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

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION et al., Plaintiffs, v. CHRISTOPHER J. CHRISTIE et al., Defendants.	Civil Action No. 3:12-cv-04947 (MAS) (LHG) Honorable Michael A. Shipp, U.S.D.J. **NOTICE OF MOTION FOR CLARIFICATION AND/OR MODIFICATION OF INJUNCTION** Oral Argument Requested

PLEASE TAKE NOTICE that the undersigned, attorneys for Defendant Christopher J. Christie *et al*., hereby move for clarification or, in the alternative, modification of the district court's injunction, entered February 28, 2013 by the Honorable Michael A. Shipp, U.S.D.J., at the United States District Court for the District of New Jersey, Clarkson S. Fisher Building & U.S. Courthouse, 402 East State Street, Trenton, New Jersey, as part of its opinion and order granting Plaintiffs' Motion for Summary Judgment and denying Defendants' Cross-Motion for Summary Judgment.

PLEASE TAKE FURTHER NOTICE that, in support of this motion, Defendants will rely upon the Memorandum of Points and Authorities in support thereof.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is also submitted.

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Dated: September 8, 2014

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR CLARIFICATION AND/OR MODIFICATION OF THE DISTRICT COURT'S FEBRUARY 28, 2013 INJUNCTION

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PRELIMINARY STATEMENT

On February 28, 2013, this Court issued an opinion and order granting the Leagues' and the United States' ("Plaintiffs") Motion for Summary Judgment and denying the New Jersey Defendants' Cross-Motion for Summary Judgment. *See Nat'l Collegiate Athletic Ass'n v. Christie* (*"Christie I"*), 926 F. Supp. 2d 551 (D.N.J. 2013). As part of that opinion and order, the Court enjoined Defendants from enforcing the provisions of the Sports Wagering Act, N.J. Stat. Ann. § 5:12A-1 *et seq.*, that conflict with the terms of the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 *et seq.* ("PASPA"), which prohibits States from, among other things, "authoriz[ing] by law" sports wagering. *See* 28 U.S.C. § 3702(1). In particular, the Court declared that Defendants were "permanently enjoined" "from sponsoring, operating, advertising, promoting, licensing, or authorizing" any type of sports wagering. *Christie I*, 926 F. Supp. 2d at 578.

The Third Circuit affirmed the district court's judgment. In so doing, as Plaintiffs had repeatedly urged it to do, the Third Circuit explicitly limited the meaning of PASPA's proscription against "authoriz[ing]" sports wagering by declaring that New Jersey is free to "repeal[] its ban on sports wagering." *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.* ("*Christie II*"), 730 F.3d 208, 232 (3d Cir. 2013); *see also* Br. for the United States ("U.S. Br.") No. 13-1713 (3d Cir.) at 28 ("[N]othing in the statute requires New Jersey to maintain or enforce its sports wagering prohibitions."); Br. for the Leagues ("Leagues Br.") No. 1713 (3d Cir.) at 16 ("New Jersey remained in compliance with PASPA even *after* repeal of its state-law prohibition on the authorization of sports wagering.").

In accordance with that undisputed aspect of the Third Circuit's controlling decision, the Acting Attorney General of New Jersey today issued a Law Enforcement Directive to all New Jersey law enforcement personnel, including local prosecutors, police, and sheriffs, and a Formal

Opinion (together, "Directive").[1] The Directive acknowledges that Defendants have been enjoined from implementing the provisions of the Act that require the Division of Gaming Enforcement and the New Jersey Racing Commission to establish a regulatory framework for licensing sports pools and acknowledges that those provisions of the Act are not effective.[2] The Directive concludes, however, that under the severability provision of the Sports Wagering Act, because PASPA does not prohibit the States from repealing state-law restrictions on sports wagering, the central provisions of the Act that establish that casinos or racetracks may operate sports pools remain in effect and exempt such activity from criminal and civil liability.

The Attorney General has a duty to "[e]nforce the . . . laws of the State," including those provisions of the Sports Wagering Act that are severable from the provisions that license or authorize by law sports wagering, which are enjoined. N.J. Stat. Ann. § 52:17A-4(h). In order to permit the Attorney General to faithfully discharge his statutory duty and to bring certainty to the legal framework governing sports betting within the State, Defendants respectfully seek clarification of this Court's injunction to establish, in accordance with the Third Circuit's decision in this case, that this Court's prohibition against Defendants' "authoriz[ation]" of sports wagering does not "prohibit New Jersey from repealing its ban on sports wagering." *Christie II*, 730 F.3d at 232. Defendants further seek clarification that state law as interpreted by the Directive issued today, which reflects the Third Circuit's holding that a State "may repeal its sports wagering ban," *id*. at 233, is not in conflict with this Court's injunction.

