No. 16-477

IN THE

Morris Tyler Moot Court of Appeals at Yale

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

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QUESTION PRESENTED

The Professional and Amateur Sports Protection Act (PASPA) makes it unlawful for states to legalize sports gambling. After a previous challenge to PASPA was enjoined, the New Jersey Legislature attempted to circumvent the statute by partially repealing specific prohibitions on sports gambling in the State. Respondents filed this civil action seeking an injunction of the new law as a violation of PASPA.

The question presented is whether a federal statute that limits a State's ability to adjust or partially repeal prohibitions on private conduct impermissibly commandeers the States in contravention of *New York v. United States* and *Printz v. United States*.

LIST OF ALL PARTIES

Petitioner, who was Defendant-Appellant below, is: New Jersey Thoroughbred Horsemen's Association, Inc.

Respondents, who were Plaintiffs-Appellees below, are: National Collegiate Athletic Association; National Basketball Association; National Football Association; National Hockey League; Office of the Commissioner of Baseball, doing business as Major League Baseball.

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The en banc opinion of the court of appeals (Pet. App. 1a-46a) is reported at 832 F.3d 389. The panel opinion (Pet. App. 49a-75a) is reported at 799 F.3d 259. The opinion of the district court granting Respondents summary judgment and a permanent injunction (Pet. App. 76a-113a) is reported at 61 F.Supp.3d 488.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2016. The petition for writ of certiorari was timely filed on September 29, 2016. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article VI, Clause 2 of the United States Constitution provides, in relevant part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and Judges in every state shall be bound thereby, any Thing in the Constitution of any State to the Contrary notwithstanding."

18 U.S.C. § 3702 (2012) provides, in relevant part:

> It shall be unlawful for . . . a 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, directly or indirectly (through the use of geographical references or otherwise), 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.

Other relevant statutory provisions and legal materials are reproduced in the Petition Appendix (204a-222a).

STATEMENT OF THE CASE

I. The Professional and Amateur Sports Protection Act (PASPA)

In 1992, Congress passed PASPA to "stop the spread of State-sponsored sports gambling." Pet. App. 124a (quoting S. Rep. No. 247, 102d Congress (1991), at 4). It was concerned that State-sponsored and State-sanctioned gaming would increase the incidence of sports gambling and thereby imperil the integrity of professional and amateur athletic contests, or—at the very least—the public's perception of the integrity of such contests. *Id.* at 125a. Congress found that this issue constituted a veritable collective action problem ripe for federal intervention since once one State legalized sports gambling, its neighbors would be tempted to as well. *Id.* However, even though Congress "believe[d] that all such sports gambling is harmful," it recognized that it was not legislating on an entirely blank slate. S. Rep. 102-258, at 8. It made exemptions for states, Oregon and Delaware, that had sports lotteries, Nevada, whose economy depends in part on sports gambling, and other state gambling regimes that might have been in place when the legislation was introduced. Pet. App. 124a; *see* 28 U.S.C. § 3704 (2012); *see also Ofc. Comm. Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009) (interpreting scope and extent of § 3704 exemptions).

Among the exemptions provided for in PASPA was a grace period for New Jersey, should the State decide to license sports wagering within a year of the enactment of PASPA. Pet. App. 124a; *see* 28 U.S.C. § 3704(a)(2). New Jersey did not take advantage of this option within the designated time period and, after a year, was fully subject to PASPA's terms. Pet. App. 126a.

II. PASPA's Impact on New Jersey

New Jersey decided not to avail itself of the option that PASPA had provided, with full knowledge of the opportunity it was giving up. Even in 1992, there was a movement in the

State to legalize sports gambling; in fact, efforts in New Jersey were an impetus for the passage of PASPA. *See* S. Rep. 102-258, at 5 (describing "[t]he current pressures in such places as New Jersey and Florida to institute casino-style sports gambling").

