No. 13-980

In The Supreme Court of the United States

STEPHEN M. SWEENEY, PRESIDENT OF THE NEW JERSEY SENATE, *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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Third Circuit's decision in this case subverts fundamental principles of federalism and this Court's precedents by permitting Congress to command the States not to regulate an activity that Congress has not undertaken to regulate itself. This decision imperils state sovereignty and should not be left unreviewed by this Court.

A. The Constitutional Question Presented is Important and Warrants Immediate Review

Respondents attempt to portray the constitutional issue presented here as limited to a single federal statute about sports wagering, the Professional and Amateur Sports Protection Act ("PASPA"). In reality, however, the Third Circuit's decision upholding PASPA raises far greater concerns: it allows Congress to evade the anti-commandeering doctrine and override the express will of the people and the legislature of a State by directing how the State must regulate its citizens in any area, provided the direction is artfully phrased to avoid requiring any "affirmative action." This Court's precedents neither invite nor support this semantic limitation on the anti-commandeering doctrine, and that limitation threatens the doctrine's very efficacy. Thus, this case is about no less than saving a critical barrier against federal overreaching into sovereign state functions.

Notably, respondents do not even mention this Court's rationale behind the anti-commandeering

doctrine and what that doctrine seeks to protect. They skirt this issue because, when the rationale is examined, it clearly condemns PASPA as well as the affirmative action limitation imposed by the Third Circuit. In *New York v. United States*, 505 U.S. 144 (1992), this Court took pains to detail the Framers' specific intent to draft a Constitution under which *individuals*, and not States, are the only proper objects of Congress' legislative authority. *See id.* at 162-66. As the Court has instructed, the anti-commandeering doctrine serves that intent and ensures that Congress does not exceed its constitutional authority by impermissibly "regulat[ing] state governments' regulation of interstate commerce" instead of regulating interstate commerce directly. *Id.* at 165. With PASPA, a law aimed at controlling how the States regulate sports wagering under state law, Congress has done precisely what the Framers sought to prevent.

This Court has long guarded our Constitution's intended system of dual sovereignty, and there are few, if any, more important questions in this area than those which determine the scope of the anti-commandeering doctrine. Certainly, to review and correct a Court of Appeals decision upholding a statute that so flagrantly violates that doctrine, contrary to the essence of the Court's decisions in *New York* and *Printz v. United States*, 521 U.S. 898 (1997), is a compelling reason to grant certiorari, and one that fits squarely within the Court's criteria for review. *See* S. Ct. R. 10(c) (review may be warranted where "a United States court of appeals . . . has decided an

important federal question in a way that conflicts with relevant decisions of this Court"). The Leagues' argument that the Rule 10 criteria are not satisfied, therefore, should be rejected out of hand. *See* Leagues Opp. 14.

Respondents also attempt to detract from the importance of this case by suggesting that the Courts of Appeals are "unanimous" in holding that the doctrine applies only "when Congress forces [S]tates to act" affirmatively and not "when Congress prohibits [S]tates from acting." Leagues Opp. 15-16 (citing *United States v. Bostic*, 168 F.3d 718, 724 (4th Cir. 1999); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906-07 (D.C. Cir. 1999); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 397 (2d Cir. 2008)). But, when fairly read, the cited cases do not support any such semantics. None of these circuit courts were called upon to determine whether the doctrine distinguishes between affirmative and prohibitory commands to the States, as the federal statutes at issue did not contain any direct commands to the States at all. *See Bostic*, 168 F.3d at 723-24 (rejecting Tenth Amendment challenge to federal criminal statute making it unlawful for certain individuals to possess a firearm); *Fraternal Order of Police*, 173 F.3d at 906-07 (same); *City of New York*, 524 F.3d at 396-97 (rejecting Tenth Amendment challenge to federal statute immunizing firearms suppliers from certain civil liability). Other circuit judges who have considered this issue have recognized that the doctrine applies wherever Congress seeks to regulate the

States in their sovereign, regulatory capacities, whether it does so through an affirmative command or a prohibitory command. *See Conant v. Walters*, 309 F.3d 629, 645-46 (9th Cir. 2002) (Kozinski, J., concurring) (explaining that "preventing [a] state from repealing an existing law is no different from forcing it to pass a new one" because, in either case, the State is being forced to conform its legislation to federal policy); *NCAA v. Christie*, 730 F.3d 208, 245, 251 (3d Cir. 2013) (Vanaskie, J., dissenting).