Alternatively, if this Court concludes that the injunction entered by the Court currently does not permit Defendants to recognize the repeal of the prohibition on sports wagering within the State, Defendants respectfully move this Court under Federal Rule of Civil Procedure 60(b)

[1] A copy of the Directive is attached as Exhibit A.
[2] The regulations that implement licensing likewise are inoperative.

to modify its injunction to conform to the Third Circuit's holding. *See* Fed. R. Civ. P. 60(b)(5) (permitting the court to "relieve a party . . . from a final judgment, order, or proceeding" where "applying [the judgment or order] prospectively is no longer equitable"). Under the Third Circuit's decision, PASPA's prohibition on a State's "authoriz[ation] by law" of sports wagering—and hence this Court's injunction of that activity—cannot constitutionally prohibit a State from "repealing its ban on sports wagering." *Christie II*, 730 F.3d at 232. As a result, the operation of New Jersey law, as interpreted by the Directive, which recognizes that, at least, the portions of the Sports Wagering Act exempting certain sports wagering activities from civil or criminal liability remain operative, should not be enjoined. As the Third Circuit made clear, "Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prohibit," and PASPA therefore allows a State to repeal its prohibitions. *Christie II*, 730 F.3d at 227 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)); *see also id.* at 232.

BACKGROUND

In its February 28, 2013 opinion, this Court concluded that PASPA was constitutional and that, "due to the operation of the Supremacy Clause, New Jersey's Sports Wagering Law [was] preempted." *Christie I*, 926 F. Supp. 2d at 577. It then concluded that an injunction was warranted in order to "require that New Jersey comply with federal law." *Id*. at 578. Tracking the language of PASPA, the Court declared that Defendants are "permanently enjoined" "from sponsoring, operating, advertising, promoting, licensing, or authorizing 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." *Id*. at 578-79. The Court did not specify what type of conduct

would constitute "authoriz[ation]" or would otherwise violate the injunction, and did not specify which provisions of the Sports Wagering Act the Defendants were enjoined from implementing.

In September 2013, the Third Circuit affirmed this Court's ruling that PASPA was constitutional because it did not "require [New Jersey] to maintain existing laws" banning sports wagering. *Christie II*, 730 F.3d at 235. The Third Circuit's holding rested in large part on its understanding that PASPA does not improperly "commandeer" the States because it does not require States to engage in any affirmative conduct. *Id.* at 231. Critically, however, while acknowledging that some prohibitions could amount to affirmative commands and thus permit Congress to "accomplish exactly what the commandeering doctrine prohibits," *id.* at 232 (quotations omitted), the Third Circuit concluded that it did not "read PASPA to prohibit New Jersey from repealing its ban on sports wagering." *Id.* The Leagues echoed this sentiment and agreed that, "[a]s a matter of law," New Jersey "could repeal a ban on wagering on sporting events." Tr. of Oral Arg. at 67:15-18, *N.C.A.A. v. Gov. of N.J.*, 730 F.3d 208 (3d Cir. 2013).

The Third Circuit further explained that, under PASPA, "[a]ll that is prohibited is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] *by law*' of gambling schemes." *Christie II*, 730 F.3d at 232. PASPA thus leaves States with the alternatives of "keep[ing] a complete ban on sports gambling, [and] . . . decid[ing] how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be," *id.* at 233, or "repeal[ing] its sports wagering ban," *id.* There is, according to the court, no "equivalence between repeal and authorization" because a repeal of restrictions on sports wagering imparts no "label of legitimacy that would make the activity appealing." *Id.* at 233, 237. In so holding, the court incorporated Plaintiffs' concessions that "the bare repeal or non-enforcement of New Jersey's sports wagering prohibitions would not constitute . . . an

'authorization' because there would be no State statute or compact granting anyone authorization to conduct sports wagering." U.S. Br. at 30. The United States stated much the same thing at oral argument: While opining that some might interpret the repeal of such a ban as "bad policy," it agreed that there was no legal obstacle to repeal, and conceded that "if [New Jersey] wants to tinker with its gambling statute in a responsible exercise of state law and enforcement power, it's perfectly free to do that." Tr. of Oral Arg. at 68:1-2, 69:6-9.

