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Hearing “Post-PASPA: An Examination of Sports Betting in America”

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Chairman Sensenbrenner, Ranking Member Jackson Lee and Members of the Subcommittee, thank you for the opportunity to present comments on behalf of my organization, the Competitive Enterprise Institute (CEI) at this hearing to discuss the merits of federal oversight of sports gambling. As a nonpartisan nonprofit organization, CEI has advocated for free enterprise and individual liberty for nearly four decades. We believe regulation is most effective when it acts to protect the interests of consumers while respecting their freedom and autonomy.

While the federal government has traditional left gambling regulation to the states, one notable exception has been sports gambling. Until recently, federal law prevented state lawmakers from regulating this activity as they and their constituents deemed in their best interest. As the U.S. Supreme Court ruled in May, this law violated not only individual choice, but also state sovereignty.

As most here are aware, the results of the 25-year de facto prohibition were disastrous, spurring the rise of an enormous illicit betting market, putting consumers and sports integrity at risk, and costing states billions in economic development and tax revenue they might have otherwise collected.

In the four months since the Court’s ruling, four states have joined Nevada in offering legal sports betting within their borders. After more than two decades, citizens have a means of placing bets on sporting events *legally*.

Legalization gives authorities the ability to begin the process of undermining and supplanting the vast illicit sports betting market created by prohibition. This ability, however, depends largely on the ability of legal operators to compete with illegal gambling enterprises in order to attract consumers out of the black market and onto legal, regulated platforms.

I argue here today that the states are best suited to develop the regulatory regimes that achieve this goal: governing the industry in a way that best protects consumers, stimulates economic development, and undercuts illegal betting operations. Congressional interference is not only unnecessary; it would harm consumer safety and sports integrity.

### [States are best equipped to regulate sports betting](#)

Under the U.S. federal system, Congress has nearly always deferred to the states on matters concerning gambling regulation. As a result, laws governing betting have long reflected our nation’s heterogeneous and evolving perspective on the morality of gambling. At various times, states have experimented with prohibition and liberalization, but today nearly all states, apart from Hawaii, allow some form of legal betting. The extent to which the states have legalized gambling and the laws governing such activities

fittingly reflects the unique values, financial needs, and enforcement priorities of each state. The one notable exception to this respect for federalism is sports gambling.

When Congress enacted the Professional and Amateur Sports Protection Act (PASPA), the goal was to stop the spread of sports betting. Some feared that without this federal interference, widespread legal sports betting would lead to corruption, match-fixing, and a public loss of faith in sports integrity. But, like all prohibitions, PASPA only succeeded in stopping *legal* sports betting, leading to the proliferation of illegal sports gambling.

Prior to PASPA, Americans spent an estimated \$40 billion a year illegally gambling on sports.<sup>1</sup> By 1999, that amount had mushroomed to around \$150 billion a year, leading the National Gambling Impact Study Commission to deem illegal sports wagering “the most widespread and popular form of gambling in America.”<sup>2</sup>

With no way to legally bet on sports, Americans sent hundreds of billions into the lucrative black market, unwittingly funding organized crime and their other illicit activities, such as drug trafficking and money laundering.<sup>3</sup> For example, of 11 illegal sports betting rings discovered by law enforcement in 2016, a single operation brought in \$1 billion during just one football season and many had connections to large, well-known crime syndicates.<sup>4,5</sup> Though aware of this situation and the threat it posed to the nation, citizens, and sports, Congress failed to act.

It took years of litigation, a ruling from the Supreme Court, and the possibility of state-based legalization to motivate Congress to finally take action. Some now assert that the federal government, not the states, is better equipped to govern the burgeoning legal sports betting industry. But, history, both distant and recent, contradicts that assumption.