By 2010, New Jersey had come to regret the decision it had made nearly twenty years before. The Legislature began holding hearings on the possibility and fiscal benefits of regulated sports gaming. Pet. App. 4a. The next year, the Legislature put an initiative on the ballot which asked New Jersey voters whether they desired to amend the State's constitution with, in part, the following text: "It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event . . . ." N.J. Const. Art. IV, § VII, ¶ 2(D); Pet. App. at 5a; *cf.* 28 U.S.C. § 3702(1) (2012) (stipulating that it shall be unlawful for "a governmental entity to . . . authorize by law or compact" sports gambling). The measure was approved, and in 2012, the New Jersey Legislature enacted the Sports Wagering Act. N.J. Stat. Ann. §§ 5:12A-1 *et seq.* (2012); Pet. App. 5a. This statute enacted an extensive sports gambling regime in the State and was challenged by the sports leagues, who are also Respondents in this case. *Id.* at 6a. The sports leagues prevailed and, in a decision affirmed by the Third Circuit, *National Collegiate Athletic Association v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2014) (*Christie I*), PASPA was held to enjoin the Sports Wagering Act. The Third Circuit also held that PASPA did not run afoul of constitutional anti-commandeering principles. *Id.*

On the day the Supreme Court denied Petitioners' petition for certiorari from the Third Circuit's decision in *Christie I*, legislation was introduced in the New Jersey Legislature to "[p]artially repeal[] prohibitions against sports wagering at racetracks and casinos in New Jersey." *Id.* at 83a (first alteration in original). A few months later, the act at issue in this case, which "partially repeal[s] the prohibitions, permits, licenses, and authorizations concerns

wagers on professional, collegiate, or amateur sport contests or athletic events," *id.* at 219a, was passed into law ("2014 Law"). N.J. Stat. Ann. §5:12A-7; Pet. App. at 84a. The effect of the law is to enable individuals, over the age of 21, to participate in sports gambling without the threat of state sanction at casinos or racetracks, provided that there is no wagering on New Jersey teams or on events that take place in the State. Pet. App. at 8a.

III. Procedural Background

Respondents are National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Officer of the Commissioner of Baseball, doing business as Major League Baseball. They filed this action in the United States District Court for the District of New Jersey. Respondents initially applied for a preliminary injunction, *id.* at 76a-77a, asserting four causes of action, three under PASPA, *id.* at 86a.

The district court consolidated Respondents' application for a preliminary injunction with a final disposition on the merits and *sua sponte* found that Respondents were entitled to summary judgment, as well as a permanent injunction against implementation or enforcement of the 2014 Law. *Id.* at 77a; *id.* at 90a. The court considered the Third Circuit's decision in *Christie I*, as well as ordinary preemption principles before holding that the 2014 Law's partial repeal of New Jersey's sports gambling ban was preempted by PASPA. *Id.* at 92a. Obligated to follow the Third Circuit's decision in *Christie I*, which had upheld the constitutionality of PASPA, the district court did not pass on the question of whether PASPA contravenes anti-commandeering principles. *Id.* at 94a.

A panel of the Third Circuit affirmed the district court's decision that the 2014 Law violated PAPSA. *Id.* at 51a. The panel was also bound by *Christie I*'s holding that "PASPA is constitutional and does not violate the anti-commandeering doctrine." *Id.* at 55a.

The court of appeals granted rehearing en banc. Pet. App. 202a. The en banc court affirmed the district court's ruling that the 2014 Law violates PASPA, as well as *Christie I*'s ruling that "PASPA does not commandeer the states in a way that runs afoul of the Constitution." *Id.* at 3a.

SUMMARY OF ARGUMENT

I. Application of the anti-commandeering doctrine to the Professional and Amateur Sports Protection Act (PASPA) is inappropriate. The Third Circuit was correct, twice, to uphold the statute in the face of increasingly desperate attempts on behalf of the State of New Jersey to either skirt its requirements or, in the alternative, have a federal court declare it unconstitutional. The Third Circuit thoroughly examined the Supreme Court's anti-commandeering cases—especially the landmarks of *New York v. United States*, 505 U.S. 144 (1992), and its successor, *Printz v. United States*, 521 U.S. 898 (1997)—and properly concluded that the federalism flaws that doomed the statutes at issue in those cases were not present in PASPA.

The Court's anti-commandeering jurisprudence forces judges and policymakers to consider the following question when formulating, interpreting, and evaluating federal legislation: does this statute command state legislators or state officers? And no matter how one looks at it, it is difficult to answer yes to that question with respect to PASPA. First of all, PASPA contemplates that there will be a diversity of responses among the States to the national policy it expresses, which is why it explicitly provides for the contingency that governmental entities will legalize sports gambling. Second, PASPA does not actually command state governments to do anything. In effect, it creates a cause of action in the federal courts, who—there is no doubt—can issue commands to state officers.

