No. 13-967

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 WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTION 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 question presented is:

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?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[*]

Certiorari is warranted because the Third Circuit's decision below conflicts with two lines of this Court's precedent concerning federal-state relations. In upholding the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq*., the Third Circuit radically expanded the doctrine of federal preemption by holding that Congress may enact a free-standing "law of preemption" that does nothing more than dictate State law, without affirmatively setting forth a federal regulatory or deregulatory scheme. In addition, the Third Circuit disregarded this Court's anti-commandeering jurisprudence by creating a false distinction between impermissible "affirmative" commands on the States and permissible "negative" commands.

Amici curiae are States that submit this brief in support of Petitioners Christopher J. Christie, David L. Rebuck, and Frank Zanzuccki because the Third Circuit's decision fundamentally alters the nature of federal-state relations. The concern of *Amici* States—the States of West Virginia, Wisconsin and Wyoming—is not *what* Congress regulates but *how* it does so. Even where it has Article I authority to act, Congress may not force the States to act as the vehicle for implementing federal policy and thereby shift to the States the political accountability for its actions. Whether it does so by affirmative or

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[*] Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file this brief in support of Petitioners.

negative command is irrelevant. In either case, it is engaged in unconstitutional commandeering and not lawful preemption under the Supremacy Clause.

Importantly, *Amici* States take no position on the wisdom of the state and federal sports wagering laws in this case. Some States may support the expansion of gambling, while others oppose it. *Amici* States file this brief because they agree that the Third Circuit's decision raises serious federalism concerns for all States.

REASONS FOR GRANTING THE PETITION

This Court has long explained that our system of dual sovereignty limits Congress's ability to directly regulate a State's regulation. It may "encourage a State to regulate in a particular way" by "hold[ing] out incentives to the States as a method of influencing a State's policy choices." *New York v. United States*, 505 U.S. 144, 166 (1992). Moreover, where Congress seeks "to regulate matters directly" through an affirmative federal regime, the Supremacy Clause authorizes "pre-empt[ion] [of] contrary state regulation." *Id.* at 178. But Congress may not simply "regulate state governments' regulation," *id.* at 166, as "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions," *id.* at 162.

The petition should be granted because the Third Circuit has failed to respect these limits on federal power. Over a dissent, the Third Circuit rejected the argument that PASPA violates this Court's anti-commandeering jurisprudence. Applying an "affirmative/negative command distinction," the court upheld PASPA because it does not "impose an affirmative requirement that the states act," but rather "only *stops* the states from doing something." Pet. App. 40a, 52a. Instead, the court explained, PASPA is a permissible "stand-alone" federal "law of pre-emption" that "simply operates to invalidate contrary state laws." *Id.* at 30a n.9, 52a, 36a.

As shown below, the Third Circuit's decision confuses preemption and anti-commandeering and,

in so doing, dramatically departs from this Court's jurisprudence on both. *First*, this Court's preemption cases make clear that if Congress enacts an affirmative federal regime, it may also enact an express preemption clause to protect that regime from contrary action by the States. But this Court has never recognized that the Supremacy Clause permits Congress to enact free-standing "law[s] of preemption" that merely prohibit state laws when there is no affirmative federal regime to protect. *Second*, this Court's anti-commandeering cases do not recognize or support an "affirmative/negative command distinction." To the contrary, the political accountability principles at the core of those cases apply with equal force whether Congress compels or forbids States from acting.

If permitted to stand, the Third Circuit's decision threatens the constitutional balance of power between States and the federal government. This Court's review is needed to reinforce the proper line between permissible preemption and impermissible commandeering.

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH TWO LINES OF THIS COURT'S PRECEDENT CONCERNING FEDERAL-STATE RELATIONS.

A. The Third Circuit's View of Preemption Is Inconsistent With This Court's Case Law.

1. In this Court's cases, the preemption of state law is something that occurs, pursuant to the Supremacy Clause, when necessary to protect the integrity of the federal government's own affirmative efforts to govern directly. As this Court has often explained, it has in its cases found state law preempted in three circumstances. *First*, Congress might "enact[] a statute containing an express preemption provision." *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012). *Second*, "state laws are preempted when they conflict with federal law." *Id.* at 2501. *Third*, "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* The consistent strand throughout the cases is the existence of valid federal law seeking to govern the country directly. *See Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981) ("A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce *when these laws conflict with federal law*." (emphasis added)).

