No.

IN THE

Supreme Court of the United States

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

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
ASHLEY E. JOHNSON
ROBERT E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5306
(202) 955-8500
TOlson@gibsondunn.com

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY

STUART M. FEINBLATT
PETER SLOCUM
OFFICE OF THE ATTORNEY
GENERAL OF THE STATE OF
NEW JERSEY
R.J. Hughes Justice Complex
25 Market St., P.O. Box 112
Trenton, NJ 08625-0112
(609) 984-9666

Counsel for State Petitioners

QUESTIONS PRESENTED

Federal law does not directly prohibit sports wagering where it occurs in a State in which it is legal. But the Professional and Amateur Sports Protection Act ("PASPA") makes it unlawful for a State, other than Nevada or several other exempted States, to "license" or "authorize" sports wagering. 28 U.S.C. § 3702.

The questions presented are:

1. Does PASPA's prohibition on state licensing or authorization of sports wagering commandeer the regulatory authority of the States, in violation of the Tenth Amendment?

2. Does PASPA's discrimination in favor of Nevada and other exempted States violate the fundamental principle of equal sovereignty?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Defendants below were Christopher J. Christie, Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; and Frank Zanzuccki, Executive Director of the New Jersey Racing Commission.

The district court granted leave to intervene as defendants to Stephen M. Sweeney, President of the New Jersey Senate; Sheila Y. Oliver, then-Speaker of the New Jersey General Assembly; and the New Jersey Thoroughbred Horsemen's Association, Inc.

Plaintiffs below were the National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and Office of the Commissioner of Baseball.

The district court granted the United States of America permission to intervene under 28 U.S.C. § 2403 to defend the constitutionality of PASPA.

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Christopher J. Christie, David L. Rebuck, and Frank Zanzuccki respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 730 F.3d 208. Pet. App. 1a. The opinion of the district court addressing the merits is reported at 926 F. Supp. 2d 551. Pet. App. 83a. The opinion of the district court addressing Article III standing is unpublished but is electronically available at 2012 WL 6698684. Pet. App. 137a.

JURISDICTION

The court of appeals entered its opinion on September 17, 2013. Petitioners timely filed a petition for panel rehearing or rehearing en banc on November 1, 2013, and the court of appeals denied that petition on November 15, 2013. Pet. App. 156a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the appendix to this brief.

STATEMENT

The citizens of New Jersey voted overwhelmingly in 2011 to amend the State Constitution to allow legalization of sports wagering. *See* N.J. Const. art IV, § 7, ¶ 2. Soon thereafter, the State Legislature enacted a licensing regime to permit sports wagering at privately operated casinos and racetracks. *See* N.J. Stat. Ann. § 5:12A-1 *et seq.* ("the Sports Wagering

Law"). The Third Circuit enjoined implementation of that licensing regime, but not because any federal law prohibits individuals from wagering on sports. Rather, the Third Circuit enjoined New Jersey's licensing regime because the Professional and Amateur Sports Protection Act ("PASPA") makes it unlawful for a "governmental entity," including a State, to "license, or authorize by law or compact" sports wagering activity. 28 U.S.C. § 3702. In other words, rather than prohibit sports wagering directly, Congress in PASPA made it unlawful for a State to "license" or "authorize" such conduct.

PASPA's regulation of the States' regulatory authority cannot be reconciled with our federalist system. Under the anti-commandeering principle of the Tenth Amendment, this Court repeatedly has explained that Congress may "regulate interstate commerce directly" but may not "regulate state governments' regulation of interstate commerce." *New York* v. *United States*, 505 U.S. 144, 166 (1992); *Printz* v. *United States*, 521 U.S. 898, 924 (1997). Yet the Third Circuit candidly acknowledged that PASPA "regulates the states' permit-issuing activities" in order to prevent "the states from lending their imprimatur to gambling on sports." Pet. App. 47a, 59a. Congress, the Third Circuit explained, was concerned that state licensure of private sports wagering would convey a "label of legitimacy" to the activity. *Id.* at 51a. That regulation of the States' regulatory "imprimatur" is precisely what the anti-commandeering principle forbids.

The ability of the States to convey a "label of legitimacy" on private conduct lies at the heart of their retained sovereignty. Federalism "secures the freedom of the individual" by allowing the "States to re-

spond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011). Yet PASPA stifles that "voice," restricting States' ability to reflect the moral judgment of the community through the conferral of their "imprimatur." This Congress cannot do: Congress may express its ***own*** disapproval of sports wagering through direct regulation of the activity, but, having declined to enact any such direct regulation, has no authority to regulate the approval or disapproval expressed by the States.

The Third Circuit justified its disregard for these constitutional principles based on a fundamental misapprehension of the anti-commandeering doctrine. In the Third Circuit's view, so long as Congress acts to prohibit State authorization, and does not require an "affirmative act," its regulation can be justified under the doctrine of preemption. But this "affirmative act" requirement finds no support in the anti-commandeering cases, which have never suggested that Congress may regulate the sovereign regulatory authority of the States so long as it frames its dictate as a prohibition.

The Third Circuit's holding would allow almost infinite degrees of federal interference with State regulation of private conduct. Any activity subject to licensure by the States (*e.g.*, driving, fishing, business ownership, or practicing law) could be regulated indirectly by limiting the circumstances under which States may issue a license. Without taking the (perhaps unpopular) step of directly prohibiting big-game hunting, sale of foie gras, or operation of a motor vehicle by any person over a certain age, Congress could accomplish the same objective by prohibiting

the States from "conferring a label of legitimacy" by licensing or authorizing the activity.

And that is not the only mischief threatened by the Third Circuit's decision. PASPA does not regulate all States equally; instead, it affords uniquely favorable treatment to Nevada and a handful of other States that are permitted to allow sports wagering to varying degrees. The Third Circuit's opinion thus authorizes Congress to regulate the regulatory authority of the States in a *facially discriminatory* manner. If Congress can prohibit authorization of sports wagering outside of Nevada, then a bloc of congressmen could likewise prohibit licensing of lobster fishing outside of Maine, registration of corporations outside of Delaware, or authorization of wine cultivation outside of California. The Third Circuit's holding cannot be reconciled with the fundamental principle of equal sovereignty articulated most recently by this Court in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013).