However, PASPA does not even entail this level of federal control of the States. Rather, as is the case in many contexts recognized by the Court, Congress has the authority to limit the

States' menu of policy options so long as it does not force them to take a discrete, affirmative action.

II. Invalidating PASPA would not promote the purposes the anti-commandeering doctrine was designed to promote. Viewed in a very abstract way, anti-commandeering is a solution to the information asymmetry problem that arises when one of the dual sovereigns in the American system, the national government, starts calling the shots for the other supposed sovereign, the states. At that point, citizens do not know who must be held responsible or accountable for the public policies and laws that affect their lives; they thus become incapable of self-governance and less able to "secure the blessings of liberty to [themselves] and [their] posterity." U.S. Const. pmbl.

These concerns are not applicable to PASPA generally, and particularly not in this case where it is abundantly clear that New Jersey's officers support the legalization of sports gambling and are only not actuating such a policy because of repeated injunctions issued by a federal court.

ARGUMENT

I. PASPA DOES NOT COMPEL THE STATES TO ENACT OR ADMINISTER A FEDERAL REGULATORY PROGRAM.

A. The text of PASPA explicitly disclaims any congressional effort to compel state legislatures or state executive officials to take, or withhold from, any action.

As Justice Scalia once wrote, "[o]ur [the Supreme Court's] obligation is to go as far in achieving the general congressional purpose as the text of the statute fairly prescribes—and not further." *Johnson v. United States*, 529 U.S. 694, 723 (2000) (Scalia, J., dissenting). In this case, a careful analysis of the text of PASPA reveals, first, that the Act does not contain an unconditional command and, second, that, even if it did, its directive is issued to federal courts, not state political officers, as would be necessary for a violation of the anti-commandeering doctrine.

1. PASPA explicitly envisions that states will authorize sports gambling.

The text of PASPA specifically contemplates the possibility that non-exempted jurisdictions will authorize, by law, sports gambling after the passage of the Act.

In interpreting PASPA, like other statutes, courts are often guided by "general canons of statutory interpretation." *Loughrin v. United States*, 134 S.Ct. 2384, 2390 (2014); *see also Johnson v. United States*, 559 U.S. 113, 147 (2010) (Alito, J., dissenting) (utilizing "standards canons of statutory interpretation"). Two important canons are relevant to a proper interpretation of this statute. First, "[i]t is a fundamental cannon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (quotation marks omitted)). Second, courts "will not read statutory provisions to be surplusage." Pet. App. 15a. Moreover, the Supreme Court has recognized that these two canons are linked. In *Marx v. General Revenue Corporation*, 133 S.Ct. 1166 (2013), the Court found "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Id.* at 1178. These general canons bear heavily on understanding the relationship between PASPA § 3702(2) and § 3702(1) of the same Act—and, accordingly, the Court's inquiry in this case.

Section 3702(2) states it shall be unlawful for "a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity," sports gambling. 28 U.S.C. § 3702(2). While not mentioned in the course of the en banc decision below, this provision reveals an interesting aspect of congressional intent with respect to PASPA.[1] If Congress had understood § 3702(1) to compel States to enact and administer a particular regulatory regime—i.e., one which prohibited sports gambling—Section 3702(2), which criminalizes sports gambling undertaken

[1] The fact that this argument was not raised below does not mean that it must be ignored by this court. As the Third Circuit noted in *Christie I*, "it is axiomatic that we may affirm on any ground apparent on the record, particularly when considering *de novo* the constitutionally [*sic*] of a Congressional enactment." Pet. App. 167a.

pursuant to state "law or compact," would have been unnecessary, or mere "surplusage." For under such a ukase-like interpretation of PASPA, there would be no "law or compact" to act pursuant to. PAPSA's drafters clearly envisioned that, even after the passage of § 3702(1), some states would continue to authorize by law sports gambling, as evinced by their codification of § 3702(2). Such intent is entitled to great weight in this court's deliberations.

2. PASPA does not command states to do anything; it is directed at federal judges.

Unlike the statutes struck down in *New York v. United States*, the Low-Level Radioactive Waste Policy Act, and *Printz v. United States*, the Brady Handgun Violence Prevention Act, PASPA is not directed to state political officials—that is, legislators and executive officials and their subordinates—but judges. This is a critical difference between PASPA and the two laws that have been invalidated under anti-commandeering principles by the Supreme Court. Both *New York* and *Printz* recognized that the Supremacy Clause not only requires that federal law be binding on state courts, but also that it grants federal courts the power to command state officials. *See Printz v. United States*, 521 U.S. 898, 907 (1997); *New York v. United States*, 505 U.S. 144, 178-79 (1992); *cf. Alden v. Maine*, 527 U.S. 706, 749 (1999) (holding that it would constitute impermissible commandeering for Congress to abrogate State sovereign immunity in state courts).