In cases of conflict or field preemption, the affirmative federal law is central to the Court's

analysis. The question in every one of those cases, after all, is whether the existence of some affirmative federal law *implies* the displacement of a particular state law. For conflict preemption, this requires close scrutiny of the federal law to determine whether it makes compliance with the challenged state law "'a physical impossibility,'" *Arizona*, 132 S. Ct. at 2501 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)), or whether the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id*. (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). For field preemption, a court must determine whether the federal law is "so comprehensive[] that it has left no room for supplementary state legislation" *R.J. Reynolds Tobacco Co. v. Durham Cnty., N.C.*, 479 U.S. 130, 140 (1986).

In cases of express preemption, the focus tends instead to be on a specific preemption clause—often a single sentence in a statute—but there is always an overarching affirmative federal law, as well. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. City of Los Angeles, Ca.*, 133 S. Ct. 2096 (2013) (Federal Aviation Administration Authorization Act of 1994 ("FAAAA")); *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (Federal Employees' Group Life Insurance Act of 1954); *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013) (FAAAA); *Arizona*, 132 S. Ct. 2492 (Immigration Reform and Control Act of 1986 ("IRCA")); *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012) (Federal Meat Inspection Act); *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968 (2011) (IRCA); *Kennedy v. Plan Adm'r for DuPont Sav. and*

Inv. Plan, 555 U.S. 285 (2009) (Employee Retirement Income Security Act of 1974 ("ERISA")); *Rowe v. N. H. Motor Transport Ass'n*, 552 U.S. 364 (2008) (FAAAA); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005) (Federal Insecticide, Fungicide, and Rodenticide Act); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (Clean Air Act); *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (Telecommunications Act); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (Federal Boat Safety Act); *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424 (2002) (FAAAA); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002) (ERISA); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Federal Cigarette Labeling and Advertising Act ("FCLAA")); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (National Traffic and Motor Vehicle Safety Act ("NTMVSA")); *Cal. Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316 (1997) (ERISA); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (Medical Device Amendments to the Federal Food, Drug and Cosmetic Act); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) (NTMVSA); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (Airline Deregulation Act ("ADA")); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (Federal Railroad Safety Act); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (FCLAA); *Morales v. Trans World Airlines*, 504 U.S. 374 (1992) (ADA); *Ingersoll-Rand Company v. McClendon*, 498 U.S. 133 (1990) (ERISA); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (ERISA); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (ERISA); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (ERISA); *Aloha Airlines, Inc. v. Dir. of Taxation of*

Haw., 464 U.S. 7 (1983) (Airport and Airway Development Acceleration Act of 1970); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (ERISA); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (ERISA).

As this Court has said, an express preemption clause makes explicit what courts infer in finding conflict or field preemption: that certain state laws contravene an affirmative federal regime. *See Whiting*, 131 S. Ct. at 1977 (describing an "express preemption clause" as "the best evidence of Congress' preemptive intent" (internal quotations omitted)). Rather than relying on the courts to later discern whether a state law interferes with an affirmative federal law, Congress is permitted by the Supremacy Clause simply to enact "a statute *containing* an express preemption provision" that makes clear which state laws must give way to the new federal regime. *Arizona*, 132 S. Ct. at 2500-01 (emphasis added); *see also Easterwood*, 507 U.S. at 664 (noting that a federal statute may "contain[]" an express preemption clause); *Sprietsma*, 537 U.S. at 62 (same). When added to an affirmative federal law, an express preemption clause serves to protect that federal scheme from state laws that would impose inconsistent rules.

This Court's cases illustrate this use of express preemption clauses not only as part of federal regulatory regimes, but also *deregulatory* regimes. For example, in 1978 Congress enacted the Airline Deregulation Act ("ADA"), turning in that industry from complex government regulation to "maximum reliance on competitive market forces."

