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

BRIEF IN OPPOSITION

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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 sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling, and it prohibits individual conduct pursuant to any such state law. Nevertheless, in 2012, New Jersey eliminated a prohibition on sports gambling and adopted a law and regulations expressly authorizing sports gambling at casinos and racetracks. The district court and Third Circuit held that PASPA preempted that law and rejected New Jersey's argument that PASPA commandeers the states by prohibiting them from authorizing or licensing sports gambling. This Court denied the state's petition for certiorari.

Undeterred, New Jersey passed another law that avowedly sought to "implement well regulated sports gaming" by "repealing" existing prohibitions on sports gambling, but only as to sports gambling that occurs at a casino or racetrack, by individuals who are 21 or older, and on particular sporting events. The district court, a Third Circuit panel, and an overwhelming majority of the en banc Third Circuit all held that PASPA could not be evaded by creative labeling, that the new law was in substance an authorization forbidden by PASPA, and that PASPA does not commandeer the states.

The question presented is whether PASPA is a valid exercise of Congress' Commerce Clause power.

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.

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INTRODUCTION

This case involves petitioners' second attempt to convince this Court to review a novel constitutional argument that has been rejected by every court to consider it. The principal difference is that now petitioners have added three more adverse decisions, including one by an overwhelming majority of an en banc court, to the tally of strikes against them. There is no reason for this Court to reach a different result this time around.

The Professional and Amateur Sports Protection Act ("PASPA") prohibits states from affirmatively sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling, and it prohibits individual conduct pursuant to any such state law. In PASPA's 24 years, courts of appeals have considered commandeering challenges to it only twice—in this case, and in a nearly identical case just a few years earlier involving New Jersey's first effort to authorize sports gambling in its casinos and racetracks in open and acknowledged violation of PASPA. Although petitioners lost that case every step of the way, New Jersey was undeterred in its efforts to bring legalized sports gambling to its casinos and racetracks. A mere three days after this Court denied petitioners' first round of petitions attempting to invalidate PASPA, the New Jersey legislature passed a new law purporting to "repeal" the state's sports gambling prohibitions, but *only* at casinos and racetracks—in other words, only at handpicked venues for state-authorized and state-licensed gambling.

The Governor vetoed that blatant attempt, as he put it, "to circumvent the Third Circuit's ruling" and "sidestep federal law." But just two months later, the Governor saw things differently, and signed the nearly identical law that is the subject of this lawsuit. Just like the legislation that the Governor vetoed months earlier, that law purports to "partially repeal" New Jersey's sports gambling prohibition, but only as applied to sports gambling that occurs at a casino or racetrack, by individuals who are 21 or older, and on particular sporting events.

The district court, a panel of the Third Circuit, and the overwhelming majority of the en banc Third Circuit all recognized that when New Jersey dictated who could gamble on sports, where they could do it, and on which events they could bet—all with the avowed purpose of enabling sports gambling to take place in New Jersey's casinos and racetracks—the state had "authorized" sports gambling in violation of PASPA. All three courts also recognized that nothing about that commonsense conclusion calls into question the constitutionality of PASPA. Just like the first time around, petitioners' contrary arguments are irreconcilable with this Court's commandeering cases and would distort that narrow doctrine beyond all recognition. In all events, there is no question that petitioners' constitutional challenge remains novel and splitless; indeed, no other state has ever brought such a challenge (and only five states could be mustered to support New Jersey's case as *amici*). Accordingly, in the unlikely event that another state raises this argument and then succeeds in producing a circuit split, there will

be time enough for this Court to consider it. The Court should deny the petitions.

STATEMENT OF THE CASE

A. The Professional and Amateur Sports Protection Act

Congress has long recognized a federal interest in curtailing gambling on professional and amateur sports. In the Interstate Wire Act of 1961, Congress prohibited the interstate wire transmission "of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest," exempting only states where the activity was legal. 18 U.S.C. §1084(a). In 1964, Congress made it a federal crime to fix or attempt to fix any sports contest. *See 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). The Senate sponsor likewise emphasized the need "to keep sports clean so that the fans, and especially young people, can continue to have complete confidence in the honesty of the players and the contests." 109 Cong. Rec. 2,016 (1963) (statement of Sen. Keating).

Congress also has long recognized a federal interest in regulating gambling on a nationwide basis. *See, e.g.*, *Champion v. Ames*, 188 U.S. 321 (1903) (upholding federal law prohibiting trafficking of lottery tickets as valid exercise of Congress' commerce power). And although Congress has accommodated limited state interests in legalized gambling, it has not strayed from its view that sports gambling is particularly damaging. When Congress exempted state lotteries from federal criminal lottery

laws in 1975, for instance, it excluded state-sponsored sports gambling 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" conducted by states. *See* 18 U.S.C. §1307(d).

In 1990, amid growing public dismay about the harms of sports gambling, Congress began considering federal legislation to stem the spread of state-sponsored gambling on professional and amateur sports. At the time, although only a handful of states had authorized any form of sports gambling, various states were considering authorizing state-sponsored sports gambling to be conducted on river boats or in off-track betting parlors and casinos; others were debating introducing sports themes to their lotteries.

