No. 13-979

In The Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL, UNITED STATES OF AMERICA,

Respondents.

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

REPLY BRIEF SUBMITTED ON BEHALF OF PETITIONER NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.

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I. Respondents' Premise That This Case Involves An Unimportant And Straightforward Exercise Of Federal Preemption Is Wrong.

Respondents' main argument that this case is not of sufficient importance for this Court to review is premised on the fundamentally flawed portrayal of this case as involving a routine exercise of federal preemption. See, *e.g.*, Leagues Opp. at 16-18; U.S. Opp. at 14.

What distinguishes this case from the routine preemption case is that PASPA does not establish a federal rule of its own, nor is it a part of any federal regulatory or deregulatory scheme. Rather, PASPA is a direct, standalone command by the national government that forbids 46 of the 50 States from exercising their sovereign legislative and executive functions under penalty of a federal injunction. Thus, this case presents the fundamental constitutional question about the nature of preemption itself – whether the national government has power to "preempt" state law by coercing state sovereign functions without creating a federal regulatory or deregulatory rule regulating interstate commerce.[1] Settling this kind of

[1] Respondents suggest that PASPA is similar to other federal statutes. U.S. Opp. at 15; Leagues Opp. at 19 n.2. This is not correct. None of the statutes cited by Respondents purport to preempt state law *without first establishing a federal regulatory or deregulatory scheme governing private conduct*.

important federal question is squarely within the Rule 10 criteria for granting certiorari.

To support the trivialization of the important question presented by petitioner, respondents embrace the radically nationalistic holding of the Third Circuit majority. Under that holding, if Congress is operating in an area in which it *could have enacted* (but did not enact) a law establishing a federal rule under the Commerce Clause, then, via the Supremacy Clause, the federal government has the constitutional power to "preclude States from enacting and implementing otherwise permissible legislation." U.S. Opp. at 14.

As explained by the Third Circuit dissent, the Third Circuit's majority holding is unprecedented. Under this Court's precedent, the Supremacy Clause is merely a rule of priority. The essential predicate for its operation is a valid federal rule enacted under one of Congress's enumerated powers that expressly or impliedly displaces state law. Absent such a valid federal rule, there is absolutely nothing to displace state law. Without any federal regulatory or deregulatory federal scheme governing sports wagering, PASPA coerces 46 disfavored States to govern their people according to federal instructions.[2]

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[2] Respondents are mistaken in suggesting that petitioners concede in this Court that "Congress properly enacted PASPA pursuant to its commerce power." U.S. Opp. at 16. The question presented by the NJTHA includes whether PASPA "exceed[s] the enumerated powers of Congress," and the petition argues throughout Point I that PASPA's flaw is that it dictates how the

(Continued on following page)

To support their extreme view of national power, respondents and the court of appeals majority narrowly construe this Court's decisions in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997). They say these cases stand for nothing more than the limited principle that so long as Congress does not command States to take affirmative action Congress remains completely free, via the Supremacy Clause, to make illegal whatever state legislative and executive action it so desires and to do so without the need to establish any federal rule whatsoever. Leagues Opp. at 20-25; U.S. Opp. at 10-14.

As the dissent in the court of appeals explains, this principle conflicts with Supreme Court precedent. While *New York* and *Printz* have commonly been described by the shorthand label of "commandeering," they reflect a much more fundamental point about the nature of our Union. *New York* and *Printz* are rooted in the recognition that the Framers made a deliberate choice to empower Congress to regulate the people directly but not to empower Congress to directly instruct, enjoin, veto, or declare to be illegal state legislative or executive actions that Congress does not fancy. See NJTHA Pet. at 18-24.

States regulate the people rather than regulating the people directly. See also *New York* v. *United States*, 505 U.S. 144, 155 (1992) (noting that in cases like these, the enumerated powers question and the Tenth Amendment question "are mirror images of each other").

The respondents' and court of appeals majority's narrow reading of *New York* and *Printz* seeks to limit the judicial role in protecting state autonomy and, thus, marks a return to those aspects of the reasoning articulated in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that were abrogated by this Court's subsequent decisions in *New York* and *Printz*, and also conflicts with this Court's decision in *Coyle* v. *Smith*, 221 U.S. 559 (1911). In *Coyle*, the unconstitutional act of Congress required no affirmative action by the State of Oklahoma; it merely prohibited the State from moving its capital. This Court in *New York* cited *Coyle* as the foundation of its opinion, using it to connect anti-commandeering statements in modern opinions to deeply-rooted and persistent understandings of the constitutional structure of our Union. See *New York*, 505 U.S. at 162 (citing *Coyle* for the proposition that the recent statements "were not innovations," because while "Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions").