Morales, 504 U.S. at 378 (internal quotations omitted). And "[t]o ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier." *Id.* at 378-79 (internal quotations omitted). Similarly, Congress "deregulated trucking" in 1980. *Rowe*, 552 U.S. at 368. Then in 1994, Congress sought to ensure that the States would not "undo federal deregulation" and thus adopted a law "pre-empt[ing] state trucking regulation." *Id.* (internal quotations omitted). In both cases, Congress adopted a federal deregulatory regime and added an express preemption clause to protect that regime by prohibiting action by the States.

All of these cases—whether concerning express, conflict, or field preemption—reflect this Court's description of the Supremacy Clause as a rule of priority between federal and state law. It is, of course, well known that the Constitution "establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). But "[f]rom the existence of two sovereigns follows the possibility that [state and federal] laws can be in conflict or at cross-purposes." *Arizona*, 132 S. Ct. at 2500. The Supremacy Clause, this Court has explained, "provides a clear rule that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Id.* (quoting U.S. Const. art. VI, cl. 2).

2. The Third Circuit, however, has adopted a radically different understanding of preemption. In its analysis, the Supremacy Clause is not merely a rule of priority between state and federal laws "in conflict or at cross-purposes," *id.*, but rather grants Congress free-wheeling power to pass "stand-alone" federal "law[s] of pre-emption" that "simply operate[] to invalidate contrary state laws," Pet. App. 30a n.9, 52a, 36a. The Third Circuit found preemption even though "all [the] federal law does is supersede state law." *Id.* at 31a.

Contrary to the Third Circuit's assertion, that is neither a "straightforward" nor "everyday" view of preemption. *Id.* at 30a n.9, 38a n.11. Citing the express preemption clause in this Court's *American Trucking* decision as a "classic" example, *id.* at 30a, the Third Circuit asserts in support of its position that "numerous federal laws are framed to prohibit States from enacting or enforcing laws contrary to federal standards, and these regulations all enjoy different preemptive qualities," *id.* at 38a n.11. *See also id.* at 43a (asserting that New Jersey's argument "imperil[s] a plethora of acts currently termed as prohibitions on the states"). But it misunderstands the nature of express preemption clauses in this Court's cases. They are not "stand-alone" "law[s] of pre-emption," *id.* at 30a n.9, 52a, but rather, as explained above, are parts of larger federal schemes. The express preemption clause at issue in *American Trucking*, for example, protects an elaborate federal regulatory scheme for motor carriers from inconsistent state law.

As Judge Vanaskie notes in dissent, "the majority opinion does not cite any case that sustained a federal statute that purported to regulate the states under the Commerce Clause where there was no underlying federal scheme of regulation or deregulation." Pet. App. 72a n.4. It cites two court of appeals decisions, *see id.* at 38a n.11, but neither is availing. The express preemption clause in *Farina v. Nokia Inc.*, 625 F.3d 97 (3d Cir. 2010), is part of the federal deregulatory regime for wireless carriers, and the clause in *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994), is integral to the federal regime for insecticides, fungicides, and rodenticides.

Hodel and *FERC v. Mississippi*, 456 U.S. 742 (1982), are also preemption cases involving the protection of federal regulatory schemes. In both those cases, Congress protected the federal regime not by excluding the States, but by permitting them to remain in the field under certain conditions. See *Printz v. United States*, 521 U.S. 898, 925-26 (1997) ("In *Hodel* we . . . concluded that the Surface Mining Control and Reclamation Act of 1977 did not present [a Tenth Amendment] problem . . . because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field."); *FERC*, 456 U.S. at 765 ("PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards.").

