-lotteries-and-poker-arelegal/#utm_source=rss&utm_medium=rss&utm_campaign=rss?utm_source=twitterfeed&utm_medium=twitter.

133. The Travel Act 18 U.S.C. §1952 (1961).

134. *Id.* § 1952(b).

135. Illegal Gambling Business Act, 18 U.S.C. § 1955 (2006).

136. *Id.*

All of these laws were passed prior to the widespread use of the Internet. Questions have circled as to the applicability of each regarding Internet gambling. Courts have held that the Wire Act would apply to Internet sports gambling, since the Internet is a wire facility and the Internet sports books would be in the business of transmitting bets or wagers on sporting events.[137] The Travel Act and IGBA have never been interpreted with regards to Internet gambling. It would appear that the Travel Act and IGBA could apply to Internet sports books if the website was in violation of antigambling state law, because the Internet is a facility in interstate commerce and it would be a business involved in gambling.[138]

Delaware recently became the first state to legalize comprehensive Internet gaming.[139] Currently, New Jersey is contemplating an Internet gaming bill. The bill would allow people living outside New Jersey to place bets with Atlantic City Casinos as long as such activity is legal within the bettor's local jurisdiction.[140] Assuming PASPA is overturned or repealed, citizens of New Jersey and Delaware could conceivably gamble on sporting events over the Internet. This would also allow citizens of other states to gamble online with New Jersey and Delaware based casinos and racetracks, provided that their state of residents allows Internet sports gambling.[141] There is currently no federal law banning Internet gambling. The Wire Act could only apply in instances where gambling was not legal in one of the states, either in the state where the person places the bet or the state receiving the bet.[142] Similarly, the Travel Act and IGBA only apply to unlawful activity—if sports betting is legal in a given state, these statutes do not apply.[143]

137. United States v. Cohen, 260 F.3d 68, 76-77 (2d Cir. 2001) (holding that the Internet is a type of wire facility and website marketed itself for the purpose of transmitting sports bets).

138. 18 U.S.C. §1952(a-b); 18 U.S.C. § 1955 (b)(1). For IGBA to apply, five people must be involved with the business.

139. Doug Dennison, *Delaware Goes All-In with Legalized Online Gambling Plan: State Hopes Move will Help its Casino Industry, Keep Jobs,* USA TODAY, June 28, 2012, at 3B (discussing the Delaware Gaming Competitiveness Act of 2012 which allows for casino style gaming, poker, and lotteries to be played online within state boundaries).

140. *N.J. Internet Gambling Bill Approved by Senate Committee*, CBS PHILLY (Apr. 3, 2012, 6:50 PM), http://philadelphia.cbslocal.com/2012/04/03/nj-Internet-gambling-bill-approved-by-senate-committee/.

141. Joseph M. Kelly, *U.S. Department of Justice Travel Alert: U.S. Enforcement Efforts Likely to Curtail Business Travel Rather than Online Gambling*, 10 GAMING L. REV. 532, 533 (2006) (noting eight states have explicit bans on Internet gambling).

142. 18 U.S.C. § 1084(b) (2006).

143. *See* 18 U.S.C. § 1952(a) (2006).

V. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006

The Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA")[144] was passed in response to the growing concern over Internet gambling and its threat to family values.[145] With the help of Senators Jon Kyl of Arizona and Bill Frist of Tennessee, the UIGEA was attached to the completely unrelated Security and Accountability for Every Port Act ("SAFE")—anti-terrorism legislation which deals with container security in our nation's ports.[146] It has been reported that few members of Congress actually ever saw the final language of the bill.[147] Despite this, however, the bill passed by a nearly unanimous vote because a vote against the bill would have been viewed as a vote for terrorism.[148]

The purpose of the UIGEA is "[t]o prevent the use of certain payment instruments, credit cards, and fund transfers for unlawful Internet gambling."[149] The UIGEA does this by making it illegal for financial institutions to conduct financial transactions for a person in the United States operating an Internet gambling site.[150] More specifically, it is a felony for those engaged in the business of betting or wagering to knowingly accept transactions made in the participation of unlawful Internet gambling.[151]

