NOS. 16-476, 16-477

In the
Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, et al.,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

JEFFREY A. MISHKIN
ANTHONY J. DREYER
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
EDMUND G. LACOUR JR.
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Respondents

October 16, 2017

QUESTION PRESENTED

Congress enacted the Professional and Amateur Sports Protection Act ("PASPA") to stop the spread of state-sponsored sports gambling. PASPA prohibits states from operating a sports-gambling scheme themselves, prohibits private individuals from conducting such schemes in the states' stead, and preempts state laws authorizing or licensing such conduct. The question presented is whether PASPA commandeers the states.

PARTIES TO THE PROCEEDING

Petitioners, who were appellants below, are Christopher J. Christie, as Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Frank Zanzuccki, Executive Director of the New Jersey Racing Commission; Stephen M. Sweeney, President of the New Jersey Senate; Vincent Prieto, Speaker of the New Jersey General Assembly; and the New Jersey Thoroughbred Horsemen's Association, Inc. The New Jersey Sports and Exposition Authority was a defendant in the district court.

Respondents, who were appellees below, are 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.

CORPORATE DISCLOSURE STATEMENT

Respondents are 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. None of the respondents has a parent company. No publicly held company owns 10% or more of any respondent's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulation

Other Authorities

INTRODUCTION

This case involves a straightforward application of the Supremacy Clause. The Professional and Amateur Sports Protection Act ("PASPA") does not force states to enact any federally-prescribed legislation or to enforce any federal regulatory regime. PASPA does prevent states from operating sports gambling schemes, like sports-based lotteries, and it does prevent states from authorizing third parties to operate such schemes in their stead. But that preemption of state action and state law that interferes with federal policy is unproblematic—indeed, commonplace—and far removed from the two statutory provisions that this Court has found to commandeer the states. PASPA does not compel states (or anyone else, for that matter) to do anything. Indeed, New Jersey complied with PASPA for two decades without doing anything at all. This case therefore lacks the irreducible minimum of any successful commandeering claim—namely, an affirmative command that states enact or implement federal law.

The notion that PASPA commandeers the states was invented 20 years after its enactment, when New Jersey intentionally violated PASPA so that it could challenge its constitutionality. After courts rejected that challenge up and down the line, the legislature passed a new law purporting to "repeal" the state's sports gambling prohibitions, but only for sports-gambling schemes provided under conditions of the state's choosing—*i.e.*, at state-licensed casinos and racetracks, by casino and racetrack patrons 21 years or older, and on only athletic contests that do not

involve a New Jersey college team or a collegiate event taking place in New Jersey. As the overwhelming majority of the *en banc* Third Circuit recognized—and as petitioners no longer dispute—that effort to channel the state's preferred forms of sports gambling to the state's hand-picked venues for lawful gambling was an authorization dressed up as a "partial repeal" and ran afoul of PASPA.

New Jersey contends that PASPA violates the anti-commandeering doctrine because it requires New Jersey to maintain its pre-existing prohibitions on sports gambling. But PASPA does no such thing. In fact, PASPA contains no affirmative command of any kind. It does not require states to maintain, enact, enforce, or *do* anything. Instead, under PASPA states must simply refrain from taking certain actions, *i.e.*, from operating sports-gambling schemes or from authorizing third parties to do so in their stead.

For example, PASPA prohibits a state from sponsoring or operating a sports lottery, or from authorizing or licensing a third party to do so. Such efforts are unlawful under, *i.e.*, preempted by, PASPA. But as long as the state refrains from undertaking or authorizing a sports lottery, it does not run afoul of PASPA. If a state had a pre-PASPA prohibition on sports lotteries on its books, it is free to maintain it, repeal it, or enhance it without running afoul of PASPA. Of course, if the state tries to engineer a clever "partial repeal" of the prohibition in an effort to authorize a hand-picked third party to operate a sports lottery, that "partial repeal" will run afoul of and be preempted by PASPA. But so long as a state refrains from authorizing a third party to offer a

forbidden sports lottery, it is free to alter its prohibitions as it sees fit. That is the ordinary and appropriate operation of the Supremacy Clause and bears no resemblance to anything this Court has ever identified as a commandeering problem.

At the end of the day, New Jersey's real complaint is that Congress has forbidden it from enacting the specific policy it prefers—namely, state-sponsored sports gambling at its state-licensed casinos and racetracks. And make no mistake, Congress has done that. But Congress does not commandeer the states just because it limits their policy options, and nothing in the Tenth Amendment prevents Congress from using its commerce power to preempt state laws that contravene federal policy. The difference between permissible preemption and impermissible commandeering is that the former *precludes* certain state action, while the latter *commands* it. PASPA falls comfortably in the former, permissible camp.

STATEMENT OF THE CASE

A. Federal Regulation of Gambling

Congress has long recognized and sought to contain the harms that can flow from various forms of gambling. In doing so, Congress has often deferred to state judgments as to what types of gambling should be allowed in that state, but it has intervened when necessary to "prevent interference by one State with the gambling policies of another" and "to protect identifiable national interests." 15 U.S.C. §3001(a)(2).

For instance, although Congress has generally left it to the states to decide whether to offer lotteries, when some states began to outlaw them, Congress passed a prohibition on the use of the mails to conduct

lotteries in an effort to help states prevent their own anti-gambling policies from being thwarted by the availability of gambling in other states. *See N.Y. State Broads. Ass'n v. United States*, 414 F.2d 990, 995 (2d Cir. 1969). By "supplement[ing] the action of those states … which, for the protection of the public morals, prohibit the drawing of lotteries … within their respective limits," Congress not only prevented one state from using interstate commerce to interfere with the policy choices of another, but also promoted the national interest of "guarding the people of the United States against the 'widespread pestilence of lotteries.'" *Champion v. Ames*, 188 U.S. 321, 357 (1903).

In the 1950s and 1960s, Congress put in place anti-gambling measures to fight the scourge of organized crime. The Interstate Wire Act of 1961, for example, included sweeping new prohibitions on the use of wire communications for interstate or foreign transmission of (1) bets or wagers on sporting events; (2) information assisting in the placement of such bets or wagers; and (3) communications entitling the recipient to receive money for such bets or wagers. 18 U.S.C. §1084(a). Congress provided a limited accommodation to states that permitted sports gambling by exempting "the transmission of *information* assisting in the placing of bets" on sporting events from a state where betting is legal into a state where such betting is also legal. *Id.* §1084(b) (emphasis added). But that exemption does not "permit the transmission of bets and wagers" themselves (as opposed to information supporting them) "from or to any State whether betting is legal in

that State or not." *United States v. McDonough*, 835 F.2d 1103, 1105 (5th Cir. 1988).

The Organized Crime Act of 1970 took federal anti-gambling measures a step further, creating new criminal prohibitions that apply directly to gambling businesses. Pub. L. No. 91-452, §801, 84 Stat. 922 (1970). The act makes it unlawful to conduct an "illegal gambling business," which is defined, in part, by whether the business violates state or local law. 18 U.S.C. §1955(b)(1)(i). The Act also makes it a federal crime to obstruct state or local law enforcement "with the intent to facilitate an illegal gambling business." *Id.* §1511(a).

Congress has enacted several statutes specifically aimed at curtailing gambling on professional and amateur sports. As noted, the Wire Act's prohibitions expressly apply to sports gambling, *id.* §1084(a), and three years after passing the Wire Act, Congress made it a federal crime to fix or attempt to fix any sports contest, *id.* §224. The House Report declared such offenses "a challenge to an important aspect of American life—honestly competitive sports." H.R. Rep. No. 88-1053, at 2 (1963). And when Congress exempted state-run lotteries from the federal prohibitions on using interstate commerce to facilitate lotteries, it excluded state-sponsored sports lotteries from that exemption, making clear that federal laws would continue to apply to "placing or accepting of bets or wagers on sporting events or contests" even when conducted by states. *See* 18 U.S.C. §1307(d).

More recently, Congress enacted the Unlawful Internet Gambling Enforcement Act ("UIGEA"), which prohibits internet gambling as a matter of

federal law unless the state in which it is conducted has in place certain federally-specified constraints. 31 U.S.C. §5362(10). Accordingly, under UIGEA, which applies to sports gambling, internet gambling that is lawful under state law may nonetheless violate federal law.

B. The Professional and Amateur Sports Protection Act

In 1990, amid growing public concern about the potential harms of sports gambling, Congress began considering federal legislation to stem the spread of state-sponsored gambling on professional and amateur sports. Although only a handful of states had actually authorized any form of sports gambling, various states were considering authorizing sports-gambling schemes to be conducted on riverboats or in off-track betting parlors and casinos; others were debating introducing sports themes into their lotteries. *See* 137 Cong. Rec. S2256 (Feb. 22, 1991) (statement of Sen. DeConcini).

After a robust debate and extensive hearings, Congress concluded that although "sports gambling offers a potential source of revenue," "the risk to the reputation of one of our Nation's most popular pastimes, professional and amateur sporting events, is not worth it." S. Rep. No. 102-248, at 7 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3558. "Sports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling," "undermines public confidence in the character of professional and amateur sports," and "will promote gambling among our Nation's young people." *Id.* at 5. The Senate Report noted that

"[w]ithout Federal legislation, sports gambling is likely to … develop an irreversible momentum," and singled out as an example "pressures in such places as New Jersey … to institute casino-style sports gambling." *Id.*

On October 28, 1992, the President signed into law PASPA, which was approved by a vote of 88-5 in the Senate and by voice vote in the House. *See* 28 U.S.C. §3701 *et seq.*[1] PASPA was not designed to eliminate any and all sports gambling. Instead, the statute specifically targets state-sponsored sports-gambling s*chemes*—in other words, organized markets for sports gambling—whether operated by the state or by a third party licensed or authorized by the state.