In *New York*, the statute offensive to the federalism embodied in the Tenth Amendment mandated that after a certain date:

> [E]ach State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the state to take possession . . . . .

42 U.S.C. § 2021e(d)(2)(C)(i) (2012), *invalidated by New York*, 505 U.S. 144. Given the nature of the obligation that was imposed directly on the state by Congress, the Court held that this provision unconstitutionally "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program, an outcome that has never

been understood to lie within the authority conferred upon Congress by the Constitution." *New York*, 505 U.S. at 176 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981) (quotation marks omitted)); *see also Printz*, 521 U.S. at 912 ("We have held, however, that state legislatures are *not* subject to federal direction.") (citing *New York*, 505 U.S. 144) (emphasis in original)).

Similarly, in *Printz*, the Court recognized that the anti-commandeering principle was equally hostile to a statute that commanded "[a] chief law enforcement officer [of a State] . . . shall make a reasonable effort" to determine whether a gun transfer would be a violation of federal law. 18 U.S.C. § 922(s)(2) (2012), *invalidated* by *Printz*, 521 U.S. 898. It concluded, "We held in *New York* that Congress cannot compel the states to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Printz*, 521 U.S. at 935; *see also United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) ("This is not a case where the etiquette of federalism has been violated by a formal command from the national government directing the State to enact a certain policy . . . .").

Thus, in both *New York* and *Printz*, the Court was confronted with statutes that represented congressional attempts to directly command the state legislature or state executive officials without any intermediary.

PASPA is not structured like either of these statutes. Textually, it does not issue a command that a state or its officers "shall" do anything, but rather makes it unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports gambling. 28 U.S.C. § 3702(1) (2012); *cf. National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2597 (2012) (*NFIB*) (holding that use of "shall" alone in legislation is not dispositive of its coercive effect). In fact, PASPA's language is remarkably

similar to that of a statute that was unanimously upheld in the Court's most recent anti-commandeering case, *Reno v. Condon*, 528 U.S. 141 (2000). In *Reno*, the Court held the Driver's Privacy Protection Act's (DPPA) declaration that "[i]t shall be unlawful for any person knowingly to obtain, or disclose personal information, from a motor vehicle record," did not run afoul of the anti-commandeering principles enunciated in *New York* and *Printz*.[2] 18 U.S.C. § 2722(a) (2012). In upholding the statute, the Court emphasized how the DPPA "does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Reno*, 528 U.S. at 151. The reasons for this lack of compulsion are twofold. First, the DPPA is couched in prohibitory language. Second, the provision does not constitute a direct command from Congress to states. Both of these features characterize PASPA as well.

In *Christie I*, the Third Circuit discussed the relationship between anti-commandeering and the Supremacy Clause, focusing on *Reno* and another case out of South Carolina, *South Carolina v. Baker*, 485 U.S. 505 (1988), which upheld a law that penalized the issuance of certain kinds of bonds by states. Pet. App. 153a-156a. While the Third Circuit dutifully refers to *New York*'s, 505 U.S. at 162, and *Printz*'s, 521 U.S. at 913, analyses of the Supremacy Clause, it fails to recognize the role that these discussions play in the Supreme Court's anti-commandeering jurisprudence. In *New York*, the Court cites no less than six cases in support of the "the power of federal *courts* to order state officials to comply with federal law," continuing, "[t]he Constitution contains no analogous grant of authority to Congress." 505 U.S. at 179 (emphasis added). As a result of PASPA, neither state legislatures, nor state officers are made beholden to Congress. The sole means of enforcing PASPA is through an injunction issued by a district court, an arrangement the Court has never held to be a violation of anti-commandeering doctrine. 28 U.S.C. § 3703 (2012).

[2] Similar to PASPA, "[t]he DPPA's provisions do not apply solely to States. The Act also regulates . . . private persons," who have acted according to the State's procedures. *Reno*, 528 U.S. at 145 (citing 18 U.S.C. § 2721(c) (1994 ed. and Supp. III)); *see Christie I*, Pet. App. 163a-164a.

