No. 19-1114

In The Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

Petitioners,

v.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent New Jersey Thoroughbred Horsemen's Association, Inc. does not have a parent company and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

On October 17, 2014, New Jersey enacted a law repealing all laws, rules, and regulations that had previously prohibited sports gambling at Atlantic City casinos and racetracks ("2014 Repealer"). A few days thereafter the New Jersey Thoroughbred Horsemen's Association, Inc. ("NJTHA") announced that on October 26, 2014, it would commence accepting bets on sports games at Monmouth Park Racetrack.

On October 21, 2014, the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League, and the Office of the Commissioner of Baseball ("petitioners") took action to block NJTHA from doing what the 2014 Repealer had legalized. Petitioners invoked the private right of action created by the federal Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. 3701 *et seq.*, to apply for a temporary restraining order ("TRO") enjoining NJTHA from engaging in any sports gambling activity, including gambling on the sports games of others.

Petitioners claimed that unless the TRO was issued they would suffer irreparable injury. They supported their claim of irreparable injury by swearing, in the words of their Verified Complaint, that halting the spread of sports gambling was "imperative to prevent irreparable injury." Hypocritically, at the same time as petitioners were swearing to the court that they would suffer immediate irreparable injury unless a TRO was issued, they were indisputably supporting

and profiting from the proliferation of sports gambling throughout the United States and internationally.

NJTHA opposed petitioners' TRO application. In the event the district court granted a TRO, NJTHA requested that petitioners be ordered to post a security bond pursuant to the requirements of Federal Rule of Civil Procedure 65(c). Petitioners opposed being ordered to post any bond.

The district court granted petitioners a TRO for the period October 24, 2014 through November 21, 2014 and ordered petitioners to post a $3.4 million security bond. Petitioners did not dispute the amount of the security bond.

On May 14, 2018, this Court held that PASPA was unconstitutional in violation of the Tenth Amendment's anti-commandeering doctrine. Ten days later, on the basis of this Court's decision, NJTHA moved under Federal Rules of Civil Procedure 65(c) and 65.1 for judgment on the $3.4 million bond and damages ("Bond Motion"). Six months later, on November 16, 2018, the district court issued its Memorandum Opinion and Order ("Order") denying NJTHA's Bond Motion in its entirety. The district court held that NJTHA had not been "wrongfully enjoined" under Rule 65(c) and, in any event, good cause existed to deny NJTHA any damages whatsoever.

On September 24, 2019, the United States Court of Appeals for the Third Circuit vacated the district court's Order and remanded the case to the district court "for further proceedings" "in accordance with the

Opinion of this Court" (the "Judgment"). The Third Circuit held both that NJTHA had been "wrongfully enjoined" and that there was no good cause to deny NJTHA damages.

SUMMARY OF REASONS FOR DENYING THE PETITION

First, the Third Circuit's Judgment is interlocutory. The Judgment remanded the case to the district court "for further proceedings." There are "proceedings" "in accordance with" the Third Circuit's remand that are currently pending in the district court. The "proceedings" include: (a) resolving discovery issues, (b) "proceedings" to determine the amount to be collected by NJTHA on the $3.4 million bond, and (c) "proceedings" to determine the amount to be collected by NJTHA from petitioners based on their bad faith in falsely claiming irreparable injury at the time they applied for and obtained the TRO against NJTHA. Because of the pending "proceedings" on the remand the Questions Presented by petitioners for review may turn out to be irrelevant.

Second, petitioners are attempting to manufacture a circuit split. There is no circuit split on either of the Questions Presented by petitioners.

With regard to petitioners' first Question Presented, the Third Circuit wrote that it was "join[ing] the other circuits that have explicitly interpreted" the words "wrongfully enjoined" in Rule 65(c) to mean

"that a party is wrongfully enjoined when it turns out that that party had a right all along to do what it was enjoined from doing." App.11. No court, including this Court, has ever accepted petitioners' interpretation of Rule 65(c) to mean that a party can only be "wrongfully enjoined" if the district court that issued interim injunctive relief decides not to confirm the interim relief it granted by entering a permanent injunction. Rule 65(c) does not give the court that issues interim injunctive relief the power to foreclose recovery on a Rule 65(c) security bond by the simple expedient of confirming its interim relief by issuing a permanent injunction.

Even if petitioners' interpretation was correct (which it is not), the record shows that the district court after full deliberation decided *not* to grant petitioners a permanent injunction against NJTHA. Petitioners, therefore, are not entitled to an advisory opinion on the basis of a hypothetical set of facts interpreting Rule 65(c). Petitioners' first Question Presented is not justiciable.

With regard to the Second Question Presented by petitioners, the Third Circuit performed a careful circuit by circuit assessment of that issue. It noted that the only circuit court case, a Fifth Circuit decision that petitioners now rely on to manufacture a circuit split, was subsequently "called into question" by the Fifth Circuit. App.20. And even if the Fifth Circuit had not itself "called into question" its own earlier decision, any purported circuit split would be completely lopsided in

favor of the rule followed by every other circuit to have decided the issue.

Third, both Questions Presented by petitioners are of little importance to anyone other than petitioners and NJTHA. This case is *sui generis*. As described by the Third Circuit, this case is a "lengthy saga" with a "unique procedural history" specific to a contentious dispute between petitioners and NJTHA. App.3. The current dispute is merely "the last shoe to drop" (*id.*) and involves only the narrow question of how much money petitioners owe NJTHA for their having invoked an unconstitutional statute supported by their false sworn statements to stop NJTHA from engaging in lawful activity under New Jersey law.