In sum, despite its claims to the contrary, the Third Circuit's position is no less than "revolutionary." Pet. App. 37a. This Court's cases make clear that if Congress enacts an affirmative federal regime, it may also enact an express preemption clause to protect that regime from contrary action by the States. But this Court has never recognized—as the Third Circuit now has—that the Supremacy Clause endows Congress with the substantive authority to enact free-standing "law[s] of preemption" that prohibit state laws when there is no affirmative federal regime to protect. *Id.* at 52a. The Supremacy Clause has been held to give primacy to valid federal laws over contrary state laws, but it has never been construed as a license to Congress to prohibit state lawmaking whenever and however it desires. *See New York*, 505 U.S. at 178 ("The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation.").

3. Implicitly acknowledging the unprecedented nature of its ruling, the Third Circuit contends in the "[a]lternative[]" that PASPA does in fact impose an affirmative federal regime. Pet. App. 48a; *see also id.* at 52a ("PASPA does impose a federal standard directly on private individuals"). This assertion, however, does little to salvage the decision.

First, even in taking this alternative position, the Third Circuit refuses to acknowledge that the preemption of state law *requires* an affirmative federal regime. At most, it accepts for the sake of argument that "preemptive schemes *normally* either impose an affirmative federal standard or a rule of

non-regulation." *Id.* at 51a (emphasis added). That is still at significant odds with this Court's many preemption cases, which consistently preempt state law only where it contravenes an affirmative federal regime.

Second, PASPA simply does *not* impose an affirmative federal regime. The Third Circuit asserts that PASPA seeks "to ban gambling pursuant to a state scheme." *Id.* at 51a. But that is not a *federal* regulatory or deregulatory regime over sports wagering. That is nothing more than an attempt by Congress to control (and prohibit) *state* regulation of sports wagering. As the dissent explains, "PASPA provides no federal regulatory standards or requirements of its own." *Id.* at 72a. Nor do "other federal statutes relating to sports gambling … aggregate to form the foundation of a federal regulatory scheme that can be interpreted as preempting state regulation of sports gambling." *Id.* at 73a.

B. The Third Circuit Decision Also Conflicts With This Court's Anti-Commandeering Jurisprudence.

PASPA is not a permissible "law[] of pre-emption," Pet. App. 52a, but rather unlawful commandeering by Congress of state legislatures. This Court has made clear that Congress may not "regulate state governments' regulation." *New York*, 505 U.S. at 166. Yet that is precisely what PASPA does; it directly prohibits States (with a few grandfathered exceptions) from licensing or otherwise officially sanctioning sports wagering within their borders.

Just as it radically departed from this Court's preemption case law, however, the Third Circuit also fundamentally misconstrued this Court's anti-commandeering jurisprudence. The Third Circuit applied an "affirmative/negative command distinction," Pet. App. 40a, determining that it is one thing to "tell[] the states what to do" and altogether another to "bar[] them from doing something they want to do," *id.* at 38a. But that is not the test for commandeering under this Court's cases. Rather, as explained below, this Court has made clear that the anti-commandeering doctrine exists to ensure that the state and federal governments each remain directly accountable for their own actions. What matters is whether Congress has obscured its responsibility by forcing state governments to carry out federal policy rather than doing so itself. And that can occur—contrary to the Third Circuit's conclusion—whether Congress issues an affirmative or a negative command to a State.

1. The political accountability principles at the core of this Court's anti-commandeering cases do not accord with the Third Circuit's "affirmative/negative command distinction."

a. This Court has explained that the anti-commandeering doctrine flows directly from the Framers' decision to adopt a structure of dual sovereignty. In drafting the Constitution, the Framers deliberately rejected a system of government in which Congress would "employ state

governments as regulatory agencies." *New York*, 505 U.S. at 163. Indeed, that was the model under the Articles of Confederation, and "[t]he inadequacy of th[at] governmental structure was responsible in part for the Constitutional Convention." *Id.* At the Convention, two proposals "took center stage," *id.* at 164, and the Framers "explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 166.