In recognizing that the surviving portions of the Sports Wagering Act effect a repeal of New Jersey's prohibition of sports wagering in casinos and racetracks, the Directive has done only what the Plaintiffs and the Third Circuit agreed States are free to do under PASPA: exempt certain sports wagering activities from liability. In accordance with the Attorney General's duty to "secure . . . the uniform and efficient enforcement of the criminal law," N.J. Stat. Ann. § 52:17B-98, the Directive explains that, under New Jersey severability law, the portions of the Sports Wagering Act that provide that a casino or racetrack "may operate a sports pool," *id.* § 5:12A-2(a), remain effective.[3] Therefore, the Directive concludes, "sports pools operated by casinos or racetracks continue to be exempted from criminal liability under New Jersey law so long as no wagering occurs on a college sport or athletic event that takes place in New Jersey or in which any New Jersey college team participates regardless of where the event takes place." Directive at 3 (citing N.J. Const., art. 4, § 7, ¶¶ 2E-F). The Directive also concludes that, for the

[3] The Sports Wagering Act's severability clause provides: "If any provision of this act . . . or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable." N.J. Stat. Ann. § 5:12A-2(g); *see also id.* § 1:1-10 ("If any title, subtitle, chapter, article or section of the Revised Statutes . . . shall be declared to be unconstitutional, invalid or inoperative, in whole or in part, by a court of competent jurisdiction, such title, subtitle, chapter, article, section or provision shall, to the extent that it is not unconstitutional, invalid or inoperative, be enforced and effectuated, and no such determination shall be deemed to invalidate or make ineffectual the remaining titles, subtitles, chapters, articles, sections or provisions.").

same reasons, sports pools are exempted from civil proscriptions and may not be enjoined so long as an operator does not violate the prohibitions in the Directive. *Id*. at 5.

ARGUMENT

I. CLARIFICATION IS APPROPRIATE TO SPECIFY THAT THE DIRECTIVE IS CONSISTENT WITH THE COURT'S INJUNCTION.

A party constrained by an injunction "is entitled to 'fair and precisely drawn notice of what the injunction actually prohibits.'" *Louis W. Epstein Family P'ship v. Kmart Corp*., 13 F.3d 762, 771 (3d Cir. 1994) (quoting *Granny Goose Foods, Inc. v. Bhd. of Teamsters, Local No. 70*, 415 U.S. 423, 444 (1974)). Accordingly, Federal Rule of Civil Procedure 65 requires that an injunction "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C). Rule 65 "strongly suggests that prohibited conduct will not be implied from such orders," which are instead "binding only to the extent they contain sufficient description of the prohibited or mandated acts." *Ford v. Kammerer*, 450 F.2d 279, 280 (3d Cir. 1971).

Tracking the command of PASPA itself, the Court's injunction "require[s] that New Jersey comply with federal law" by not "sponsoring, operating, advertising, promoting, licensing, or authorizing" sports wagering. *Christie I*, 926 F. Supp. 2d at 578. The Third Circuit, however, has determined that PASPA's prohibition on "authoriz[ing]" sports wagering does not preclude States from repealing state-law prohibitions on the activity. *Christie II*, 730 F.3d at 232. Because this Court did not have the Third Circuit's now-controlling interpretation of PASPA's prohibition on "authoriz[ing]" sports wagering available to it at the time it issued the injunction, it is not clear whether this Court's injunction incorporates the Third Circuit's limiting construction of "authorize." Defendants therefore seek clarification that (1) this Court's injunction does not bar Defendants from repealing or limiting state-law prohibitions on sports

wagering activity, and (2) that state law, as explained by the Directive, which recognizes that surviving portions of the Sports Wagering Act exempt sports wagering in casinos and racetracks from criminal or civil liability, accordingly complies with this Court's injunction. *See Romero v. Allstate Ins. Co.*, ---F. Supp. 2d---, 2014 WL 796005, at *84 (E.D. Pa. Feb. 27, 2014) ("[T]he general purpose of a motion for clarification is to explain or clarify something ambiguous or vague." (quotations omitted)); *see also Pub. Interest Research Grp. of N.J., Inc. v. Hercules, Inc.*, 970 F. Supp. 363, 364 (D.N.J. 1997) (clarification appropriate to avoid "confusion").

A. The Surviving Provisions Of The Sports Wagering Act Do Not "Authorize by Law" Sports Wagering.

Defendants' proposed clarification of the injunction to align with the interpretation in the Directive would not violate this Court's or the Third Circuit's rulings because, as Plaintiffs concede, neither PASPA nor the injunction requires New Jersey to affirmatively maintain a law against sports wagering. Indeed, the Leagues and the United States both strongly urged that PASPA permits repeal. *See supra* pp. 4-5. Nor could Plaintiffs have argued otherwise: As the Third Circuit acknowledged, it would violate the Constitution for Congress to compel States to preserve laws against sports wagering. *See Christie II*, 730 F.3d at 232. To reverse course and now maintain that PASPA does not in fact permit the repeal recognized by the Directive would not only be disingenuous, but would state a *de jure* constitutional violation. *See id.* at 227 (citing *New York*, 505 U.S. at 166 (the federal government "lacks the power directly to compel the States to . . . prohibit" certain conduct, such as sports wagering)); *see also id.* at 232-33. The Third Circuit accordingly affirmed that PASPA does "not require states to maintain existing laws," because it did "not see how having *no law* in place governing sports wagering is the same as authorizing it by law." *Christie II*, 730 F.3d at 232, 235. "[T]he lack of an affirmative prohibition of an activity," the Third Circuit explained, "does not mean it is *affirmatively*

authorized by law," and the affirmative authorization by law of sports wagering is what (the Third Circuit held) PASPA prohibits. *Id.* at 232.