Fourth, the interpretation and application of Rule 65(c) is rarely an issue that is litigated in the lower federal courts. Indeed, the meaning of the words "wrongfully enjoined" under Rule 65(c), which was adopted in 1937, was a matter of first impression for the Third Circuit. Some circuits have never decided the issue.

Fifth, the Third Circuit correctly concluded that NJTHA was "wrongfully enjoined" within the meaning of Rule 65(c) and that no good cause existed to deny it bond damages. The dissent did not disagree with the majority's interpretation of "wrongfully enjoined" under Rule 65(c) but only disagreed with the application of the majority's interpretation.

STATEMENT OF THE CASE

A. *Christie I*

In 2011, New Jersey voters approved an amendment to the State Constitution making it lawful for the legislature to authorize sports gambling. N.J. Const. Art. IV, §7, ¶2(D), (F). In 2012, New Jersey enacted a sports wagering Law (the "2012 Law"), N.J. Stat. Ann. § 5:12A-1 *et seq.*, authorizing sports gambling at Atlantic City casinos and New Jersey racetracks, including Monmouth Park Racetrack. NJTHA is the licensed operator of Monmouth Park Racetrack. ECF 1 (Complaint) in *Nat'l Collegiate Athletic Ass'n* v. *Christie*, District of New Jersey, 3:14-cv-6450, at ¶21.

On August 7, 2012, petitioners filed a complaint in the District Court of New Jersey against the Governor of New Jersey and other state officials (the "State Defendants"). ECF 1 in *Nat'l Collegiate Athletic Ass'n* v. *Christie*, District of New Jersey, 3:12-cv-4797 ("*Christie I*"). Based on the private right of action in PASPA, the complaint sought an injunction restraining the State Defendants from giving operation or effect to the 2012 Law. ECF 1 in *Christie I* at ¶35. To substantiate their claim that they would suffer irreparable injury unless the spread of sports gambling was immediately enjoined, petitioners relied on what NJTHA alleges were five materially false sworn Declarations from petitioners' chief executives. ECF 10-3 through 10-7 in *Christie I*.

On December 11, 2012, the district court granted NJTHA's motion to intervene. ECF 102 in *Christie I*.

On February 28, 2013, the district court issued an Order and Opinion holding that PASPA was constitutional and preempted the 2012 Law. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, 926 F. Supp.2d 551 (D.N.J. 2013); ECF 142-143 in *Christie I*. The district court entered a permanent injunction against the State Defendants. ECF 143 in *Christie I*.

On September 17, 2013, in a 2-1 decision, the Third Circuit affirmed the district court's Order and upheld the constitutionality of PASPA. *Nat'l Collegiate Athletic Ass'n* v. *Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013). It did so only after adopting a savings interpretation of PASPA advocated by petitioners. Under the savings interpretation, PASPA was held to be constitutional because it allowed States to repeal sports gambling prohibitions, in whole or in part. On June 23, 2014, this Court denied NJTHA's and the State Defendants' petitions for certiorari. *N.J. Thoroughbred Horsemen's Ass'n, Inc.* v. *Nat'l Collegiate Athletic Ass'n*, 573 U.S. 931 (2014); *Christie* v. *Nat'l Collegiate Athletic Ass'n*, 573 U.S. 931 (2014).

B. *Christie II*

On October 17, 2014, New Jersey enacted a law repealing all sports-gambling prohibitions at casinos and racetracks, including Monmouth Park. See N.J. Sess. Law Serv. Ch. 62 (codified at N.J. Stat. Ann. §§ 5:12A-7 to -9 (repealed 2018)) ("2014 Repealer"). Under the 2014 Repealer, all laws, rules, and regulations concerning sports gambling were repealed to the extent they

may apply to Atlantic City casinos, current New Jersey racetracks, and former New Jersey racetrack racecourses. N.J. Stat. Ann. § 5:12A-7 (repealed 2018).

Based on the 2014 Repealer, NJTHA announced that it would begin accepting sports bets at Monmouth Park on October 26, 2014. ECF 1 in *Nat'l Collegiate Athletic Ass'n* v. *Christie*, District of New Jersey, 3:14-cv-6450 ("*Christie II*"), at ¶11. Petitioners promptly filed another complaint (ECF 1 in *Christie II*) against NJTHA and the State Defendants demanding, *inter alia*, that NJTHA be preliminarily and permanently enjoined from conducting sports gambling at Monmouth Park (ECF 1 in *Christie II* at pp.21-23).

Petitioners claim that NJTHA's actions forced them to seek a TRO. Pet.1 ("NJTHA refused to delay its plans *** forcing the [district] court to decide in four days whether to grant temporary relief."); Pet.7 ("NJTHA refused to delay its plans to implement sports betting by even a few days."); Pet.16 ("NJTHA has a bond to seek recovery against only because it refused to hold off even a few weeks on beginning to offer sports gambling."); Pet.22 ("[H]ad NJTHA not insisted on trying to offer sports gambling a mere nine days after [passage of the 2014 Repealer] there never would have been a need for a TRO and hence never would have been a Rule 65(c) bond for NJTHA to try to recover against.").

Petitioners' contention is a classic example of "blaming the victim." As made clear by this Court's final judgment in this case (*Murphy v. Nat'l Collegiate*

Athletic Ass'n, 138 S. Ct. 1461 (2018)), NJTHA was fully within its rights when it sought to begin accepting sports bets at Monmouth Park on October 26, 2014. Petitioners were not coerced to seek a TRO. Instead, they undertook the risk of seeking a TRO, knowing full well that under Rule 65(c) they would have to pay bond damages if it was later determined, as it was, that NJTHA had been "wrongfully enjoined." As the Third Circuit put it: "Temporary restraining orders are not always a sure bet." App.2.