To that end, PASPA's first set of prohibitions makes it "unlawful for" any "governmental entity" (*i.e.*, the state itself) to "sponsor, operate, advertise, promote, license, or authorize by law or compact … a lottery, sweepstakes, or other betting, gambling, or

[1] Contrary to petitioners' suggestion, NJ.Br.6, Congress did not enact PASPA over constitutional objections from the Justice Department. Instead, DOJ's only objection pertained to "overbreadth and ambiguity" concerns about the definition of the term "lottery" in an earlier version of the legislation—a concern that DOJ suggested could be addressed simply by "more fully defin[ing]" the term, which Congress ultimately did. Pet.App.225. While DOJ also suggested that PASPA "raises federalism issues," the only such issue it identified in its opinion letter was a *policy* concern that PASPA would limit the states' ability to use sports gambling to raise revenue. This Court has subsequently clarified, unanimously, that laws that prohibit states from pursuing potentially lucrative revenue-raising opportunities raise no commandeering concerns. *See, e.g.*, *Reno v. Condon*, 528 U.S. 141 (2000).

wagering scheme based" on an amateur or professional sporting event. *Id.* §3702(1). PASPA thus precludes states from sponsoring or operating their own sports-gambling schemes, from advertising or promoting sports-gambling schemes, and from licensing or authorizing third parties to run sports-gambling schemes in their stead.

PASPA's second set of prohibitions are directed at private parties, making it "unlawful for … a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity," any sports-gambling scheme. *Id.* §3702(2). The law thus not only precludes the state from operating or authorizing a sports-gambling scheme, but also prevents a third party from operating a sports-gambling scheme pursuant to state law.

To promote PASPA's federal policy against state-sponsored sports-gambling schemes without resorting to federal "criminal prosecutions of State officials" or private parties, S. Rep. 102-248, at 6 (1991), Congress granted the Attorney General authority to enforce PASPA's prohibitions through civil suits for injunctions. 28 U.S.C. §3703. PASPA also provides professional and amateur sports organizations with a cause of action to seek to enjoin a PASPA violation when the organization's own "competitive game is alleged to be the basis of such violation." *Id.*

To accommodate the reliance interests of the handful of states that already had authorized some sports-gambling schemes, PASPA exempts from its prohibitions state-authorized sports-gambling schemes that pre-dated PASPA's enactment. *Id.* §3704(a)(1)-(2). PASPA likewise exempts "parimutuel

animal racing" and "jai-alai games" from its reach. *Id.* §3704(a)(4). PASPA also includes a special exemption specifically crafted for New Jersey, which flatly prohibited sports gambling at the time but had authorized and licensed extensive non-sports gambling at casinos in Atlantic City. Under this exemption, New Jersey was given until "one year after [PASPA's] effective date" to "authorize[]" sports-gambling schemes to be "conducted exclusively in casinos" in Atlantic City "pursuant to a comprehensive system of State regulation authorized by that State's constitution." *Id.* §3704(a)(3).

New Jersey chose not to avail itself of PASPA's one-year window. In fact, the state legislature declined even to vote on a resolution that would have allowed a referendum on a constitutional amendment authorizing sports gambling at casinos. *See In re Pet. of Casino Licensees for Approval of a New Game, Rulemaking & Authorization of a Test*, 633 A.2d 1050, 1051 (N.J. Super. Ct. App. Div.), *aff'd*, 647 A.2d 454 (N.J. 1993) (per curiam). Instead, New Jersey continued to flatly prohibit sports gambling for the next two decades. *See, e.g.*, N.J. Stat. Ann. §2a:40-1 ("All wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."). The New Jersey Constitution likewise continued to prohibit the legislature from authorizing wagering on the results of any professional, college, or amateur sports other than horse racing. *See In re Casino Licensees*, 633 A.2d at 1054.

C. New Jersey's Relentless Efforts to Get Sports-Gambling Schemes Into Its Casinos and Racetracks

In recent years, New Jersey has come to regret its decision not to avail itself of the option to authorize its casinos to provide sports gambling back in 1993, and has undertaken a series of efforts to get out from under PASPA's prohibitions.

The state began by amending its constitution to eliminate its historical prohibition on sports gambling and to permit the legislature "to authorize by law wagering … on the results of any professional, college, or amateur sport or athletic event," except for certain New Jersey-related collegiate events. N.J. Const. art. IV, §VII, ¶2D. New Jersey then enacted the Sports Wagering Law, N.J. Stat. Ann. §5:12A-1, *et seq.* (West 2012) (the "2012 Law"), which authorized Atlantic City casinos and horse racetracks throughout the state to engage in "the business of accepting wagers on any sports event by any system or method of wagering." *Id.* §§5:12A-1, 5:12A-2. Consistent with its amended constitution, New Jersey exempted from this authorization the athletic events of its own colleges and universities, as well as any collegiate events taking place in New Jersey, thus shielding these local interests from the negative effects of the sports gambling it authorized. *Id.* §5:12A-1. The Division of Gaming Enforcement, which was charged with regulating and issuing licenses for the sports gambling that the law authorized, *id.* §§5:12A-2, 5:12A-4, then promulgated regulations pursuant to the 2012 Law. N.J. Admin. Code §13:69N.

New Jersey did not claim that the 2012 Law and implementing regulations were somehow compatible with PASPA. Instead, New Jersey acknowledged the unambiguous conflict with federal law, and the governor declared, "if someone wants to stop us, then they'll have to take action to try to stop us." App.118, *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) ("*Christie I*").

The National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball (collectively, "respondents") took up the charge, bringing suit under §3703 of PASPA. New Jersey responded by conceding that its 2012 Law violated PASPA but arguing that PASPA is unconstitutional because, among other things, it commandeers the states. The United States intervened to defend PASPA's constitutionality, and the district court and the Third Circuit thoroughly rejected New Jersey's argument and enjoined New Jersey from enforcing the 2012 Law and regulations. *See Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013), *aff'd*, *Christie I*, 730 F.3d 208.

After the Third Circuit denied their *en banc* petitions, petitioners sought this Court's review. Before the Court could act, however, the legislative sponsors of the 2012 Law announced that they had no intention of letting the courts stand in the way of their plans to authorize sports gambling at New Jersey's casinos and racetracks. As State Senator Raymond Lesniak put it, no matter what the outcome before the Court, "we will push the envelope on sports betting."

JA122. To that end, he vowed that if this Court did not revive the 2012 Law, he would introduce new legislation that, once again, would "allow casinos and racetracks to have sports betting." *Id.*

This Court denied the petitions. *See Christie v. Nat'l Collegiate Athletic Ass'n*, 134 S. Ct. 2866 (2014). Three days later, the New Jersey legislature made good on Senator Lesniak's promise and passed Senate Bill 2250, 216th Leg., 1st Sess. (N.J. 2014) ("S2250"). S2250 purported to "repeal" the state's existing prohibitions on sports wagering, but *only* "to the extent they would apply to such wagering at casinos or gambling houses in Atlantic City or at current running and harness racetracks in this State." S2250. S2250 thus purported to "repeal" the prohibitions only as applied to sports-gambling schemes run by state-licensed and state-regulated commercial gambling venues. As Senator Lesniak explained, S2250 would—like the invalidated 2012 Law before it—"put [sports gambling] in the regulated hands of existing casino and racetrack operators." JA125. Governor Christie vetoed that unabashed effort to undo *Christie I*, describing it as a "novel attempt to circumvent the Third Circuit's ruling" and to "sidestep federal law." JA128. Emphasizing that "the rule of law is sacrosanct" and "binding on all Americans," the Governor refused to sign off on the legislature's transparent effort to "[i]gnor[e] federal law." JA128.

Two months later, the Governor saw things differently. On October 17, 2014, he signed into law Senate Bill 2460, 216th Leg., 1st Sess. (N.J. 2014) (the "2014 Law"), which was also sponsored by Senator Lesniak. As one of his co-sponsors candidly

acknowledged, the 2014 Law was yet another attempt to achieve the same thing as the invalidated 2012 Law—namely, to "implement well regulated sports gaming" in New Jersey's casinos and racetracks. JA314.

The 2014 Law authorizes and licenses sports gambling in the same manner as the vetoed S2250—*i.e.*, by purporting to "repeal" existing prohibitions on provision of and participation in sports-gambling schemes, but *only* "to the extent they apply … at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State." N.J. Stat. Ann. §5:12A-7. This "partial repeal" applies, moreover, *only* to sports-gambling schemes that confine betting to "persons 21 years of age or older situated at such location," and to sporting events other than "a collegiate sport contest or collegiate athletic event that takes place in New Jersey or … in which any New Jersey college team participates regardless of where the event takes place." *Id.* In short, the 2014 Law, like the 2012 Law before it, ensured that sports-gambling schemes would be operated only by state-licensed gambling venues, and offered only to specified persons and on specified sporting events.

D. Proceedings Below

1. Respondents responded by filing this lawsuit asking the district court to enjoin New Jersey's latest effort to "authorize" and "license" sports gambling in violation of PASPA. In addition to the same state defendants named in *Christie I*, respondents named as defendants the New Jersey Thoroughbred Horsemen's Association ("NJTHA"), which operates Monmouth

Park Racetrack and announced within mere hours of the 2014 Law's signing its intent to "begin offering and accepting wagers on sporting contests and athletic events" within the week, JA119; as well as the New Jersey Sports and Exposition Authority ("NJSEA"), the state instrumentality that owns Monmouth Park (and other state-sponsored gambling venues). The complaint sought to enjoin the state petitioners and NJSEA from violating §3702(1) of PASPA and to enjoin NJTHA from violating §3702(2).