The Third Circuit's approval of Congress's discrimination between the States with respect to their fundamental sovereign powers—restricting the ability of New Jersey, but not Nevada, to respond to the preferences of its citizens—calls out for correction. "When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Alden* v. *Maine*, 527 U.S. 706, 751 (1999). That injury is magnified when Congress asserts such authority over only some of the States.

The petition for certiorari should be granted.

A. The Professional And Amateur Sports Protection Act

Congress enacted PASPA against a backdrop of state law restricting wagering generally, and sports wagering in particular. Most States, including New Jersey, maintain blanket prohibitions of wagering activity, including sports wagering, unless specifically authorized by the State. *See*, *e.g.*, N.J. Stat. Ann. § 2A:40-1 *et seq.*; *see also* N.J. Stat. Ann. § 2C:37-1 *et seq*. Sports wagering is accordingly unlawful except to the extent the State permits it.[1]

While the majority of States have not enacted measures authorizing sports wagering, a few have. Nevada authorized sports wagering in 1949. Other States, including Delaware, Oregon, and Montana, have at times permitted limited sports wagering. And, when Congress debated PASPA in 1992, some suggested additional States might soon choose to legalize sports wagering. *See* S. Rep. No. 102-248, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3556.

In response to that concern, Congress enacted an unusual statute, which the U.S. Department of Justice opposed at the time because it raised serious "federalism issues." Pet. App. 174a. To "stop the spread" of sports wagering, S. Rep. No. 102-248, at 4, 1992 U.S.C.C.A.N. at 3555, Congress did ***not*** prohibit the activity directly by, for example, making sports wagering unlawful as a matter of federal law. Nor did Congress amend federal criminal wire fraud and racketeering prohibitions, which both before and af-

---

[1] *See also*, *e.g.*, Conn. Gen. Stat. Ann. § 53-278a *et seq.*; Del. Code Ann. tit. 11, § 1401 *et seq.*; Md. Code Ann., Crim. Law § 12-101 *et seq.*; N.Y. Penal Law art. 225; Ohio Rev. Code Ann. § 2915.01 *et seq*.; 18 Pa. Cons. Stat. Ann. § 5513 *et seq*.

ter PASPA criminalize sports wagering only if unlawful in the State where it occurs.[2] Instead, Congress in PASPA purported to regulate the content of ***state laws*** concerning sports wagering—by making it "unlawful" only for "***a governmental entity*** to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. 28 U.S.C. § 3702(1) (emphasis added).

PASPA's command does not apply equally to all States. Congress included a patchwork of exceptions, designed to preserve the legality of sports wagering in Nevada and, to a lesser extent, Delaware, Oregon, and Montana. PASPA thus exempts sports wagering "in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." 28 U.S.C. § 3704(a)(1). PASPA also gave New Jersey permission to authorize sports wagering in Atlantic City, but only if a measure was enacted within one year of PASPA's effective date. *Id.* § 3704(a)(3). New Jersey did not authorize sports wagering within that period.

The practical effect of PASPA has been to channel sports wagering into two types of venues: legal sports books in Nevada, and illegal, unregulated sports books in other States. Since PASPA's enactment, the volume of sports wagering in Nevada has increased from $1.5 to $2.9 billion per year. D.E. 76-2, at 2. Over roughly the same period, the volume

---

[2] *See*, *e.g.*, 18 U.S.C. § 1084(a) (barring use of a "wire communication facility" to assist placement of bets or wagers, except when wagering is "legal" under state law); *id.* §§ 1952, 1955.

of illegal sports wagering has grown exponentially, from an estimated $50 billion in 1989, to recent estimates of up to $500 billion annually. *Id.* at 3.

B. New Jersey's Sports Wagering Law

Against this backdrop, New Jersey moved to stanch the sports-wagering black market flourishing within its borders by allowing State-regulated casinos and racetracks to operate legal, regulated, transparent, and taxable sports books. The State's citizens approved, by overwhelming margins, an amendment to the State's Constitution to permit the State Legislature to authorize sports wagering. Following that lead, the State Legislature (also by landslide votes) enacted the Sports Wagering Law to authorize closely regulated sports wagering at privately-operated casinos and racetracks. *See* N.J. Stat. Ann. § 5:12A-1 *et seq*.

The Sports Wagering Law establishes a State licensing regime to monitor and regulate private sports books. Entities seeking licenses must demonstrate "financial stability," as well as "integrity and responsibility and [] good character." N.J. Stat. Ann. § 5:12A-2(a).

New Jersey has subsequently promulgated regulations to ensure that legal sports wagering in the State is closely monitored and transparent. *See* 44 N.J. Reg. 2374(a) (Oct. 15, 2012). Among other things, the regulations authorize examination of accounts and records by state officials, N.J. Admin. Code § 13:69N-3.1(d); mandate production of reports on sports wagering, *id.* § 13:69N-3.1(a); prohibit placing a bet on behalf of another person, *id.* § 13:69N-2.1; and prohibit wagering by persons under 21 years old, *id.* § 13:69N-2.2(f).

C. District Court Proceedings

The National Collegiate Athletic Association, National Basketball Association, National Football League, and Office of the Commissioner of Baseball (together, "the Leagues") filed this action, seeking a declaration that the Sports Wagering Law and accompanying regulations "violate PASPA," as well as an injunction barring Defendants from implementing them.

Defendants argued that the Leagues lacked standing because New Jersey's authorization of sports wagering would not certainly and imminently cause injury to the Leagues. New Jersey argued that, to the contrary, its licensing regime would channel wagering from illegal, black market gambling rings into regulated, transparent legal venues—which would diminish the risk of match fixing or other harms posited by the Leagues. *See* D.E. 76-2, at 26-27.