The point of the new governmental structure was to establish dual sovereigns, with each directly responsible to its citizens for its own actions. The Framers determined that "[t]he new National Government 'must carry its agency to the persons of the citizens . . . . [and] address itself immediately to the hopes and fears of individuals." *Id.* at 163 (quoting *The Federalist* No. 16, at 116 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Likewise, "a State's government [would] represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920 (1997). The "great innovation of th[e] design" was "'a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

The anti-commandeering doctrine safeguards this system of dual sovereignty and clear accountability. When state and federal governments act separately and directly on their citizens, each is publicly exposed as responsible for its actions, and

each must bear the electoral consequences of those actions. If the citizens of a State do not agree with a certain state policy, for example, "they may elect state officials who share their view." *New York,* 505 U.S. at 168. And if that view is contrary to the national view, it "can always be pre-empted under the Supremacy Clause," and then "federal officials [will] suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* But where Congress commandeers and forces States to implement federal policy, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169.

Contrary to the Third Circuit's suggestion, these concerns about misplaced political blame were not simply an afterthought in this Court's anti-commandeering jurisprudence. *See* Pet. App. 35a, 48a n.15. Rather, this Court has stressed that maintaining clear lines of political accountability is the touchstone of the anti-commandeering doctrine. Although commandeering can be a way for Congress to save a few federal dollars, it does not matter whether the States must actually "absorb the costs of implementing a federal program." *Printz*, 521 U.S. at 930. Nor is the importance of the federal program, *New York*, 505 U.S. at 178, or a State's consent, *id.* at 182, relevant. The critical question is whether the federal government has put States "in the position of taking the blame for [the federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

As this Court has noted, the focus on maintaining direct accountability "may appear 'formalistic'" but that is the nature of our Constitution, which places great emphasis on "the form of our government." *New York*, 505 U.S. at 187. Our system of dual sovereignty, requiring each government to remain accountable to its citizens, is as much a part of the Constitution as the substantive limits on Congress's power. And it is equally, if not more, significant. The separation of the state and federal governments "is one of the Constitution's structural protections of liberty," *Printz*, 521 U.S. at 921, providing an important "'double security'" against tyranny and the abuse of power, *id.* at 922 (quoting *The Federalist* No. 51, at 323 (James Madison)). By keeping them strictly apart, "'[t]he different governments will control each other, at the same time that each will be controlled by itself.'" *Id.*

b. The Third Circuit's "affirmative/negative command distinction" fails to recognize that federal laws prohibiting state action—particularly ones restricting or conditioning a State's ability to issue licenses—can result in precisely the sort of misplaced blame that the anti-commandeering doctrine aims to prevent. When a State denies an individual his driver's license, building permit, medical license, or fishing license, the individual is unlikely to blame Congress, which did not enact some form of direct national regulation. For the average American, who is not familiar with every nuance of the United States Code, the more obvious culprits are the state officials who stand between the citizen and the desired license.

Consider the following example. A 65-year-old citizen of West Virginia wants to lawfully fish. He goes to his county clerk's office and submits his information and fee to obtain a fishing license. Unbeknownst to him, the federal government, in an effort to prevent overfishing, has prohibited state governments from issuing fishing licenses to individuals over the age of 50. Congress, however, has not adopted any direct national regulation of fishing. Our would-be fisherman is denied his license. Because there is no federal regulatory regime that might have alerted him to Congress's involvement, it is unlikely that he will think to blame the federal government. More likely, he will fault the clerk who delivers the bad news or the West Virginia Division of Natural Resources, which is responsible for issuing fishing licenses.

This human propensity to "shoot the messenger" has long been recognized. Sophocles wrote in *Antigone* that "[n]o one likes the bringer of bad news." Sophocles, *Antigone* (c. 441 B.C.), *reprinted in* Sophocles: *The Complete Plays* 352 (Paul Roche transl., Signet Classics 2001). Shakespeare wrote in *Antony and Cleopatra* that "[t]he nature of bad news infects the teller." William Shakespeare, *Antony and Cleopatra* (c. 1606), *reprinted in The Unabridged William Shakespeare* 1135 (William George Clark & William Aldis Wright eds. 1989). English law historically protected town criers because of the people's tendency to lash out at these bearers of the King's news. Any harm to a town crier—shooting the messenger, so to speak—was considered treason. *See* "*Top town crier to be crowned as Hebden Bridge hits 500*," BBC,

http://news.bbc.co.uk/local/bradford/hi/people_and_places/arts_and_culture/newsid_8931000/8931369.stm (last updated Aug. 20, 2010).