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; *see also id.* at 5 ("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."). "Without Federal legislation," Congress concluded, "sports gambling is likely to … develop an irreversible momentum." As an example, the report

singled out the "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*. PASPA makes it "unlawful for" any "governmental entity" to "sponsor, operate, advertise, promote, license, or authorize by law or compact":

> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based … on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

Id. §3702. PASPA also makes it unlawful for "a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a government entity," any such sports gambling. *Id.* §3702(2). In addition to granting the attorney general authority to enforce these prohibitions, PASPA gives professional and amateur sports organizations 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.* §3703.

To accommodate the reliance interests of the handful of states that already had authorized some form of sports gambling, PASPA exempted from its prohibitions authorized sports gambling that was in operation before its enactment. *Id.* §3704(a)(1)-(2). PASPA also included a special exemption specifically

crafted for New Jersey, a state that flatly prohibited sports gambling at the time but did have extensive authorized and licensed 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 to be "conducted exclusively in casinos located in a municipality" where "any commercial casino gaming scheme was in operation … throughout the 10-year period [before PASPA became effective] pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality." *Id.* §3704(a)(3). In other words, PASPA gave New Jersey one year to authorize sports gambling at casinos in Atlantic City.

New Jersey chose not to avail itself of PASPA's one-year window. In fact, the New Jersey legislature declined even to vote on a joint resolution proposed during that year 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."); N.J. Stat. Ann. §§2c:37-2, 2c:37-9 (prohibiting promotion of gambling unless authorized). The New Jersey Constitution also continued to prohibit the legislature from

authorizing wagering on the results of any professional, college, or amateur sports or athletic event, excluding horse racing. *See In re Casino Licensees*, 633 A.2d at 1054.

B. New Jersey's Relentless Efforts to Authorize Sports Gambling

In recent years, New Jersey has come to regret its decision not to avail itself of the ability to authorize sports gambling in its casinos back in 1993. Accordingly, the state has undertaken a series of efforts to get out from under PASPA's prohibitions on sponsoring, licensing, or authorizing sports gambling. The state began by amending its own constitution, effective December 8, 2011, to permit the legislature "to authorize by law wagering … on the results of any professional, college, or amateur sport or athletic event." N.J. Const. art. IV, §VII, ¶2D. The amendment included a caveat "that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place." *Id.* New Jersey then promptly enacted the Sports Wagering Law, N.J. Stat. Ann. §5:12A-1, *et seq.* (West 2012) (the "2012 Law"), which, in open and acknowledged violation of PASPA, 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.

The National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the

Commissioner of Baseball (collectively, "respondents") brought suit to enjoin this blatant violation of PASPA. The state petitioners (joined by the same parties that join them as petitioners here) responded by conceding that the law violated PASPA but arguing that PASPA is unconstitutional because it, *inter alia*, commandeers the states. After carefully considering that argument, both the district court and the Third Circuit thoroughly rejected it and enjoined New Jersey from enforcing the 2012 Law and the regulations promulgated pursuant to it. *See Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551 (D.N.J.), *aff'd*, *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013) ("*Christie I*").

After the Third Circuit denied their petitions for rehearing en banc, petitioners sought this Court's review. Even before the Court could act on those petitions, however, the sponsors of the 2012 Law announced that they had no intention of letting the courts stand in the way of their plans to sanction sports gambling at New Jersey's casinos and racetracks. As Senator Raymond Lesniak put it, no matter what the outcome before this Court, "we will push the envelope on sports betting. And we are not going to be deterred." JA101. To that end, the senator vowed that if this Court left undisturbed the lower court decisions invalidating 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 on June 23, 2014. *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 gambling, 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. In other words, it purported to "repeal" the prohibitions only at state-licensed and heavily regulated commercial gambling venues. As Senator Lesniak, who sponsored the legislation, explained, like the invalidated 2012 Law before it, S2250 would "put [sports gambling] in the regulated hands of existing casino and racetrack operators" in New Jersey and "provide a safe and legal avenue for [people] to bet on their favorite teams." JA108.

On August 8, 2014, Governor Christie vetoed this unabashed effort to undo the outcome of *Christie I*. In a letter accompanying his veto, the Governor described the legislation as a "novel attempt to circumvent the Third Circuit's ruling" by, "[i]n essence, partially deregulat[ing] betting at casinos and racetracks in an attempt to sidestep federal law." JA65. Reiterating that "the rule of law is sacrosanct," and "binding on all Americans," the Governor refused to sign on to the legislature's transparent effort to "[i]gnor[e] federal law." *Id.* Instead, he admonished that the state must respect the rule of law and the decisions of the courts. *Id.*

One month later, the Governor saw things differently. On September 8, 2014, with the Governor's support, New Jersey's acting attorney

general issued a directive taking the remarkable position that, notwithstanding the affirmed injunction prohibiting the state defendants from enforcing the 2012 Law in its entirety, the provisions of that law stating that casinos and racetracks "may operate a sports pool" continued to remain "in force and effect." JA118-21. This was so, according to the state, because, notwithstanding their plain language, these provisions did not "authorize" sports gambling, but rather merely "repealed" existing prohibitions on sports gambling at casinos and racetracks. JA120-21. The directive thus instructed the state's law enforcement agencies that they should neither object to nor seek to enjoin a sports pool operated by a casino or racetrack, so long as that sports pool did not permit wagering on college sporting events that take place in New Jersey or in which a New Jersey college team participates. JA121.