To substantiate their claim for injunctive relief petitioners swore under oath that stopping the spread of sports gambling was "imperative to prevent [] irreparable injury." ECF 1 in *Christie II* at ¶12; ECF 12-19 through 12-23 (5 Affidavits verifying Complaint) in *Christie II*. Petitioners further swore that unless injunctive relief was granted they would suffer the same irreparable injury as "this Court already found sufficient to warrant injunctive relief when the same plaintiffs challenged the 2012 Sports Wagering Law." ECF 1 in *Christie II* at ¶¶61, 65, 69, 74. NJTHA responded that these statements were lies because at the same time as petitioners claimed they would suffer irreparable injury unless the spread of sports gambling was enjoined, they were actively fueling and profiting from the very activity they were seeking to enjoin – the spread of sports gambling not only on their games but on the games of others as well. See, *e.g.*, ECF 53 in *Christie II* at pp.5-6.

On October 21, 2014, petitioners applied for an order to show cause ("Order to Show Cause") seeking a

TRO against NJTHA and the State Defendants. ECF 12 in *Christie II*; ECF 174 in *Christie I*. Petitioners argued that "no bond should be required." ECF 12-2 in *Christie II* at p.27; ECF 174-2 in *Christie I* at p.27.[1]

On October 22, 2014, NJTHA responded to the Order to Show Cause. It filed a brief and Certification of Dennis Drazin ("Drazin Certification"). ECF Nos. 21, 21-11 in *Christie II*. NJTHA argued, *inter alia*, that in the event any injunction was granted a bond was required to be posted by petitioners pursuant to Fed. R. Civ. P. 65(c). ECF 21 in *Christie II* at pp.35-36. The Drazin Certification stated that the lost revenue to Monmouth Park, in the event sports gambling was enjoined from commencing as scheduled on October 26, 2014, would be $1,170,219 per week. ECF 21-11 in *Christie II*. Petitioners did not dispute anything in the Drazin Certification. ECF 26. They merely argued that any lost revenue that NTJHA would suffer from a TRO was "self-inflicted." *Id.* at 16.

On October 24, 2014, the district court granted a TRO restraining NJTHA from conducting sports gambling at Monmouth Park. ECF 32 in *Christie II*. The scope of the TRO included sports gambling not only on petitioners' games but on the games of others with

[1] Petitioners and the district court filed many identical documents on both the *Christie I* docket and *Christie II* docket. *Compare* ECF Nos. 174-175, 178-182, 184-188, 190-193, 195, 197-200 in *Christie I* with ECF Nos. 12-13, 26-27, 31-35, 37-38, 41, 47, 49-51, 56, 63-65, 71 in *Christie II*.

whom petitioners had no relationship or legal interest, such as soccer, tennis, golf, and boxing. *Id.*

Petitioners repeatedly assert that the district court had no realistic choice under binding Third Circuit precedent other than to grant the TRO. See, *e.g.*, Pet.2-3 ("no court has ever suggested that the district court, bound by recently issued, on-point Third Circuit precedent, had any realistic choice but to grant both the TRO and the permanent injunction."). The Third Circuit debunked petitioners' claim. It wrote that the district court did have a realistic choice to deny the TRO and was not "bound" by the Third Circuit's holding in *Christie I* "to enter the TRO." App.16 n.10. "The District Court might have, instead, seized upon [the Third Circuit's] reasoning that a repeal would not be an authorization in violation of PASPA." *Id.*

With the issuance of the TRO the district court ordered petitioners to post a bond in the amount of $1.7 million. ECF 41 in *Christie II* at p.19 lines 16-17. The district court wrote that "when a risk of financial harm exists for the party to be enjoined, the posting of a security bond is required." ECF 41 in *Christie II* at p.18 lines 17-19.

On October 27, 2014, the district court extended the TRO for two weeks (through November 21, 2014). ECF 38 in *Christie II*. It ordered petitioners to post an additional $1.7 million bond, for a total bond of $3.4 million. *Id.* On November 5, 2014, petitioners posted a bond in the amount of $3.4 million. ECF 47 in *Christie II*.

On November 19, 2014, the district court, over NJTHA's objection, converted a previously scheduled preliminary injunction hearing into a final summary judgment hearing. ECF Nos. 50, 56 in *Christie II*. NJTHA's objection was based, in part, on NJTHA's allegation that petitioners' false sworn statements about their claimed irreparable injury constituted unclean hands and precluded them from obtaining injunctive relief. ECF 53 in *Christie II* at pp.5-6. On November 21, 2014, the district court issued an Order and Opinion granting petitioners summary judgment and entering a permanent injunction against the State Defendants. ECF 65 in *Christie II*; *Nat'l Collegiate Athletic Ass'n* v. *Christie*, 61 F.Supp.3d 488, 507-508 (D.N.J. 2014).

The district court did not permanently enjoin NJTHA. ECF 65 in *Christie II* at ¶4. It wrote that "no injunction is being entered against the NJTHA. Therefore, it is unnecessary for the Court to determine the validity of the NJTHA's assertion of unclean hands [of petitioners]." *Nat'l Collegiate Athletic Ass'n* v**.** *Christie*, 61 F. Supp.3d at 497 n.7. See also App.6 n.4 ("The District Court did not permanently enjoin NJTHA."). Petitioners' statement that the district court "permanently enjoined NJTHA from offering sports gambling pursuant to [the 2014 Repealer]" is, thus, wrong. Pet.8. The district court specifically *did not* permanently enjoin NJTHA. *Nat'l Collegiate Athletic Ass'n* v. *Christie*, 61 F. Supp.3d at 497 n.7; App.6 n.4

NJTHA had argued throughout to the district court that because petitioners had unclean hands, stemming from submitting materially false sworn

statements to the court in support of their purported irreparable injury, they were not entitled to the equitable remedy of an injunction. ECF 53 in *Christie II* at 5-6. By not permanently enjoining NJTHA, the district court sidestepped the entire question of petitioners' bad faith and abuse of judicial processes.