For decades, state lawmakers have engaged in the evolving debate around gambling, developed and rearranged regulatory schemes, and cultivated robust enforcement regimes to govern gambling within their states:

- Most allow betting on horse and dog racing;
- 44 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have state lotteries;
- 40 states allow casinos;
- 20 states have legalized card games (e.g. poker or blackjack); and
- 5 states now have legal online gambling.<sup>6,7</sup>

State regulators have an on-the-ground expertise not shared by their federal counterparts. Additionally, state lawmakers have every incentive to formulate gambling regulations that best protect consumers, address negative externalities, and promote economic development. More importantly, state legislatures have the flexibility to revisit and modify any rules that prove to be imperfect or outdated.

As PASPA demonstrated, even when federal rules have disastrous unintended consequences, it is nearly impossible for Congress to revisit, let alone amend, such laws. State lawmakers, on the other hand, are driven to address any missteps they might make in regulating sports betting as a means of protecting constituents’ interests and maximizing state revenues. This is evidenced by the fact that it took just four months after the Supreme Court overturned PASPA for four states to launch legal, regulated sports betting markets, with two additional states set to open by the end of 2018, and about a dozen likely to follow suit in the next year.

If Congress decides to, once again, usurp state sovereignty and institute federal regulations on sports gambling, America may well be stuck with those rules and their unintended consequences for the next three decades. Based on the recommendations made to Congress thus far, those consequences could be dire.

### Federal rules would harm sports integrity

The justification for PASPA centered on an earnest desire to safeguard athletes and officials from corruption and protect the integrity of the nation's sporting events. But, as noted, the law utterly failed to stop sports betting, deprived states of tax revenue, funded organized crime, and left consumers without legal protections. Ironically, it also made corruption in sports *more likely*.

The integrity of sports arises from the outcome of any given match being the result of fair play on the field. Apart from players' use of performance-enhancing drugs, the greatest threat to sports integrity comes from the willful manipulation of in-game play by players and officials, which enables "fixers" (either the players and officials themselves or, more typically, outside parties) to win by gambling on fixed matches. While fixers sometimes employ coercion to manipulate in-game play, far more often players and officials are convinced to participate in a fix through financial inducement.<sup>8</sup> The environment most likely to foster this form of corruption is that created by prohibiting sports betting.

While match-fixing certainly still occurs within legal betting markets, evidence indicates that it is far more prevalent in illicit betting markets. Corrupt operators seem to focus their activities on illegal betting markets in Asia, while avoiding the regulated markets of Europe. While corruption still occurs in European markets, European nations' embrace of the activity and corresponding regulation have limited their vulnerability and allowed them to successfully address match-fixing, as the International Center for Sports Security recently found.<sup>9</sup> Integrity measures in regulated markets, like closing games and voiding bets when suspicious betting is spotted, limit corrupt actors' ability to earn large profits on fixed games, thereby significantly reducing the attractiveness of regulated markets.<sup>10</sup>

Match-fixers and their collaborators can earn larger profits and are far less likely to get caught by operating in illegal markets. As such, **large, unregulated gambling markets are far more likely to attract would-be corruptors and generate the massive profits necessary to corrupt athletes and officials.** That, in essence, is the exact scenario created by PASPA. The only real hope for reducing the risk of corruption is to reduce the size of this illegal market.

### Only competition will shrink the illegal market

With legal sports betting now an option, the U.S. stands to gain billions, anywhere from \$16 to \$40 billion in new economic output.<sup>11</sup> The amount of revenue generated by legal sports betting for the U.S. as a whole and for states depends on how competitive the newly legal industry turns out to be. With the existing illegal market, both on and offshore, the level of competitiveness of legal sports betting hinges largely on how it is regulated. Given this reality, regulations that influence the competitiveness of the industry must be applied very carefully, in order to allow legal operators to offer the types of games, modes of play, and payouts that are competitive with those offered by their illicit counterparts. This will ensure that consumers migrate away from the illegal market. That will protect gamblers, shrink the criminal market's profit, and minimize the risk of corruption in sports. If Congress interferes, however, this will likely not occur.