The Act imposes a hardship on financial institutions by requiring them to develop policies and procedures to identify and prevent restricted transactions.[152] The Act imposes civil penalties on institutions that are noncompliant with UIGEA.[153] Bizarrely, the UIGEA appears to shift the burden of preventing Internet gambling to banks and credit card companies. Furthermore, the UIGEA fails to address what exactly unlawful Internet gambling is and does not

144. The Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361-5367 (2006).

145. Anthony Cabot, *Betting on the Budget: Can State Legislatures Go All In or Will the Federal Government Force Them to Fold?: The Absence of a Comprehensive Federal Policy toward Internet and Sports Wagering and a Proposal for Change*, 17 VILL. SPORTS & ENT. L.J. 271, 298-304 (2010).

146. SAFE Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006). *See* Cabot supra note 145, at 298-304.

147. I. Nelson Rose, Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed, 10 GAMING L. REV. 537, 537 (2006).

148. I. Nelson Rose, Enforcing a Stupid Law, 12 GAMING L. REV. & ECON. 547, 547 (2008).

149. H.R. 4411, 109th Cong. (2d Sess. 2006).

150. 31 U.S.C. § 5363 (2006).

151. *Id.*

152. 31 U.S.C. § 5364(b) (2006).

153. 31 U.S.C. § 5365 (2006).

penalize gamblers.[154]

If PASPA is repealed and New Jersey successfully passes the bill legalizing Internet gambling, UIGEA could only be applied if there was some type of "unlawful gaming" occurring. This would require that a state or federal law is broken in the process. If PASPA were no longer in force, it would be hard to conceive UIGEA having a significant effect on Internet sports gambling unless several states began to outlaw Internet gambling or sports gambling and residents from those states began to bet online with legal Internet sports books in the United States. In the instances that UIGEA would apply it would appear to hurt financial institutions.[155] Given that the country is in a recession and several banks have defaulted over the last five years,[156] is it really wise to regulate Internet gambling through financial institutions? If Congress is concerned with Internet gambling they should consider regulating it and making it safe for players, instead of penalizing financial institutions.

VI. REGULATORY MEASURES FOR INTERNET SPORTS BETTING

This section will briefly cover regulatory measures that can be taken to control Internet sports books.[157] Assuming PASPA is overturned; states would be free to legalize sports gambling if they chose to do so. States could also legalize Internet sports books because there is no federal statute that currently prohibits Internet gambling.[158] To control the number of Internet sports books, states could limit the amount of licenses that they issue.

One of the biggest concerns with gambling, and particularly Internet gambling is underage gamblers.[159] If Internet gambling were to become legal, states would need to ensure that there were preemptive measures taken to guard against underage gambling. A

154. I. Nelson Rose, *Prohibition 2.0: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, GAMBLING & L. BLOG (Dec. 13, 2010), http://www.gamblingandthelaw.com/articles/286-prohibition-20-the-unlawful-Internet-gambling enforcement-act-of-2006-analyzed.html.

155. *Id.*

156. Bank Failure Map, THE STREET, http://www.thestreet.com/stock-market-news/10607062/bank-failure-map.html (Click on any state to see the list of banks that have failed in that state between 2008 and 2012).

157. These regulations are for state sponsored online sports books. Regulating offshore sports books is outside the scope of this paper and would require a more in-depth analysis. However, these regulations could apply to offshore books.

158. The Wire Act wouldn't apply as long as it is legal to bet on sports where the sports book is located and where the bettor is located.

159. Oskar Garcia, *Adelson Against Online Gambling Because of Risk of Underage Players*, LAS VEGAS SUN (Dec. 7, 2011, 11:43 AM), http://www.lasvegassun.com/news/2011/dec/07/us-online-gambling-sands-ceo-1st-ld-writethru/.

fairly easy solution would be to require a gambler, when they create an account or try to withdraw money from their account, to provide a valid driver's license or form of identification, social security number, and a utility bill of some kind.[160] This would require a gambler to scan and upload their license as well as the utility bill. The Internet sports book could then verify that the gambler is of age and is permitted to gamble.