B. PASPA offers States multiple constitutionally acceptable courses of action.

Describing the offending provisions in *New York*, the Supreme Court wrote, "A choice between two unconstitutionally coercive regulatory techniques is no choice at all." *New York*, 505 U.S. at 176. What was crucial to the Court's analysis in both *New York* and *Printz* was that the States had no option but to follow the direction of Congress. This lack of choice contributed to the accountability concerns in *New York*, 505 U.S. at 168, and *Printz*, 521 U.S. at 930, and, ultimately, the invalidation of the statutes at issue.

1. There are numerous options available to States under PASPA.

In the en banc decision below, the Third Circuit took the district court to task for interpreting PASPA as "present[ing] states with a strict binary choice between total repeal and keeping a complete ban on their books . . . ." Pet. App. 24a. It concludes:

> That 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. . . . [A]s the Leagues noted at oral argument before the en banc court, not all partial repeals are created equal. For instance, a state's partial repeal of a sports wagering ban to allow *de minimis* wagers between friends and family would not have nearly the type of authorizing effect that we find in the 2014 Law. We need not, however, articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, if indeed such a line could be drawn. It is sufficient to conclude that the 2014 Law overstepped it.

Id. at 24a.

Even if this analysis about the number of potential options available to States under PASPA is not accepted, it remains undisputed in the lower court decisions that the options available to States under PASPA are different in kind than those that were found offensive to the Constitution in *New York*. *Id.* at 161a. PASPA allows, at the very least, a State to maintain its prohibition or completely repeal its ban on sports gambling. In *Christie I*, the Third Circuit wrote, "Neither of PASPA's two "choices" affirmatively requires the states to enact a law, and both choices leave much room for the states to make their own policy." *Id.*

2. The Court has approved the specific policy choice set PAPSA makes available to States in the preemption context.

Even taking the least generous interpretation of PASPA that has been put forward—that it offers States a binary choice between maintaining their bans on sports gambling and completely repealing them—the Supreme Court's anti-commandeering decisions are clear that limiting a State to such a choice set is acceptable to the Constitution. As the en banc court recognized, "congressional action in passing laws in otherwise pre-emptible fields has withstood attack in cases where the states were not compelled to enact laws or implement federal statutes or regulatory programs themselves." Pet. App. 19a. Judge Vanaskie dissented from this opinion, and analysis, arguing, "In such situations, States have a choice: they may either comply with the federal legislation *or the Federal Government will carry the legislation into effect*." *Id.* at 41a (emphasis in original). But Judge Vanaskie's analysis is incorrect. The State's choice in such cases is between complying with federal legislation and *not regulating*; States do not have the power to choose whether or not the federal government will act.

In *New York*, citing *Hodel* and *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982), the Supreme Court recognized that "[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity or having state law pre-empted by federal regulation." 505 U.S. at 167. As the Court has also recognized, the distinctive feature of preemption is not the substance or nature of the federal policy, but rather "that state laws that conflict with federal law are 'without effect.' " *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). The Federal Government's actions, outside of commands to states, are simply irrelevant to the Court's anti-commandeering calculus.

Thus, in *F.E.R.C.*, in the course of upholding provisions of the Public Utility Regulatory Policies Act (PURPA) that required States consider particular energy policies and administrative

procedures, the Court concluded, "As we read them, Titles I and III simply establish requirements for continued state activity in an otherwise pre-emptible field." *F.E.R.C.*, 456 U.S. at 769; *see Printz*, 521 U.S. at 929 (describing *F.E.R.C.* as upholding "the statutory provisions at issue precisely because they did *not* commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field" (emphasis in original)); *see also Hodel*, 452 U.S. at 290 ("Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.").

Anti-commandeering principles police the line between valid exercises of congressional power and violations of the "state sovereignty reserved by the Tenth Amendment . . . ." *New York*, 505 U.S. at 156. The doctrine, however, performs this task in a very particular way. Commandeering analysis focuses not on the nature or validity of the federal policy in the abstract, but exclusively on how a policy's method of implementation affects the relationship between Congress and the states. *See Reno*, 528 U.S. at 149 ("In *New York* and *Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment."); *see NFIB*, 132 S.Ct. at 2597 (discussing *New York*'s focus on how incentive structure affected state legislatures). Thus, Judge Vanaskie's concern about the federal action to be undertaken in the PASPA's preemptive wake is inappropriate to the role of the anti-commandeering inquiry. The choice that no one denies PASPA presents states—to regulate in accordance with congressional directive or not to regulate at all—has been recognized by the Court as a legitimate exercise of federal power on multiple occasions both within and without the anti-commandeering context.