Although the state declared this directive effective immediately, the state petitioners simultaneously filed a motion asking the district court to "clarify" or "modify" its injunction to conform to their dubious new theory. Respondents opposed the motion, arguing that the directive violated both the injunction and PASPA. Before the court could act on that motion, however, New Jersey changed course once again. On October 17, 2014, Governor Christie signed into law Senate Bill 2460, 216th Leg., 1st Sess. (N.J. 2014) (the "2014 Law"), another Senator Lesniak-sponsored piece of legislation, which repealed the 2012 Law in its entirety, *see* N.J. Stat. Ann. §5:12A-7, and the state petitioners then withdrew their pending motion.

As one of its sponsors candidly acknowledged, the 2014 Law is 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. JA434. The law does so in the same manner as the vetoed S2250 would have done, *i.e.*, by purporting to "repeal" existing prohibitions on sports gambling, but *only* "to the extent they apply or may be construed to 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 "by persons 21 years of age or older situated at such location," and *only* to gambling that is not on "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 would be permitted only at certain locations, by certain persons, and on some, but not all, sporting events.

C. Proceedings Below

1. Respondents promptly responded by filing this new lawsuit asking the district court to enjoin the state petitioners from giving effect to New Jersey's latest effort to authorize licensed sports gambling at its casinos and racetracks in violation of PASPA. In addition to naming the same state petitioners 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" at the racetrack within the week, JA97, 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 section 3702(1) of PASPA pursuant to the 2014 Law and to enjoin NJTHA from violating section 3702(2).

Petitioners refused to agree to hold off initiating sports gambling, even for a few weeks, to give the district court time to consider the legality of New Jersey's latest actions, leaving respondents no choice but to seek a temporary restraining order. The district court granted that order after concluding that respondents had established a reasonable likelihood of success on the merits and irreparable harm. JA303-09. After additional briefing, the court noticed its intent to "consolidate Plaintiffs' application for a preliminary injunction with a decision on the merits through summary judgment." Pet.App.88a. The United States, which supported respondents in the first round of *Christie* litigation, then filed a statement of interest agreeing with respondents that the 2014 Law authorizes and licenses sports gambling in violation of PASPA. JA541-61.

After holding a hearing, the district court permanently enjoined the state petitioners from "giving operation or effect" to the 2014 Law. Pet.App.113a. The court concluded that "PASPA preempts the type of *partial repeal* New Jersey is

attempting to accomplish in the 2014 Law." Pet.App.105a. Not only would "the 2014 Law … have the same primary effect of the 2012 Law," but "by allowing some, but not all, types of sports wagering in New Jersey," the court explained, the law "necessarily results in sports wagering with the State's imprimatur, which goes against the very goal of PASPA." Pet.App.105a-07a. Although the court acknowledged that New Jersey "carefully styled the 2014 Law as a repeal," Pet.App.107a, the court recognized that "'the Supremacy Clause is not so weak that it can be evaded by mere mention of [a] word,' nor can it 'be evaded by formalism,' which would only 'provide a roadmap for States wishing to circumvent' federal law." Pet.App.106a (citation omitted) (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)).[1]

2. Petitioners again appealed to the Third Circuit, which held that the 2014 Law, like the 2012 Law before it, violated PASPA. Pet.App.60a. As the court explained, "the 2014 Law authorizes sports gambling 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." Pet.App.60a-61a. Allowing sports gambling in only those limited circumstances "constitutes specific

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

permission and empowerment," as "the 2014 Law provides the authorization for conduct that is otherwise clearly and completely legally prohibited." Pet.App.60a-61a. The court also noted that the 2014 Law was at particular odds with PASPA's exception allowing New Jersey to authorize sports gambling at its casinos within one year of PASPA's enactment. Pet.App.62a. As the court noted, Congress could not plausibly have intended to allow New Jersey to accomplish through a dubiously labeled "partial repeal" the exact same result that PASPA gave New Jersey only one year to achieve. Pet.App.62a-63a.

Judge Fuentes, the author of *Christie I*, issued a dissent in which he maintained that the 2014 Law did not violate PASPA because a law styled as a repeal—whether "partial" or otherwise—can never be an "authorization." Pet.App.67a.

3. The Third Circuit agreed to hear petitioners' case en banc. In a 9-3 decision, the court once again rejected petitioners' argument that PASPA unconstitutionally commandeers the states.

The en banc court began by agreeing with the panel majority that the 2014 Law "authorized" sports gambling in violation of PASPA. As the court explained, "this is not a situation where there are *no* laws governing sports gambling in New Jersey." Pet.App.12a. To the contrary, New Jersey flatly prohibits sports gambling. It is the 2014 Law that "provides the authorization for conduct that is otherwise clearly and completely legally prohibited." Pet.App.13a. Moreover, the law also "authorizes sports gambling 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." Pet.App.13a. By allowing "casinos and racetracks and their patrons to engage, under enumerated circumstances, in conduct that other businesses and their patrons cannot," the law grants "specific permission and empowerment." Pet.App.13a.