Finally, contrary to the Leagues' contention, States in addition to New Jersey have expressed concern about PASPA's impact on state sovereignty and the improper cabining of the anti-commandeering doctrine. In the proceedings in the Third Circuit, four States – West Virginia, Georgia, Kansas, and Virginia – supported New Jersey's appeal as *amici*. On petition for writ of certiorari, West Virginia again as well as two new States – Wisconsin and Wyoming – support New Jersey's petition as *amici*. Thus, a total of seven States have spoken against these threats to our constitutional system of dual sovereignty. Accordingly, this case is not simply a dispute about sports wagering in New Jersey – an important issue in its own right – but rather one which raises an important question about state sovereignty that warrants this Court's immediate review.

B. PASPA Cannot be Defended as a Preemption Statute Because There is No Federal Regulatory Scheme in Place to Displace State Law

Respondents erroneously contend that the anti-commandeering doctrine will "swallow preemption whole" if it prohibits Congressional commands that do not require affirmative action by the States. *See, e.g.*, Leagues Opp. 22. Respondents argue that, if this were the rule, "[s]cores of federal statutes" with express preemption provisions would have to be invalidated because they prohibit the States from enacting conflicting regulations and do not require any affirmative action. *See, e.g.*, Leagues Opp. 18-19. But PASPA is not, as the Leagues contend, "like any . . . express preemption clause." Leagues Opp. 23. The key difference is that, unlike such statutes, PASPA does not set forth or protect any federal regulations of private sports wagering activity with which state law might conflict, and to which state law would be subordinated.

For a federal law to preempt state law via the Supremacy Clause, there must be some federal regulatory scheme in place that directly governs individuals and displaces conflicting state regulation. *See* Pet. 30-32 (citing *Petersburg Cellular P'ship v. Bd. of Supervisors*, 205 F.3d 688, 703 (4th Cir. 2000)). Indeed, each of the express preemption provisions cited by respondents is found within an extensive federal regulatory scheme that directly governs individuals, whether it be a scheme of tight federal control or of

reliance on market forces.[1] In that context, Congress preempts the States from imposing any regulations that would conflict with the federal scheme. For example, one of those cited provisions, 7 U.S.C. § 136v(b), is part of the Environmental Pesticide Control Act, which establishes an extensive federal regulatory scheme for pesticides, including labeling and packaging requirements. Section 136v(b) then prohibits the States from imposing "any requirements for labeling or packaging in addition to or different from those required under this Act." 7 U.S.C. § 136v(b). The other statutes cited by respondents are materially

[1] *See* U.S. Opp. 15; Leagues Opp. 19 n.2, citing the following: 7 U.S.C. § 136v(b) (Environmental Pesticide Control Act establishes federal regulatory scheme for the labeling and packaging of pesticides); 15 U.S.C. § 376a(e)(5)(A) (Prevent All Cigarette Trafficking Act establishes federal regulatory scheme for the shipment of cigarettes across state lines); 15 U.S.C. § 1121(b) (Lanham (Trademark) Act establishes federal regulatory scheme for registering and displaying trademarks); 21 U.S.C. § 360k (Federal Food, Drug, and Cosmetic Act establishes federal regulatory scheme for the safety of medical devices); 21 U.S.C. § 678 (Federal Meat Inspection Act establishes federal regulatory scheme for the inspection, labeling, and packaging of meat); 46 U.S.C. § 4306 (Federal Boat Safety Act establishes federal regulatory scheme for the safety of recreational boats); 49 U.S.C. § 508(c), 49 U.S.C. § 31111(b), 49 U.S.C. § 14501(c)(1) (Federal Motor Carrier Safety Administration establishes federal regulatory scheme over the trucking industry, with an accompanying scheme of deregulation and reliance on market forces with respect to a motor carrier's prices, routes, and services); 49 U.S.C. App. § 1305(a)(1) (Federal Aviation Administration establishes federal regulatory scheme over the aviation industry, with an accompanying scheme of deregulation and reliance on market forces with respect to an air carrier's rates, routes, and services).

