No. 19-1114

In the
Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, et al.,

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

REPLY BRIEF FOR PETITIONERS

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The district court that entered both a temporary restraining order (TRO) and permanent injunctive relief on a full record concluded that the New Jersey Thoroughbred Horsemen's Association (NJTHA) was not "wrongfully" restrained by the TRO. The court also concluded that, even if NJTHA were "wrongfully" restrained by the TRO, there was good cause for withholding damages here because injunctive relief was affirmed by the Third Circuit and "wrongful" only in light of this Court's subsequent decision to overturn circuit precedent and hold the Professional and Amateur Sports Protection Act (PASPA) unconstitutional. The Third Circuit reversed on both counts, deeming the original TRO "wrongful" in light of subsequent changes in the law and deeming the district court without discretion to withhold damages. The Third Circuit's decision ignores the limited office and equitable nature of Rule 65(c). It deepens two circuit splits and all but guarantees inequitable results, as this case well illustrates.

NJTHA counters with a series of *non sequiturs*. Its lead argument is that the petition is interlocutory, but a reversal on either question presented would bring this long-running case to an end, as the district court's final order denying damages on two alternative grounds makes crystal clear. On the substance, NJTHA never squares its view that Rule 65(c) protects against appellate reversal with the reality that Rule 65(c) and its bond requirement apply only to temporary injunctive relief, not to permanent injunctions, which typically inflict far greater damage before appellate review is complete. The limited scope

of Rule 65(c) makes sense only if it protects against temporary injunctions "wrongfully" issued based on expedited proceedings and skeletal records, rather than insuring against appellate reversal.

NJTHA has even less to say about the second question. The decision below deepens an acknowledged split with the Fifth Circuit and ensures inequitable results by constraining district courts from taking into account factors such as the TRO (and PASPA's constitutionality) being foreordained by recent circuit law or that no court ever accepted NJTHA's theory that the TRO was inappropriate because New Jersey's repealer was permitted by PASPA.

NJTHA disputes the importance of the questions presented, but district courts across the country enter TROs and preliminary injunctions, and thus deal with the contours of Rule 65(c), on a daily basis. There is no justification for having the scope of the rule or of district courts' equitable discretion shrouded in uncertainty or dependent on the happenstance of where the TRO was entered. This case is an ideal vehicle to settle these important questions, as the Court is intimately familiar with the case, and both issues are outcome determinative.

I. The Third Circuit's Conclusion That The District Court "Wrongfully Enjoined" NJTHA Conflicts With The Scope And Text Of Rule 65(c) And Cases Correctly Applying It.

The Third Circuit erred by holding that, under Rule 65(c), a party may be considered "wrongfully enjoined or restrained" whenever a higher court disagrees with the enjoining court's final judgment,

even when the temporary injunction was effectively compelled by then-extant law and vacated only based on subsequent changes in the law. This view of Rule 65(c) as insuring against appellate reversal is incompatible with the limited scope of the rule.

1. Rule 65(c) applies only to *temporary* injunctions—*i.e.*, TROs and preliminary injunctions. Fed. R. Civ. P. 65(c). No rule requires a party to give comparable security for a *permanent* injunction. That difference reflects the limited but important office of Rule 65(c): It protects against the risk that the expedited nature of TRO/preliminary injunction hearings will cause a court to mistakenly award interim relief on "the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). It does not protect against the risk of appellate reversal, much less reversal based on subsequent changes in the applicable law. If that were the rule's aim, it would require bonds (indeed, far larger bonds) to secure permanent injunctions.

NJTHA insists that petitioners' interpretation of Rule 65(c) is incorrect, but never explains why. In fact, NJTHA never even acknowledges the absence of a bond requirement for permanent injunctions, let alone offers an alternative theory for the differential treatment of interim and permanent injunctions. Instead, NJTHA just parrots the Third Circuit's claims 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," and that the "only question" that matters is what the last reviewing court "ultimately" holds. BIO.21, 25. But the injury from a

permanent injunction after an appellate reversal is orders of magnitude greater than any injury from an interim injunction. Indeed, by NJTHA's own estimates, its injury from the years-long permanent injunction was some 13-times greater than the weeks-long TRO. BIO.15. If Rule 65(c) were concerned with securing litigants against appellate reversals based on changes in the law or otherwise, it would necessarily require a bond for permanent injunctions too. NJTHA has no explanation for this anomaly.