C. PASPA does not command states to take affirmative actions.

As the Third Circuit in *Christie I* remarked: "When Congress passes a law that operates via the Supremacy Clause to invalidate contrary state laws, it is not telling the states what to do, it is barring them from doing something they want to do. Anti-commandeering challenges to statutes worded like PASPA have thus consistently failed." Pet. App. 154a-155a (citing *Kelley v. United States*, 69 F.3d 1503, 1510 (10th Cir. 1995); *California Dump Truck Owners Ass'n v. Davis*, 172 F.Supp.2d 1298, 1304 (E.D. Cal. 2001)).

1. The Court has only struck down laws that impose positive obligations on states as violations of the anti-commandeering doctrine.

The Court has struck down federal legislation under the anti-commandeering principle in only two cases. Pet. App. 121a. In both, *New York* and *Printz*, the unconstitutional provision was found to require States to undertake some action beyond what their current regulatory regime required.

In *New York*, which concerned congressional commandeering of state legislatures, the offending feature of the Low-Level Radioactive Waste Policy Act was its direction to the States "to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288) (quotation marks omitted). Moreover, the *New York* Court explicitly found that the provisions of PURPA at issue in *F.E.R.C.* were saved precisely "[b]ecause '[t]here [wa]s nothing in PURPA "directly compelling" the States to enact a legislative program[.]" *Id.* at 162 (quoting *F.E.R.C.*, 456 U.S. at 764 (quoting *Hodel*, 452 U.S. at 288)) (second and third alterations in original); *see also NFIB*, 132 S.Ct. at 2597 (describing how a "statute [read] as a federal command that the state legislature enact legislation . . . would have violated the Constitution"); *Reno*, 528 U.S. at 142 (upholding DPPA and arguing *Baker* correctly upheld tax bond provisions because neither statute "require[d] the South Carolina Legislature to enact any laws or regulations").

There is no cognizable argument that PASPA compels States to enact a legislative program. The word "enact" means, inter alia, "[t]o make into law by authoritative act; to pass." Black's Law Dictionary 606 (9th ed. 2009). Due to PASPA's exemption section, pre-existing sports gambling schemes were not subject to its terms and, therefore, no State was required to pass legislation to make itself compliant with PASPA's regime. 28 U.S.C. § 3704(a).

Additionally, as the Third Circuit recognized in *Christie I*, PASPA does not lead to the same sorts of concerns that forced the Court to strike down the interim provisions of the Brady Handgun Violence Act in *Printz*. It wrote, "[U]nder PASPA . . . a state may choose to keep a complete ban on sports gambling, but it is left to each state to decide how much of a law enforcement priority it wants to make of sports gambling . . . ." Pet. App. 161a. This flexibility stands in stark opposition to the situation in *Printz*, where federal law imposed an unconstitutional affirmative obligation on chief law enforcement officers of the States to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law . . . ." 18 U.S.C. § 922(s)(2); *see Printz*, 521 U.S. at 933.

Like the en banc court, Pet. App. 23a, and *Christie I*, Pet. App. 17a, other circuits that have considered anti-commandeering challenges have also imposed an affirmative action requirement. *See Town of Johnson v. Federal Housing Finance Agency*, 765 F.3d 80, 86 (1st Cir. 2014) (reasoning that "the anti-commandeering cases concern the federal government's requiring a state to take particular types of affirmative action"); *Connecticut v. Physicians Health Services of Connecticut*, 287 F.3d 110, 122 (2d Cir. 2002) (holding statute "does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them"); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (upholding statute which "does not force state officials to do anything affirmative to implement its bar on domestic violence misdemeanants' possession of firearms"); *United States v. Bostic*, 168 F.3d. 718, 724 (4th

Cir. 1999) (distinguishing *Printz* because statute "poses no similar affirmative obligation."). This affirmative action requirement flows from both the language and logic of the Court's opinions in *New York* and *Printz*—the paradigm cases of anti-commandeering principles at work.[3]

2. Laws like PASPA that prohibit or limit particular exercises of State power are an accepted feature of our federal system.