The district court rejected this argument, holding that "[t]he Leagues articulated a particularized injury based upon the negative effect the Sports Wagering Law would have upon perception of the integrity of the Leagues' games and their relationship with their fans." Pet. App. 145a. The court made no attempt to reconcile this theory of injury with extensive evidence that the Leagues take advantage of the enthusiasm generated by sports wagering and voluntarily hold games in locations where sports wagering is legal. *See id.* at 146a-148a.[3]

---

[3] For years, the NHL, NBA, and MLB have located teams in Canada, where sports wagering is legal. The NBA hosted its 2007 All-Star Game in Las Vegas, and the NCAA has allowed the Pac-12, Mountain West Conference, Western Athletic Conference, and West Coast Conference to hold championship

Addressing the merits, Defendants argued both that PASPA's regulation of the States' regulatory authority violates the Tenth Amendment, and that PASPA's facial discrimination between the States violates the fundamental principle of equal sovereignty. The Leagues did not dispute that requiring States to retain existing wagering prohibitions would violate the Tenth Amendment, but urged the court to adopt a limiting construction under which PASPA instead forbids States from taking affirmative steps to license or authorize sports wagering. *See* D.E. 95, at 13. In the Leagues' view, "[n]othing in PASPA necessarily compels states . . . to maintain prohibitions on gambling." *Id.* at 12.

The district court rejected Defendants' commandeering challenge. The court interpreted PASPA as a command to the States to maintain prohibitions of sports wagering, explaining that PASPA "forbid[s] any additional states to legalize sports wagering." Pet. App. 121a. Nonetheless, the court held that PASPA does not violate the anti-commandeering principle because retaining existing laws requires "[n]o *action* on the part of States." *Id.* at 123a. The court observed that federal criminal laws prohibit sports wagering so long as it is illegal under state law, and explained that PASPA closed a "loophole" in the federal scheme by requiring States to maintain their prohibitions. *Id.* at 121a.

The court dispensed with equal sovereignty on the ground that New Jersey, as "one of the original colonies," enjoys no right to equal treatment, as the

---

games in Las Vegas. The NFL has also hosted a game in London, which has legalized sports wagering, each year since 2007.

equal sovereignty principle applies only to newly admitted States. Pet. App. 133a.

D. The Third Circuit's Decision

The Third Circuit affirmed, over a partial dissent by Judge Vanaskie.

The Third Circuit first found that the Leagues have standing because they would be "harmed by their unwanted association" with licensed sports wagering in New Jersey. Pet. App. 17a.

Regarding commandeering, the Third Circuit found it irrelevant that "PASPA involves a regulation of the states as states." Pet. App. 47a. Rather, the Third Circuit held that the Tenth Amendment prohibits only federal laws that include "an affirmative command that the states enact or carry out a federal scheme." *Id.* at 52a. The Third Circuit conceded that "many affirmative commands can be easily recast as prohibitions," but nonetheless maintained that the anti-commandeering principle has no application where a law does not "impose any condition that the states carry out an affirmative act." *Id.* at 43a. In the Third Circuit's view, a law that only ***prohibits*** the States from acting "merely operates via the Supremacy Clause to invalidate contrary state action." *Id.* at 52a.

The Third Circuit acknowledged that interpreting PASPA to require States to maintain existing prohibitions—as did the district court—would "'accomplish exactly what the commandeering doctrine prohibits.'" Pet. App. 41a (quoting *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring)). The Third Circuit, however, did not read PASPA to impose any such requirement. While PASPA makes it unlawful for States to "authorize"

sports wagering, the Third Circuit rejected "a false equivalence between repeal and authorization," and held that States can comply with PASPA by "having *no law*." *Id.* at 41a-42a. The Third Circuit said Congress was "concerned that state-sponsored gambling carried with it a label of legitimacy," and prohibited only state laws that would confer "state approval and authorization" on sports wagering. *Id.* at 42a, 51a. The court thus construed PASPA to ***permit legalization*** of sports wagering, but to ***prohibit state licensing*** of that conduct.

While the Leagues did not bring suit under PASPA's parallel regulation of individual conduct "pursuant to the law or compact of a governmental entity," 28 U.S.C. § 3702(2), the Third Circuit also cited that prohibition in support of its conclusion. The Third Circuit stated that this provision "confirmed" that PASPA imposed a federal policy of "stopping state-sanctioned sports gambling," and that this federal policy preempted contrary state law. Pet. App. 52a.

Finally, the Third Circuit rejected Defendants' equal sovereignty argument. The Third Circuit acknowledged this Court's *Shelby County* decision, but found "nothing" to suggest that equal sovereignty applies "'outside the context of sensitive areas of state and local policymaking.'" Pet. App. 55a (quoting *Shelby County*, 133 S. Ct. at 2624). The Third Circuit emphasized that "regulation of gambling via the Commerce Clause is . . . not of the same nature as the regulation of elections." *Id.* at 54a. Moreover, even if the equal sovereignty principle did apply, the Third Circuit found that principle satisfied because PASPA is "precisely tailored" to Congress's purpose to "stop the spread of state-sanctioned sports gam-

bling" to States in which it does not already exist. *Id.* at 55a-56a (emphasis omitted).

Judge Vanaskie dissented in part, disagreeing with the majority's misconstruction of the anti-commandeering principle. In Judge Vanaskie's view, Supreme Court precedent precludes the majority's curtailment of the anti-commandeering principle to "a narrow class of cases in which Congress specifically directs a state legislature to affirmatively enact legislation." Pet. App. at 67a. Rather, "the Supreme Court 'has been explicit' that 'the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions,'" which "is exactly what PASPA does." *Id.* at 82a. Judge Vanaskie rejected the "affirmative act" requirement adopted by the majority as "illusory" and "untenable," observing that an affirmative command can always "be rephrased as a prohibition against not engaging in that conduct." *Id.* at 69a. And Judge Vanaskie warned that the majority's contrary holding would "eviscerate the constitutional lines drawn in *New York* and *Printz*." *Ibid.*

REASONS FOR GRANTING THE PETITION

Precisely because of the bedrock importance of state sovereignty to our system of government, laws that violate ***either*** of the federalism doctrines at issue in this case are rare. For a law to violate ***both*** simultaneously is practically unheard of. Yet that is what PASPA does: It impermissibly trenches on the States' authority to regulate their own citizens, and it does so in a manner that discriminates among the States. That double-barreled infringement on the sovereign prerogatives of the States calls out for review.