For this reason, the Third Circuit expressly rejected the "false equivalence between repeal and authorization," and held unequivocally that PASPA did not "prohibit New Jersey from repealing its ban on sports wagering." *Id*. at 232, 233. PASPA, as both this Court and the Third Circuit said—and the United States and the Leagues agreed—was intended only to restrict the spread of "state-sponsored" sports wagering that might create a "label of legitimacy." *Id.* at 237; *see also Christie I*, 926 F. Supp. 2d at 555; U.S. Br. at 31 ("PASPA sought to prevent the spread of *state-sponsored* sports wagering, which carries with it a State endorsement of sports gambling."); Leagues' Br. at 29 ("PASPA makes it a violation of federal law for a state . . . to conduct or promote sports gambling itself or to authorize anyone else to do so" or "for anyone else to promote or operate state-sponsored sports gambling"). "Nothing in [PASPA]," the Third Circuit held, requires New Jersey to maintain or enforce its sports wagering prohibitions. *Christie II*, 730 F.3d at 232; *see also* U.S. Br. at 28; Leagues Br. at 46-47. For a State to declare that casinos and racetracks "may operate a sports pool," N.J. Stat. Ann. § 5:12A-2(a), imparts no "label of legitimacy" on sports wagering that would "make the activity appealing." *Christie II*, 730 F.3d at 237. Rather, it simply states that the activity no longer is prohibited in those settings.

It never has been true that "[t]he omission of any affirmative prohibition . . . even against the background of detailed State regulation . . . is tantamount to express State approval." *Cohen v. Ill. Inst. of Tech*., 524 F.2d 818, 826 (7th Cir. 1975); *accord Hayden v. Pataki*, 449 F.3d 305, 349 (2d Cir. 2006) (Parker, J., dissenting) ("Declining to prohibit something is not the same as protecting it."). Thus, the Sports Wagering Act's repeal of the prohibition on sports wagering, and the Directive's recognition of and respect for that legislative decision, does not signal the

"state approval and authorization" that the Third Circuit held PASPA prohibits.[4] *Christie II*, 730 F.3d at 232.

B. The Existence Of Laws Restricting Gambling And Regulating Casinos And Racetracks Does Not "Authorize By Law" Sports Wagering.

The Directive establishes only that sports wagering pools operated by casinos and racetracks no longer are subject to state civil or criminal prohibitions. Regulatory actions Defendants may take in the future with respect to sports wagering activity in the State, therefore, are not implicated by this motion for clarification.[5]

To the extent that any contend, however, that because casinos and racetracks are regulated by the State, any sports wagering activity in New Jersey's casinos and racetracks necessarily will be "license[d]" or otherwise "authorize[d]" by the State, that contention would be misplaced. Even if that were correct (and as explained below, it is not), it would present no reason to enjoin the Directive's recognition that certain sports wagering in casinos and racetracks is exempt from civil and criminal penalties. A complaint about other regulatory actions that may (or may not) take place in the future is not a reason to prevent the Acting Attorney General from expressly recognizing that civil and criminal prohibitions already have been partially repealed.

More importantly, the argument fails on its own terms because merely applying laws and regulations of general applicability does not constitute licensure or authorization of sports wagering. To be sure, any sports pool operated by a casino or racetrack would be subject to all

[4] Nor does the Directive's interpretation of New Jersey law violate any other restriction of the injunction. Because the Third Circuit held that New Jersey could repeal its prohibition on sports wagering, the Acting Attorney General's recognition that certain sports wagering in casinos and racetracks no longer is subject to criminal or civil liability does not "sponsor, operate, advertise, promote, [or] license" sports wagering. *See* 28 U.S.C. § 3702(1).