As recognized in *F.E.R.C.*, "[w]hile this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, there are instances where the Court has upheld federal statutory structures that in effect directed states to take or refrain from taking certain actions." *F.E.R.C.*, 456 U.S. at 761-62 (citation omitted). In its subsequent analysis, the *F.E.R.C.* Court does not cite any case that deals with the precise issue in this case—whether the federal government can prevent States from passing laws that would adjust or partially repeal state-law prohibitions on private conduct. However, it does direct the reader's attention to *Fry v. United States*, 421 U.S. 542 (1975), which upheld federal statutory limits on the actions of state executive officials. This implies that just as *Printz* recognized that the anti-commandeering principles developed in the state legislative context in *New York* were equally applicable to congressional commands of state executive officers, so the limit on the anti-commandeering principle recognized in *Fry* must be equally applicable to the state legislatures.

[3] The majority in *Christie I*, as well as Judge Vanaskie in dissent from the en banc opinion, are justifiably concerned about the viability of the affirmative/negative requirement distinction given Judge Kozinski's cogent analysis in concurrence in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). In that opinion, Judge Kozinski argued that Congress may be able to "accomplish exactly what the commandeering doctrine prohibits" by stopping the states from "repealing an existing law." *Id.* at 646 (Kozinski, J., concurring). Before his analysis can be applied to PAPSA, two points must be noted. First, the federal policy—taking away licenses from doctors who recommended medicinal marijuana—struck down in *Conant* was the equivalent, not to 28 U.S.C. § 3702(1), which makes it unlawful for a State to authorize by law sports gambling, but § 3702(2), which makes it illegal for anyone to act pursuant to such a scheme. *Conant*, 309 F.3d at 632 (majority opinion). It must be recognized that this represents quite an expansion of the anti-commandeering principle beyond *New York* and *Printz*. Second, Judge Kozinski's analysis was influenced by his understanding that "[t]he commandeering problem becomes even more acute where Congress legislates at the periphery of its powers," *Conant*, 309 F.3d at 647 (Kozinski, J., concurring). *Conant* was decided at a time when it was unclear whether medicinal marijuana was within the ambit of interstate commerce. This ambiguity was resolved, against Judge Kozinski's inclinations, in *Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding that regulations of medicinal marijuana are proper exercises of the Commerce Clause). In contrast, in the opinions below, there is little question that PASPA is a proper regulation of interstate commerce outside of lingering anti-commandeering concerns. *See* Pet. App. 143a-146a.

Accordingly, in *Reno* and *Baker*, the Supreme Court upheld statutes that limited the authority of state officers to disclose personal information and issue certain types of government bonds, respectively. This was so even though in the latter case, the Court was informed that "many state legislatures had to amend a substantial number of statutes in order to issue bonds in registered form and . . . state officials had to devote substantial effort to determine how best to implement a registered bond system." *Baker*, 485 U.S. at 514. The Court rejected the charge of commandeering, holding such costs were "an inevitable consequence of regulating a state activity." *Id.* Moreover, to the extent that the statutes at issue in *Baker* and *Reno* are insulated from anti-commandeering attacks because they "regulate[] state activities . . . not, as did the statute in *F.E.R.C.*, seek[ing] to control or influence the manner in which States regulate private parties," so ought PASPA be protected. *Baker*, 485 U.S. at 514; *see Reno*, 528 U.S. at 150-51. To the extent that PASPA regulates the types of licenses or license-equivalents, *see Haywood v. Drown*, 556 U.S. 729, 742 (2009) ("[T]he Supremacy Clause cannot be evaded by formalism."), issuable by states, PASPA resembles the tax provision at issue in *Baker*, which limited the types of bonds states could issue, and the DPPA, which limited state disclosures of private information. PASPA is, in fact, less invasive of state sovereignty than those statutes because it requires neither changes in state laws, as did *Baker*, or compliance costs, as in *Reno*. *Reno*, 528 U.S. at 149-50.