**Legal online betting is key:** In an op-ed published in *Sports Illustrated* after the Supreme Court ruling, Sen. Orrin Hatch (R-UT), warned that as the legal sports betting industry grows, “so too does the likelihood that players will be exposed to bribes, exploitation, and other forms of corruption endemic to an environment where sports betting is poorly regulated.” Sen. Hatch, who is one of the original architects of PASPA and a longtime opponent of legal online wagering, urged his colleagues to “protect the integrity of sports and guide states as they consider whether to embrace sports betting.” He suggested that federal rules should prohibit Internet sports betting, noting that “a borderless internet makes it all but impossible to enforce state laws across state lines.”<sup>12</sup>

As CEI has written about extensively, making online gambling illegal has never worked. As the nation’s experience with PASPA has shown, criminalizing the activity has only created a robust illegal online gambling market, run primarily, but not exclusively, by offshore betting rings.<sup>13</sup> Despite federal law criminalizing online sports gambling, offshore sports betting websites continued to receive billions of American dollars in wagers from U.S.-based users.<sup>14</sup> Preventing licensed sports gambling operators from offering their games online will not stop American consumers from betting on sports online, as they have been doing for more than a decade. It will, however, hamper licensed gambling operators’ ability to compete with illegal operators and weaken the consumer protections and law enforcement mechanisms instituted in states with legal online gambling.

Sen. Chuck Schumer (D-N.Y.) seems to understand the futility of restricting sports betting to brick-and-mortar establishments. In his framework for federal sports betting regulation, released in August, Sen. Schumer noted that his rules would provide a pathway for legal online and mobile betting “so that sports betting can come out of the shadows and we can further remove the competitive advantage of illegitimate online sports books.”<sup>15</sup> While his proposal broadly recognizes the importance of the legal market being competitive with illegal operators, other aspects of it would make that goal unfeasible.

**Preserving game variety and competitive odds:** A key feature that will define the legal U.S. sports betting industry’s competitiveness will be the types of wagers and the odds (or payouts) that operators can offer consumers. Because sports books keep only a percentage of the wagers placed, they must carefully set the odds for or against a particular outcome. That means setting the odds higher on an “underdog” outcome and lower on the favorite as a way to balance the funds bookies receive so they can payout winners. Also added to the calculation of odds is the bookies’ estimate of how high the odds need to be for them not just to break even, but to earn a profit. Consequently, the amount of money bookies lose in taxes and fees increases the amount they must charge their customers in the form of less attractive odds.

As illegal sports betting operations pay neither taxes nor licensing fees, they already have a distinct advantage over legal operators when it comes to setting attractive odds. Schumer’s proposal would magnify this advantage a thousand-fold, by giving sports leagues a price monopoly.

When Congress first considered enacting PASPA, all the major U.S. sports leagues testified in favor, arguing that preventing legal gambling was necessary to protect the integrity of sports.<sup>16</sup> As the U.S. Supreme Court ruling approached, however, the leagues shifted their argument. Perhaps recognizing that states would soon have the power to decide if and how to regulate sports gambling, league representatives began heavily lobbying state legislatures to institute what they termed an “integrity fee,” a levy that would require gambling operators to transfer to the leagues 1 percent of all bets wagered on their respective games. As the name implies, the justification for such a fee was that legal

sports betting would somehow increase the cost of preventing corruption in sports.<sup>17</sup> In reality, the fees are merely a way to guarantee the leagues a cut of the gambling profits.

One percent may sound like a pittance, but as a fee on *wagers placed*, it is substantial. As noted, sports books keep only a small amount of bets placed on any event, paying out the rest to winners. **Forcing the sports books to hand over 1 percent of wagers amounts to a 20 percent bite out of their profits.**

Adding a 20 percent fee on profits—on top of federal taxes, state taxes, and licensing fees—would make it difficult for the gambling industry to thrive. Gambling operators would have to choose either to pay the fee and accept reduced profits or, more likely, pass the increased costs on to consumers in the form of worse odds. In either scenario, the result will make legal operators less competitive, reduce the amount they can invest in the states, and reduce the tax revenue states might otherwise collect.