NJTHA's position guarantees that a district court's temporary injunction will be branded "wrongful" even when it was compelled by circuit precedent or otherwise unassailably correct when it issued. Indeed, NJTHA does not dispute that, if a district court temporarily enjoins a defendant who brazenly flouts a statute repeatedly upheld as constitutional by this Court, that injunction would be "wrongful" (with the party who vindicated the statutory policy on the hook for damages) if this Court overturned its precedent. *See* Pet.34. In other words, the rule would operate to penalize those who acted to enforce rights that were clear as day under then-extant law against parties whose actions were just as clearly unlawful. NJTHA offers no explanation why rules for issuing equitable relief would operate in such a patently inequitable manner.

2. Instead of seriously engaging on the merits, NJTHA principally argues that the decision below is consistent with decisions from other courts of appeals. *See* BIO.21 (citing *Glob. NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13 (1st Cir. 2007); *Slidell, Inc. v. Millennium Inorganic Chems., Inc.*, 460 F.3d 1047

(8th Cir. 2006); *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032 (9th Cir. 1994); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049 (2d Cir. 1990)). But none of those cases has "explicitly interpreted" the meaning of Rule 65(c)'s "wrongfully enjoined" language, BIO.21, or embraced the Third Circuit's view that whether a party is "wrongfully enjoined" turns solely on whether an appellate court reverses, without regard to whether reversal turned on changes in governing law beyond a district court's power to anticipate or effectuate. *See* Pet.22-24.[1]

NJTHA claims in a footnote—without any accompanying explanation—that petitioners' reading of these cases is "without merit," and "nothing in the[m] … supports petitioners' interpretation of Rule 65(c)." BIO.22 n.4. But that *ipse dixit* cannot change the language or reasoning of the decisions. All four recognize that what matters under Rule 65(c) is whether full deliberations confirm or disprove the enjoining court's initial instinct based on expedited and streamlined proceedings. NJTHA's quibbling as to whether Third Circuit precedent made the TRO inevitable, as opposed to just plainly appropriate, is thus beside the point. BIO.24. What matters is whether full and final deliberations indicate that the expedited proceedings caused the district court to err,

[1] NJTHA discusses various other decisions, but it does not argue that those decisions squarely interpret Rule 65(c)'s "wrongfully enjoined" language. *See* BIO.22-23.

or whether, as here, further proceedings confirm the appropriateness of injunctive relief.[2]

In sum, the Third Circuit's resolution of the first question presented cannot be reconciled with the scope and text of Rule 65(c) or with other decisions interpreting it.

II. The Third Circuit's Adoption Of An "Implied Presumption" Of Recovery Under Rule 65(c) Guarantees Inequitable Results And Deepens A Different Circuit Split.

NJTHA's brief is, if anything, less responsive on the second question presented. NJTHA cannot deny that the Third Circuit expressly disagreed with the Fifth Circuit. Nor can it explain why the rules for equitable relief would subject a district court to a rigid rule that ensures unfair results in the absence of any clear text directing inflexibility or inequity. If the Third Circuit really were correct that a TRO that was entirely correct when issued can become "wrongful" based on subsequent changes in the law, it would be absolutely critical for courts to have discretion to ameliorate inequitable results. The combined effect of

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[2] NJTHA protests that the district court did not permanently enjoin NJTHA. BIO.25-26. But that is just because the court's permanent injunction against state officials and the state law made a permanent injunction specifically directed to NJTHA unnecessary. NJHTA never disputes that the proceedings that culminated in that permanent injunction confirmed the district court's views in entering the TRO. And NJHTA itself estimates that the permanent injunction cost it far more in lost revenue than the TRO, notwithstanding that only the latter was specifically directed to NJTHA. BIO.15.

the Third Circuit's rulings guarantees inequitable results and demands this Court's review.