similar. Many of them are even in fields, such as aviation, where Congress has regulated so pervasively that there is no room for state regulation (*i.e.*, field preemption). *See* Pet. 32 (citing *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318 (10th Cir. 2010)).[2]

In stark contrast to these statutes, PASPA does not establish or protect any federal regulatory scheme directly governing sports wagering, let alone one that conflicts with New Jersey's Sports Wagering Law.[3]

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[2] The remaining federal statutes cited by respondents are inapposite. For instance, the United States cites two provisions from the Federal-Aid Highway Act wherein Congress attached non-coercive conditions to the States' receipt of federal funding for interstate highways. *See* U.S. Opp. 15 (citing 23 U.S.C. §§ 102(a), 127(b)). Such Spending Clause statutes, however, are not at issue here. *See* Pet. 19 n.6 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987)). The Leagues also cite two irrelevant provisions aimed at preventing States from discriminating against interstate commerce in the way they tax railroads and airports. *See* Leagues Opp. 19 n.2 (citing 49 U.S.C. § 11501(b); 49 U.S.C. § 40116(b)).

[3] It certainly cannot be said that sports wagering is a field that Congress has regulated pervasively to the exclusion of the States, especially since PASPA itself allows four States to continue regulating sports wagering. Indeed, the Leagues acknowledge that Congress has not "preempt[ed] the field entirely," yet they still attempt to conjur the illusion of a federal regulatory scheme by pointing to a few narrow statutes potentially related to sports wagering (*e.g.*, criminal prohibitions on bribery in sporting contests and on sports wagering by interstate wire between States where such betting is illegal). Leagues Opp. at 26 (citing, *e.g.*, 18 U.S.C. § 224; 18 U.S.C. § 1084). New Jersey's Sports Wagering Law does not conflict with any of these statutes, and, moreover, none of them indicate any federal intent to occupy the field of sports wagering to the exclusion of state law. To the contrary, 18

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Nor does PASPA merely provide that the States may not impose regulations that are "in addition to or different from" this (non-existent) federal regulatory scheme. Rather, PASPA just regulates how the States regulate sports wagering as a matter of state law. Respondents have been unable to identify even a *single* federal statute in existence that is similar to PASPA in this regard.

If respondents were correct that the Supremacy Clause permits Congress to command the States not to license and authorize an activity that Congress has not undertaken to regulate itself, the sovereign States could readily be reduced to mere puppets of Congress. For whenever Congress wanted to escape accountability for prohibiting a certain activity, it could simply prohibit the States from licensing or authorizing that activity. For example, if Congress wanted to ban the sale of assault weapons but feared it would be unpopular, Congress would not itself need to directly prohibit individuals from selling assault weapons; rather, it could simply prohibit the States from enacting legislation licensing or authorizing individuals to sell assault weapons and let the States

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U.S.C. § 224(b) expressly provides that it "shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State. . . ." *See also* 15 U.S.C. § 3001(a)(1) (stating, in the context of interstate wagering on horse-races, that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders").

take any ensuing blame. The possibilities for Congress to escape electoral accountability would be endless.

C. Review Would Not be "Academic" Because § 3702(2) is Not Severable from PASPA

Nodding to the axiom that individuals are the only proper objects of federal law, respondents argue that one portion of PASPA, section 3702(2), applies to individuals and would prevent implementation of New Jersey's Sports Wagering Law even if the portion that directly commands the States, section 3702(1), is struck down as unconstitutional. *See* Leagues Opp. 14, 26-27; U.S. Opp. 17-19. The Leagues contend that review by this Court would therefore be "potentially academic" because "New Jersey does not (and cannot) challenge" section 3702(2). *See* Leagues Opp. 14.