Petitioners refused to hold off on initiating sports gambling, even for a few weeks, to give the district court time to consider the legality of the 2014 Law, and so respondents sought a temporary restraining order. The district court granted that order and, after additional briefing and a hearing in which the United States participated as an *amicus* (because PASPA's constitutionality was not directly challenged), permanently enjoined New Jersey from "giving operation or effect" to the 2014 Law. Pet.App.113. Although the court acknowledged that New Jersey "carefully styled the 2014 Law as a repeal," Pet.App.107, it concluded that the law is in substance an authorization, recognizing that "'the Supremacy Clause is not so weak that it can be evaded by mere mention of [a] word,' … '[or] by formalism,' which would only 'provide a roadmap for States wishing to circumvent' federal law." Pet.App.106 (quoting *Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 382-83

(1990) & *Haywood v. Drown*, 556 U.S. 729, 742 & n.9 (2009)).[2]

2. Petitioners again appealed to the Third Circuit, which held that the 2014 Law, like the 2012 Law before it, violated PASPA. Pet.App.60. As the court explained, "by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling," "the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited." Pet.App.60-61. The court noted that the 2014 Law is at odds with PASPA's exception allowing New Jersey to authorize sports-gambling schemes at its casinos within one year of PASPA's enactment, explaining that Congress could not plausibly have intended to allow New Jersey belatedly to accomplish through a dubiously labeled "partial repeal" the same result that PASPA gave it only one year to adopt. Pet.App.62-63.

Judge Fuentes, the author of *Christie I*, dissented, maintaining that the 2014 Law does not violate PASPA because a law styled as a repeal—whether "partial" or otherwise—is not an "authorization." Pet.App.67.

3. The Third Circuit agreed to hear the case *en banc*. In a 9-3 decision, the court rejected petitioners' argument that the 2014 Law does not violate PASPA, as well as their revived argument that PASPA unconstitutionally commandeers the states.

---

[2] Having enjoined New Jersey from giving operation or effect to the 2014 Law, the court found no need to resolve respondents' claims against NJSEA and NJTHA. Pet.App.110a.

The court began by agreeing with the panel majority that the 2014 Law "authorized" sports-gambling schemes in violation of PASPA. Rejecting petitioners' argument that a law labeled a "repeal" cannot be an authorization, the court explained that "the presence of the word 'repeal' does not prevent us from examining what the provision actually does." Pet.App.14. And "[w]hile artfully couched in terms of a repealer, the 2014 Law essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling. This is an authorization." Pet.App.14.[3]

The court then rejected petitioners' reprise of their argument that PASPA unconstitutionally commandeers the states. The court first reiterated, as the panel held in *Christie I*, that the commandeering doctrine has never been understood to apply "where the states were not compelled to enact laws or implement federal statutes or regulatory programs." Pet.App.19. After examining this Court's preemption and commandeering cases in exhaustive detail, the court found PASPA "more akin to those laws upheld" by this Court than to the two unusual laws struck down in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). Pet.App.22. The court found it enough for constitutional purposes that PASPA "does not

[3] Having concluded as much, the court declined to address respondents' (and the United States') additional argument that, by confining sports gambling to state-licensed gambling venues, the law licenses sports-gambling schemes in violation of PASPA. Pet.App.16a n.7.

require … the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law." Pet.App.25 (quoting *Christie I*, 730 F.3d at 231). "Put simply, PASPA does not impose a coercive either-or requirement or affirmative command." Pet.App.25.

In reaching that conclusion, the court rejected petitioners' argument that "if the legislature cannot repeal New Jersey's prohibition as it attempted to do in the 2014 Law, then it is required to affirmatively keep the prohibition on the books." Pet.App.22-23. As the court explained, the mere fact "[t]hat a specific partial repeal which New Jersey chose to pursue in its 2014 Law is not valid under PASPA does not preclude the possibility that other options may pass muster." Pet.App.24. Accordingly, while the court saw no need to "articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA," it declined to accept the proposition "that PASPA presents states with a strict binary choice between total repeal and keeping a complete ban on their books." Pet.App.24.

Judge Fuentes, joined by Judge Restrepo, dissented again, reasoning that a repeal is not an "authorization" under PASPA. Pet.App.27-34. Judge Vanaskie, the lone dissenter in *Christie I*, also continued to dissent, reiterating his view that PASPA effectively requires states to maintain sports-gambling prohibitions in violation of the commandeering doctrine because there is no workable "distinction between repeal and authorization." Pet.App.46.

E. New Jersey's Proposed Abandonment of the Regulation of Sports Gambling

Less than three months after the *en banc* court's decision, New Jersey legislators introduced a bill that would "remov[e] and repeal[] all prohibitions, permits, licenses, and authorizations concerning sports wagering" in the state. G.A. A4303, 217th Leg. (2016). The bill's statement sets forth the sponsors' view that the new law would not run afoul of the Third Circuit's decisions because it would be a "total repeal." *Id.* In May 2017, Dennis Drazin, who has served as an advisor to NJTHA during this litigation, JA235, asserted that he had spoken with numerous state legislators and declared that "[w]e're moving forward with the full repeal." Stephen Edelson, *Monmouth Park set to use sports betting 'Nuclear Option'*, Asbury Park Press, May 25, 2017, http://on.app.com/2hKWY5k. Senator Lesniak then introduced in the New Jersey Senate a bill that "would totally remove and repeal the State's prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events." G.A. S3375, 217th Leg. (2017). That bill and the similar bill in the General Assembly have both been referred to committee.

SUMMARY OF ARGUMENT

While PASPA requires states to refrain from engaging in certain conduct and from embracing certain policies, it does not force them to adopt federally-prescribed policies or to enforce federal law. Put differently, PASPA preempts but does not commandeer. The distinction is critical. Federal preemption of state law is both permissible and

commonplace, and it does not cross any constitutional line just because it prevents states from achieving their preferred policy objectives. Commandeering, by contrast, is impermissible but arises only when Congress goes beyond precluding state action and affirmatively commands it.

That is a very rare thing. Indeed, this Court has found a commandeering problem in a grand total of two cases. In both of those cases, the challenged law told states what they *must do* instead of what they *must not do*. In *New York*, Congress told states they must adopt federal standards for disposal of radioactive waste; in *Printz*, Congress told states they must run federal background checks. But in both cases the Court was at pains to distinguish those rare *thou shalt* commands from the commonplace dynamic in which Congress tells states *thou shalt not* have laws inconsistent with federal policy. And as those cases, the cases before them, and the cases after them all make clear, without that type of affirmative *command* to enact or implement federal policy, there is no *command*eering; instead, there is just ordinary preemption.

Implicitly recognizing that critical distinction between preemption and commandeering, New Jersey insists that PASPA is unconstitutional because it purportedly commands states to maintain their existing, pre-PASPA prohibitions against sports gambling on their statute books. The problem with that argument—as every court to consider it has recognized—is that PASPA does no such thing. As is clear on its face, PASPA does not require states to maintain existing prohibitions against sports

gambling. Indeed, PASPA does not require states to enact, maintain, consider, enforce, or *do* anything. Instead, the statute sets forth only what states (and private parties) may *not do*—*i.e.*, take action inconsistent with the federal policy against state-sponsored sports-gambling schemes.

More concretely, a state may not sponsor or operate a sports-gambling scheme, like a sports-based lottery. Nor may a state authorize or license a third party to sponsor or operate such a scheme. And neither a state nor a third party may advertise or promote such a scheme, whether state-operated or state-authorized. That is it. All a state must do to comply with PASPA is abide by those prohibitions. If a state already prohibits sports-gambling schemes, it can leave its prohibitions intact, but it can also repeal or enhance them without running afoul of PASPA. To be sure, a state cannot "partially repeal" a general prohibition for only one or two preferred providers, or only as to sports-gambling schemes conducted by the state, for PASPA's prohibitions are not that easily evaded. But the notion that PASPA compels states to keep existing sports gambling prohibitions in place is a fiction—and a fiction on which petitioners' argument critically depends.

Petitioners thus are ultimately reduced to arguing that PASPA commandeers New Jersey not because it compels New Jersey to do anything, but because it prevents New Jersey from effectuating the specific policy it prefers—*i.e.*, from authorizing sports gambling at its state-licensed casinos and racetracks. But while PASPA certainly does prevent that, that is nothing but the appropriate and unremarkable

consequence of the Supremacy Clause. Congress does not commandeer the states just because it limits their options, and the Tenth Amendment does not require Congress to let states override its policy decisions in areas that concededly fall within Congress' enumerated powers.

In all events, even if there were a constitutional problem with PASPA's prohibition on states "authorizing" sports-gambling schemes, PASPA's remaining unchallenged prohibitions would still constitutionally prohibit New Jersey's casinos and racetracks from offering sports-gambling schemes pursuant to the 2014 Law. PASPA prohibits not only state action inconsistent with federal policy, but private action as well. And petitioners do not have a constitutional argument as to *most* of the prohibitions on state conduct or *any* of the prohibitions on private conduct. Section 3702(1)'s provisions making it unlawful for a state itself to "sponsor, operate, advertise, [or] promote" a sports-gambling scheme are an unquestionably permissible regulation of states as participants in the sports-gambling market. And petitioners have never suggested that there is any constitutional problem with §3702(2), which prohibits private parties from sponsoring, operating, advertising, or promoting sports-gambling schemes pursuant to state law. Together, those provisions suffice to ensure that third parties cannot execute the state-authorized sports-gambling schemes envisioned by the 2014 Law (or the 2012 Law) regardless of whether PASPA validly preempts the state laws directly.

Not only does that underscore that Congress plainly would have wanted the balance of PASPA to remain intact with or without the challenged authorization prohibition in §3702(1); it also underscores that PASPA was never about commandeering the states. Instead, the statute is nothing more than an attempt to achieve the permissible and commonplace objective of preempting state laws that override the federal policy against having the states or their authorized agents operating state-sponsored sports-gambling schemes.

ARGUMENT

I. PASPA Does Not Commandeer The States.

A. The Anti-Commandeering Doctrine Prohibits Only Laws that Compel States to Enact or Administer Federal Policy.

Countless federal laws preempt state laws, sometimes by supplanting them with detailed federal regulations, sometimes by expressing a federal preference for deregulation, and sometimes by prohibiting conduct that states might otherwise want to engage in or authorize. All of those laws constrain states' legislative options and preclude policies that states could otherwise pursue. But none of that raises a constitutional red flag, or even a yellow one. Commandeering concerns arise only when, rather than *constraining* states by taking certain state policy options off the table, Congress imposes affirmative duties that *compel* states to do its bidding. This Court's commandeering cases (not to mention the very name of the doctrine) make that crystal clear.