In reaching that conclusion, the court expressly rejected petitioners' argument that a repeal can never constitute an authorization. Pet.App.13a. At the same time, however, the court also declined to interpret PASPA as limiting a state's options to either complete prohibition or complete repeal. Pet.App.13a. Instead, the court simply concluded that "the presence of the word 'repeal' does not prevent us from examining what the provision actually does." Pet.App.14a. 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.14a.[2]

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

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[2] Having concluded that the 2014 Law authorizes sports gambling in violation of PASPA, the court declined to address respondents' (and the United States') additional argument that, by confining sports gambling to state-licensed gambling venues, the law also licenses sports gambling in violation of PASPA. Pet.App.16a n.7.

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.19a. And 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* and *Printz*. Pet.App.22a.

The court then 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, and PASPA unconstitutionally commandeers the states." Pet.App.22a-23a. As the court explained, not only does New Jersey still retain the option of complete repeal, but 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.24a. And while the court 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," the court saw no need to "articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA" because "[i]t is sufficient" for this case "that the 2014 Law overstepped it." Pet.App.24a. The court found it enough for constitutional purposes, moreover, that PASPA "does not *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.App25a (quoting *Christie I*, 730 F.3d at 231). "Put simply, PASPA does not impose a coercive either-or requirement or affirmative command." *Id*.

Judge Fuentes, joined by Judge Restrepo, dissented once again, reasoning that a repeal can never be treated as an "authorization" under PASPA. Pet.App.27a-34a. 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.46a.

REASONS FOR DENYING THE PETITION

Petitioners' commandeering challenge to PASPA is as novel, splitless, and meritless as it was when the Court declined to hear it just two years ago. PASPA prohibits states from sponsoring, operating, advertising, promoting, licensing, or authorizing sports gambling, and it separately prohibits individual conduct pursuant to any such state law. This belt-and-suspenders approach of preempting state laws that affirmatively authorize sports gambling and prohibiting private conduct pursuant to such laws is an unremarkable exercise of Congress' settled power to regulate commerce in sports gambling. PASPA is nothing like the only two statutes this Court has invalidated under the commandeering doctrine, both of which *compelled* states to enact or implement federal regulatory schemes. Not surprisingly, then, every court to consider New Jersey's arguments has rejected them.

Petitioners nonetheless ask this Court for yet another bite at the apple, insisting that PASPA *must* commandeer the states because it preempts New Jersey's attempt to "partially repeal" its otherwise-blanket sports gambling prohibitions—but only at less than a dozen handpicked venues licensed for state-authorized gambling. Far from evincing any constitutional problem, PASPA's preemption of that novel law follows from a straightforward operation of the principle that the substance of a state law, not its label or form, controls the preemption analysis. As the en banc court was at pains to make clear, the conclusion that PASPA preempts *this* "repeal" hardly means that PASPA necessarily preempts *all* efforts to repeal sports gambling prohibitions, or somehow compels states to maintain sports gambling prohibitions. Petitioners' commandeering challenge thus continues to rest, as it always has, on a misunderstanding of PASPA. Simply put, a federal law does not commandeer the states just because it *limits* their policy options.

In all events, in the exceedingly unlikely event that a court ever accepts the argument that PASPA impermissibly commandeers the states, there will be time enough to consider the question when the circuits are split and an act of Congress has been invalidated rather than upheld. Here, by contrast, the criteria for this Court's review are not remotely satisfied. The Court thus should once again decline to review this novel, splitless, and meritless challenge.

I. Petitioners' Repeatedly Rejected Argument That PASPA Commandeers The States Does Not Warrant This Court's Review.

Petitioners do not suggest that there is any division among the lower courts on whether PASPA violates the commandeering doctrine. Nor could they, as the novelty of their argument eliminates any such possibility. The only other case to address PASPA's constitutionality was petitioners' own unsuccessful effort to invalidate the statute just a few years ago. *See Christie I*, 730 F.3d at 216 ("This is the first case addressing PASPA's constitutionality."). Indeed, in its nearly 25-year existence, PASPA has generated a grand total of four court of appeals opinions—all four from the Third Circuit, all four resolved against a state resisting the statute's application.

Three of those opinions (*Christie I*, the *Christie II* panel opinion, and the *Christie II* en banc opinion) were generated by the same petitioners pressing the same arguments as they press here. *See id.* ("Only one Court of Appeals has decided a case under PASPA—ours.").[3] The fourth opinion—and the only PASPA case that did not involve New Jersey's efforts

[3] That is not to suggest that there is a plethora of district court PASPA litigation. To respondents' knowledge, the district courts have produced only two PASPA decisions other than those that led to the four Third Circuit opinions addressing the statute. *See Interactive Media Entm't & Gaming Ass'n v. Holder*, No. 09-1301 (GEB), 2011 WL 802106 (D.N.J. Mar. 7, 2011) (dismissing constitutional challenge to PASPA for lack of standing); *Flagler v. U.S. Att'y for Dist. of N.J.*, No. 06-3699 (JAG), 2007 WL 2814657 (D.N.J. Sept. 25, 2007) (same).

to legalize sports gambling at its casinos and racetracks—did not involve a commandeering challenge, but rather involved Delaware's effort to shoehorn a new initiative into PASPA's grandfathering provision, which fared no better than New Jersey's repeated efforts to invalidate the statute. *See Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009) (rejecting Delaware's arguments), *cert. denied*, 559 U.S. 1106 (2010). Accordingly, petitioners' contention that PASPA commandeers the states is a novel argument about a rarely invoked statute that has been rejected by every court to consider it.