This contention, however, is untrue. Petitioners have never limited their challenge of PASPA to section 3702(1), but have always challenged the entire statute's commandeering of state authority. *See, e.g.*, Pet. 33 n.12; App. 97. Section 3702(2) comes into play *if and only if* a State has enacted a law authorizing sports wagering in violation of section 3702(1). *See* 28 U.S.C. § 3702(2) (prohibiting individuals from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" sports wagering activity only if the individual has done so "*pursuant to the law or compact of a governmental entity*") (emphasis added). Section 3702(2),

therefore, merely reinforces section 3702(1)'s unconstitutional command to the States.

Moreover, even if only section 3702(1)'s command to the States is declared unconstitutional under the anti-commandeering doctrine and section 3702(2) is not interpreted as encompassing a similar unconstitutional command, section 3702(1) cannot be severed from PASPA without deviating from Congress' intent. As respondents themselves emphasize, Congress intended to stop only the spread of *State-sponsored* sports wagering through PASPA, and not all sports wagering activity. Thus, applying this Court's severability analysis, there is no reason to conclude that Congress would have enacted section 3702(2) as a stand-alone provision.

In analyzing whether an unconstitutional portion of a statute may be severed or whether the entire statute must be stricken, this Court has instructed that the inquiry "is essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (citation omitted). First, the Court asks whether, if the invalid provision is severed, the remaining provisions will "function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987); *see also National Fed'n of Ind. Bus v. Sebelius*, 132 S. Ct. 2566, 2668 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). It is not enough that the remaining provisions will work "in some coherent way"; instead, they must "work as Congress intended." *Sebelius*, 132 S. Ct. at 2668.

Second, even if they can operate as Congress intended, the Court must then determine "if Congress would have enacted them standing alone and without the unconstitutional portion." *Id.* at 2669. "If Congress would not, those provisions, too, must be invalidated." *Id.*; *see also Alaska Airlines*, 480 U.S. at 685 ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.").

Congress' undisputed goal in enacting PASPA was to prevent the forty-six States that had not yet legalized sports wagering from doing so and to thereby "stop the spread of *State-sponsored* sports gambling." S. Rep. No. 102-248, at 4, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555 (emphasis added); 138 Cong. Rec. S7275 (daily ed. June 2, 1992) (statement of Sen. DeConcini) (emphasis added). The legislative history describes the bill's effect in terms of restraining the *States* – and not in terms of restraining individuals – because Congress accepted the proposition that there is something more insidious about sports wagering when it is done under the auspices of State approval:

> [PASPA] *bars States and their political subdivisions* from sponsoring, operating, advertising, authorizing, licensing, or promoting any lottery or gambling scheme that is based directly or indirectly on the games of a professional or amateur sports team. *It is that*

> *simple*. It just basically does away with *State-backed* gambling.

138 CONG. REC. S7276 (daily ed. June 2, 1992) (statement of Sen. Hatch) (emphasis added). That Congress did not intend PASPA to primarily act upon individuals is further evidenced by the Congressional Budget Office's estimate that PASPA's enforcement would result in absolutely "no cost to the federal government." S. REP. NO. 102-248, at 10, *reprinted in* 1992 U.S.C.C.A.N. 3553, 3561.

Put simply, without section 3702(1), there would no longer be any provision in PASPA directly prohibiting the forty-six States from sponsoring, authorizing, licensing, or otherwise giving their stamp of approval to sports wagering activity, which was Congress' express objective in enacting PASPA in the first place. And there is absolutely nothing in the legislative history to suggest that Congress would have enacted PASPA without the direct command to the States that is at its core. Accordingly, if section 3702(1) is declared unconstitutional, then section 3702(2) and the rest of PASPA must be declared invalid as well.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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