The first case in which this Court identified a commandeering violation was *New York*. That case

involved a provision of the Radioactive Waste Policy Amendments Act that required states either to take title to radioactive waste or to regulate that waste pursuant to Congress' direction. The fatal flaw in that provision was that it did not give states the option of doing *nothing*. The only two available options both commandeered the states "by *directly compelling* them to enact and enforce a federal regulatory program," either through the executive action of taking title or through the legislative action of enacting federally-specified state legislation. 505 U.S. at 161 (emphasis added). Either option required affirmative action by the state, so confining states to those two options was unconstitutional. *Id.* at 188.

The second commandeering case, *Printz*, involved a provision of the Brady Handgun Violence Protection Act that required state law enforcement officers to perform federal background checks on prospective firearm buyers. Like the law in *New York*, the fundamental defect with this aspect of the Brady Act was that states had no option of doing nothing; the law directed them to take affirmative action. Congress, the Court reiterated, "may not compel the States to implement, by legislation or executive action, federal regulatory programs." 521 U.S. at 925. By requiring state and local law enforcement officers to conduct federally-mandated background checks, the Brady Act unconstitutionally conscripted state law enforcement officers into federal service. *Id.* at 935.

The laws at issue in *New York* and *Printz* both entailed an extraordinary type of command: an "unambiguous" directive requiring the states to *do something*—to take affirmative executive or

legislative action to administer federal regulation or enact federally-specified legislation. *Id.* at 926. Indeed, this Court emphasized in both cases that such a "thou must do X" direction to the states was essentially unprecedented. *Id.*; *see also New York*, 505 U.S. at 177. As those two cases reflect, the commandeering doctrine embodies two related—and limited—principles: The federal government "cannot compel the States to enact or enforce a federal regulatory program," and it "cannot circumvent that prohibition by conscripting the State's officers directly." *Printz*, 521 U.S. at 935.

Nothing about those two principles imperils the ordinary operation of the Supremacy Clause. *See*, *e.g.*, *Printz*, 521 U.S. at 913. Both before and after *New York* and *Printz*, this Court has rejected the notion that federal statutes that preclude states from engaging in certain activity, or permit them to do so only subject to certain conditions, commandeer the states. For instance, in *South Carolina v. Baker*, 485 U.S. 505 (1988), the Court held that Congress may prohibit states from issuing unregistered bonds, even if that federal constraint would require states that wanted to issue bonds to "amend a substantial number of statutes" and "devote substantial effort to determine how best to implement a registered bond system." *Id.* at 514. Likewise, in *Reno v. Condon*, 528 U.S. 141 (2000), this Court held that a federal law prohibiting states from engaging in the profitable practice of disclosing drivers' license information to certain third parties does not commandeer the states just because it requires "time and effort on the part of state employees" to make sure that any disclosures comply with federal law. *Id.* at 150-51.

The anti-commandeering doctrine likewise does not call into question the countless federal laws that displace contrary state law—whether by supplying detailed federal regulations, *see, e.g.*, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992) (considering Occupational Safety and Health Act, which preempts "state laws regulating the same issue as federal laws"), or by expressing a federal preference for deregulation, *see, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992) (considering Airline Deregulation Act, which precludes "States from prohibiting allegedly deceptive airline fare advertisements"). Those laws are routine exercises of Congress' commerce power, which includes the power to preempt state law through the Supremacy Clause.

Thus, while it is easy to take a few sentences from *New York* and *Printz* out of context and begin to imagine commandeering problems lurking throughout the U.S. Code, the anti-commandeering principle is actually quite narrow—and necessarily so: Congress may altogether prohibit states from engaging in conduct or enacting laws contrary to federal policy (as in *Gade* and *Morales*), and it may prohibit states from engaging in certain activity unless they comply with federal policy (as in *Baker* and *Condon*), but what Congress may not do is require states to enact federally-specified laws or to enforce federal laws—*i.e.*, deprive states of the option of doing nothing at all. Unless the commandeering doctrine is to swallow preemption whole, it cannot be understood to invalidate laws that neither "require [states] to enact any laws or regulations" nor "require state officials to assist in the enforcement of federal statutes." *Condon*, 528 U.S. at 150-51.

Petitioners downplay this critical distinction between permissible prohibitions on state activity and impermissible commands to act, but *Printz* itself went to great pains to draw the same distinction to distinguish the unprecedented and improper commandeering it confronted from the sea of laws that uncontroversially limit state action through the ordinary operation of the Supremacy Clause, *i.e.*, the "duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative Acts, are *ipso facto* invalid." 521 U.S. at 913. Preemption is a necessary, appropriate, and unremarkable consequence of the Supremacy Clause, and the commandeering cases themselves make perfectly clear that Congress does not commandeer the states when it precludes them from engaging in conduct or from authorizing others to engage in conduct that conflicts with federal policy.

Petitioners contend that the distinction between prohibitions and commands is "irreconcilable with this Court's cases." NJ.Br.32. But all they succeed in showing is that the anti-commandeering principle is even *narrower* and more specific than the prohibition/command dichotomy suggests. Instead of identifying a case in which this Court found impermissible commandeering in the absence of an affirmative command (there is none), petitioners demonstrate only the converse (and, for them, unhelpful) proposition: "*Reno v. Condon* involved a federal 'prohibition' that required 'affirmative action' on the part of the State in order to comply, but the

Court nevertheless rejected South Carolina's commandeering argument." NJ.Br.32. *Condon* thus illustrates only that the mere fact that a federal law may force the state to take certain action does not, in and of itself, prove impermissible commandeering.[4]

In short, petitioners' sweeping conception of the commandeering doctrine ignores just how unusual the laws at issue in *New York* and *Printz* really were. There is a fundamental difference between federal legislation that compels states to enact or implement federal policy and federal legislation that requires states to refrain from engaging in or authorizing conduct that is contrary to federal policy. Maintaining that distinction is essential to ensuring that *New York* and *Printz* remain important exceptions to an equally important and well-established rule. The only way to keep a clear line between uncontroversial, commonplace preemption and impermissible, aberrant commandeering is to limit the latter to laws that command states to enact or implement federal policy.

---

[4] The only other case petitioners cite, *Coyle v. Smith*, 221 U.S. 559 (1911), concerns the equal footing doctrine, not the anti-commandeering doctrine. *Coyle* rejected a federal law that prohibited Oklahoma from moving its state capital—not because laws that impose prohibitions on states raise Tenth Amendment concerns, but because, by prohibiting Oklahoma alone from choosing the location of its capital, the law placed Oklahoma "upon a plane of inequality with its sister states in the Union." *Id.* at 565.

B. PASPA Does Not Compel States to Enact or Administer Federal Policy.

PASPA lacks the irreducible minimum of any successful commandeering claim: It does not compel states or state officials to do anything. States are not required to enact laws, to take title to something, to conduct background checks, to consider federal standards, to expend funds, or to enforce federal law. Proving the point, New Jersey fully complied with PASPA for two decades without doing *anything*. That is because PASPA only *prohibits* states from sponsoring, operating, advertising, or promoting sports-gambling schemes, and *prohibits* states from licensing or authorizing third parties to engage in that conduct. PASPA does not force states to take any affirmative action to comply with those prohibitions.

Thus, while petitioners portray PASPA as an anomalous effort to enlist states to do the federal government's bidding, the reality is that PASPA is an unremarkable effort to preclude states from engaging in certain conduct and to preempt state laws that license or authorize others to do the same. To be sure, states enjoy less power to run sports lotteries or license sports books in casinos post-PASPA than they had pre-PASPA. But countless federal statutes restrict state legislative options through the ordinary operation of the Supremacy Clause. Simply put, PASPA raises none of the distinct concerns that animate and necessitate the commandeering doctrine.

1. It is important to recognize at the outset that PASPA is not a general anti-sports-gambling statute, designed to ensure that individuals never place a wager on a sporting event. Indeed, PASPA does not

address the placing of sports wagers by individuals at all. Instead, Congress enacted PASPA for a more limited purpose: to prohibit states from operating (or promoting or advertising) a "lottery, sweepstakes, or other betting, gambling, or wagering scheme based on" professional or amateur sports or from authorizing third parties to do the same. 28 U.S.C. §3702. In other words, PASPA is focused on preventing states from entering, or authorizing others to enter into, the market for *providing* sports gambling, whether in the form of lotteries, sports books, or some other gambling "scheme."

That limited focus makes sense, as PASPA was the product of concerns that states were beginning to turn to state-sponsored sports-themed lotteries and other state-authorized sports gambling as a source of revenue. While Congress was not indifferent to private parties *engaging* in sports gambling, it was content to leave that issue primarily to the states and to the many federal criminal laws that provide a backdrop to state enforcement efforts. The specific concern that animated PASPA was the nascent trend toward states actually *operating* sports-gambling schemes, or authorizing others to do so in their stead, in an effort to raise revenue. For example, members of Congress expressed particular concern with a proposed Oregon state lottery that would have been based on the results of sporting events, and with the very real possibility that other states would follow Oregon's lead.[5]

---

[5] Congress' limited focus on state-operated and state-authorized sports-gambling schemes is reinforced by the grandfathering exceptions, which grandfather sports-gambling

Given the national scope of professional and amateur sports, the undeniably commercial aspects of lotteries and sports gambling, and the scope of modern Commerce Clause jurisprudence, there can be no serious dispute that Congress could have passed a law simply prohibiting sports gambling nationwide (perhaps with a grandfather clause for certain pre-existing lawful enterprises with distinct reliance concerns). But that kind of nationwide prohibition would have been overkill, both because almost all states already prohibited sports gambling and because federal law already included substantial prohibitions on illegal sports gambling. What Congress wanted to do, and all it needed to do, was to stop states from operating sports lotteries or sports books or authorizing third parties to do so.