Importantly, this Court has shown that it does not matter, for purposes of the anti-commandeering doctrine, that a little research might reveal the federal government's involvement. In *Printz*, this Court found that Congress had improperly shifted political accountability to state chief law enforcement officers ("CLEOs") by requiring them to conduct background checks during handgun sales. The Court reasoned: "[I]t will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun." 521 U.S. at 930. Thus, "it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected." *Id.* This Court did not suggest that the gun purchaser should have researched whether the CLEO was in fact acting at Congress's direction. Nor did the Court find it relevant that the challenged federal law—the Brady Act—was a very high-profile piece of federal gun-control legislation of which many Americans were surely aware.

2. This Court's anti-commandeering cases have never adopted an "affirmative/negative command distinction."

a. Discussing *New York* and *Printz*, the Third Circuit asserts that this Court's cases support its novel limitation on the anti-commandeering doctrine, *see* Pet. App. 39a-46a, but it is wrong. In *New York*,

this Court stated that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions." 505 U.S. at 162. Congress may not "conscript state governments as its agents," *id.* at 178, or "regulate state governments' regulation," *id.* at 166. None of this language even begins to suggest that Congress runs afoul of the anti-commandeering doctrine only where it compels affirmative action by the States. Indeed, a federal law prohibiting state action would fall squarely within the scope of all these statements.

The Third Circuit claims that "it is hard to see how Congress can 'commandeer' a state, or how it can be found to regulate how a state regulates, if it does not require it to do anything at all." Pet. App. 39a-40a. The court's confusion is perplexing, to say the least. Restraining a State's actions can exert just as much control over the State as does dictating its actions. If Congress were to prohibit a State from issuing fishing licenses, for example, it would be directly mandating at least part of what the State's fishing policy shall be.

To be sure, *New York* and *Printz* did include some statements specifically barring Congress from compelling affirmative state action. *See New York*, 505 U.S. at 188 (finding it "clear" that Congress "may not compel the States to enact or administer a federal regulatory program"); *Printz*, 521 U.S. at 933 (same). But the reason for those seemingly narrow statements is that the offending federal law in both cases required affirmative state action. Those

statements concerned the particular statutes in the two cases and nothing more.

More important is the fact that the laws at issue in *New York* and *Printz*—as well as any number of other affirmative commands—could just as easily be written as prohibitions on state action. Instead of requiring States to enact certain regulations governing the disposal of radioactive waste, as was rejected in *New York*, Congress could put limitations on the ability of States to license the disposal of such waste. And instead of requiring state law enforcement officers to conduct background checks during handgun sales, as in *Printz*, Congress could prohibit those same state officers from issuing handgun permits if they have not performed a background check.

This Court thus could not have intended in those cases to limit the anti-commandeering doctrine to "affirmative" requirements, as that would have robbed those decisions of any real meaning. Congress could continue to govern in exactly the same objectionable way—making States implement a federal restriction on the activity in question rather than doing so itself—by slightly rewriting the offending laws. The Third Circuit quarrels with whether the specific law in *Printz* could actually be recast as a prohibition without also imposing an affirmative condition, *see* Pet. App. 43a, but it has no answer to the general principle that many affirmative commands can be easily recast as prohibitions.

b. The Third Circuit also places great weight on *South Carolina v. Baker*, 485 U.S. 505 (1988), and

Reno v. Condon, 528 U.S. 141 (2000), but neither is an anti-commandeering case. Those cases did not involve attempts by Congress to control the States' actions as sovereigns governing their own citizens—the issue central to commandeering—but rather concerned federal laws regulating the actions of States like private individuals participating in a market. *Condon* involved the federal Driver's Privacy Protection Act (DPPA), which regulated the behavior of States and private actors in the market for drivers' personal information. *Id.* at 149-151 ("The DPPA regulates the States as the owners of databases."); *id* at 149 (describing "drivers' personal information" as "an article in interstate commerce"). *Baker* involved a regulation of States and private actors in the bond market. 485 U.S. at 510 (explaining that the law "covers not only state bonds but also bonds issued by the United States and private corporations"). Whatever lessons those cases may have regarding federal regulation of a State's actions, they have no application to the anti-commandeering doctrine.