The Third Circuit's decision cannot be reconciled with this Court's anti-commandeering cases. Those precedents set out a simple rule: Congress may regulate commerce directly, but may not "regulate state governments' regulation of interstate commerce." *New York* v. *United States*, 505 U.S. 144, 166 (1992); *Printz* v. *United States*, 521 U.S. 898, 924 (1997). Application of that rule to this case is likewise straightforward, as PASPA makes it unlawful for "a governmental entity" to "license" or "authorize" sports wagering. 28 U.S.C. § 3702(1). That regulation of the States' sovereign regulatory authority is not a permissible exercise of Congress's enumerated power to regulate interstate commerce; it is an impermissible regulation of "state governments' regulation of interstate commerce," and therefore trenches upon the powers reserved to the States under the Tenth Amendment.

The Third Circuit jettisoned this straightforward framework—declaring that this Court's cases "do not contemplate [a] distinction" between regulation of commerce and regulation of "states as states," Pet. App. 47a—and adopted in its place an artificial and unworkable distinction between commands and prohibitions. The Third Circuit justified its approach as an application of preemption doctrine, but in doing so fundamentally misinterpreted the Supremacy Clause as a grant of authority to regulate the States' regulation of their own citizens. The result of these errors will be to open the regulatory authority of the States to practically unlimited commandeering, as ***any*** area subject to state licensing requirements can be commandeered by setting the conditions under which a State may grant a license.

The Third Circuit also parted ways with this Court's precedents when it approved PASPA's facial discrimination between the States. The Third Circuit effectively limited the equal sovereignty principle to the narrow context of voting rights legislation, as it viewed even PASPA's regulation of the States' regulatory powers as insufficiently "sensitive" to trigger an equal-treatment requirement under *Shelby County*. Pet. App. 55a. And the Third Circuit also adopted a method of analysis that would render the equal sovereignty principle meaningless in application: The Third Circuit found PASPA's discrimination permissible because Congress's purpose was to target wagering only in some States. That rationale would permit Congress to violate the equal sovereignty principle simply by framing its intended aim in discriminatory terms.

These errors put the Third Circuit at odds with this Court's precedents on issues of immense importance. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union." *Texas* v. *White*, 74 U.S. 700, 725 (1869). Indeed, the Constitution's federalist design not only preserves the sovereign prerogatives of the States, but also safeguards the rights of all citizens, for, "[i]n the tension between federal and state power lies the promise of liberty." *Gregory* v. *Ashcroft*, 501 U.S. 452, 459 (1991); *see also Printz*, 521 U.S. at 921. This Court's intervention is needed to reaffirm these basic principles of our federalism.

I. PASPA'S REGULATION OF THE STATES' REGULATORY "IMPRIMATUR" VIOLATES THE ANTI-COMMANDEERING PRINCIPLE.

The commandeering of New Jersey's regulatory authority upheld by the Third Circuit manifestly interferes with the representative function of the State's elected officials. But the error below runs significantly deeper than that, as the Third Circuit also rejected the doctrinal framework that comprises this Court's anti-commandeering precedents, and elevated in its place a dangerous and artificial distinction with no basis in constitutional text, history, or precedent.

A. PASPA's Prohibition Of State Licensing Of Otherwise Lawful Activity Is Invalid Under *New York* and *Printz*.

The Third Circuit's interpretation of PASPA would no doubt surprise the enacting Congress. While PASPA was intended to "stop the spread" of sports wagering, S. Rep. No. 102-248, at 2 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555, the Third Circuit read that law to allow a State to entirely "repeal[ ] its ban" but to prohibit it from conveying a "label of legitimacy" through licensure or authorization that might ensure that the wagering is conducted in a transparent and lawful manner, Pet. App. 41a, 51a. The Third Circuit explained that it was adopting this interpretation as a matter of constitutional avoidance, because it recognized Congress cannot require States to keep existing laws on the books. *See id.* at 42a-43a. But this so-called limiting construction does not save the law: PASPA's restriction of the States' ability to convey a "label of legitimacy" or regulatory "imprimatur" on otherwise

lawful private conduct presents a straightforward violation of the anti-commandeering principle.

1. This Court has articulated a simple rule, under which PASPA's regulation of the States' regulatory "imprimatur" is plainly unconstitutional: Congress may "regulate interstate commerce directly" but cannot "regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166; *Printz*, 521 U.S. at 924.

This Court's pathmarking decision in *New York* explains that this rule is rooted in the Constitution's basic structure of enumerated powers. The powers delegated by the Constitution and reserved by the Tenth Amendment are "mirror images." *New York*, 505 U.S. at 156. The Tenth Amendment prohibition on commandeering is therefore also a limit on the Commerce Clause, as "[t]he allocation of power contained in the Commerce Clause . . . does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.* at 166; *see also Brown* v. *EPA*, 521 F.2d 827, 839 (9th Cir. 1975) ("To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent . . . an abrupt departure from previous constitutional practice."). The law in *New York*—a regulation of States' exercise of legislative authority over radioactive waste—was unconstitutional under this framework because it sought to "require the States to govern according to Congress' instructions." 505 U.S. at 162.

Subsequent cases have reaffirmed this doctrinal framework. In *Printz*, this Court rejected Congress's attempt to require state police officers to enforce federal law, and explained that the Constitution "'confers upon Congress the power to regulate individu-

als, not States.'" *Printz*, 521 U.S. at 920 (quoting *New York*, 505 U.S. at 166). The Court emphasized that States are "no more subject, within their respective spheres, to the general authority than the general authority is subject to them." *Id.* at 920-21 (quoting *The Federalist No. 39*, at 245 (James Madison) (Clinton Rossiter ed., 1961)).

Three years later, in *Reno* v. *Condon*, the Court again reaffirmed that Congress may not "'control or influence the manner in which States regulate private parties.'" 528 U.S. 141, 150 (2000) (quoting *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988)). Applying that principle, the Court upheld a law regulating resale and disposal of personal information contained in DMV records. The Court explained that the law "regulate[d] the States as the owners of data bases," and did not "require the States in their sovereign capacity to regulate their own citizens." *Id.* at 151. The Court thus drew a distinction between permissible regulation of interstate commerce (including regulation of the States as participants in interstate commerce) and impermissible regulation of States in their "sovereign capacity" as "regulat[ors of] their own citizens."