II. THE ACCOUNTABILITY CONCERNS THAT ANIMATE THE COURT'S ANTI-COMMANDEERING DOCTRINE ARE NOT IMPLICATED BY PASPA.

The commandeering doctrine is motivated by more than just a concern for federalism for its own sake. As the Court wrote in *New York*, "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " *New York*, 505 U.S. at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)); *see also id.* at 156-57 ("The Tenth Amendment . . . restrains the power

of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology."). The means by which the anti-commandeering doctrine helps secure that liberty is by ensuring that the people know who must be held accountable for the public policies that affect their lives. *See Horne v. Flores*, 557 U.S. 433, 471 (2009) ("When it is unclear whether an onerous obligation is the work of the Federal or State Government, accountability is diminished."); *New York*, 505 U.S. at 169 ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain isolated from the electoral ramifications of their decision."); *see also* The Federalist No. 37, at 234 (J. Madison) (J. Cooke ed. 1961) ("The genius of Republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people . . . .").

A. New Jersey's failure to permit sports gambling cannot be attributed to state officials.

As a result of the process by which the 2014 Law was passed and PASPA is enforced, the accountability concerns that motivate the anti-commandeering doctrine are simply irrelevant.

The 2014 Law at issue in this case and the injunction issued by the district court, Pet. App. 114a- 16a, were the culmination of a long, incredibly public process that make it clear to anyone paying a modicum of attention that the Federal Government is responsible for the continued ban on sports gambling in the state of New Jersey.

This process was initiated by the New Jersey Legislature in 2010 with hearings about whether the State's constitutional ban on sports gambling should be lifted. *Id.* at 4a. Then in 2011, the Legislature held a state-wide referendum where nearly two thirds of voters supported amending the State's constitution to state, in part, "It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any

professional, college, or amateur sport or athletic event . . . .” N.J. Const. Art. IV, § VII, ¶ 2(D). Next, in 2012, the Legislature used this authority to pass the 2012 Law that was struck down in *Christie I*. Pet. App. 5a-6a. Finally, in 2014, the State passed the law at issue here. *Id.* at 7a; *see also id.* at 81a-86a (describing the legislature’s tremendous efforts to legalize sports gambling in New Jersey). Thus, it is hard to believe that citizens of New Jersey would mistakenly hold their state government responsible for the lack of legal sports gambling in their state.

B. PASPA’s enforcement mechanism will enable people to hold the Federal Government accountable for continued state gambling bans.

The Federal Government’s role in preventing sports gambling in New Jersey is also more clear in this case than in either *New York* or *Printz*. Rather than a federal command embedded in a complex statute like the Low-Level Radioactive Waste Policy Act or the Brady Handgun Violence Prevention Act, the federal power at issue here is embodied in an injunction issued by a federal judge. In fact, the only way that PASPA can ever be enforced is through an injunction issued by a federal district court. 28 U.S. § 3703. Recognizing the importance of this distinction, the *New York* Court explicitly distinguished commands issued to state officials from Congress and those from a court in the course of its accountability analysis. It wrote, “Additional cases cited by the United States discuss the power of federal courts to order state officials to comply with federal law. Again, however, however, the text of the Constitution plainly confers this authority on the federal courts . . . . The Constitution contains no analogous grant of authority to Congress.” *New York*, 505 U.S. at 179 (citations omitted); *see also id.* at 166 (“[T]he Framers explicitly chose a Constitution that confers upon *Congress* the power to regulate individuals, not States.”) (emphasis added). Thus, there are no blurred lines of accountability when a federal court issues an injunction, not only because such an exercise of federal power is the product of a very public proceeding that concerns the specific state policy, but also because this exercise of federal power—i.e., commands

from federal judges to state officials—is the sort of thing that citizens in our constitutional system are accustomed to and perfectly able to attribute to federal judges and not state officials.

C. The fiscal accountability concerns that motivated the Court in Printz are inapplicable to PASPA.

On top of the political accountability concerns enunciated in *New York*, *Printz* introduces the related issue of financial responsibility to the Court's commandeering analysis. The Court wrote, "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz*, 521 U.S. at 930. This development complements the concerns raised in *New York*, and is similarly inapplicable to a statute like PASPA. Unlike with *Printz*, there is no federal requirement that state officials expend a "reasonable effort" to pursue federal ends. *Cf.* 18 U.S.C. § 922(s)(2). Instead, as the Third Circuit recognized in *Christie I*:

> [U]nder PASPA, on the one hand, a state may repeal its sports wagering ban, a move that will result in the expenditure of no resources or effort by any official. On the other hand, a state may choose to keep a complete ban on sports gambling, but it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be.

Pet. App. 161a. Because the means by which PASPA implements its policy is through state law, the state, unlike in *Printz*, maintains control of its purse strings, as do its people.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FEBRUARY 2017