2. There is no question that Congress can do the former—*i.e.*, Congress can prohibit states from entering the sports-gambling market themselves. Indeed, this Court has long held that Congress is free to prevent states from raising revenue through activities that contravene federal policy. *See, e.g.*, *Condon*, 528 U.S. at 151. And that is the very first thing PASPA does, making it unlawful for states themselves to "sponsor, operate, advertise, [or] promote" a sports lottery or other sports-gambling scheme. 28 U.S.C. §3702(1). Thus, any effort by a state to operate a sports-gambling scheme itself plainly would be preempted by PASPA—regardless of

---

schemes operated by states, 28 U.S.C. §3704(a)(1), and authorized by states, *id.* §3704(a)(2), but make no reference to the extent of other pre-PASPA sports gambling, such as whether pre-PASPA state law prohibited small sports wagers among friends.

whether that effort came in the form of a state law expressly authorizing state-operated sports gambling or a state law purporting to partially "repeal" existing broad prohibitions on sports gambling only when it comes to state-operated sports-gambling schemes.

That does not mean that PASPA "commandeers" states into maintaining their existing laws on sports gambling. If, for example, a state had an existing felony prohibition on all lotteries, it could maintain the law, it could repeal the law, it could downgrade the crime to a misdemeanor or increase the penalty, and it could amend the law to permit the state to run a lottery that did not involve sports. PASPA permits all those options. But if the state modified its law, whether through a new authorization or through an amendment partially repealing the existing prohibition, to authorize the state to conduct a sports lottery, that modified law would be preempted by PASPA—and that result would raise no commandeering concern.

There is likewise no question that Congress can prohibit private parties from entering the sports-gambling market. And PASPA does that too, making it unlawful for any person to "sponsor, operate, advertise, or promote" a sports-gambling scheme pursuant to state law or compact. *Id.* §3702(2). Again, that does not mean that states are "commandeered" into maintaining prohibitions on sports-gambling schemes operated by third parties. Section 3702(2) is a belt-and-suspenders provision that makes clear that even if a state purports to authorize a sports-gambling scheme notwithstanding §3702(1), private parties are still prohibited from undertaking conduct pursuant to

state law that is contrary to federal policy. That regulation of private conduct poses no federalism difficulty.

3. According to petitioners, Congress somehow crossed the constitutional line by making explicit in §3702(1) what is already implicit in §3702(2)—namely, that state laws "authorizing" a third party to provide a sports-gambling scheme are preempted by federal law. But petitioners do not and cannot explain why including that prohibition makes any constitutional difference. Just like PASPA's prohibitions making it unlawful for states to offer sports-gambling schemes themselves, and its prohibitions making it unlawful for third parties to offer sports-gambling schemes pursuant to state law, PASPA's prohibition making it unlawful for states to authorize third parties to offer sports-gambling schemes does not require states to enact, maintain, consider, enforce, or *do* anything. Instead, it just renders inoperable any state law that "authorize[s] by law or compact" a sports-gambling scheme. 28 U.S.C. §3702(1). That does not cross a constitutional line. A "wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).

This all is remarkably straightforward when it comes to lotteries, a market in which states have traditionally been directly involved. PASPA plainly prevents a state from sponsoring or operating its own sports lottery. PASPA just as plainly prohibits the state from authorizing or licensing a third party to run

a sports lottery. And whether a sports lottery is conducted by the state or by a third party, neither the state nor a third party can advertise or promote it. If existing state law already prohibits all of that, then the state obviously is not in violation of PASPA, but it is not required to maintain those state-law prohibitions to stay compliant. The state could repeal the entirety of its laws prohibiting or authorizing lotteries without running afoul of federal law. But if the state changes its laws to authorize, either explicitly or implicitly, the state or a specified third party to sponsor, operate, advertise, or promote a sports lottery, the law would be preempted by PASPA, without any commandeering problem.

The result is no different when it comes to sports books, even though, unlike with sports lotteries, the lone state that permitted sports books pre-PASPA did not conduct the sports gambling itself. In that context as well, PASPA still operates by preventing the state from providing its own sports book, preventing the state from licensing or authorizing a third party to provide a sports book, and preventing either the state or a third party from promoting or advertising a sports book. If existing state law already prohibited sports books, then that state law does not conflict with PASPA, but the state will remain in compliance with PASPA even if it modifies or repeals the existing law—as long as it does not either run a sports book or authorize a third party to do so. Once again, there is no commandeering problem.

Nor does PASPA force states to bear the brunt of policing third party efforts to operate sports-gambling schemes in violation of PASPA. To the contrary,

PASPA explicitly contemplates that states are *not* responsible for enforcing its prohibitions, as the statute gives the Attorney General and sports organizations, not the states, the power to bring actions seeking to enjoin violations of PASPA, whether by the state itself (in violation of §3702(1)) or by a third party (in violation of §3702(2)). *See* 28 U.S.C. §3703. PASPA thus neither requires states to enact or maintain any laws, nor requires states to do anything to enforce the federal-law prohibitions it creates. Instead, PASPA just prohibits states from entering or authorizing third parties to enter into the market for providing sports-gambling schemes, and then leaves it to the federal government and sports organizations to enforce those prohibitions.

4. As all of that illustrates, there is nothing unusual, let alone constitutionally suspect, about the fact that PASPA prohibits states from authorizing third parties to offer sports-gambling schemes to the public. Countless federal statutes and regulations prohibit states from enacting, maintaining, or enforcing laws that regulate third parties in ways that conflict with federal policy. *See, e.g.*, 15 U.S.C. §1121(b) ("No State … may require alteration of a registered mark.").[6] That does not mean that all of

[6] *See also, e.g.*, 7 U.S.C. §136v(b) (a "State shall not impose or continue in effect any requirements for labeling or packaging [pesticides] in addition to or different from those required under this subchapter"); 21 U.S.C. §360k(a) ("no State … may establish or continue in effect with respect to a device intended for human use any requirement" that conflicts with federal requirements); 21 U.S.C. §678 (identifying requirements relating to food or drug inspection that "may not be imposed by any State"); 46 U.S.C. §4306 ("a State … may not establish, continue in effect, or enforce

those laws impermissibly "regulate state governments' regulation of interstate commerce," NJ.Br.22, or somehow compel states to enact laws embracing whatever federal policy underlies those prohibitions. It just means that, to the extent a state adopts a law that regulates third parties in a way that conflicts with federal policy, the Supremacy Clause renders that law inoperable.[7]

The same is true of laws that, like PASPA, prohibit states from "licensing" or "authorizing" certain third-party conduct. For example, FDA regulations preempt any state law authorizing generic drug manufacturers to modify their labels. *See PLIVA Inc. v. Mensing*, 546 U.S. 604 (2011). The Federal Aviation Administration Authorization Act preempts any state law authorizing a state port authority to impose "placard and parking requirements" on interstate trucking companies. *Am. Trucking Ass'ns*

---

a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment"); 49 U.S.C. §11501(b) ("a State … may not" impose certain taxes on rail transportation property); *id.* §31111(b) ("a State may not prescribe or enforce a regulation of commerce" that imposes length requirements on certain vehicles); *id.* §40116(b) ("a State … may not levy or collect a tax, fee, head charge, or other charge on" air commerce or transportation).

[7] PASPA is a bit unusual in terming "unlawful" state laws that conflict with the federal policy reflected in PASPA. But that is just an accurate, if unvarnished, description of the operation of the Supremacy Clause. Moreover, that choice of phraseology simply reflects that, unlike most statutes with preemptive force, Congress expressly provided an enforcement mechanism to redress state laws that are "unlawful" under PASPA. *See* 28 U.S.C. §3703.

v. City of Los Angeles, 133 S. Ct. 2096 (2013). In exactly the same way, PASPA preempts state laws authorizing third parties to offer sports-gambling schemes. The difference between the statutes in *New York* and *Printz* on the one hand, and all of these mine-run preemption statutes on the other, is that the former *compelled* states to enact or implement federal laws, while the latter *preclude* state laws that violate federal policy. PASPA falls squarely in the latter camp.

C. PASPA Does Not Require States to Maintain Sports-Gambling Prohibitions.

Implicitly accepting the reality that commandeering concerns arise only when a federal law compels states to enact or enforce federal policy, petitioners attempt to recast PASPA as a law that does just that. According to petitioners, PASPA does not confine itself to preempting state actions and laws that conflict with federal policy, but also compels states to maintain and enforce laws prohibiting sports gambling. NJ.Br.22-23. Petitioners essentially contend that any retreat from any pre-existing state-law prohibitions on sports gambling would be treated as a forbidden *de facto* authorization of a sports-gambling scheme, and thus that states must maintain their existing prohibitions to comply with PASPA.

The problem with that argument is that PASPA contains no such command. As its plain text makes clear, PASPA does not require states to maintain or enforce anything. It just renders unlawful state efforts to "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports-gambling schemes. 28 U.S.C. §3702(1). If the state

passes a law that does any of those things, that law will be preempted. But as respondents have conceded time and again, and the Third Circuit concluded as well, if New Jersey wants to fully repeal its prohibitions on sports gambling, it can do so without running afoul of PASPA's prohibition on "authorizing" sports-gambling schemes. New Jersey is also free to alter its prohibitions in ways that do not amount to an authorization of sports-gambling schemes, such as by altering the penalties, or creating exceptions for *de minimis* friendly wagers that do not create an authorized sports-gambling "scheme." *See* Pet.App.24. And, of course, New Jersey controls the extent to which it enforces sports-gambling prohibitions that remain on its books. *See* Pet.App.25.