The Third Circuit's decision finds PASPA constitutional only because it breaks with these decisions, and announces that this Court's cases "do not contemplate [a] distinction" between regulation of interstate commerce and "regulation of the states as states." Pet. App. 47a. The decision thus represents a wholesale rejection of the doctrinal framework for the anti-commandeering doctrine.[4]

---

[4] In a footnote, the Third Circuit states that its rejection of the doctrinal framework of *New York*, *Printz*, and *Reno* is "arguably" required by *Garcia* v. *San Antonio Metropolitan Transit*

2. PASPA's regulation of the States' regulatory "imprimatur" also directly implicates the concern with accountability and responsiveness that this Court has said underlies the anti-commandeering doctrine.

Regulation of the States' ability to confer their "imprimatur" or "label of legitimacy" strikes at the heart of the representative relationship between state officials and their citizens. The ability of a State to "represent . . . its own citizens" defines what it means for a State to retain sovereignty. *Printz*, 521 U.S. at 920. "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Alden* v. *Maine*, 527 U.S. 706, 751 (1999). For the federal government to set the circumstances under which States may "authorize" otherwise-lawful private conduct or convey a "label of legitimacy" through exercise of regulatory authority fundamentally undermines that representative function.

This is precisely the concern the Court has invoked when it has spoken of accountability in its commandeering precedents. As this Court stated in *New York*, "when, due to federal coercion, elected

---

Authority, 469 U.S. 528 (1985). Pet. App. 47a n.14. That case, however, merely rejected a claim that States were exempt from "the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." 469 U.S. at 554. The law at issue in *Garcia*, like the law in *Reno*, regulated States as economic actors, not in their capacity as regulators of their own citizens.

state officials cannot regulate in accordance with the views of the local electorate," "[a]ccountability is thus diminished." 505 U.S. at 169. To be sure, Congress may regulate private conduct directly, and the States' "view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public." *Id.* at 168. When Congress instead regulates the regulatory authority of the States, those lines of accountability are distorted: An individual denied a state license may naturally blame the State, even if the State is acting pursuant to federal compulsion. Indeed that potential for confusion is heightened where, as here, citizens are told that a federal prohibition on state licensure does not "prohibit [the State] from repealing its ban"—a statement that would leave many citizens justifiably confused as to the source of the legal authority prohibiting sports wagering. Pet. App. 41a.

B. The Third Circuit's "Affirmative Act" Requirement Contravenes Constitutional Text, History, And Precedent.

In place of the rule articulated by this Court, the Third Circuit adopted a framework under which a law violates the Tenth Amendment only if it imposes a "condition that the states carry out an affirmative act or implement a federal scheme." Pet. App. 43a. The Third Circuit thus upheld PASPA on the theory that it "only *stops* the States from doing something." *Id.* at 52a. This novel doctrinal approach contravenes the principles undergirding the anti-commandeering doctrine, and finds no support in constitutional text, history, or precedent.

1. This Court's anti-commandeering precedents not only articulate a different rule, *supra* 16-17, but also are flatly contrary to the Third Circuit's "affirmative act" requirement.

Long before *New York* or *Printz*, this Court in *Coyle* v. *Smith*, 221 U.S. 559 (1911), applied the anti-commandeering principle to invalidate a federal prohibition on action by a State. *Coyle* involved a federal law providing, as a condition of admission to the union, that the location of Oklahoma's capital "shall not be changed" before 1913. *Id.* at 564. The Court found this to be an impermissible limitation on state sovereignty. *Id.* at 565. The importance of that holding to the commandeering doctrine is demonstrated by its place in the decision in *New York*, where *Coyle* is cited for the proposition that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." 505 U.S. at 162. One of this Court's foundational anti-commandeering precedents thus invalidated a prohibition on State action.[5]

Moreover, while *New York* and *Printz* involved affirmative commands to the States, this Court never suggested that the result in those decisions could be circumvented merely by rephrasing the offending laws as prohibitions. The laws at issue in both cases could easily have been recast: Rather than require

---

[5] The Third Circuit distinguishes *Coyle* as a case about discrimination against a new entrant to the union, Pet. App. 122a, but this Court explicitly held that it "would not be for a moment entertained" that "one of the original thirteen States could now be shorn of" the powers at issue. 221 U.S. at 565. It is true that *Coyle* involved discrimination, but the same is true of PASPA, which likewise facially discriminates between the States. *See infra* 31-33.

state officials to run background checks on gun purchasers, the law in *Printz* could have prohibited the State from issuing licenses to firearm dealers unless the State ran background checks on purchasers. Or, in *New York*, in order to secure the States' cooperation in a program of disposal for nuclear waste, the federal government could have made it unlawful for the States to authorize disposal of nuclear waste outside defined circumstances. But this Court never even remotely suggested that fundamental principles of federalism and state sovereignty could hinge on such minor semantic distinctions.

Indeed, in *Reno*, this Court implicitly rejected the suggestion that a law's constitutionality should turn upon whether it is characterized as requiring an "affirmative act" by the States. If that distinction were significant, then the Court in *Reno* could have ended its commandeering analysis after recognizing that the law at issue merely prohibited sale of driver information. But the Court instead continued its analysis, explaining that the law "is consistent with the constitutional principles enunciated in *New York* and *Printz*" because it "regulates the States as the owners of data bases," rather than "in their sovereign capacity." 528 U.S. at 151. The Third Circuit's "affirmative act" requirement cannot be reconciled with this authority.[6]

---

[6] Cases from other Circuits likewise do not turn upon an affirmative/negative distinction, although some courts of appeal have erroneously used such language. For instance, the Third Circuit cited *Connecticut* v. *Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110, 122 (2d Cir. 2002), but that case merely rejected the contention that it violated the Tenth Amendment for Congress to decline to confer *parens patriae* standing on a State to enforce federal law. The decision in *Fraternal Order of Police* v. *United States*, 173 F.3d 898 (D.C. Cir.