Noting that DMVs are "uniquely state institutions," the Third Circuit challenges this characterization of *Condon*, arguing that States are not engaged in market activity when they "obtain information through the[ir] DMVs." Pet. App. 47a. But the court misunderstands what was at issue in *Condon*. The issue there was not whether the States could *obtain* information from their DMVs, but rather their "*sale* or *release* of that information in interstate commerce" for use by private "insurers, manufacturers, direct marketers, and others." *Condon*, 528 U.S. at 671 (emphases added). This

latter activity, the *Condon* Court explained, was market activity "proper[ly] subject [to] congressional regulation." *Id.*

II. THE THIRD CIRCUIT'S DECISION HARMS STATES AND OUR SYSTEM OF DUAL SOVEREIGNTY.

If permitted to stand, the Third Circuit's decision threatens to greatly expand the federal government's power. Like every other State in the union, West Virginia requires state-issued licenses, permits, or authorizations for a wide-ranging variety of occupations and activities. Some form of state approval is required for matters as varied as becoming an auctioneer or a veterinarian, manufacturing frozen desserts or dealing ginseng, building a house, or driving a car. *See* Business for West Virginia, Apply for Licenses/Permits, http://www.business4wv.com/b4wvpublic/default.aspx?pagename=applyforlicense#resultsBookmark. If there is some nexus to interstate commerce, the Third Circuit would permit Congress to pass "stand-alone" laws that restrict West Virginia's ability to issue these licenses, permits, or authorizations. Pet. App. 30a n.9.

Significantly, with the ability to shift political blame to the States, Congress could act with far less fear of repercussions at the voting booth, especially on issues that strike at the core of American life and for which the federal government would very likely want to avoid responsibility. For instance, with the recent controversy over long-term brain damage in football players, Congress could decide that American children should not be playing the sport.

But rather than enact what could be extremely unpopular restrictions at the national level, the federal government could prohibit the States from authorizing or licensing youth football leagues. In the interest of national security, Congress might decide that the Department of Justice requires greater ability to monitor the Internet. But to deflect the backlash for its invasion of privacy, federal legislators could restrict the States from issuing business licenses to Internet service providers unless those companies agreed to provide the FBI unrestrained access to their subscriber databases. To save money on health insurance costs, Congress could determine that Americans should avoid eating particular foods. But to try to avoid being blamed, it could bar States from allowing the sale of buttered popcorn at movie theaters or extra-large sodas at sports stadiums. And if studies began to show detrimental effects from the ingestion of large amounts of caffeine, Congress could even decide to regulate the consumption of coffee. But because the federal government would not want to be seen as interfering with such an integral part of so many morning routines, Congress might instead stop States from licensing businesses that sell drinks that exceed a certain caffeine content.

In each case, when the permit or license is denied, at least some (if not all) of the blame will fall wrongly on the States, even if a particular State would prefer as a matter of policy to have acted otherwise. Just as in *Printz*, it will be the State, or a state official, and "not some federal official" who is interfering with day-to-day life. 521 U.S. at 930. And just as in *Printz*, there would be legitimate

concerns about misplaced blame even though these are high-profile issues and the relevant laws would be available to anyone diligent enough to seek them out and read them.

The injury to state sovereignty would be unprecedented. The genius of our system of dual sovereignty is that the States can act as a voice for change or dissent, even in the face of a national policy. Our system of government "promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'" *Gonzalez v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). If Congress disagrees and has the Article I authority to act, it may establish a federal regime and preempt contrary state law. And when Congress does so, it is understood that the federal government has simply overridden the States and that individual States do not necessarily agree with the national policy. But under the Third Circuit's view, Congress could avoid taking ownership and force the States to advance its policy view, whatever that may be under the political party then in power, in a way that makes individual States seem responsible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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