Petitioners resist this straightforward reading of PASPA, insisting that PASPA's prohibition on authorization of sports-gambling schemes amounts to "a direct command to States to maintain their state-law prohibitions." NJ.Br.40. Betraying the weakness of that claim, New Jersey's lead "statutory" argument is not about the statutory text at all, but rather is an accusation that respondents' and the Third Circuit's positions on the interpretation of PASPA have "continually morphed." NJ.Br.40-41. But, in reality, not a single one of the interpretations petitioners recount suggests that PASPA prevents New Jersey from fully repealing its sports-gambling prohibitions. Since day one of this litigation, respondents have not argued, and no court has held, that PASPA requires

states "to affirmatively keep a prohibition against sports wagering on their books." Pet.App.22.[8]

When petitioners finally turn to the text of the statute, they engage in a strange sort of reverse-constitutional-avoidance, contending that this Court should construe the word "authorize" as expansively as possible so that every repeal of a sports-gambling prohibition would amount to an "authoriz[ation]" of a sports-gambling scheme. NJ.Br.42-45; NJTHA.Br.31-32. Setting aside the fact that petitioners made the *opposite* argument below, *see* Brief For Appellants Christopher J. Christie, *et al.*, at 34 ("When a prohibition is withdrawn … it does not reflect authorization."), their current contention gets matters backwards. Courts are supposed to read statutes to avoid constitutional difficulties, not to create them. *See*, *e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

Ignoring that canonical rule, New Jersey digs deep into Black's Law Dictionary, skipping over the first, second, and third definitions of "authorize" and disclosing only the fourth. NJ.Br.42. The first three

---

[8] The procedural history of this case actually undermines petitioners' claim that a full repeal would constitute an "authoriz[ation]" under PASPA. Before enacting the 2012 Law, New Jersey amended its state constitution to remove its existing prohibition against state laws authorizing wagering "on the results of any professional, college, or amateur sport or athletic event." N.J. Const. art. IV, §VII, ¶2D. That repeal of a constitutional prohibition was not enough, standing alone, to "authorize" such gambling—as evidenced by New Jersey's subsequent enactment of the 2012 Law and 2014 Law, and as evidenced by the fact that respondents have never sought to compel New Jersey to reinstate its constitutional prohibition.

omitted definitions of "authorize" plainly would not encompass all repeals: "To empower; to give a right or authority to act; to endow with authority or effective legal power, warrant, or right." Black's Law Dictionary 133 (6th ed. 1990). New Jersey repeats the tactic with Webster's Third, skipping over "to endorse" and "[to] empower" before arriving at its preferred "[to] permit by or as if by some recognized or proper power." Webster's Third New Int'l Dictionary 146 (1992). There is no reason to resort to tertiary and quaternary definitions to create a constitutional question that otherwise would not exist.

Nor would the broad reading of "authorize" that petitioners have suggested be consistent with Congress' goals in enacting PASPA. As New Jersey's own citations indicate, Congress was specifically concerned that allowing states to put their imprimatur on sports-gambling schemes—whether by running them themselves or by authorizing others to do so—would impart a "moral status" that could "draw new recruits." NJ.Br.43. Given that specific concern with states' affirmative provision of and encouragement of sports-gambling schemes, there is no reason to believe that Congress used the word "authorize" to prohibit states from staying on the sidelines. Thus, as the Third Circuit has now correctly recognized on three separate occasions, PASPA does not prevent states from repealing their sports-gambling prohibitions.

To be sure, Congress may well have assumed that if it enacted a federal policy that prevented states from providing or authorizing the provision of sports-gambling schemes, states would respond by

maintaining their existing prohibitions. But that is because PASPA was animated by Congress' concern that, despite policy concerns with sports gambling, states would nonetheless authorize sports lotteries and casino-style sports gambling to raise revenue, especially if other states were doing likewise. *See supra* pp.6-7. Thus, Congress may have assumed that if PASPA disabled states from *profiting* off of sports gambling (either by running it themselves or by authorizing or licensing third parties to do so), then states would be inclined to maintain the status quo.

If that was indeed Congress' assumption, it proved to be a sound one, as states responded to PASPA with nearly decades of relative inactivity (hardly a promising basis for a commandeering claim). But that certainly does not establish that PASPA freezes in place all state sports-gambling laws. To the contrary, PASPA plainly allows states to change their laws. As noted, PASPA addresses the extent to which states and their authorized agents conduct sports-gambling schemes, but it does not directly address sports gambling by individuals. Thus, states can alter laws addressing such conduct, such as by decriminalizing sports wagers between social acquaintances, without implicating PASPA. Moreover, nothing in PASPA prevents the four states that had sports gambling in place when it was enacted from changing their laws to curtail their sports-gambling schemes. Likewise, had New Jersey availed itself of its one-year window to authorize sports gambling in its casinos, nothing in PASPA would have prevented New Jersey from reversing course in whole or in part. To be sure, if a state that may operate a *limited* sports-gambling scheme under PASPA were to

expand sports gambling beyond what PASPA permits, that expansion would be preempted. *See, e.g.*, *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009), *cert. denied*, 559 U.S. 1106 (2010). But that is just the ordinary operation of the Supremacy Clause, not an impermissible effort to force states to maintain their pre-PASPA laws on the books.

As all of that illustrates, while Congress may have assumed states would maintain the status quo if they could not profit off of sports gambling, that does not mean that Congress compelled them to do so. And, at bottom, neither the fact that Congress assumed states would maintain existing prohibitions, nor the fact that states did just that—nor even the fact that if multiple states repealed their laws Congress might need to enhance existing federal statutes that pre-supposed the existence of state-law prohibitions—changes two basic realities: PASPA does not prohibit a state from repealing its sports-gambling prohibitions entirely, and PASPA does not commandeer states.[9]

---

[9] It is not uncommon in our federal system for Congress to enact a law that pre-supposes certain state-law prohibitions. For example, the Assimilated Crimes Act, 18 U.S.C. §13, makes it a federal crime to violate the state criminal laws of adjacent jurisdictions on a federal enclave. That law pre-supposes that states prohibit certain conduct, and if a state repealed certain prohibitions, Congress might need to amend federal law in response. But none of that means states cannot repeal their laws or otherwise creates a constitutional problem. More typically, federal criminal laws, like the prohibition on gambling businesses, discussed *supra* p.5, pre-suppose a certain degree of state prohibitions. If multiple states decided to decriminalize gambling, Congress might have to adjust those laws accordingly, but none of that prevents states from repealing their laws or creates a looming commandeering problem.

D. PASPA Constitutionally Preempts the 2014 Law.

Petitioners try to avoid that conclusion by insisting that, because PASPA preempts New Jersey's self-styled "partial repeal," it must prohibit *all* repeals of sports-gambling prohibitions, and thus commandeers the states. Again, petitioners are mistaken. While *some* repeals of sports-gambling prohibitions are certainly consistent with PASPA, that does not mean that everything labeled a "repeal" necessarily passes muster. Nor does it mean that states may circumvent PASPA's prohibition on affirmatively authorizing sports-gambling schemes by styling as a "partial repeal" a law that channels sports gambling to state-selected (and state-licensed) gambling venues on state-selected terms.

And that, as the *en banc* court correctly held, is precisely what the 2014 Law did. Pet.App.12-16. Although petitioners' briefs proceed as if the 2014 Law actually repealed existing prohibitions on sports gambling, that demonstrably false premise was expressly rejected below (in a holding that petitioners do not challenge). The 2014 Law does not repeal *any* of New Jersey's myriad prohibitions on sports gambling; indeed, it did not eliminate a single word from those laws. Instead, it just declared those prohibitions inapplicable to sports-gambling schemes "to the extent" they are provided by venues of the state's choosing (state-licensed casinos or racetracks), available only to persons of the state's choosing (patrons who are 21 or older), and restricted to sporting events of the state's choosing (those that do not involve college sports contests taking place in New

Jersey or in which a New Jersey college team is participating). In other words, the 2014 Law affirmatively grants casinos and racetracks a legal "right" to offer sports-gambling schemes that New Jersey has denied everyone else in the state. That is plainly an authorization, as the Third Circuit held.[10]

That the state achieved this end by purporting to "partially repeal" its sports-gambling prohibitions "to the extent" its chosen conditions are satisfied, rather than declaring that sports-gambling schemes "are hereby authorized" to the same extent, does not change the bottom line. *See Haywood v. Drown*, 556 U.S. 729, 742 (2009) ("[T]he Supremacy Clause cannot be evaded by formalism."). A state law that "repealed" existing blanket prohibitions on sports lotteries, but only to the extent conducted by the state (or its hand-picked third party), and only if the operator omitted in-state college games, would equally constitute an authorization of a sports lottery and would equally be preempted by PASPA.

Petitioners fare no better with their contention that the district court's injunction somehow compels New Jersey to maintain its sports-gambling prohibitions. NJ.Br.36-37; NJTHA.Br.35-38. The injunction, like PASPA itself, does not require New Jersey to maintain or enforce any laws; it simply forbids New Jersey from "giving operation or effect" to the 2014 Law, which was found preempted. Pet.App.113. To be sure, as a practical matter, that

---

[10] The 2014 Law also violates PASPA because it "license[s]" sports-gambling schemes, as it makes them legal only if they are offered by a venue that already has a state license to provide gambling.

invalidation of a supposed partial repealer means New Jersey's sports-gambling prohibitions now remain in force at casinos and racetracks as well as everywhere else. But that is not because the injunction prohibits New Jersey from repealing the state-wide prohibitions; it is simply because the injunction invalidates the state law that purported to repeal the laws only at the state's favored venues.

That relief is no different from the relief whenever a state enacts an invalid "partial repealer." Judicial invalidation of the flawed repealer necessarily returns the law to the status quo—which here, after two failed efforts to introduce state-authorized sports gambling, is the pre-existing prohibitions. For example, if a state were to "partially repeal" its workplace anti-discrimination laws by declaring them inapplicable to African-Americans, the inevitable federal injunction of that invalid "partial repeal" would restore the pre-existing general prohibition on workplace discrimination. But that would hardly mean that the injunction impermissibly "operates as a direct command to the State's Executive to re-impose the stricken prohibitions." NJ.Br.36-37.[11]

Moreover, it is simply untrue that "from the moment the 2014 Repeal was enacted, … those state-law prohibitions were considered as if they never existed." NJ.Br.36 (alterations omitted). Again, the 2014 Law did not remove New Jersey's pre-existing

[11] The fact that the injunction does not require New Jersey to *enforce* its state-law prohibitions answers NJTHA's alarmist rhetoric about "state officials … being hauled into federal court … for their failure to … bring [a] state law prosecution." NJTHA.Br.37 & n.17.

sports-gambling prohibitions from the statute books; all it did was declare those still-extant prohibitions inapplicable to certain sports-gambling schemes. The district court's injunction thus did not "command … the State's Executive to re-impose … stricken prohibitions," NJ.Br.36-37, but rather just removed an invalid exception to those still-and-always extant prohibitions. Indeed, NJTHA concedes as much, acknowledging that even though the injunction is not directed to NJTHA, any of its employees who accept sports wagers "would be in violation of every state criminal and civil law prohibiting sports gambling." NJTHA.Br.36. As that concession underscores, NJHTA cannot provide sports gambling today not because of the injunction but because New Jersey's sports-gambling prohibitions *are still on the books*, and the exemption/authorization the state tried to create through the 2014 Law has been found preempted.