2. The Third Circuit located support for its approach in the doctrine of preemption, stating that "there is nothing in the anti-commandeering cases to suggest that the principle is meant to apply when a law merely operates via the Supremacy Clause to invalidate contrary state action." Pet. App. 52a. This reasoning, however, fundamentally misunderstands preemption doctrine, which provides only that ***valid*** federal rules regulating private conduct supersede contrary state laws. The Third Circuit was wrong to construe the Supremacy Clause as a grant of authority to regulate the States' regulation of their own citizens.

a. The text of the Supremacy Clause nowhere suggests that it was intended as a grant of regulatory authority. The Supremacy Clause states a rule of priority: Laws "made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It does not enlarge or otherwise alter the scope of Congress's enumerated powers.

Because the Supremacy Clause confers no power on Congress, the Third Circuit plainly erred by treating it as relevant to the Tenth Amendment analysis. The Tenth Amendment draws a distinction between those powers enumerated in the Constitution, which are "delegated to the United States," and those powers instead "reserved to the States." U.S. Const. amend X. Because the Supremacy Clause delegates no power to Congress, it has no bearing on whether a law falls within the scope of those powers reserved to the States. Thus, this Court in *Printz* rejected the

---

1999), meanwhile, upheld a federal ban on firearm possession. Both cases involve federal statutes that directly regulate private conduct.

dissent's reliance on the Supremacy Clause on the ground that, because the Supremacy Clause only applies to laws "made in Pursuance" of the Constitution, it "merely brings us back to the question" of whether a federal law "violate[s] state sovereignty." 521 U.S. at 924-25. The Third Circuit assigned precisely the weight to the Supremacy Clause that this Court rejected in *Printz*.

b. The history of the Constitution likewise refutes the Third Circuit's interpretation of the Supremacy Clause as a grant of authority to regulate the States in their sovereign regulatory capacity.

The question of whether Congress would legislate directly on the public, or instead upon the States (as it had under the Articles of Confederation), was "a topic of lively debate among the Framers." *New York*, 505 U.S. at 163. Ultimately the Framers settled upon a structure—embodied in the Supremacy Clause—under which "Congress would exercise its legislative authority directly over individuals rather than over States." *Id.* at 165. Oliver Ellsworth thus explained, at the Connecticut convention, that "'[t]his Constitution does not attempt to coerce sovereign bodies, states, in their political capacity.'" *Ibid.* (quoting 2 Jonathan Elliot, *Debates on the Federal Constitution* 197 (2d ed. 1863)). Charles Pickney likewise explained, in South Carolina, that the government under the Constitution would "'operate upon the people, and not upon the states.'" *Ibid.* (citing 4 Elliot, at 256). And the Federalist Papers drive home the reason for this approach, emphasizing: "'[A] sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order

and ends of civil polity.'" *Id.* at 180 (quoting *The Federalist No. 20* (James Madison & Alexander Hamilton) (Clinton Rossiter ed., 1961)). Nothing in this history suggests that Congress under the Supremacy Clause may exercise a "sovereignty over sovereigns," or a "government over governments," so long as it does so through a prohibition rather than an affirmative command.

c. This Court's preemption cases, meanwhile, have never approved the sort of commandeering at issue in this case, and provide no support for the Third Circuit's "affirmative act" requirement.

The doctrine of preemption applies where Congress articulates a valid federal rule to govern conduct directly, which then supersedes contrary state law. Thus, this Court has explained that the "claim of the United States, as the supreme authority, must be preferred," but that this rule of priority does not limit the regulatory discretion of the States; rather, the States' "discretion is restrained only by the will of the people expressed in the State constitutions or through elections." *Lane County* v. *Oregon*, 74 U.S. 71, 76-77 (1869). That rule of priority is fully consistent with the distinction between direct and indirect regulation set out in this Court's anti-commandeering cases; the commandeering principle addresses the entirely separate question of whether a rule is valid, and thus entitled to preemptive force at all. Nothing in that rule of priority confers authority on Congress to regulate the regulatory authority of the States. For that reason, the government conceded at argument in the district court that it was not "arguing the actual Doctrine of Preemption," as PASPA does not impose a federal "regulato-

ry scheme" for sports wagering directly. D.E. 145, at 107.

The Third Circuit was led astray by cases holding that Congress may bar the States from areas of exclusive federal regulation. Thus, for instance, the Third Circuit cited *American Trucking Associations* v. *City of Los Angeles*, 133 S. Ct. 2096 (2013), which applied a federal deregulatory statute invalidating state laws "'related to a price, route, or service of any motor carrier.'" *Id.* at 2100-01 (quoting 49 U.S.C. § 14501(c)(1)); *see also*, *e.g.*, Pet. App. 38a n.11 (citing laws excluding state regulation of "'commercial mobile service[s]'" or the labeling and packaging of pesticides). But it is not necessary to misconstrue the Supremacy Clause as a grant of regulatory authority over the States' regulation of their own citizens in order to justify such laws. Such laws exercise Congress's power to directly regulate interstate commerce, as Congress "take[s] unto itself all regulatory authority" over a particular realm within its lawful authority. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Congress's ability to exert exclusive jurisdiction over a field of regulation, in order to impose an exclusive federal regulatory or deregulatory scheme, does not imply the far greater power to impose substantive prohibitions on ***States'*** exercise of their independent regulatory authority.

The Third Circuit also relied upon cases—equally irrelevant—that have approved laws threatening the States with displacement of their regulatory authority if they do not enact a federal scheme. *See FERC* v. *Mississippi*, 456 U.S. 742 (1982); *Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Such laws do not directly regulate the States, but rather use the threat to exercise Con-

gress's power to regulate private conduct to motivate the States to regulate; they "offer States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation." *New York*, 505 U.S. at 167. Such laws are controversial, as they often have the effect of coercing the States in their exercise of sovereign authority. *See FERC*, 456 U.S. at 778-79 (O'Connor, J., dissenting in part). But even these most aggressive applications of preemption doctrine provide no support for PASPA. Even if Congress may deploy its power to regulate commerce to coerce the States to regulate their citizens, it does not follow that Congress may dispense with even the threat of direct federal regulation and instead jump directly to regulation of the States' regulation of their citizens, as PASPA does.