Even widening the lens to commandeering cases more generally, petitioners identify no conflict in need of this Court's resolution. That is because their exceedingly expansive view of the commandeering doctrine—namely, that the doctrine applies not just when Congress forces states to act, but also when Congress prohibits states from acting, or even constrains their policymaking authority—has been rejected by every court to consider it. *See, e.g.*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 397 (2d Cir. 2008) (rejecting commandeering claim where statute "impose[d] no affirmative duty of any kind"); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906-07 (D.C. Cir. 1999) (rejecting commandeering claim where statute did "not force state officials to do anything affirmative"); *United States v. Bostic*, 168 F.3d 718, 724 (4th Cir. 1999) (rejecting Tenth Amendment claim where statute imposed no "affirmative obligation"). As this unanimous body of case law reflects, petitioners' revolutionary view of the commandeering doctrine is

utterly inconsistent with this Court's cases and well-settled preemption doctrines. *See infra* Part II. In short, there is simply nothing about PASPA that renders it comparable to the two unusual statutes this Court held unconstitutional in its commandeering cases.

Nor is petitioners' commandeering challenge to PASPA exceptionally important or likely to recur. As noted, PASPA has spawned just five cases and four appellate opinions in its more than two decades on the books—all within the Third Circuit. And in the 24 years since its enactment, states have expressed little or no concern about PASPA, let alone about its constitutionality. In the highly unlikely event that an influx of constitutional challenges to PASPA should materialize, there will be time enough for this Court to resolve any commandeering question if and when a conflict arises—and to do so with the benefit of the views of more than one court of appeals and perhaps in a state without New Jersey's nearly unique history concerning state-authorized gambling. Indeed, petitioners' complaint that the Third Circuit did not opine on precisely what types of state laws PASPA permits only underscores why further percolation could assist this Court in the event subsequent litigation materializes. NJ.Pet.31-34.

Finally, the mere fact that PASPA has frustrated New Jersey's desire to authorize sports gambling is not nearly enough to warrant this Court's review. Every case finding preemption involves a state law trumped by a federal statute through operation of the Supremacy Clause, yet this Court certainly does not grant certiorari every time a state complains that

federal law has interfered with its policy choices. This case thus does not come close to satisfying any of this Court's criteria for granting certiorari.

II. The Courts Below Correctly Concluded That PASPA Does Not Commandeer The States.

The Court should also deny review because petitioners' oft-rejected commandeering argument is not only splitless and novel, but meritless as well. As the district court, a Third Circuit panel, and now nine members of the 12-judge en banc court correctly concluded, PASPA lacks the irreducible minimum of any successful commandeering claim: It does not compel states (or state officials) to do anything. Instead, PASPA only *prohibits* states from licensing or authorizing sports gambling, and prohibits private parties from sponsoring, operating, advertising, or promoting sports gambling pursuant to state law. Accordingly, PASPA is a straightforward exercise of Congress' power to preempt the operation of state laws that conflict with federal policy on matters within Congress' purview.

Attempting to resist that conclusion, petitioners continue to insist (as they did in their last round of cert petitions) that PASPA prohibits New Jersey from repealing its sports gambling prohibitions, and thus effectively compels states to maintain sports gambling laws. PASPA does nothing of the sort. If New Jersey wants to repeal its long-standing sports gambling prohibitions entirely, as opposed to channeling sports gambling to its casinos and racetracks, it remains just as free to do so now as it was when it last sought this Court's review.

Moreover, the Third Circuit stressed that New Jersey may also be able to repeal or modify aspects of those prohibitions without repealing them entirely. What PASPA prohibits is New Jersey's blatant attempt to circumvent the statute's preemptive force by styling as a "partial repeal" something that plainly constitutes an authorization. Indeed, there is no other way to understand a law that does not remove a single piece of statutory text from the books, but rather just purports to "partially repeal" otherwise-operational sports gambling prohibitions by simply declaring them inapplicable to certain people (those 21 or older), certain games (those that do not involve a New Jersey college team or collegiate events taking place in New Jersey) and certain venues (casinos and racetracks licensed to offer state-authorized gambling).

As the en banc court went out of its way to make clear, that commonsense conclusion does not mean that PASPA prohibits any and all state efforts to repeal or alter existing sports gambling prohibitions. It just means that PASPA, like every other federal statute, looks to the substance of state laws, not just at labels. And there is nothing remarkable—let alone cert-worthy or constitutionally suspect—about the Third Circuit's conclusion that whatever else PASPA may prohibit or permit, it does not allow a state to use wordplay to channel sports gambling to its favored venues for state-authorized gambling while prohibiting it everywhere else.