On November 24, 2014, petitioners moved to discharge the $3.4 million bond. ECF 69 in *Christie II*. On December 2, 2014, the district court denied petitioners' request to discharge the bond. ECF 72 in *Christie II*.

On August 25, 2015, a panel of the Third Circuit by a vote of 2-1 affirmed the district court's November 21, 2014 Order. *Nat'l Collegiate Athletic Ass'n* v. *Governor of New Jersey*, 799 F.3d 259 (2015). On October 14, 2015, the Third Circuit granted NTJHA's petition for a rehearing en banc and vacated the panel's August 25, 2015 Judgment and Opinion. *Nat'l Collegiate Athletic Ass'n* v. *Governor of New Jersey*, 832 F.3d 389, 392 (2016). On August 9, 2016, the Third Circuit, sitting en banc, affirmed (9-3) the district court's November 21, 2014 Order. *Id.*

C. The Supreme Court's Final Judgment In Favor Of NJTHA

On May 14, 2018, this Court reversed the Third Circuit's en banc Judgment. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018). This Court held that PASPA was unconstitutional in violation of the Tenth Amendment's anti-commandeering doctrine. *Id.* at 1473-1481. No Justice voted to uphold the

constitutionality of PASPA. The Court also held (6-3) that none of PASPA's provisions were severable.

The Court explicitly rejected the savings interpretation of PASPA that had been advocated by petitioners and adopted in *Christie I* and reaffirmed in *Christie II*. *Murphy*, 138 S. Ct. at 1474-1475. The Court concluded that even if PASPA was interpreted to allow States to repeal sports gambling prohibitions, in whole or in part, PASPA was still unconstitutional. *Id.* at 1475. The Court described the distinction adopted in *Christie I* and *II* between State repeals of gambling prohibitions and affirmative State authorizations allowing sports gambling as an "empty" distinction premised on a "misread[ing]" of Supreme Court precedents. *Id.* at 1478.[2]

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[2] In describing this Court's opinion, petitioners repeatedly imply that this Court agreed with the district court's determination to issue a TRO because the 2014 Repealer violated PASPA, which under Third Circuit precedent at the time the TRO was issued was a valid constitutional federal law. See, *e.g.*, Pet.9 ("The Court agreed with the district court and the Third Circuit that, when a State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity within the meaning of PASPA." (internal quotation marks omitted)). Petitioners are doubly wrong. First, this Court never agreed or even hinted that the district court was correct in issuing its TRO. Based on this Court's holding that PASPA was unconstitutional, NJTHA should never have been temporarily enjoined from accepting sports bets. Second, this Court's holding was not an endorsement of the district court's ruling that the 2014 Repealer was a violation of PASPA. The district court dealt with the question of whether the 2014 Repealer violated PASPA *assuming PASPA was constitutional based on the Third Circuit's savings interpretation in Christie I* (730 F.3d 208) *that PASPA did not unconstitutionally*

D. The Bond Motion

On May 24, 2018, NJTHA filed its Bond Motion. ECF 80 in *Christie II*. In support of the Bond Motion NTJHA submitted the Certification of Chris Grove, an expert in the sports betting industry. ECF 80-2 in *Christie II*. Grove concluded that had NJTHA not been restrained from conducting sports gambling at Monmouth Park during the TRO time period (October 24, 2014 – November 21, 2014) its estimated sportsbook win would have been $10,227,331. *Id.* at ¶14. Grove also concluded that during the post-TRO time period (November 22, 2014 – May 14, 2018) had the permanent injunction not been issued, NJTHA's estimated sportsbook win would have been $139,749,842. *Id.* at ¶27.

Petitioners assert that NJTHA's claim for damages in excess of the bond amount is premised "on the theory that petitioners acted in 'bad faith' by invoking their rights under PASPA." Pet.10. That is incorrect. NJTHA's claims for damages in excess of the bond amount is premised on petitioners' bad faith in seeking to enjoin NJTHA from accepting sports bets based on their allegation that the halting of sports gambling was imperative to prevent immediate irreparable

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commandeer the States because it allowed States to repeal its sports gambling prohibitions. This Court never dealt with this question because it held that the purported "savings" interpretation of PASPA was an incorrect interpretation and even if it was correct PASPA still violated the Tenth Amendment's anti-commandeering doctrine. *Murphy* v. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1474-1475 (2018).

injury while at the same time they were indisputably supporting and profiting from the proliferation of sports gambling. ECF 80-1 in *Christie II* at pp.3, 13-30.

In response to the Bond Motion, petitioners argued that NJTHA had not been "wrongfully enjoined" under Rule 65(c). ECF 91 in *Christie II*. They argued that because the law favored petitioners at the time the TRO was issued, it would be unreasonable to hold them liable for any damages. ECF 91 in *Christie II* at pp.17-18.

On November 16, 2018, the district court issued an order (the "Order") denying NJTHA's Bond Motion in its entirety. ECF 103; App.34-45. The district court held that NJTHA had not been "wrongfully enjoined" and even if it had been, under *Coyne-Delany Co.* v. *Capital Development Board*, 717 F.2d 385 (7th Cir. 1983), "good cause" existed to deny NJTHA any bond damages. App.43.