Another major concern is teenagers and other youth stealing their parent's credit cards to gamble with.[161] There is actually a federal statute that shields the parents from liability after the first fifty dollars.[162] While this will not stop gambling, it will protect parents from their children's actions.

A third concern would be how to prevent someone from a state that prohibits Internet gambling from gambling in a state that allows Internet gambling. To solve this problem, Delaware is going to use geolocation and GPS technology to track players based on IP address and location to ensure that a player is located within the borders of Delaware when they gamble online.[163] If the person lives in a state that does not allow Internet gambling then the website or state would automatically block people from certain places from placing bets.[164] A federal or state law could be created that fines these websites large amounts of money if they were found to be accepting bets from states that prohibit Internet gambling.

In short, these are just mere ideas and obviously would require a more in-depth analysis. The point of this section was to propose some solutions to some of the major issues concerning the regulation of Internet gambling.

CONCLUSION

"[T]here is a practice around today that causes a lot of problems,

160. For example, www.sportsbook.ag requires that gamblers provide a valid form of identification and a utility bill to verify the persons address.

161. Avi Salzman & Campbell Robertson, *But It All Looks So Harmless on TV,* N.Y. TIMES, Apr. 17, 2005, at 14LI, *available at* http://query.nytimes.com /gst/fullpage.html?res=9405E7D9133EF934A25757C0A9639C8B63&pagewanted=all&smid=pl-share.

162. 15 U.S.C. § 1643(b) (2006).

163. *Delaware 1st State to Legalize Online Casino Gambling,* U.S. GAMBLING ONLINE, http://www.unitedstatesgamblingonline.com/news/delaware-first-state-legalize-comprehensive-online-casino-gambling.html (last visited Oct. 23, 2012).

164. Brian Pempus, *Full Tilt Poker Blocks Players from Washington: All Residents of Washington No Longer Allowed to Play For Real Money*, CARD PLAYER (Nov. 12, 2010), http://www.cardplayer.com/poker-news/10171-full-tilt-poker-blocks-players-from-washington-state (discussing how Full Tilt Poker was able to block any users from the state of Washington).

damages families, people lose their jobs, they get in debt. They do it in excess. It is called drinking. . . . Prohibition didn't work for alcohol; it doesn't work for gambling."[165]

PASPA essentially acts as a blanket prohibition on sports gambling in America. PASPA infringes on states' rights in raising revenue and unfairly disadvantages many states. Furthermore, PASPA has been ineffective in what it has set out to do. Overturning PASPA and allowing States to decide for themselves would provide a boost in revenue to this country and cut down on crime. State sponsored Internet sports books could help cut down on money that is bet offshore or with bookies. Consumers will turn to the state sponsored sports books to gamble because they know they will be guaranteed to get paid if they win. There is uncertainty with offshore books and bookies because they are unregulated in the United States.[166]

The other federal laws, the Wire Act, Travel Act, and IGBA would not be as effective or needed if PASPA is overturned or repealed. The UIGEA needs to be rethought because Internet gambling is here to stay and asking banks to regulate gambling is not the correct course of action. Internet technology has evolved significantly over the last twenty years. Internet sports gambling is going to happen regardless, even if it is prohibited. Why not tax it? If estimates are correct and $380 billion is gambled illegally on sports each year, the government is leaving a lot of potential revenue on the table. As a capitalist nation, America needs to join the marketplace. The best way to do that would be to repeal or overturn PASPA and allow states to decide if they want sports gambling and if so, in what capacity.

165. 152 CONG. REC. H4978 (2006) (statement of Rep. Barney Frank).

166. *Worst Sportsbooks –Blacklist Avoid These Offshore Betting Sites,* JOE WAGER, http://www.joewager.com/worst-sportsbooks.htm (last visited Oct. 23, 2012) (listing online sports books to avoid).