1. Wrenching out of context a single line of dictum from *New York v. United States*, 505 U.S. 144 (1992), petitioners insist that PASPA is

constitutionally infirm because it "regulate[s] state governments' regulation of interstate commerce," NJ.Pet.19 (quoting *New York*, 505 U.S. at 166), and leaves insufficient "room" for states to "relax[] state-law prohibitions on sports wagering as to particular persons or places," *id.* at 18. That novel theory of the commandeering doctrine is wholly divorced from this Court's cases and would have extraordinary consequences for the federal-state balance. Scores of federal statutes regulate states' ability to regulate commerce by explicitly precluding states from enacting laws that conflict with federal policy.[4]

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[4] *See, e.g.*, *Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096 (2013) (considering 49 U.S.C. §14501(c)(1), which provides that a state "may not enact or enforce a law … related to a price, route, or service of any motor carrier … with respect to the transportation of property"); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008) (same); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992) (considering 49 U.S.C. App. §1305(a)(1), which precluded "States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes"); 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"); 15 U.S.C. §1121(b) ("[n]o State or other jurisdiction of the United States or any political subdivision or any agency thereof may" impose certain requirements relating to trademarks); 21 U.S.C. §360k(a) ("no State or political subdivision of a 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 or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a

Neither this Court nor any other has suggested that such laws raise commandeering concerns simply because they remove some of the tools states could otherwise use to "regulat[e] private conduct within their borders." NJ.Pet.19. And certainly the fact that Congress is explicit, rather than implicit, about its intent to displace state law pursuant to the Supremacy Clause is no strike against it. To the contrary, this Court has confirmed that "[t]here is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012); *cf. Wyeth v. Levine*, 555 U.S. 555, 587 (2009) (Thomas, J., concurring) (questioning implied preemption doctrine while reaffirming Congress' ability to expressly preempt state law).

Commandeering concerns arise only when, rather than *withdraw* powers from states (whether explicitly or implicitly), Congress commandeers states by imposing affirmative duties on them that

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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, subdivision of a State, or authority acting for a State or subdivision of a State may not" impose certain taxes on rail transportation property); 49 U.S.C. §31111(b) ("a State may not prescribe or enforce a regulation of commerce" that imposes length requirements on certain vehicles); 49 U.S.C. §40116(b) ("a State, a political subdivision of a State, and any person that has purchased or leased an airport under … this title may not levy or collect a tax, fee, head charge, or other charge on" air commerce or transportation).

force states to do Congress' bidding. This Court's commandeering cases (not to mention the very name of the doctrine) make that crystal clear. The fatal flaw in the provision of the Radioactive Waste Policy Amendments Act at issue in *New York* was that it *required* states either to enact particular legislation or take title to radioactive waste. *See New York*, 505 U.S. at 175. Either option required affirmative action by the state, and, thus, neither option was constitutionally permissible. *Id.* at 177. The provision of the Brady Handgun Violence Protection Act at issue in *Printz v. United States*, 521 U.S. 898 (1997), suffered from a variant of the same basic defect: By *requiring* state and local law enforcement officers to conduct federally mandated background checks for handgun sales, it unconstitutionally conscripted state law enforcement officers into federal service. *See id.* at 902-05.

As these cases reflect, the commandeering doctrine embodies two related—and limited—principles: "The Federal Government may neither issue directives requiring the States to address particular problems," as in *New York*, "nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," as in *Printz*. *Id.* at 935. Nothing about those two principles imperils the ordinary operation of the Supremacy Clause. To the contrary, *Printz* went out of its way to distinguish the rare statute that poses a commandeering problem from the multitude of federal statutes that simply preempt state laws that conflict with federal policy. *See Printz*, 521 U.S. at 913 (noting 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").

Thus, while it is easy and tempting to take a few sentences from *New York* and *Printz* out of context, both this Court and the courts of appeals consistently have rejected "commandeering" challenges and reaffirmed that *New York* and *Printz* do not call into question large swaths of the federal code. *See, e.g.*, *Reno v. Condon*, 528 U.S. 141 (2000).[5] Unless it is to swallow preemption whole, the commandeering doctrine simply cannot be understood to invalidate laws that neither "require [a state] to enact any laws or regulations" nor "require state officials to assist in the enforcement of federal statutes." *Id.* at 150-51.

2. As the Third Circuit has now correctly recognized on three separate occasions, PASPA runs

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[5] *See also, e.g.*, *Strahan v. Coxe*, 127 F.3d 155, 167-70 (1st Cir. 1997); *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir. 2002); *Kennedy v. Allera*, 612 F.3d 261, 268-70 (4th Cir. 2010); *Texas v. United States*, 106 F.3d 661, 665-66 (5th Cir. 1997); *Cutter v. Wilkinson*, 423 F.3d 579, 588-90 (6th Cir. 2005); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 367 F.3d 650, 662-65 (7th Cir. 2004); *Dakota, Minn. & E. R.R. v. South Dakota*, 362 F.3d 512, 517-18 (8th Cir. 2004); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 844-48 (9th Cir. 2003); *Okla. ex rel. Okla. Dep't of Public Safety v. United States*, 161 F.3d 1266, 1271-73 (10th Cir. 1998); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1242-43 (11th Cir. 2004); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1305-07 (D.C. Cir. 2004).

afoul of neither of the principles the commandeering doctrine embodies. PASPA "does not *require* or coerce 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.25a (quoting *Christie I*, 730 F.3d at 231). Indeed, New Jersey complied with PASPA for two decades without enacting or implementing anything. Instead, PASPA only *prohibits* states from enacting laws that interfere with federal objectives by, *inter alia*, licensing or authorizing sports gambling. PASPA's effect on state law is thus nothing like the effect of the statutes in *New York* and *Printz*; instead, it has the same effect as the countless federal statutes that displace state law through the ordinary operation of the Supremacy Clause.