State lawmakers are well aware of how the leagues' integrity fee would hamper the nascent industry and have uniformly rejected the idea. Schumer's proposal, though it does not require a direct payment from the gambling industry to the leagues, would effectively achieve the same result by stipulating that gambling operators must exclusively rely on "league data" when determining the outcome of bets. Gambling operators would have to buy that data, which would give the leagues a price monopoly and, in effect, the ability to hold the entire gambling industry hostage.

### Freedom of contract

There is no rational justification to force gambling operators to rely only on league data for their bets other than as a means of gifting the leagues the power to charge sports books exorbitant fees for that data. Data about game outcomes is widely and publicly available through many sources (e.g. sports broadcasting), but the lifeblood of sports betting is in-play betting: wagers on "events" that occur during game play, such as how, when, and where goals are scored, who assisted in goals, etc. This makes providing data about in-game activities a highly valuable service. Third-party data companies compete fiercely on price, speed, and accuracy to win contracts to supply this data to bet makers.<sup>18</sup> Schumer's proposed would short-circuit such contract negotiations, undermine data competition, and give the major sports leagues the power to force gambling companies to pay as much as the leagues want for that data. As noted, the costs associated with paying the leagues a premium for their data would force gambling operators to decrease the attractiveness of their odds.

Moreover, recent developments suggest that the leagues are capable of negotiating contracts with gambling operators in a manner that benefits both parties, without any need for without government interference. For years, the leagues and individual teams have signed private sponsorship deals with the various fantasy sports betting companies and, in August, the National Basketball Association finalized a deal to make MGM Resorts its exclusive official gaming partner. The three-year, \$25 million deal gives MGM direct access to the NBA data feed and rights to use league highlights and logos.<sup>19</sup>

### Private non-delegation

More worrying, the data monopoly that Sen. Schumer's legislation would create gives the leagues the power to decide *what types of bets* gambling operators can make. By requiring league data to make bets, the data monopoly gives the leagues *implicit* regulatory power.

Democratic accountability requires the maintenance of the "non-delegation" principle articulated in Article I of the Constitution: "All legislative powers herein granted shall be vested in a Congress of the

United States.” Without this principle, members of Congress could pass along legislative powers to entities that are not answerable to citizens through the electoral process, thus insulating themselves from responsibility for policies that might prove unpopular.

Schumer’s proposal would sly hand over the power to regulate sports betting to the leagues because, if they decide they do not want certain bets made, they can simply decline to sell gambling companies the data necessary for those bets. This would give the leagues an additional advantage over gambling operators in contract negotiations and potentially limit operators’ ability to compete by offering the mix of games offered by illegal sports books.

More importantly, it is an improper delegation of government authority to a private party. Such decisions should be made by lawmakers, not the same businesses that stand to profit based on the regulation in question.

### Political Accountability

One can debate what features a sports betting regulatory regime should have to protect consumer safety and game integrity, but it is difficult to argue that Congress is better equipped to oversee this regulation than are the states. While proposals for federal rules on sports gambling may differ in their details, all share one particularly dangerous feature: They eliminate government accountability.

Individual citizens communicate their will by voting for their representatives in government. The closer a government is to the voters, the more responsive it is to their concerns. This has been clearly demonstrated over the last two years by state legislatures’ careful deliberations on sports betting. State lawmakers know they will be held accountable for the consequences—whether regulation allows the industry to engage in careless or abusive practices (the so-called “race to the bottom effect) or whether burdensome taxes cause the industry to languish and fail to produce promised tax revenue.