On September 24, 2019, the Third Circuit vacated the District Court's Order denying NJTHA's Bond Motion "conclud[ing] that NJTHA was 'wrongfully enjoined' within the meaning of Rule 65(c) and no good cause existed to deny bond damages in this case." App.2. The Third Circuit "h[e]ld that a party is wrongfully enjoined [under Fed. R. Civ. P. 65(c)] when it turns out that that party had a right all along to do what it was enjoined from doing." App.11; see also App.14 ("whether a party is wrongfully enjoined depends upon whether it *turns out* that that party had a right all along to conduct the activity it was enjoined from

doing" (emphasis in original)). The Third Circuit held that "NJTHA had a right all along to conduct sports gambling." App.16.

The Third Circuit concluded the first section of its Opinion by holding as follows:

> "Here, PASPA provided the only basis for enjoining NJTHA from conducting sports gambling, and the Supreme Court ultimately held that that law is unconstitutional. Therefore, NJTHA had a right to conduct sports gambling all along. We conclude that NJTHA was wrongfully enjoined and should be able to call on the bond."

App.18.

In the second section of its Opinion, the Third Circuit "adopt[ed]" the "rule" held by the "clear majority" of its "sister circuits" "that there is a rebuttable presumption that a wrongfully enjoined party is entitled to recover provable damages up to the bond amount" because that rule "is implied in the language of Rule 65(c) and promotes its goals." App.18-21; see also App.20 (it is a "rare party who has lost a case on the merits but nevertheless should not suffer the execution of the preliminary injunction bond") (quoting *Nintendo of Am.* v. *Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1037 (9th Cir. 1994)).

The Third Circuit wrote that although the district court:

> "relied on *Coyne*[-*Delany Co.* v. *Capital Development Board*, 717 F.2d 385 (7th Cir. 1983)]

> ***, the District Court failed to apply the presumption in favor of recovery that the Court in *Coyne* applied. Nor did the District Court note the main thrust of the Seventh Circuit's reasoning in that case, namely, that a district court is required to 'consider and evaluate the full range of factors *** that would be relevant under the proper standard.'"

App.21 (quoting *Coyne*, 717 F.2d at 392). After reviewing the *Coyne* factors the Third Circuit held that "[n]one of the factors cited in *Coyne* rebut the presumption that NJTHA is entitled to recover bond damages in this case"[3] and "conclude[d] that NJTHA is entitled to recover provable damages up to the bond amount." App.22-23. The Third Circuit "vacate[d] the denial of NJTHA's motion for judgment on the bond and damages, and remand[ed] for the District Court to determine the amount to be collected." App.23.

In reviewing the *Coyne* factor regarding whether the bond amount was unreasonable, the Third Circuit wrote that "[i]n fact, the bond amount was set well below what NJTHA had requested." App.22 n.14.

[3] Petitioners assert that this case involved an "intervening change[ ] in the law." Pet.17. This is not true. As the Third Circuit noted, while *Coyne* did involve an intervening change in the law, this case did not. The Third Circuit wrote:

> "Here, there was no change in the state of the law while the case was in federal court. Instead, the defendants in this case successfully challenged the constitutionality of PASPA on appeal, such that they ultimately prevailed. That is not a change in the law; that is success on the merits."

App.22-23.

Significantly, the Third Circuit was careful to point out that petitioners "have not claimed *** that the bond amount is unreasonable." App.22.

On September 24, 2019, the Third Circuit issued a Judgment vacating the district court's Order and remanding the case to the district court "for further proceedings" "in accordance with the Opinion of this Court" (the "Judgment"). ECF 106 in *Christie II*. On October 8, 2019, petitioners petitioned for rehearing before the Third Circuit, which was denied on December 10, 2019. App.33. On December 18, 2019, the Third Circuit certified the Judgment in lieu of a formal mandate. ECF 107 in *Christie II*. Petitioners did not move before the Third Circuit to stay its Judgment pending the filing of this Petition.

Per the Third Circuit's Judgment the case is currently pending in the district court "for further proceedings" "in accordance with the Opinion of [the Third Circuit]." The "further proceedings" currently pending in the district court include: (a) resolving discovery issues, (b) determining the amount to be collected by NJTHA on the $3.4 million bond, and (c) determining the amount to be collected by NJTHA from petitioners in excess of the bond amount based on petitioners' bad faith in falsely claiming irreparable injury. ECF Nos. 108-123 in *Christie II*.

REASONS FOR DENYING THE PETITION

I. The Third Circuit's Judgment Is Interlocutory.

The Third Circuit's Judgment is interlocutory. It remanded the case to the district court "for further proceedings" "in accordance with" its Opinion. ECF 106 in *Christie II*. The "proceedings" that are currently pending in the district court include (a) resolving discovery issues, (b) determining the amount to be collected by NJTHA on the $3.4 million bond, and (c) determining the amount to be collected by NJTHA from petitioners based on their bad faith in falsely claiming irreparable injury when they procured the TRO against NJTHA. ECF Nos. 108-123 in *Christie II*.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The mere "fact" that a judgment of the lower courts is not a final one is "itself alone" "sufficient ground for the denial" of the petition for certiorari. *Id.* See also *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court"); *Mount Soledad Mem. Ass'n* v. *Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring) (agreeing to deny petition for certiorari "[b]ecause no

final judgment has been rendered and it remains unclear precisely" what will happen on remand); Stephen M. Shapiro *et al.*, Supreme Court Practice § 4.18, at pp.282-283 (10th ed. 2013).

The Questions Presented by petitioners are not "extraordinary." Further, the Questions Presented by petitioners may turn out to be irrelevant as a result of the "further proceedings" on the remand "in accordance with" the Third Circuit's Opinion.