According to petitioners, PASPA does not confine itself to prohibiting states from authorizing sports gambling, but rather reaches more broadly to prohibit states from repealing sports gambling prohibitions, thereby effectively compelling states to maintain and enforce laws prohibiting sports gambling. Even setting aside the bedrock rule that statutes should be read to avoid constitutional questions, not to create them, *see, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), PASPA plainly does no such thing. PASPA preempts only those state laws that "sponsor, operate, advertise, promote, license, or authorize" sports gambling. 28 U.S.C. §3702(1). And PASPA preempts the two sports wagering laws that New Jersey has enacted

because both authorized and licensed sports gambling.

Petitioners resist that conclusion, insisting that the 2014 Law sought only to "repeal" existing prohibitions, not to "authorize" sports gambling. As the courts below correctly recognized, that argument is mere semantics. To be sure, New Jersey styled the 2014 Law as a "partial repeal"—in an acknowledged effort to try to get around PASPA and the Third Circuit's decision affirming its constitutionality. But in this context as in all others, states may not "elevate form over substance … to evade" federal preemption. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214-15 (2004). And simply labeling a law a "repeal" does not end the analysis. Indeed, Governor Christie himself recognized as much when he vetoed S2250, acknowledging that using a purported "repeal" to "partially deregulat[e] betting" only at certain locations by certain people on certain events is an impermissible "attempt to sidestep federal law." JA65.

Yet that is precisely what the 2014 Law did. The law did not actually "repeal" a single one of New Jersey's comprehensive prohibitions on sports wagering; indeed, it did not even eliminate a single word from those laws. It just declared those prohibitions inapplicable to the places, persons, and sporting events of the state's choosing. The courts below correctly found that "partial repeal" law preempted precisely because there *is* a meaningful and principled difference between a true repeal and an authorization. And labels notwithstanding, the 2014 Law cannot be understood as anything other

than an authorization for sports gambling to occur at the state's favored venues for state-authorized gambling. Indeed, by affirmatively channeling sports gambling exclusively to *state-licensed gambling venues*, the law not only authorized sports gambling, but effectively licensed it as well.

That does not mean, as petitioners would have it, that New Jersey is now compelled to "maintain state-law prohibitions" on sports gambling. NJ.Pet.3. It just means that the particular law through which New Jersey attempted to alter the scope of those prohibitions (without actually repealing them in any true sense) does not comport with PASPA. As the en banc court was at pains to make clear, New Jersey is still free to pass a true repeal that actually eliminates its sports gambling prohibitions entirely, or alters them in other respects that do not run afoul of PASPA. Pet.App.24a. Moreover, whether and to what degree to enforce its sports gambling prohibitions, and what penalties to attach to them, remain questions for New Jersey.[6] Petitioners are therefore simply wrong to contend that PASPA forces New Jersey to do anything.

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[6] To the extent petitioners suggest that the district court's injunction somehow compels New Jersey to maintain or enforce its existing sports gambling prohibitions, that is incorrect. The injunction simply enjoins the state petitioners from implementing the 2014 Law. Pet.App.114a-16a. If that means the state petitioners are now obligated to enforce the state's still-extant sports gambling prohibitions, that is a consequence of state law, and the legislature's decision to keep those prohibitions on the books, not of anything in the district court's order.

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 fails to "'afford[] sufficient room' for States to determine how they will regulate sports wagering." NJ.Pet.22-23. As they put it, if New Jersey cannot "selectively grant[] permission to certain entities to engage in sports wagering," then "[w]hat options does this leave for New Jersey to stanch black market wagering throughout the State?" NJ.Pet.23. That reveals the fundamental problem with their argument, as their real issue with PASPA is not that it forces the state to prohibit sports gambling. Indeed, if all New Jersey wanted were to "stanch black market wagering," then it is hard to see why it would have any problem with a law that plainly leaves the state free to actually *enforce* or strengthen the blanket prohibitions that it already has in place. The problem is, New Jersey's preferred solution to its "black market" sports gambling problem is not to *eliminate* that market, but rather to affirmatively embrace sports gambling, and channel it to its casinos and racetracks. And that is precisely what Congress plainly sought to prohibit in PASPA. Indeed, Congress could not have been clearer that a law opening up Atlantic City casinos to sports gambling violated PASPA, which is why New Jersey was given an exemption for a one-year window, and only a one-year window, to adopt such a law.