In an attempt to shoehorn PASPA within preemption doctrine, the Third Circuit asserted that PASPA itself can be understood as establishing a federal "policy" that sports wagering "should not occur under the auspices of a state license" (except in Nevada), and that this policy preempts contrary state law. Pet. App. 49a. But the Third Circuit's articulation of this purported federal policy only highlights the Tenth Amendment problem. The policy identified by the Third Circuit is not a policy for sports wagering itself, but rather is a policy concerning ***state licensure***—*i.e.* a policy regarding state regulation of sports wagering. Such a federal "policy" is precisely the type of regulation of the States' regulatory authority that the Tenth Amendment forbids.

And for that same reason, the Third Circuit was incorrect to suggest that PASPA's prohibition on individuals engaging in sports wagering "pursuant to

the law or policy of a governmental entity," 28 U.S.C. § 3702(2), "confirm[s]" PASPA's "policy of stopping state-sanctioned sports gambling." Pet. App. 52a. A "policy" of attempting to "stop[ ]" a state from "sanction[ing]" an activity is not a valid federal policy under the Tenth Amendment. PASPA's regulation of private conduct thus suffers from the ***very same*** constitutional flaw as PASPA's regulation of "a governmental entity." PASPA's regulation of individuals applies only to conduct "pursuant to" state law, and thus plainly is intended to govern States' exercise of regulatory authority. *Cf. Printz*, 521 U.S. at 930-31 (rejecting attempt to circumvent anti-commandeering principle on ground that regulation of the States was formally "directed to 'individuals'"). The Third Circuit itself acknowledged as much: Congress, the Third Circuit stated, distinguished between "general sports gambling activity and that which occurs under the auspices of ***state approval and authorization***, and chose to reach private activity only to the extent that it is conducted 'pursuant to State law.'" Pet. App. 42a (emphasis added). That attempt to regulate State "approval and authorization" of private conduct is precisely what the Tenth Amendment forbids.

C. The Third Circuit's Decision Threatens To Eviscerate The Anti-Commandeering Doctrine.

Left undisturbed, the Third Circuit's doctrinal innovation will drive a truck-sized hole through the anti-commandeering doctrine. In any of the myriad areas of activity subject to state licensure, Congress could commandeer the legislative authority of the States simply by prohibiting States from issuing a license outside defined circumstances. Indeed, as

Judge Vanaskie warned in dissent, because virtually any affirmative command may be phrased as a prohibition, the majority's approach "will eviscerate the constitutional lines drawn in *New York* and *Printz*." Pet. App. 69a.

States frequently prohibit conduct unless authorized by a license, and in every such instance the Third Circuit's rule would allow extensive federal control over state regulation. In New Jersey, barbers, bakers, accountants, architects, nurses, dentists, electricians, plumbers, midwives, morticians, optometrists, pharmacists, podiatrists, plumbers, pawnbrokers, librarians, welders, teachers, social workers, taxidermists, and veterinarians—among others—are required to obtain permission from the State to practice their trade. It is unlawful to hunt, trap, or fish without a license. Citizens must obtain a license before they can operate a boat or drive a car. And permits are required to carry a gun, sell alcohol, advertise outdoors, build or renovate a home, brew beer for personal consumption, or operate an amusement ride—among many, many other activities.[7] Under the Third Circuit's holding, Congress could prescribe the content of the States' regulation of all of these activities by prohibiting the issuance of a license except under defined circumstances. Practically ***any*** area of state regulation could be subjected to federal commandeering, so long as Congress phrased its command as "thou shalt not," rather than "thou shall."

---

[7] For a comprehensive survey of licensing restrictions in New Jersey, see New Jersey Business Action Center, New Jersey License and Certification Guide (2011), *available at* https://www.state.nj.us/LCI/licguid.html (last visited Feb. 10, 2014).

If PASPA is constitutional, it is easy to imagine a host of issues that the federal government could subject to analogous legislation. Congress, wishing to address perceived cruelty to animals, but unwilling to regulate directly, might make it unlawful for a State to "authorize" sale of foie gras. Or, concerned that a State might provide its "imprimatur" to semi-automatic firearms, Congress might make it unlawful for a State to license sale or possession of such weapons. Congress might also determine, as a health and safety measure, that States should not encourage driving by persons over age 75; to prevent the States from sending the message that such driving is safe, Congress could make it unlawful for States to "license" driving by anyone over that age.

Moreover, because "it is possible to restate most actions as corresponding inactions with the same effect," *Archie* v. *City of Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988) (en banc) (Easterbrook, J.), the Third Circuit's rule will open the door to myriad other forms of federal control of state regulation. In many instances, it will be possible for Congress to ***require*** the States to take action through a prohibition. Few States would allow concealed carry of a firearm, for instance, without requiring some form of licensure; a prohibition on licensure would thus amount to a requirement to prohibit the activity. Indeed, many (if not most) licensing requirements exist because in the absence of regulation, the conduct could pose manifest dangers to the safety, health, and welfare of the public. It is fatuous to suggest that States are "free" to permit those activities if they are barred from issuing licenses. *See Petersburg Cellular P'ship* v. *Bd. of Supervisors*, 205 F.3d 688, 703 (4th Cir. 2000) (opinion of Niemeyer, J.) (where "abandonment" of an entire field of regulation "is not a viable option"

the choice to "either submit to federal instruction or abdicate" regulation "amounts in reality to coercion"); *see also Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J.).

The Third Circuit acknowledged that PASPA itself might be such an exercise in coercion, stating that "Congress may have suspected that most states would choose to keep an actual prohibition on sports gambling on the books" as opposed to welcoming sports wagering without a licensing scheme to regulate it. Pet. App. 44a. Indeed, the attorney for the government likewise opined at oral argument before the Third Circuit that (in view of PASPA's prohibition on state licensing) it would be "incredibly irresponsible" and a "really, really, really bad idea" for a State to entirely repeal its prohibition on sports wagering. Tr. 67.