[5] The Third Circuit's interpretation of PASPA does not unambiguously proscribe all forms of regulation; to the contrary, it expressly acknowledges that it is "left up to each state to decide . . . what the exact contours of the prohibition [on sports wagering] will be." *Christie II*, 730 F.3d at 233.

of the laws and regulations that apply to those businesses, ranging from employment laws that protect the casino employees who run sports pools just as they protect every other employee in the State, to requirements that the physical facilities of the sports pool be constructed in accordance with applicable construction codes, to regulations enacted by and issued under the Casino Control Act that apply uniformly to all gambling activity in the State. *See, e.g.*, Casino Control Act, N.J. Stat. Ann. § 5:12-1 *et seq*.; N.J. Admin. Code § 13:69 *et seq*. For example, pursuant to their obligations and authority under laws other than the Sports Wagering Act (particularly the Casino Control Act), the Division of Gaming Enforcement, the Casino Control Commission, and the New Jersey Racing Commission have issued and enforced regulations that address, among other things, persons who must be excluded from casinos because of their criminal gambling offenses or cheating, N.J. Admin. Code § 13:69G-1.3; prohibitions on gambling for underage persons, *id*. § 13:69C-16.1; conditions for the service of alcohol, *id*. § 13:69I-3.1; and requirements for casino facilities, *id*. § 13:69C-6.2.

These restrictions on who may gamble (e.g., no cheats or underage persons), where they may gamble (e.g., only at specified facilities), and under what conditions (e.g., only if specified facilities and alcohol service requirements are met) do not "authorize" gambling. The plain meaning of "authorize" is "[t]o give formal approval to; to sanction, approve, countenance." Oxford English Dictionary 798-99 (2d ed. 1989). The fact that some individuals are prohibited from gambling does not mean that the State is "sanction[ing]" or "approv[ing]" gambling for everyone else. This is simply common sense: An ordinance stating "no dogs in the park" would not be understood as putting the State's imprimatur on a reptile lover's decision to bring her pet python to the park, just as a sign in a restaurant that said "no smoking on the patio" would not constitute a State endorsement of smoking in every place other than the patio. The Third Circuit

already has declared "the importance of the affirmative/negative command distinction" in this context and has acknowledged that allowing every restriction or prohibition to be recast as an implied authorization would eviscerate the anti-commandeering doctrine. *Christie II*, 730 F.3d at 232. As a result, these generally applicable restrictions on gambling activity do not constitute an authorization or sponsorship, implied or otherwise, of sports wagering. *See id.* at 237 (recognizing that PASPA's concern is a state-granted "label of legitimacy").

As Plaintiffs conceded, PASPA's constitutionality hinges on the fact that it does not prohibit New Jersey from repealing its ban on sports wagering. If New Jersey is effectively prohibited from repealing its ban because it has preexisting general regulations on gaming—and other laws of general applicability that apply to casinos, such as antitrust laws or employment discrimination laws—then the Third Circuit's ruling that a repeal does not amount to an "authoriz[ation]" would be meaningless and there would be no basis to find PASPA constitutional. To the contrary, it would constitute a clear violation of Tenth Amendment anti-commandeering principles. *See New York*, 505 U.S. at 166; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (when "pressure turns into compulsion," legislation "runs contrary to our system of federalism" (quotation marks omitted)). If any generally applicable regulation, no matter how far removed from sports wagering, could be construed as an "authorization" of such wagering, then it would be practically impossible to repeal any restriction on sports wagering. While the Third Circuit concluded that the federal government could present States with a "hard choice," permitting wagering only if operators and participants are exempted from all state laws provides the States no choice at all—it would be "compulsion" and thus unconstitutional. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602.

In sum, Defendants' proposed clarification of the injunction to state expressly that Defendants may repeal prohibitions on sports wagering follows readily from the Third Circuit's controlling construction of PASPA. Preexisting regulations generally applicable to casinos and racetracks do not "authorize" sports wagering and accordingly should not preclude the Directive's recognition that surviving provisions of the Sports Wagering Act exempt certain sports wagering in casinos and racetracks from state civil and criminal liability.

II. IF THE COURT CONCLUDES THAT THE INJUNCTION CURRENTLY PROHIBITS THE REPEAL EFFECTED BY THE SPORTS WAGERING ACT AS RECOGNIZED BY THE DIRECTIVE, THE INJUNCTION SHOULD BE MODIFIED TO CONFORM TO THE THIRD CIRCUIT'S RULING ON THE PERMISSIBLE SCOPE OF PASPA.

Defendants maintain that the repeal of the sports wagering ban already falls within the scope of permissible conduct under the injunction. But, if this Court were to conclude otherwise, Defendants respectfully request a modification of the injunction to reflect the Third Circuit's explicit recognition—and the Plaintiffs' express concession—that a State "may repeal its sports wagering ban" or "keep a complete ban on sports gambling" and "decide what the exact contours of the prohibition will be." *Christie II*, 730 F.3d at 233.