Congress, on the other hand, does not share this same level of accountability. Members of Congress are beholden only to the constituents of their states and districts, but, as 25 years of inaction demonstrates, the ability of members’ ability to champion their own states’ interest at the federal level is limited. As recently retired Supreme Court Justice Anthony Kennedy stated regarding the constitutionality of PASPA, allowing Congress to interfere with state-based regulation “blurs political accountability ... precisely what federalism is designed to prevent.”

### Conclusion

It is human nature to fear the unknown. Therefore, it is understandable for Members of Congress to be anxious about sports gambling becoming legal nationwide for the first time. Such fears are, in fact, justified, as it is unlikely that all states will institute optimal regulatory regimes from the outset. Some states will burden the industry with heavy-handed rules and taxes, while others may fail to adequately address negative externalities. The states may fumble as they first enter the field, but it is not Congress’ role to interfere with these “laboratories of democracy.” State legislatures have the ability and incentive to revisit and amend ineffective laws.

Any regulatory missteps the states experience should not be justification for Congress to intervene, but rather an expression of our nation’s federalist system at work. By experimenting with different

approaches to policy, the states will be able to discover the mix that serves *their* constituents best and keeps lawmakers more accountable to their voters.

I hope my testimony has shown that federal regulation of sports gambling would not protect consumers or reduce corruption in sports. In fact, it would preserve the illegal betting market, put consumers at risk, hamper legal operators, and increase the risk to sports integrity. If given the power to regulate sports betting, Congressional inertia guarantees that America will be stuck with the rules it settles on now, regardless of the consequences, potentially for decades. Above all, federal interference threatens one of America's foundational principles: the ability for state and local lawmakers to determine what regulations work for their state and reflect the will of their constituents.

## Notes

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<sup>1</sup> Andrew Beyer, "Commentary: Betting bill hard to understand," *Washington Post*, November 16, 1991, p. G9.

<sup>2</sup> National Gambling Impact Study Commission, Final Report 1999, accessed September 1, 2018, <https://govinfo.library.unt.edu/ngisc/reports/fullrpt.html>.

<sup>3</sup> Joe Valiquette, "'Lazy Eye,' 'Fat Sal' Charged in Genovese Crime Family Takedown: Indictment," NBC New York, May 12, 2016, <https://www.nbcnewyork.com/news/local/Genovese-Crime-Family-Arrests-Federal-Raid-Mob-NYC-379194521.html>. Christina Carrega-Woodby, "Six arrested after gambling website managed by Lucchese crime family member is shut down, prosecutors say," *New York Daily News*, May 26, 2016, <http://www.nydailynews.com/news/crime/gambling-website-mob-ties-shut-arrested-article-1.2651400>.

Kati Cornell Smith, "16 years for Capo in B'klyn plea deal," *New York Post*, December 22, 2001, <https://nypost.com/2001/12/22/16-years-for-capo-in-bklyn-plea-deal>.

<sup>4</sup> Laila Kearney, "California, New York men charged in billion-dollar gambling ring," Reuters, June 30, 2016, <https://www.reuters.com/article/us-new-york-gambling/california-new-york-men-charged-in-billion-dollar-gambling-ring-idUSKCN0ZG2VM>.

<sup>5</sup> Valiquette. Christina Carrega-Woodby, "Six arrested after gambling website managed by Lucchese crime family member is shut down, prosecutors say," *New York Daily News*, May 26, 2016, <http://www.nydailynews.com/news/crime/gambling-website-mob-ties-shut-arrested-article-1.2651400>. Cornell Smith.

<sup>6</sup> David Schwartz, UNLV Center for Gaming Research, United States Commercial Casino Revenues (2016), [http://gaming.unlv.edu/reports/national\\_annual\\_revenues.pdf](http://gaming.unlv.edu/reports/national_annual_revenues.pdf).

<sup>7</sup> American Casino Guide, accessed March 4, 2018, <https://www.americancasinoguide.com/casinos-by-state.html>.

<sup>8</sup> David Forrest and Rick Parry, "The Key to Sports Integrity in the United States: Legalized, Regulated Sports Betting," American Gaming Association, September 27, 2016, <https://www.americangaming.org/research/white-papers/key-sports-integrity-united-states-legalized-regulated-sports-betting>.