1. "[W]hen district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001). Rule 65(c) plainly addresses equitable relief and provides only that a district court may not "issue" temporary injunctive relief unless a movant "gives security" that the court, in its discretion, deems "proper." Fed. R. Civ. P. 65(c). The rule is silent on the court's power to permit or deny later recovery on that bond. The absence of any textual limitation—much less the "clear" limitation this Court's precedent demands—leaves district courts with discretion to award damages or simply release the bond as the circumstances warrant. That conclusion is consistent with traditional equity practice. *See, e.g.*, *Russell v. Farley*, 105 U.S. 433, 441-42 (1881). And it accords with how this Court has interpreted comparable civil rules. *See* Fed. R. Civ. P. 54(d); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 377 (2013).

NJTHA does not dispute any of this. Instead, it just maintains that the Third Circuit's view that there is an "implicit presumption" in favor of recovery is shared by other courts. *See* BIO.26-27. But NJTHA makes no effort to explain why those courts are correct. That is understandable; explaining why courts of equity are bound by an *implicit* rule of rigidity and inflexibility, when this Court has demanded a clear statement, is no mean feat. That multiple circuits have repeated the error with citations to each other, but no persuasive analysis,

only reinforces the need for this Court's review—especially given the contrary (and correct) view of the Fifth Circuit.

2. NJTHA denies that there is a circuit split, but the Third Circuit itself begged to differ. As it acknowledged, the Fifth Circuit has long held that "[t]he awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction." *H&R Block, Inc. v. McCaslin*, 541 F.2d 1098, 1099 (5th Cir. 1976) (per curiam). On the other side, several circuits have held that Rule 65(c) codifies an "implicit presumption" in favor of damages. *See* Pet.27-28.

NJTHA claims that another Fifth Circuit panel "called into question" *H&R Block*'s viability. BIO.27 (discussing *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801 (5th Cir. 1989)). In fact, that decision arose in a different posture (appeal of a bond amount), does not even mention *H&R Block*, and merely cites the Seventh Circuit's decision in *Coyne-Delany Co. v. Capital Development Board of Illinois*, 717 F.2d 385 (7th Cir. 1983), for a different proposition in dictum. Regardless, it is a "well-established rule that one panel of the Fifth Circuit cannot overrule the prior decision of another panel." *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 945 F.3d 206, 212 n.7 (5th Cir. 2019). That is likely why other courts—both before and after that 1989 decision—have specifically cited *H&R Block* when acknowledging that "there is a split of authority" on this question. *Glob. NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13, 23 (1st Cir. 2007); *see also Zenith Radio Corp. v. United States*,

823 F.2d 518, 521 (Fed. Cir. 1987); *Coyne-Delany*, 717 F.2d at 391.

NJTHA alternatively urges the Court to deny review because the split is "lopsided." BIO.27. But the interest in maintaining uniformity in circuit practice is implicated by "lopsided" and "even" splits alike, which presumably explains the Court's practice of granting certiorari when even one "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). And "lopsided" splits are often resolved in favor of the minority position, sometimes by "lopsided" margins. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 & n.4 (2018) (8-1 decision resolving 6-1 split in favor of minority position); *Merit Mgmt. Grp. LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018) (unanimous decision resolving 5-2 split in favor of minority position).

In all events, NJTHA is wrong to claim that no other circuit has "endorsed" the Fifth Circuit's view. BIO.28. Despite inconsistency in their practice, *see* Pet.28-29, the Seventh, Tenth, and Eleventh Circuits have all relied on *H&R Block* to support the proposition that the awarding of damages on an injunction bond lies within the district court's sound discretion. *See Henco, Inc. v. Brown*, 904 F.2d 11, 13 n.2 (7th Cir. 1990); *Kansas ex rel. Stephan v. Adams*, 705 F.2d 1267, 1269 (10th Cir. 1983); *Milan Express, Inc. v. Averitt Express, Inc.*, 208 F.3d 975, 980 (11th Cir. 2000). Thus, the split is real; it is mature; and it warrants this Court's review.