Tellingly, petitioners cite no authority for the novel proposition that Congress runs afoul of the commandeering doctrine any time it takes a state's *preferred* policy option off the table. That is because

the Constitution has never been understood to require the federal government to leave states with "sufficient room" to override Congress' policy preferences in areas that concededly fall within Congress' enumerated powers. To the contrary, constraining the scope of states' policymaking authority is a natural consequence of countless preemption schemes.

For instance, a state does not have the option of "partially repealing" or "otherwise modulat[ing]," NJ.Pet.3, federal standards that it has agreed to adopt and enforce on the federal government's behalf. *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). But that narrowing of options hardly invalidates putting a state to the choice of enforcing the federal standard or going it alone. Rather, Congress' ability to constrain a state's regulatory options is inherent in the Supremacy Clause, which creates a "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." *Printz*, 521 U.S. at 913; *see also New York*, 505 U.S. at 167-68. PASPA is no different from the scores of federal statutes, explicitly distinguished by *Printz*, that prevent states from enacting or enforcing laws that conflict with federal policy. Petitioners' novel contention that New Jersey is constitutionally entitled to "room to make [its] own policy," NJ.Pet.18, would put the commandeering doctrine on a collision course with Article I, Section 8 of the Constitution.

3. Petitioners fare no better in arguing that PASPA diminishes the accountability of state or federal elected officials. NJ.Pet.29-31. In fact, federal responsibility for PASPA is clear. Not only does the statute operate on states; it also regulates private conduct directly by "prohibit[ing] individuals from engaging in a sports gambling scheme 'pursuant to' state law." Pet.App.166a (quoting 28 U.S.C. §3702(2)). And PASPA is just one small piece of Congress' broader regulation of gambling, which includes numerous prohibitions on private conduct. *See, e.g.*, 18 U.S.C. §§224, 1084, 1301, 1307(d); NJ.App.167a. As those provisions reflect, PASPA does not even force states to shoulder the costs of policing illegal sports gambling. Instead, federal law independently prohibits sports gambling that is not authorized by state law, meaning the federal government has already taken on the obligation of expending its own resources to prevent sports gambling.

Petitioners' attempt to portray PASPA as some sort of stand-alone provision that is the beginning and end of Congress' concern with sports gambling therefore distorts and ignores reality. In fact, PASPA is part and parcel of Congress' efforts to regulate private conduct *directly*, which includes expending *federal* resources to enforce *federal* prohibitions on gambling activities (including sports gambling activities) that are not authorized by state law. To be sure, those laws reflect Congress' choice to assist states in their efforts to prevent sports and other gambling, rather than to preempt the field

entirely. But that only underscores Congress' desire to respect, not override, federalism concerns.[7]

Moreover, as noted, precisely because PASPA does *not* operate solely on states, it would prohibit operation of New Jersey's sports gambling scheme even without its preemption provision, as a casino or racetrack that attempted to operate sports gambling pursuant to the 2014 Law would violate section 3702(2) of PASPA wholly independent from New Jersey's violation of section 3702(1). That underscores just how radical petitioners' position really is, as they seem to suggest that the commandeering doctrine invalidates not only laws that limit how states may regulate private conduct, but also laws that regulate private conduct directly. Surely that cannot be what this Court envisioned when it concluded that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz*, 521 U.S. at 925.

Nor can *New York* and *Printz* plausibly be read to suggest that the accountability concerns they discussed give rise to a commandeering problem every time "state officials cannot regulate in

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[7] PASPA also is part and parcel of Congress' efforts to protect respondents' interstate activities. Congress viewed respondents' sporting events as important interstate activities well worth protecting and viewed the spread of state-sponsored gambling as a threat to those games. Prohibiting state laws that interfere with federal objectives is, of course, the classic justification for federal laws that unobjectionably displace state laws pursuant to the Supremacy Clause.

accordance with the views of the local electorate." NJ.Pet.30 (quoting *New York*, 505 U.S. at 169); NJTHA.Pet.8-13. That is *always* the case when Congress preempts state law, which is why the very sentence of *New York* from which New Jersey quotes concludes with the critical caveat "*in matters not pre-empted by federal regulation*." 505 U.S. at 169 (emphasis added). As the decision goes on to explain, when, as here, Congress explicitly preempts state law, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* at 168. The only accountability problem with which the commandeering doctrine is concerned arises "where the Federal Government compels States to regulate," thereby creating the appearance that *state officials* are responsible for policies that *Congress* forced them to enact. *Id.*

Clearly, no such problem exists here. Precisely because New Jersey stood in full compliance with PASPA for two decades without enacting or implementing anything, PASPA did not put New Jersey in a situation where it was "forced to absorb the costs of implementing a federal program" or "tak[e] the blame for [a federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930. And to the extent the citizens of New Jersey are frustrated by their inability to engage in state-authorized sports gambling at casinos and racetracks, there is no question that PASPA, not New Jersey, is to blame. If there were any confusion on that score, this now four-years-running litigation has surely removed it. And if New Jersey wants to

change that dynamic, then it (along with the handful of states supporting it as *amici*) remains free to pursue the ordinary course of trying to persuade Congress to alter or repeal PASPA. But this Court should reject, just as it did the last time around, New Jersey's attempt to short-circuit that political process through an ill-conceived expansion of the commandeering doctrine.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

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