<sup>9</sup> International Center for Sports Security, *Resource Guide on Good Practices in the Investigation of Match-Fixing* (Vienna, Austria: United Nations Office on Drugs and Crime, 2016), <http://bit.ly/2tjvEQO>.

<sup>10</sup> Jason Foley-Train, "Sports Betting: Commercial and Integrity Issues," Report by the Association of British Bookmakers, European Gaming and Betting Association, European Sports Security Association, and the Remote Gaming Association, September 15, 2014, <http://www.egba.eu/sports-betting-report-provides-a-factual-base-to-inform-the-commercial-and-integrity-debate>.

<sup>11</sup> Chris Grove, Adam Krejcik, and Alun Bowden, "Regulated sports betting: defining the U.S. opportunity," Eilers and Krejcik Gaming, September 26, 2017. Adam Sacks and Aran Ryan, "Economic Impact of Legalized Sports Betting," Oxford Economics, May 2017. <http://bit.ly/2p2fAO4>.

<sup>12</sup> Orrin Hatch, "Sports Betting Is Inevitable—Let's Make Sure It's Done Right," *Sports Illustrated*, May 23, 2018, <https://www.si.com/more-sports/2018/05/23/sports-betting-senator-orrin-hatch-legislation>.

<sup>13</sup> Steven Titch and Michelle Minton, "Game Changer: Rethinking Online Gambling Regulation in the Age of Daily Fantasy Sports," *Issue Analysis* 2016 No. 2, Competitive Enterprise Institute, <http://bit.ly/TitchMinton>.

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<sup>14</sup> Walt Bogdanish, James Glanz, and Augustin Armendarez, "Cash Drops and Keystrokes: The Dark Reality of Sports Betting and Daily Fantasy Games," *New York Times*, October 15, 2015, <http://www.nytimes.com/interactive/2015/10/15/us/sports-betting-daily-fantasy-games-fanduel-draftkings.html>.

<sup>15</sup> Office of Sen. Charles E. Schumer, "Protecting the Games We Love after Murphy v. NCAA: A Federal Framework for Consumer Protection and Sports Integrity," August 29, 2018, <http://bit.ly/2Q9RRHF>.

By Senate Democratic Leader Charles E. Schumer

<sup>16</sup> United States House of Representatives, Committee on the Judiciary, Subcommittee on Economic and Commercial Law, Professional and Amateur Sports Protection Act: hearing before the Subcommittee on Economic and Commercial Law of the Committee on the Judiciary, One Hundred Second Congress, first session, on H.R. 74 September 12, 1991, <https://babel.hathitrust.org/cgi/pt?id=pur1.32754063298537>.

<sup>17</sup> Legalizing sports gambling would have no effect on the cost of educating, monitoring, and enforcing league rules against match-fixing. It might, however, change the magnitude to which the leagues must advertise their anti-corruption efforts to fans. While legalization makes oversight easier and less expensive, it arguably raises awareness among fans that gambling on games is occurring, which could lead to increased concerns (not necessarily valid) about match-fixing. As such, the leagues' worry is not that legal gambling would force them to spend more combating corruption, but rather that they might need to spend more to ameliorate fans' concerns.

<sup>18</sup> James Glanz and Augustin Armendariz, "When Sports Betting Is Legal, the Value of Game Data Soars," *New York Times*, July 4, 2018, <https://www.nytimes.com/2018/07/02/sports/sports-betting.html>.

<sup>19</sup> David Purdum and Darren Rovell, "NBA signs deal with MGM to be gaming partner, August 9, 2018, [http://www.espn.com/chalk/story/\\_/id/24245142/nba-first-league-betting-sponsor-deal-mgm](http://www.espn.com/chalk/story/_/id/24245142/nba-first-league-betting-sponsor-deal-mgm).