II. There Is No Circuit Split On Either Of The Questions Presented By Petitioners.

A. There Is No Circuit Split With Respect To The First Question Presented By Petitioners.

The Third Circuit "join[ed] the other circuits that have explicitly interpreted th[e] term [wrongfully enjoined] and h[e]ld that a party is wrongfully enjoined when it turns out that that party had a right all along to do what it was enjoined from doing." App.11. The other circuit courts to have considered the issue and with which the Third Circuit joined include the First Circuit (*Global Naps, Inc.* v. *Verizon New England, Inc.*, 489 F.3d 13, 22 (2007)), the Second Circuit (*Blumenthal* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (1990)), the Eighth Circuit (*Slidell, Inc.* v. *Millennium Inorganic Chems., Inc.*, 460 F.3d 1047, 1059 (2006)), and the Ninth Circuit (*Nintendo of Am.* v. *Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (1994)).

App.11.[4] Even the Third Circuit's dissenting judge agreed with the standard followed by the Third Circuit's majority. App.27 ("I agree that this is the correct standard."). Petitioners cite no case that applies any different standard for, or interpretation of, the term "wrongfully enjoined" as used in Rule 65(c).

1. Petitioners' Contention That A Party Can Never Be Wrongfully Enjoined If The Issuing Court Confirms Its TRO By Granting A Permanent Injunction Is Wrong On The Law.

There is no case cited by petitioners – and nor is NJTHA aware of any – holding that a party can never be "wrongfully enjoined" under Rule 65(c) when the issuing court confirms a TRO granted pursuant to Rule 65 by subsequently entering a permanent injunction. Indeed, numerous cases, both at the circuit level and in this Court, hold the opposite.

For example, in *Atomic Oil Co.* v. *Bardahl Oil Co.*, 419 F.2d 1097 (10th Cir. 1969), the district court, upon issuing a preliminary injunction, ordered the plaintiff to post a security bond. *Id.* at 1099. After a trial, the district court confirmed its preliminary injunction and entered a permanent injunction. *Id*. The permanent injunction was reversed on appeal. *Id.* The enjoined

[4] Petitioners' attempts to distinguish these four circuit cases (Pet.23-24) are without merit. There is nothing in these four cases that supports petitioners' interpretation of Rule 65(c) that once a district court converts a TRO into a permanent injunction, the enjoined party can never be considered "wrongfully enjoined."

party then moved for damages under the bond. *Id*. at 1100. In opposition, the plaintiff argued, as petitioners do here, that "recovery on the preliminary bond is precluded by the second order of the first trial court which established a permanent injunction and set aside the undertaking required as a condition of the preliminary injunction." *Id.* The court rejected the plaintiff's argument holding that Rule 65(c) does not grant "the court which issues an injunction *** the power to foreclose recovery on the injunction bond, when such recovery devolves upon the substantive correctness of the determinations of the very same court." *Id.* See also *Meyers* v. *Jay St. Connecting R.R.*, 288 F.2d 356 (2d Cir. 1961) (defendant can recover on bond when appellate court rules district court was wrong in issuing preliminary injunctive relief even though the district court, after the opportunity for full deliberation, confirmed correctness of its initial decision to grant preliminary injunctive relief); *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 305-306 (1964) (party may recover under injunction bond even after a permanent injunction has been entered by the court that issued the preliminary injunction); *Houghton* v. *Cortelyou*, 208 U.S. 149 (1908) (same result under pre Rule 65(c) case).

Petitioners' reliance on *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981), *Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982), and *Ty, Inc.* v. *Publications Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002) (Pet.18-20) is misplaced. None of these cases holds or implies that once a district court transforms preliminary injunctive relief into a permanent injunction, the party that was

enjoined can never be "wrongfully enjoined" under Rule 65(c).[5]

Petitioners also argue that it is "particularly perverse to conclude that a defendant was 'wrongfully enjoined' in 2014 *** when the district court had no choice under then-applicable law and was powerless to anticipate a 2018 Supreme Court decision reversing the Third Circuit precedent that bound it back in 2014." Pet.24; see also Pet.17. Petitioners are wrong again.

First, as pointed out by the Third Circuit (App.16 n.10), the district court was not compelled to grant the TRO based on the Third Circuit's decision in *Christie I* (730 F.3d 208). The district court could have denied the TRO and determined that PASPA, per the Third Circuit's savings interpretation in *Christie I*, was not violated by the 2014 Repealer. App.16 n.10.

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[5] Indeed, this Court's decision in *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981), proves petitioners' position is wrong. In *Camenisch*, this Court held that if after the grant of a preliminary injunction conditioned upon the posting of a security bond a "federal district court has granted a permanent injunction, the parties will already have had their trial on the merits," such that "even if the case would otherwise be moot, a determination can be had on appeal of the correctness of the trial court's decision on the merits, *since the case has been saved from mootness by the injunction bond*." *Id.*, 451 U.S. at 396 (emphasis added). Thus, it is clear from *Camenisch* that even if a district court transforms preliminary injunctive relief into a permanent injunction, the party that was enjoined can still recover on the security bond if the district court's decision on the merits was wrong, as was the case here.

Second, petitioners suggest this Court held that PASPA was unconstitutional in an unrelated case. Pet.3 (describing this Court's reversal as an "intervening change in the law"); Pet.17 (same). This is not so. PASPA was held to be unconstitutional in *this* case.