This case presents an ideal vehicle to resolve it. The district court expressly held in the alternative that it would exercise its discretion to deny NJTHA recovery since then-binding law "clearly favored" petitioners and changed only years later in *Murphy*. Pet.App.44. The Third Circuit reversed because it held that the district court had no such discretion to exercise. The issue that has split the circuits thus was plainly dispositive here. Indeed, only a rule under which district courts' equitable hands are tied could justify the inequitable result here.

III. This Case Is An Optimal Vehicle For Resolving The Highly Consequential Questions Presented.

NJTHA leads off its opposition by criticizing the petition as "interlocutory." BIO.20. But it is not interlocutory in any sense that matters. This litigation has dragged on for years, and the district court order the Third Circuit reversed and petitioners seek to reinstate was a final order that would have ended this long-running dispute once and for all. Indeed, reversal on either question would be outcome determinative, and the Third Circuit remand is for proceedings that would be unnecessary in other circuits. Thus, this case is not interlocutory in any material way. In all events, this Court routinely grants review of interlocutory federal court decisions as long as the questions presented are "fundamental to the further conduct of the case," *Land v. Dollar,* 330 U.S. 731, 734 n.2 (1947), a standard that is amply satisfied here. S*ee, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020); *see generally* Eugene Gressman et al., *Supreme Court Practice* 283 (10th ed. 2013).

NJTHA questions the importance of these issues, suggesting they arise infrequently in appellate opinions. But NJTHA acknowledges that no fewer than five circuits have weighed in on the first question presented, and even more have addressed the second. BIO.21, 26-27. And those appellate decisions are just a tip of an iceberg. Modest bond amounts in some cases and the fact that the issues come to a head only at the end of exhausting, multi-stage litigation amply explain why relatively few Rule 65(c) disputes precipitate appellate opinions. But district courts across the country wrestle with the scope of Rule 65(c) whenever they issue TROs and preliminary injunctions. Even an issue as basic and recurring as setting the bond amount can be influenced by the legal standards for when a "wrongly enjoined" party is entitled to compensation. And the answers to the questions presented will influence the decisions of countless plaintiffs weighing whether to vindicate their rights by seeking interim relief at the risk of incurring damages if the law changes in unpredictable ways. The rules that govern those ubiquitous decisions should not be uncertain or vary from circuit to circuit.

Finally, NJTHA claims that this case is "*sui generis*." BIO.29. But as the many cases that make up the circuit splits show, while questions concerning the scope of Rule 65(c) arise in a wide range of factual scenarios, the underlying legal issues remain the same. Moreover, the aspects of this case that are unusual—namely, that petitioners' rights under circuit law had just been established in an earlier round of litigation, that the district court's TRO and permanent injunction ruling were affirmed by the

circuit twice (via panel decision and then en banc), that this Court then reversed by finding PASPA unconstitutional (a conclusion the district court was precluded by circuit-law from reaching), and that no court along the way embraced NJTHA's argument against the TRO—only highlight the inequity of the result.[3] They are otherwise irrelevant to the recurring legal issues. Indeed, the happenstance of this Court's prior involvement is a feature, not a bug, as it gives the Court an intimate familiarity with the procedural history and a keen sense of the inequity.

[3] Both the Third Circuit and this Court squarely rejected NJTHA's argument that "PASPA … was not violated by the 2014 Repealer." BIO.24; *see Murphy v. Nat'l Collegiate Athletic Ass'n,* 138 S. Ct. 1461, 1474 (2018); Pet.App.7, 28 n.1. The only thing more remarkable than NJTHA's refusal to concede the point is its effort to revive a frivolous "bad-faith" argument that also has been rejected thrice over. *See* CA3 Response Br.31-34.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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