Rule 60(b)(5) permits "a party or its legal representative" to seek relief from a final judgment or order within a "reasonable time" in cases where "applying [the judgment or order] prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Such discretionary relief is appropriate when "there has been a change of circumstances between the entry of the injunction and the filing of the motion [to modify the injunction] that would render the continuance of the injunction in its original form inequitable." *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 337 (3d Cir. 1993). A party may meet its initial burden under Rule 60(b)(5) "by showing a significant change" in "either statutory or decisional law," *Agostini v. Felton*, 521 U.S. 203, 215 (1997), and if it can do so, "the court should consider whether the proposed modification is suitably tailored

to the changed circumstances," *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992). "While '[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)' . . . 'a supervening change in governing law that calls into question the correctness of the court's judgment may . . . constitute such an extraordinary circumstance justifying the granting of a Rule 60(b) motion.'" *AARP v. E.E.O.C.*, 390 F. Supp. 2d 437, 443 (E.D. Pa. 2005) (quoting *Agostini*, 521 U.S. at 239 and *United States v. Enigwe*, 320 F. Supp. 2d 301, 308 (E.D. Pa. 2004)).

Were this Court to conclude that section 5:12A-2(a), which establishes that casinos and racetracks "may operate" sports pools, is currently inoperative, the injunction should be modified in light of the Third Circuit's decision. Although the Third Circuit affirmed this Court's ruling, it also expressly permitted Defendants to repeal their ban on sports wagering, a possibility that this Court did not address in its injunction. To the extent this Court construes its injunction to prohibit repeal, modification is required. *Cf. Rufo*, 502 U.S. at 390 ("[A] decision that clarifies the law . . . could constitute a change in circumstances that would support modification" if the district court's interpretation of the law and corresponding injunction was based "on a misunderstanding of the governing law.").

The Third Circuit's conclusion that repeal is permitted under PASPA relied in part on PASPA's inclusion of the critical phrase "authorize *by law*," a term which, in the Third Circuit's view, was dispositive of the question whether a repeal was equivalent to an authorization. *Christie II*, 730 F.3d at 233 (equating repeal and authorization would "read[] the term 'by law' out of the statute"). In contrast, this Court's injunction prohibits Defendants from "authorizing" sports wagering, not merely from authorizing it "by law." *Christie I*, 926 F. Supp. 2d at 578. If this Court is of the view that its injunction against authorizing sports wagering, as currently

phrased, sweeps more broadly than the Third Circuit's prohibition against authorizing sports wagering *by law*, so as to bar New Jersey from repealing its ban on sports wagering, then the injunction is inconsistent with the Third Circuit's decision. The Supreme Court and the Third Circuit have suggested that modification is appropriate in such circumstances. *See, e.g.*, *Sys. Fed'n No. 91, Ry. Emps. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 649-50 (1961) (allowing modification of consent decree after it came into conflict with new statutory objectives); *see also Jordan v. Sch. Dist. of Erie, Pa.*, 548 F.2d 117, 122 (3d Cir. 1977) (modifying consent decree where intervening Supreme Court decision affected the procedures set forth in the decree). As such, Defendants respectfully request that, if this Court concludes that the language of the injunction prohibits repeal of the prohibition on sports wagering, the Court modify that injunction to conform to the Third Circuit opinion, thereby allowing the Acting Attorney General to follow the Third Circuit's holding and implement the Directive.

CONCLUSION

To bring certainty to the status of sports wagering within the State of New Jersey, Defendants respectfully seek clarification of this Court's injunction to provide that Defendants are not obligated to maintain prohibitions on sports wagering and that the Directive permissibly recognizes that surviving portions of the Sports Wagering Act exempt certain sports wagering activities in casinos and racetracks from civil or criminal liability.

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Alternatively, if this Court concludes that the repeal is currently not permitted under the terms of the injunction, Defendants respectfully request that the Court modify the injunction to conform to the Third Circuit's decision.

Dated: September 8, 2014

By: /s/Theodore B. Olson

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Exhibit A

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KIM GUADAGNO
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LAW ENFORCEMENT DIRECTIVE 2014-1

FORMAL OPINION 1-2014

TO: Elie Honig, Director
New Jersey Division of Criminal Justice

All County Prosecutors

All Municipal Prosecutors

Joseph R. Fuentes, Superintendent
New Jersey State Police

All County Sheriffs

All Police Chief Executives

David L. Rebuck, Director
New Jersey Division of Gaming Enforcement

Frank Zanzuccki, Executive Director
New Jersey Racing Commission

Jeffrey S. Jacobson, Director
New Jersey Division of Law

FROM: John J. Hoffman, Acting Attorney General

SUBJECT: Law Enforcement Directive to Ensure Uniform Enforcement of the Sports Wagering Act's Exemption from Criminal Liability for the Operation of Sports Pools by Casinos and Racetracks

Formal Opinion Addressing the Effects of Law Enforcement Directive 2014-1 on the Sports Wagering Act's Exemption from Civil Liability for the Operation of Sports Pools by Casinos and Racetracks

DATE: September 8, 2014

LAW ENFORCEMENT DIRECTIVE 2014-1

On November 8, 2011, the citizens of New Jersey voted overwhelmingly to amend the New Jersey Constitution to permit the Legislature to repeal prohibitions against the operation of sports pools by casinos and racetracks. Thereafter, Governor Christie signed the Sports Wagering Act, N.J.S.A. 5:12A-1 to -6, to effectuate the will of the people expressed in the constitutional referendum. That statute decriminalized the operation of sports pools by casinos and racetracks, and implemented an extensive licensing and regulatory regime. Those regulations are codified in N.J.A.C. 13:69N-1.1 et seq.