Third, when determining whether a party has been "wrongfully enjoined" under Rule 65(c) – under the standard established by every circuit court that addressed this issue – it is irrelevant whether the district court abused its discretion in issuing preliminary injunctive relief. See App.13-16. The only question that needs to be answered is whether the enjoined party had a right all along to engage in the enjoined activity. If the law on which the injunction was based was ultimately found to be unconstitutional, the enjoined party was "wrongfully enjoined." App.16-18.

2. In Any Event, The District Court Did Not Grant Petitioners A Permanent Injunction Against NJTHA.

Even if petitioners' interpretation of the words "wrongfully enjoined" was correct (which it is not), the record shows that the district court after full deliberation did *not* grant petitioners a permanent injunction against NJTHA. It did so in order to avoid addressing NJTHA's unclean hands defense to petitioners' application for injunctive relief. The district court wrote that "no injunction is being entered against the NJTHA. Therefore, it is unnecessary for the Court to determine the validity of the NJTHA's assertion of

unclean hands [of petitioners]." *Nat'l Collegiate Athletic Ass'n* v. *Christie*, 61 F. Supp.3d at 497 n.7; see also App.6 n.4 ("The District Court did not permanently enjoin NJTHA.").

Petitioners' assertion in their petition that the district court "permanently enjoined NJTHA from offering sports gambling pursuant to [the 2014 Repealer]" (Pet.8) is a misdescription of the record.

There can be no dispute that petitioners are not entitled to an advisory opinion from this Court interpreting Rule 65(c) on the basis of a hypothetical set of facts. *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion."); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971))). Accordingly, the First Question Presented by petitioners is not justiciable.

B. There Is No Circuit Split With Respect To The Second Question Presented By Petitioners.

1. There Is A Presumption In Favor Of Recovery Under The Injunction Bond.

There is broad circuit court support for the proposition that, at a minimum, there is an "implicit presumption in Rule[ ] *** 65(c) in favor of awarding" bond

damages to a wrongfully enjoined party. *Coyne-Delany Co.* v. *Capital Dev. Bd.*, 717 F.2d 385, 392 (7th Cir. 1983). See also *Nokia Corp.* v. *InterDigital, Inc.*, 645 F.3d 553, 558 (2d Cir. 2011); *Global Naps, Inc.* v. *Verizon New England, Inc.*, 489 F.3d 13, 23 (1st Cir. 2007); *Nat'l Kidney Patients Ass'n* v. *Sullivan*, 958 F.2d 1127, 1134 (D.C. Cir. 1992); *Nintendo of Am.* v. *Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (9th Cir. 1994); *Front Range Equine Rescue* v. *Vilsack*, 844 F.3d 1230, 1234 (10th Cir. 2017); App.18-19. "[A] prevailing defendant is entitled to damages on the injunction bond unless there is a good reason for not requiring the plaintiff to pay in the particular case." *Coyne*, 717 F. 2d at 391. See also *Nintendo of Am., Inc.* v. *Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1037 (9th Cir. 1994) (it is "rare" for a party to lose on merits and not suffer the execution of preliminary injunction bond); *Atomic Oil Co.* v. *Bardahl Oil Co*., 419 F.2d 1097, 1100-1103 (10th Cir. 1969).

The Third Circuit did a careful circuit by circuit assessment of the issue raised in petitioners' second Question Presented. App.18-23. It noted that the only Circuit Court case, a Fifth Circuit decision, *H&R Block, Inc.* v. *McCaslin*, 541 F.2d 1098 (1976), that petitioners rely on to manufacture a circuit split was "called into question" by the subsequent Fifth Circuit decision in *Continuum Co.* v. *Incepts, Inc.*, 873 F.2d 801 (1989). App.20-21. And even if the Fifth Circuit had not itself "called into question" its own earlier decision, any purported circuit split would be completely lopsided in favor of the rule followed by the Third Circuit. App.18-23.

Petitioners argue that the Fifth Circuit's decision in *H&R Block* has been endorsed by other circuit courts. They seek to draw support from *Henco, Inc.* v. *Brown*, 904 F.2d 11 (7th Cir. 1990); *City of Riviera Beach* v. *Lozman*, 672 F. App'x 892 (11th Cir. 2016); *Milan Express, Inc.* v. *Averitt Express, Inc.*, 208 F.3d 975 (11th Cir. 2000); and *State of Kan. ex rel. Stephan* v. *Adams*, 705 F.2d 1267 (10th Cir. 1983). Pet.28-29. None of these cases hold that there is no presumption of recovery on an injunction bond or that a court has unfettered discretion to deny bond damages to a party who has been "wrongfully enjoined" under Rule 65(c).

2. Petitioners' Factual Argument That There Was An Intervening Change In The Law In This Case Is Wrong.

Petitioners argue that if the district court had complete discretion to deny bond damages to a wrongfully enjoined defendant, then the district court's denial of bond damages in this case should not have been reversed because here there was a "change[] in the law." Pet.32. But as the Third Circuit noted (App.22-23), unlike in *Coyne* where there was an intervening change in the law outside the case in which the preliminary injunctive relief was issued, here the law on which petitioners sought and obtained their TRO was found *in the very same case* to be unconstitutional. "That is not a change in the law; that is success on the merits." App.23.

III. Both Questions Presented By Petitioners Are Of Little Importance To Anyone Other Than Petitioners And NJTHA.

Petitioners argue that "[t]his case is an optimal vehicle for resolving the highly consequential questions presented." Pet.32. They are wrong. This case is *sui generis* and does not involve any "highly consequential questions."

This litigation, which began in 2012, has been described by the Third Circuit, as a "lengthy saga" with a "unique procedural history" specific to a contentious dispute between petitioners and NJTHA. App.3. The current dispute is merely "the last shoe to drop" (*id.*) and involves only the narrow question of how much money petitioners owe NJTHA for their having invoked an unconstitutional statute supported by false sworn statements feigning irreparable injury in order to enjoin NJTHA from engaging in an activity that was lawful under New Jersey law.