In sum, petitioners' core argument—that a "federal prohibition against States' repeals of their own laws violates the anti-commandeering principle," NJ.Br.31—is simply not implicated by PASPA. PASPA does not prohibit states from repealing their sports-gambling prohibitions. That is the most natural reading of PASPA, and it is certainly a permissible construction under the well-established canon instructing courts to avoid, rather than engender, constitutional doubts. New Jersey's sports-gambling prohibitions remain on the books only because New Jersey has (so far) chosen not to repeal them.

E. The Commandeering Doctrine Does Not Entitle New Jersey To Achieve Policy Objectives that Are Inconsistent with Federal Law.

Petitioners are thus reduced to arguing that PASPA runs afoul of the commandeering doctrine not because it compels states to enact or enforce federal policies, but because it prevents New Jersey from effectuating the *specific policy* it prefers. As New Jersey puts it, PASPA is unconstitutional because it "leaves New Jersey no real option to lift its prohibition on sports wagering *at casinos and racetracks*." NJ.Br.46.

While it is true that PASPA prevents New Jersey from enacting a targeted decriminalization for casinos and racetracks, so that sports-gambling schemes are prohibited unless they are provided by the state's favored venues specifically designed for state-sponsored and state-licensed gambling, that has more to do with the nature of casinos and racetracks than with any constitutional issue. Under PASPA, there is no way for a state to steer lawful sports-gambling schemes to the state's hand-picked venues for state-authorized gambling, just as there is no way for a state to steer a sports lottery to its handpicked third-party lottery operator. That is because the whole point of PASPA is to prohibit states from operating sports-gambling schemes or authorizing third parties to do the same.[12] But a federal law does not commandeer

[12] Thus, while New Jersey is free to repeal its prohibitions on sports gambling, and is free to license casinos as venues for state-authorized gambling, it may not be free to do both under PASPA without specifying that casinos may not offer sports-gambling

the states just because it limits their policy options; nor does the Constitution require Congress to let states override its policy preferences in areas that fall within its enumerated powers. States are not free to have a little bit of airline rate regulation, a little bit of generic drug labeling regulation, or a little bit of state-sponsored sports-gambling schemes.

None of that creates a commandeering problem, as this Court's cases make abundantly clear. In *Hodel*, for example, this Court addressed the Surface Mining Control and Reclamation Act, which, among other things, prescribed federal performance standards for surface coal mining on "steep slopes." 452 U.S. at 283-84. The district court invalidated the act on the ground that it interfered with states' ability to make "essential decisions" about land use, *id.* at 284-85, but this Court reversed, rejecting the notion that there is something wrong with a federal law that limits "the States' freedom to make decisions." *Id.* at 289. To the contrary, the whole point of the Supremacy Clause is to ensure that Congress can "displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law." *Id.* at 290. Even though "such congressional enactments obviously curtail or prohibit

---

schemes. But that is because PASPA limits a state's ability to authorize sports-gambling schemes at state-licensed casinos, not because PASPA prevents a state from repealing its sports-gambling prohibitions. That result is no different from the dynamic produced in *Baker* and *Condon*. Under the federal statutes at issue there, states could not issue bonds or sell drivers' license information without complying with federal law. Under PASPA, states are not free to authorize gambling schemes at state-licensed casinos without complying with PASPA.

the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Id.*

So too here. There is no dispute that Congress may exercise its commerce power to regulate gambling on a nationwide basis. *See Champion*, 188 U.S. at 352. And although Congress has accommodated New Jersey's interest in legalizing and collecting revenues from games of chance, it has also decided that state-sponsored sports gambling raises distinct issues and is contrary to federal interests, and therefore has taken that option off the table. Just as the SMCRA would preempt any state law authorizing steep-slope mine operators to violate federal performance standards, PASPA preempts state laws authorizing casinos and racetracks to violate the federal policy against offering sports-gambling schemes. It would be "a radical departure from long-established precedent … to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity." *Hodel*, 452 U.S. at 292.

Petitioners make the strained argument that *Hodel* has no bearing here, contending that PASPA, unlike the SMCRA, "provides no option of yielding the field to federal regulation of sports wagering; no federal regulatory scheme exists." NJ.Br.50. The first part of that contention is plainly untrue; the second is both irrelevant and untrue. With respect to the first part, as already discussed, nothing in PASPA requires states to regulate or prohibit sports gambling. States remain free to repeal their prohibitions on sports

gambling and yield the field to the federal government.

As for New Jersey's contention that "no federal regulatory scheme exists," that ignores both PASPA and the complementary provisions of the Code directed at sports gambling. First, PASPA does impose a "regulatory scheme" in the narrow field in which operates. PASPA is not designed to prohibit any and all sports gambling and does not directly address sports wagering by individuals. It is instead concerned with the specific problem of states operating or authorizing sports-gambling schemes. And in that field, PASPA regulates comprehensively, forbidding states from operating such schemes or authorizing third parties to do so, 28 U.S.C. §3702(1), and prohibiting private parties from conducting such schemes pursuant to state law, *id.* §3702(2). PASPA then provides a specific federal remedy to enforce those prohibitions. *Id.* §3703. That is hardly the absence of a federal regulatory regime.

And PASPA does not stand alone. Federal laws also prohibit interstate transmission of wagers on sporting events, 18 U.S.C. §1084(a), any attempts to influence the outcome of a sporting contest through bribery, *id.* §224, operation of an illegal gambling business, *id.* §1955(a), the interstate transmission of sports lottery tickets, *id.* §1301, and certain forms of internet sports gambling, 31 U.S.C. §5362(10).[13] All of

[13] New Jersey is incorrect in asserting that 18 U.S.C. §1084's prohibition on interstate transmission of wagers "does not apply where a State has legalized the activity." NJ.Br.52. In fact, §1084(b) allows the transmission only of "information" about sporting events between two states that allow sports gambling;

those prohibitions, moreover, are backed up by the Racketeer Influenced and Corrupt Organizations Act (RICO), which authorizes criminal penalties and civil liability for illegal gambling conducted by criminal organizations. *Id.* §§1961-68. And, of course, if New Jersey or any other state fully repeals its sports-gambling prohibitions, Congress can certainly impose additional or enhanced federal restrictions as it sees fit.

In all events, even if Congress had not enacted any of those laws, the resulting regulatory vacuum would not create a commandeering problem. This Court has already rejected the argument that the absence of a federal backstop causes a commandeering problem. In *FERC v. Mississippi*, 456 U.S. 742 (1982), this Court addressed a law that gave states a choice between considering federal ratemaking standards or abandoning the field of public utility regulation to the federal government. *Id.* at 764-65. Congress, however, did not "provide an alternative regulatory mechanism to police the area in the event of state default," which made "the choice … a difficult one" for the states. *Id.* at 766. This Court nonetheless upheld the statute against Tenth Amendment attack, explaining that even though the absence of a federal backstop was "likely to move the States to act in a given way," that absence "cannot be constitutionally determinative." *Id.*

---

the interstate transmission of "bets or wagers" remains prohibited under §1084(b), regardless of whether sports gambling is permissible in the sending and receiving states. *See McDonough*, 835 F.2d at 1105.

Moreover, when Congress acts with a deregulatory purpose, as in the ADA and FAAAA, a state has no choice but to abandon the field. No matter how much a state abhors a regulatory vacuum for certain airline or trucking rates and services, the state must abandon the field—and there is no constitutional problem. That is because there is simply "no doctrinal authority requiring the creation of a federal regulatory scheme in order for the national government to divest the states of power in an arena." Ryan Baasch & Saikrishna Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 Mich. L. Rev. 47, 90 (2016).

More fundamentally, the question under the anti-commandeering doctrine cannot possibly turn on what the federal government would do if the state abandons the field, because the very fact that the state *could* abandon the field is sufficient to eliminate a commandeering problem. The relevant question in a commandeering challenge is not whether the state will like what the federal government does if the latter takes control, but whether the state has the option to cede control in the first place. If the answer is yes, then there is no commandeering. The answer under PASPA is plainly yes.

Moreover, contrary to petitioners' insistence that "PASPA does not enact a cooperative federalism regime" in the same manner as *FERC* or *Hodel*, NJ.Br.51, PASPA provides New Jersey with far more flexibility than it would have if Congress banned sports gambling outright—which everyone agrees Congress could do. Under PASPA, states can determine the nature and extent of the penalties for

engaging in various forms of sports gambling (as New Jersey has done, *e.g.*, N.J. Stat. Ann. §2c:37-2); and they can implement any other policy that does not conflict with the federal policy against state-sponsored sports-gambling schemes. It would be "a curious type of federalism" that required Congress to take away those options and instead federalize every sports-gambling prosecution, even though "its preference is to let the States retain the primary regulatory role." *FERC*, 456 U.S. at 766 n.29. New Jersey essentially asks this Court to punish Congress for acting in a manner more, not less, solicitous of state sovereignty.

New Jersey hints at an argument that the choice between maintaining its sports-gambling prohibitions and repealing them in full is overly "coercive" because "no responsible government" would choose the latter option. NJ.Br.46-47. But even if PASPA left only those two options—and the *en banc* court held to the contrary, Pet.App.23—New Jersey is hardly well positioned to press a "coercion" argument when, mere months after the *en banc* court's decision (indeed, the day before this Court granted *certiorari*), legislators in New Jersey introduced a bill that "would totally remove and repeal the State's prohibitions" on sports gambling. G.A. S3375, 217th Leg. (2017). New Jersey thus cannot credibly argue that the prospect of full repeal is so implausible as to be equivalent to "a gun to the head." *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012) (opinion of Roberts, C.J.).