Certain sports leagues claimed that the State's implementation of the Sports Wagering Act violated the federal Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. 3701 et seq. They brought suit in federal court to enjoin the implementation of the Sports Wagering Act. Governor Christie and the other defendants argued that PASPA violated the federal constitution and therefore could not be enforced. The federal district court ruled in favor of the plaintiff sports leagues and, in accordance with PASPA, enjoined the State from licensing or authorizing sports wagering.

Governor Christie and the other defendants appealed to the United States Court of Appeals for the Third Circuit. In September 2013, that court upheld the constitutionality of PASPA on the basis that it does not require States to maintain existing laws and thus does "not prohibit New Jersey from repealing its ban on sports wagering." N.C.A.A. v. Governor of the State of New Jersey, 730 F.3d 208, 232 (3d Cir. 2013), cert. denied, __ U.S. __ (2014) (hereinafter "N.C.A.A. v. Governor" or "Third Circuit opinion"). In holding that New Jersey "may repeal its sports wagering ban," id. at 233, the Third Circuit accepted the positions of the plaintiffs in the case, who had argued that the statute was constitutional because "nothing in [PASPA] requires New Jersey to maintain or enforce its sports wagering prohibitions," and, indeed, that New Jersey's "repeal of its state-law prohibition on the authorization of sports wagering" itself was "in compliance with PASPA." Br. of the United States ("U.S. Br."), No. 13-1713 (3d Cir.) at 28-29; Br. of Leagues ("Leagues Br.") No. 1713 (3d Cir.) at 16.

The specific issues addressed in this Law Enforcement Directive are whether, in light of N.C.A.A. v. Governor, casinos and racetracks would be committing a criminal offense under New Jersey law if they were to operate sports pools as part of their business activities.

The New Jersey Code of Criminal Justice (Title 2C) provides that when determining whether their conduct constitutes a criminal offense, persons may rely on "an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense." N.J.S.A. 2C:2-4(c)(2). Pursuant to the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 et seq., the Attorney General serves as the State's chief law enforcement officer, and is required to ensure the uniform and efficient enforcement of the criminal law and administration of criminal justice. The Attorney General ultimately is responsible for the

enforcement of our State's criminal laws, including our gambling laws, and therefore is the public officer best suited to interpret the Sports Wagering Act and its relationship to Title 2C in view of the Third Circuit opinion. Given the importance of the issues raised by that opinion, it is appropriate to issue clear and authoritative guidance on whether casinos and racetracks are prohibited by our criminal law from operating sports pools, or whether the provisions of the Sports Wagering Act that exempt casinos and racetracks from criminal liability remain in effect.

For the following reasons, sports pools operated by casinos or racetracks continue to be exempted from criminal liability under New Jersey law so long as no wagering occurs on a college sport or athletic event that takes place in New Jersey or in which any New Jersey college team participates regardless of where the event takes place. See N.J. Const., art. 4, sec. 7, par. 2E and F. Accordingly, no law enforcement or prosecution agency or officer shall, pursuant to N.J.S.A. 2C:37-1 to -9, make an arrest, file a complaint against, or prosecute any person[1] involved in the operation of a sports pool by a casino or racetrack to the extent that such activity takes place consistent with this Law Enforcement Directive.

Title 2C expressly provides that "no conduct constitutes an offense unless the offense is defined by this code or another statute of this State." N.J.S.A. 2C:1-5. Criminal statutes establish the scope of criminal liability not only by defining the material elements of offenses, see N.J.S.A. 2C:1-13(h), (i), but also by creating exemptions or affirmative defenses. In the specific context of gambling, chapter 37 of Title 2C establishes a comprehensive suite of criminal offenses that generally prohibit all persons from promoting gambling or engaging in gambling activity, subject to certain exceptions. See, e.g., N.J.S.A. 2C:37-1(c); N.J.S.A. 2C:37-9.