IV. The Interpretation And Application Of Rule 65(c) Is Rarely An Issue That Is Litigated In The Lower Federal Courts.

The interpretation and application of the words "wrongfully enjoined" is rarely litigated. Indeed, since 1937 when Rule 65(c) was adopted, the Third Circuit had not previously been called on to interpret and apply Rule 65(c). Petitioners cite one case to suggest that "courts have clearly struggled with what is meant by 'wrongfully enjoined.'" Pet.33 (quoting *Pamperin, Inc.*

v. *Plass*, No. 5:08-CV-227-C, 2009 WL 10677695, at *1 (N.D. Tex. Mar. 31, 2009)). This is not accurate. The meaning of Rule 65(c) is hardly an issue in the lower federal courts. And, in any event, petitioners' reliance on *Pamperin* is misplaced.

In *Pamperin*, the district court dealt with the question of whether the defendants could recover their expenses in litigating personal jurisdiction issues from an injunction bond after the plaintiff that secured a TRO dismissed its claim under Fed. R. Civ. P. 41(a) such that a decision on the merits of the plaintiff's claim was never reached. That has nothing whatsoever to do with our case where a decision on the merits in favor of NJTHA was reached. Second, as demonstrated above, petitioners cannot point to a single case that supports their position that when a district court confirms its TRO with a permanent injunction (which is not the case here anyway with respect to NJTHA), the enjoined party cannot, by definition, be "wrongfully enjoined" under Rule 65(c).

V. The Third Circuit Correctly Concluded That NJTHA Was "Wrongfully Enjoined" Within The Meaning Of Fed. R. Civ. P. 65(c) And That No Good Cause Existed To Deny It Bond Damages.

The Third Circuit correctly interpreted and applied the words "wrongfully enjoined" as used in Rule 65(c). App.10-18. It also correctly held that no good

cause existed to deny NJTHA bond damages. App.18-23.

Petitioners seek to rely on Judge Porter's dissenting opinion (App.24-31) to re-argue the correctness of the Third Circuit's majority decision. Petitioners' reliance on the dissent is misplaced for numerous reasons.

First, not only was Judge Porter outvoted by the other two members of the Third Circuit panel – Chief Judge McKee and Judge Rendell – but petitioners' petition for rehearing by the panel and the Third Circuit en banc was denied. App.33.

Second, the dissent did not disagree with the interpretation of the words "wrongfully enjoined" under Rule 65(c). Nor did the dissent discuss a court's discretion to deny bond damages to a "wrongfully enjoined" party. The dissent merely disagreed with the application by the majority of the agreed upon meaning of the words "wrongfully enjoined."

Third, as explained by the majority, the dissent was mistaken in concluding that NJTHA was not "wrongfully enjoined" under Rule 65(c). The dissent reached that conclusion based on three points. App.24. First, the dissent thought that the "[TRO] was not based on PASPA's constitutionality. Instead, the District Court considered whether [the 2014 Repealer] complied with PASPA." *Id.* Second, the dissent reasoned that when striking down PASPA this Court "agreed with the District Court on that statutory question." *Id.* Third, the dissent disagreed that this "Court's decision holding PASPA unconstitutional necessarily

means that the NJTHA was wrongfully enjoined" because, according to the dissent, that "holding requires indulging in the fiction *** that PASPA never existed at all." *Id.* All three of these points are mistaken.

With regard to the dissent's conclusion that the TRO "was not based on PASPA's constitutionality," the majority correctly noted that "the constitutionality of PASPA was inexorably intertwined with the issues in *Christie II*" and this Court "clearly considered the [*Christie I* and *Christie II*] cases to be the proverbial 'whole ball of wax.'" App.12-13.[6] See also ECF 41 in *Christie II* at pp.10-12.

The dissent's second point that this Court agreed with the district court on the statutory ground is mistaken. This Court had no need to and, therefore, did not address the statutory question that was before the district court. That question was did the 2014 Repealer violate PASPA assuming PASPA was constitutional based on the savings interpretation advocated by petitioners and accepted by the Third Circuit that under PASPA States were allowed to repeal sports gambling prohibitions. This Court never addressed this statutory question because it rejected petitioners' savings interpretation and held that even if the savings interpretation of PASPA was correct PASPA was still

[6] It should be noted that the majority decision was authored by Judge Rendell (App.2), who also authored both the *Christie II* panel majority decision (799 F.3d 259 (3d Cir. 2015)) and the *Christie II* en banc majority decision (832 F.3d 389 (3d Cir. 2016)).

unconstitutional. *Murphy* v. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1474-1475 (2018).

The dissent's third point that one should not conclude from this Court's decision holding PASPA unconstitutional that NJTHA was wrongfully enjoined because to do so, according to the dissent, "requires indulging in the fiction *** that PASPA never existed at all" (App.24) is wrong for at least two reasons. First, when this Court held that PASPA was unconstitutional, it, indeed, rendered PASPA void *ab initio*. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (An unconstitutional statute is "void"; a "legislative act contrary to the constitution is not law."); 16A Am. Jur. 2d Constitutional Law § 195 (2009) ("Since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void ab initio."). Second, as the majority explained, "retroactivity" is not even "implicated when [a court is] asked to determine whether a party was 'wrongfully enjoined.'" App.17. To determine whether NJTHA was wrongfully enjoined the only question is "[d]id it turn out that NJTHA had the right all along to do what [it was] enjoined from doing? There is no way that the answer to that question could be 'no.'" *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 30, 2020