Nor can petitioners credibly argue that PASPA raises accountability concerns. The accountability problem with which the commandeering doctrine is concerned arises only "where the Federal Government

compels States to regulate" or to enforce federal law, thereby creating the appearance that state officials are responsible for policies that Congress forced them to enact. *New York*, 505 U.S. at 168. No such problem exists here because PASPA does not require states to enact or enforce anything. Unlike in *Printz*, where a state official was required to enforce a potentially unpopular federal law, or in *New York*, where a state would have to enact federally-prescribed legislation, here there is no state action demanded by federal law. And if a citizen complains to state officials about not doing more about airline rates or about not having a sports book in the local casinos, state officials have an easy answer that promotes accountability: Call your Senator. Indeed, New Jersey has hardly been shy about blaming PASPA for the state's inability to introduce sports gambling into its casinos and racetracks.

II. Even Without The Challenged Authorization Provision, PASPA Would Still Prohibit Casinos And Racetracks From Providing Sports Gambling Pursuant To The 2014 Law.

The conclusion that PASPA does not commandeer the states is reinforced by the reality that casinos and racetracks could not offer sports-gambling schemes pursuant to the 2014 Law even *without* §3702(1)'s prohibition on authorizing sports gambling, which is the only provision petitioners challenge. That is because §3702(2) independently prohibits private parties from operating sports-gambling schemes pursuant to state law, and petitioners neither challenge §3702(2) nor have a theory as to how that restriction on private conduct commandeers the

states. Thus, even if New Jersey were to prevail on its commandeering challenge to §3702(1), the result would have little practical effect, as PASPA would still independently prohibit casinos and racetracks from relying on the 2014 Law to engage in the conduct that federal law forbids. That just underscores that PASPA is nothing like the provisions in *New York* and *Printz* (which were directed exclusively at the states and commandeered them), but rather addresses both states, 28 U.S.C. §3702(1), and private parties, *id.* §3702(2), and precludes both from taking action contrary to federal law.

To try to avoid an empty victory, New Jersey proffers an implausible if-you-give-a-mouse-a-cookie severability argument, contending that if the authorization provision falls, then the licensing provision must fall, and if the licensing provision falls, then the prohibitions on state conduct must fall, and if the prohibitions on state conduct fall, then the prohibitions on private conduct must fall with them. NJ.Br.53-56. That is not how severability analysis works. Instead of searching for an excuse to strike down a statute in its entirety, this Court "tr[ies] to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010).

Indeed, the "normal rule" is "that partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). In applying that "normal rule," this Court gives effect to the valid portion of a statute "so long as it remains fully operative as a law, and so long as it is

not evident from the statutory text and context that Congress would have preferred no statute at all." *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2173 (2014) (citations omitted). Congress applied that rule in *New York*, severing the offending provision of the statute and keeping the rest, 505 U.S. at 186-87, and the Court likewise declined to invalidate anything more than the challenged provision in *Printz*, 521 U.S. at 935.[14]

Here, Congress plainly would have wanted PASPA's unchallenged provisions to remain intact. First, there can be no serious dispute that Congress still would have wanted to prohibit states themselves from "sponsor[ing], operat[ing], advertis[ing], [or] promot[ing]" sports-gambling schemes even it could not also prohibit them from "authorizing" third parties to offer sports-gambling schemes. While New Jersey makes the remarkable claim in a footnote that "[t]here is no evidence that Congress would have singled out State-run" sports-gambling schemes for prohibition,

---

[14] New Jersey repeatedly asserts that the standard for severability is whether a statute, absent its unconstitutional provision, can function in "the manner Congress intended." NJ.Br.54, 56. This Court has never applied that standard, which, at least as petitioners seem to understand it, would render all but the most trivial provisions of a statute inoperative. After all, the "manner" Congress intends a statute to operate is the "manner" that includes all of its provisions. The correct standard is not whether the statute will operate in *exactly* the same manner as before, but whether it will "function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). As a unanimous Court thus recently reaffirmed, the relevant question is whether Congress would have wanted the remaining provisions to remain in effect, or "would have preferred no statute at all." *Exec. Benefits*, 134 S. Ct. at 2173.

NJ.Br.55 n.3, that is *exactly* what Congress sought to do. *See supra* pp.6-7; S. Rep. 102-248, at 5 ("Governments should not be in the business of encouraging people … to gamble."). Thus, even if Congress knew that states could still enact laws authorizing third parties to run sports-gambling schemes, there is no reason to think that Congress would have wanted to allow states themselves to sponsor, operate, advertise, or promote such schemes.[15]

Nor is there any reason to think that Congress would have wanted to abandon §3702(2)'s prohibition making it unlawful for third parties to "sponsor, operate, advertise, [or] promote" sports-gambling schemes pursuant to state law if §3702(1)'s prohibition on state authorization of sports-gambling schemes were to fall. To the contrary, §3702(2) would become all the more essential without the authorization provision in §3702(1) because those two provisions work as belt and suspenders. Section 3702(2) ensures that private parties cannot undermine federal policy by operating sports-gambling schemes *even if* the state may enact laws that authorize them to do so.

Indeed, arguably, the authorization prohibition in §3702(1) is not even strictly necessary, as the

---

[15] The states' experiences with lotteries are instructive. In 2016 alone, New Jersey spent $286 million operating and advertising its state lottery. *See* Northstar New Jersey, 2016 Annual Corporate Social Responsibility Report 15, http://www.northstarnewjerseylottery.com/images/2016_Annual_Corporate_Social_Responsibility_Report.pdf. Section 3702(1) prevents states from spending taxpayer dollars to encourage conduct that contravenes federal policy.

unchallenged provisions in §3702(1) already prohibit states from directly conducting and promoting sports-gambling schemes, and the unchallenged provisions in §3702(2) already prohibit third parties from accomplishing what is permissibly forbidden to the states. Congress was certainly well within its power to preempt state laws authorizing private conduct contrary to federal policy from both ends of the proverbial stick, by prohibiting laws authorizing third-party conduct and prohibiting third-party conduct pursuant to the authorizations. But even if (contrary to fact) there were some constitutional problem with the former, the latter would still prohibit the private conduct and would still accomplish Congress' objective of prohibiting sports-gambling schemes run pursuant to state law.

New Jersey claims that it would be "nonsensical" for §3702(2)'s prohibitions on private conduct to apply in the absence of a ban on state authorization of sports-gambling schemes. NJ.Br.56. To the contrary, while it may not make much practical sense for a party to challenge §3702(1) without also challenging §3702(2), the continuing validity of the latter prohibitions on private conduct would make perfect sense in a world where Congress is subject to special limits when regulating states, as opposed to private citizens. Moreover, given Congress' decision to enforce PASPA through an injunctive remedy, 28 U.S.C. §3703, it makes sense to direct a prohibition (and potential injunction) at both the state and the private party when the state has authorized or licensed a third party to operate a sports-gambling scheme.

Indeed, if Congress wanted to prohibit private individuals from operating state-authorized sports-gambling schemes, while giving states a primary role in prohibiting such schemes when they were inclined to exercise it, the most logical way to do so would be to prohibit such private conduct only when it is authorized by state law, which is precisely what §3702(2) does. When a state chooses to prohibit sports-gambling schemes, states can retain the primary regulatory role, with longstanding federal prohibitions available to supplement those state laws. But if states want to authorize sports-gambling schemes, federal law can come in and declare that state-authorized sports gambling unlawful and prohibit private actions pursuant to the unlawful state scheme. Many systems of cooperative federalism work in exactly that way, with federal law deferring to state efforts that meet certain criteria, but with federal prohibitions applicable if a state declines to regulate. In actuality, Congress intended to preempt state laws authorizing sports-gambling schemes, but if there is some heretofore undiscovered constitutional problem with that prohibition, then the remaining prohibitions on private conduct would hardly be nonsensical.

Finally, even if PASPA could not constitutionally block New Jersey from authorizing sports-gambling schemes, it is far from evident that Congress would have wanted the state-licensing prohibition to fall. Removing the powerful temptation of lucrative licensing regimes decreases the odds that states on the fence about whether to allow sports-gambling schemes in their borders ultimately will do so. *See, e.g.*, N.J. Const. art. IV, §VII, ¶2 (prohibiting private lotteries,

but allowing state-run lotteries that fund state programs).

New Jersey argues that if states are permitted to authorize sports-gambling schemes but are not permitted to enact lucrative licensing regimes, then PASPA could lead to "*unregulated* sports wagering." NJ.Br.55. But that depends on whether states given a choice between unlicensed sports-gambling schemes and maintaining existing prohibitions will choose the former. As noted, Congress enacted PASPA against an assumption that the desire for revenues, rather than an affirmative preference for sports gambling, was driving the feared spread of sports gambling. If Congress was correct, then the prospect of unregulated sports gambling will not materialize, and Congress' policy interests will be vindicated. And if it turns out that multiple states opt for unregulated sports gambling, Congress may opt for additional federal regulations. But such speculation is not a basis for striking down aspects of a federal statute that have no constitutional flaw.

* * *

In enacting PASPA, Congress sought to prevent the spread of state-sponsored sports gambling. In full compliance with the anti-commandeering doctrine, Congress effectuated its intent without resorting to anything like the affirmative commands that doomed the statutory provisions at issue in *New York* and *Printz*. Instead, PASPA does no more than what its plain text says: It prohibits a wide range of government and private conduct that would facilitate and encourage the spread of state-sponsored sports gambling. Congress' power to regulate gambling on a

nationwide basis is as settled as its power to prohibit states from undertaking or authorizing conduct that conflicts with federal policy, and nothing in petitioners' arguments calls either commonly exercised power into question.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

JEFFREY A. MISHKIN
ANTHONY J. DREYER
SKADDEN ARPS
SLATE MEAGHER
& FLOM LLP
Four Times Square
New York, NY 10036

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
EDMUND G. LACOUR JR.
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Respondents

October 16, 2017