The Sports Wagering Act, however, provides that "[i]n addition to casino games permitted pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.) [the Casino Control Act], a casino may operate a sports pool...." N.J.S.A. 5:12A-2(a). It further provides that, "[i]n addition to the conduct of pari-mutuel wagering on horse races under regulation by the racing commission pursuant to chapter 5 of Title 5 of the Revised Statutes, a racetrack may operate a sports pool...." Id. In this manner, the Sports Wagering Act repealed the prohibition against the operation of sports pools by casinos and racetracks, thus exempting those activities from criminal prosecution under New Jersey law. The issue, then, is whether that exemption is consistent with the Third Circuit's ruling. The answer to that question is found in the text and reasoning of the Third Circuit opinion, as well as the concessions made by the plaintiffs in that case.

The Third Circuit made clear that it did "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." 730 F.3d at 232. The Court reached this conclusion based on the arguments of the sports leagues, which stated that "[n]owhere in its unambiguous text does PASPA order states to keep laws on their books," or "to keep existing laws in effect." Leagues Br. at 16. The United States Department of Justice, which had intervened in the case to defend

[1]The New Jersey Code of Criminal Justice defines "person" to include any natural person and, where relevant, a corporation or an unincorporated association. N.J.S.A. 2C:1-14(g).

PASPA's constitutionality, joined in the leagues' arguments, stating that "nothing in the statute requires New Jersey to maintain or enforce its sports wagering prohibitions," and that "PASPA also allows a state to . . . modify or repeal its prohibitions." U.S. Br. at 29. Summarizing and accepting those arguments, the Third Circuit noted that "no one contends that PASPA requires the states to enact any laws, and we have held that it does not require states to maintain existing laws." 730 F.3d at 235. Indeed, the United States Constitution clearly forbids Congress from requiring a State to criminalize conduct under state law. As the Third Circuit observed, "Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prohibit." Id. at 227 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

That federal courts have found the licensing regime of the Sports Wagering Act to be preempted by PASPA does not invalidate the Sports Wagering Act's repeal of prohibitions against the operation of sports pools by casinos and racetracks. Recognizing that the Sports Wagering Act might be challenged under PASPA, the Legislature included a "severability clause" in its statute:

> If any provision of this act, P.L. 2011, c. 231 (C.5:12A-1 et al), or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.
>
> [N.J.S.A. 5:12-2(g).]

The Legislature therefore intended for the provisions of the statute that are not directly invalidated to continue in force and effect. Here, as the Third Circuit made clear, and as the sports leagues and the Department of Justice conceded, PASPA does not prohibit States from repealing state-law prohibitions on sports wagering. The Sports Wagering Act's repeal of prohibitions against sports wagering in casinos and racetracks can be given effect without licensing or otherwise authorizing by law sports wagering, as prohibited by the Third Circuit's decision, and, accordingly, must be given effect. N.J.S.A. 1:1-10.

For the foregoing reasons, it is the view of the Attorney General that, at least, the provisions of the Sports Wagering Act exempting casinos and racetracks from criminal liability for operating a sports pool—specifically, N.J.S.A. 5:12A-2(a), which states that "a casino may operate a sports pool" and that "a racetrack may operate a sports pool," in accordance with how those terms are defined in N.J.S.A. 5:12A-1—remain in force and effect, and all law enforcement and prosecuting agencies in carrying out their duties under the laws of the State of New Jersey shall abide by that exemption.

Any questions concerning this Law Enforcement Directive shall be addressed to the Director of the Division of Criminal Justice.

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The issue also has arisen regarding what effect the above Law Enforcement Directive has on the civil proscriptions applicable to sports wagering. See N.J.S.A. 2A:40-1 to -9. It is the Attorney General's statutory role to "[a]ct as the sole legal advisor" of, and to "interpret all statutes and legal documents" governing, state agencies. N.J.S.A. 52:17A-4(e).

As explained in the above Law Enforcement Directive, the Sports Wagering Act provides that a casino or racetrack "may operate a sports pool." Accordingly, sports pools operated by casinos and racetracks are exempted from criminal liability so long as no wagering occurs on a college sport or athletic event that takes place in New Jersey or in which any New Jersey college team participates regardless of where the event takes place. For the same reason, sports pools operated by casinos and racetracks are exempted from the civil proscriptions of Title 2A, chapter 40, so long as no wagering occurs on a college sport or athletic event that takes place in New Jersey or in which any New Jersey college team participates regardless of where the event takes place. Accordingly, I hereby instruct that the Department of Law and Public Safety shall not object to or seek civilly to enjoin a sports pool operated by a casino or racetrack to the extent that it is conducted in a manner consistent with this Formal Opinion.

Any questions concerning this Formal Opinion shall be addressed to the Director of the Division of Law.

John J. Hoffman
Acting Attorney General

Dated: September 8, 2014

c. Christopher S. Porrino, Chief Counsel to the Governor
Lee Vartan, Executive Assistant Attorney General
Deborah R. Edwards, Counsel to the Attorney General