Finally, although the Third Circuit correctly acknowledged that Congress cannot bar the States from repealing existing prohibitions of private conduct, the Third Circuit offered no coherent explanation why its affirmative act requirement would not permit another Congress to achieve that very result. Such a law would be a flagrant violation of the anti-commandeering principle: "If the federal government could make it illegal under federal law to remove a state-law penalty, it could . . . force the state to criminalize behavior it has chosen to make legal." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). Although the district court endorsed such a reading of PASPA under the heading of an "affirmative act" analysis, Pet. App. 123a, the Third Circuit suggested that its own affirmative act requirement would not permit such a

result so long as "properly applied," *id.* at 40a-41a. Yet the Third Circuit did not even attempt to explain what such "proper" application would entail. In fact, as Judge Vanaskie explained in dissent, the distinction between affirmative commands and negative prohibitions is "illusory" and "untenable," as an affirmative command can always "be rephrased as a prohibition against not engaging in that conduct." *Id.* at 69a.

"Surely," however, "the structure of Our Federalism does not turn on the phraseology used by Congress in commanding the states how to regulate." Pet. App. 69a (Vanaskie, J., dissenting). Whether phrased as a command or a prohibition, "the federal government's interference with a state's sovereign autonomy is the same." *Ibid.*

II. PASPA'S FACIAL DISCRIMINATION BETWEEN THE STATES VIOLATES THE EQUAL SOVEREIGNTY PRINCIPLE.

Not only does PASPA commandeer the legislative authority of the States, but it also imposes that restriction ***unequally***. As a result, PASPA violates yet another principle of federalism—that "all the States enjoy equal sovereignty." *Shelby County* v. *Holder*, 133 S. Ct. 2612, 2621 (2013).

The Third Circuit distinguished *Shelby County* on the ground that PASPA involves a regulation of commerce, as opposed to elections. *See* Pet. App. 54a. But nothing in this Court's decisions suggests that the principle of equal sovereignty is limited to the election context, or that Congress has authority to facially discriminate between the States when attempting to regulate those States' exercise of their sovereign authority to regulate commerce within

their borders. States' ability to enact regulatory measures in response to the expressed preferences of their citizens is no less central to their "broad autonomy in structuring their governments and pursuing legislative objectives," than is their ability to regulate elections. 133 S. Ct. at 2623.

Shelby County in fact refutes the suggestion that equal sovereignty is somehow peculiar to the elections context. In *Shelby County*, this Court cited *Coyle* as authority that ours is fundamentally "'a union of States, equal in power, dignity, and authority.'" 133 S. Ct. at 2623 (quoting *Coyle*, 221 U.S. at 567). *Coyle*, prominently cited in two of the Supreme Court's most recent pathmarking federalism decisions, thus presents ***precisely*** the same two constitutional violations as this case, and definitively rejects the panel's cramped applications of both the commandeering and equal sovereignty principles.

The Third Circuit also departed from this Court's precedents when it suggested that PASPA's discrimination was permissible because it affects a majority of States. *See* Pet. App. 56a. This Court has explained, "Where Congress exceeds its authority relative to the States . . . the departure from the constitutional plan cannot be ratified by the 'consent'" of the States. *New York*, 505 U.S. at 182. And that is all the more true when this supposed consent is manifested by Congress—which after all is an arm of the federal government. That a majority of congressional representatives have voted to subject their States to an unconstitutional law cannot justify the law. Such "consent" may simply reflect the fact that a majority of representatives have no political interest in legalizing sports wagering, and thus are happy to grant Nevada a monopoly over that area of economic

activity, to the detriment of States such as New Jersey.[8]

Finally, in its alternative holding, the Third Circuit adopted an approach to equal sovereignty that would eviscerate this Court's *Shelby County* decision. In the Third Circuit's view, PASPA's discrimination against most States is "sufficiently related" to the supposed "problem" that sports wagering could "spread" to those States. Pet. App. 55a-56a. But that reasoning is entirely circular, as it finds a legislative fit only by defining the "problem" by reference to the targeted States. Under such an approach, Section 4 of the Voting Rights Act would have been saved if Congress had described the "problem" as racial discrimination in covered jurisdictions. For the "sufficiently related" test to mean anything at all, a "problem" under *Shelby County* must, instead, be defined without reference to political boundaries. Here, the supposed "problem" of State-sanctioned sports wagering is not rationally addressed by a statute that categorically excludes the States (*e.g.*, Nevada) that manifest that "problem." The Third Circuit's contrary approach will render *Shelby County* meaningless in application.

* * *

While both constitutional errors in this case are significant, and worthy of this Court's attention, the

---

[8] The Third Circuit's suggestion that a proper remedy would be to invalidate Nevada's preference, meanwhile, is not a justification for the Third Circuit having found no violation of equal sovereignty *at all*. Pet. App. 56a. And, of course, if it had found Nevada's preference unconstitutional, it may also have concluded that the preference was not severable from the rest of PASPA.

combination of the two would be fatal to our federalist system. Congress could impose separate prohibitions on the governance of the several States, either to confer a monopoly on favored States (*e.g.*, no State other than Florida may "license or authorize" production of orange juice), to restrict conduct in disfavored States (*e.g.*, the State of Delaware may not "license or authorize" conduct of business in the corporate form), or to respond to local preferences not shared by the nation as a whole (*e.g.*, the State of Oregon may not "license or authorize" sale of fur coats). In such a nation, Congress could take upon itself the power and authority to micromanage state governance, as well as to carve up the national economy into fifty distinct monopolies. That is not the nation envisioned by the Framers, yet that is the nation approved by the Third Circuit's decision.

Certiorari is necessary to redress this trespass on the sovereign authority and representative function of the States. The principle of state sovereignty is not a relic of a foregone era, to be cast aside whenever deemed inconvenient. The separate sovereignty of the States is a bulwark of liberty, significant precisely because the separation of governmental authority allows each level of government to serve as a check on the other. *See*, *e.g.*, *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011). That bulwark of liberty would not long survive if the federal government could tell the States how and when to exercise their core regulatory prerogatives.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
ASHLEY E. JOHNSON
ROBERT E. JOHNSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

STUART M. FEINBLATT
PETER SLOCUM
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY
R.J. Hughes Justice Complex
25 Market St., P.O. Box 112
Trenton, NJ 08625-0112
(609) 984-9666

Counsel for State Petitioners

February 12, 2014