Respondents attempt to recast *Coyle* entirely, viewing it as a product of the substantive scope of the Commerce Clause. Leagues Opp. at 34 n.7. Because the Tenth Amendment and the Commerce Clause are "mirror images," that fails to distinguish this case. *Supra* 2-3 n.2. Moreover, if respondents mean to say that *Coyle* turns on the mere conclusion that

the location of a State's capital was not "commerce" under then-governing precedent, then, under modern Commerce Clause jurisprudence, Congress would have the power to prohibit States from relocating their capital.[3] If respondents' proposition were true, *Coyle* would no longer be good law and the Court in *New York* would never have relied on *Coyle* to support the development of the anti-commandeering doctrine.

Respondents offer a fallback position to their expansive view of national power. They assert that section 3702(2) of PASPA *does* regulate private conduct directly and independently. U.S. Opp. at 17, 18; Leagues Opp. at 27. There are several flaws in respondents' fallback argument.

First, it is at best textually incongruous to describe PASPA's prohibition on private conduct "pursuant to the law or compact of a governmental entity," as a *direct* regulation of private actors, given that any conclusion that a private party is in violation of PASPA is dependent on the prior conclusion that a State has first violated PASPA.

It is also evident that the target of PASPA is state authorization and licensing, not private action. If state law *prohibits* sports gambling, PASPA imposes no constraint on private behavior. Similarly, if state law *allows* sports gambling, in whole or in part, but

[3] The location of a state capital substantially affects interstate commerce. See *United States* v. *Lopez*, 514 U.S. 549 (1995).

does not bless it with the imprimatur of authorization or license, PASPA imposes no constraint on private behavior. It is only *when state law blesses sports gambling with the imprimatur of authorization or license* that PASPA imposes any constraint on private behavior, and even then only to the extent that the private behavior is done "pursuant to" state law.

Respondents agree that what PASPA seeks to directly regulate is not private behavior but only state authorization or licensing of sports gambling. Leagues Opp. at 23 ("PASPA does not prohibit states from eliminating sports gambling prohibitions entirely should they so choose, or even require states to enforce whatever prohibitions they opt to maintain."); U.S. Opp. at 11 ("PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part."). Thus, the only mandate of PASPA is that States cannot authorize or license sports gambling.

Recognizing the hole in their argument, respondents suggest that there is a federal regulatory scheme governing sports wagering. They cobble together three unrelated federal statutes to support their argument. They cite 18 U.S.C. 224, 18 U.S.C. 1084, and 18 U.S.C. 1301, 1307(d). See Leagues Opp. at 23 n.3, 26. These three statutes do not create a federal scheme governing sports wagering and are completely unrelated to PASPA. The "Bribery in

Sporting Contests" statute, 18 U.S.C. 224, addresses sports *bribery*, not sports gambling. The Federal Wire Act, 18 U.S.C. 1084, does not apply in States where sports betting "is legal." 18 U.S.C. 1084(b). And the Importing or Transporting Lottery Tickets statute, 18 U.S.C. 1301, 1307(d), addresses the transportation in foreign or interstate commerce of lottery tickets, which involve "prizes dependent in whole or in part upon lot or chance." See *United States* v. *Halseth*, 342 U.S. 277, 280 (1952) (holding that the Lottery Act "must be strictly construed").

The record reflects that the Department of Justice has already conceded that there is no federal regulatory scheme governing sports betting. NJTHA App. at 210-213. Further, the Interstate Horseracing Act of 1978 dictates that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. 3001(a)(1). And as the dissent in the court of appeals wrote, "there is no federal regulatory or deregulatory scheme on the matter of sports wagering. Instead, there is the congressional directive that states not allow it." NJTHA App. at 80-81 n.3.

Respondents say that adopting petitioners' view would mean that the doctrine of preemption would be swallowed up. Not so. All Congress would have to do – as it has done thousands of times – is to enact a federal rule that governs private commerce such as sports betting (whether or not blessed by the State) and state law could be preempted pursuant to the Supremacy Clause. That federal rule could tightly

regulate commerce or broadly deregulate commerce (or combine the two in any of an infinite number of combinations), but it would be a federal rule directly governing private commerce. And once it has enacted such a federal rule governing private commerce, Congress may surely specify how much that federal rule supplants rather than supplements state law. What Congress may not do is what PASPA does, namely, skip the first step of establishing a federal rule that is within the scope of its enumerated power to regulate interstate commerce.

Regardless of whether petitioner or respondents are correct in their view of national power versus state sovereignty, this case presents an important and fundamental federal question. Resolution of this question should not be left to a sharply divided panel of a court of appeals but should be settled by this Court.

II. This Case Presents An Important Question About The Scope Of The Equal Sovereignty Doctrine And The Applicable Standard When Reviewing State Sovereignty Discrimination By The National Government.

Just as they narrowly interpret *New York*, *Printz*, and *Coyle*, respondents similarly contend that the Equal Sovereignty Doctrine should be narrowly confined to the facts in *Northwest Austin Municipal Utility District Number One* v. *Holder*, 557 U.S. 193 (2009), and *Shelby County, Alabama* v. *Holder*, 133

S. Ct. 2612 (2013), see Leagues Opp. at 31, U.S. Opp. at 20. But, as already explained in the NJTHA petition (at 31-35), the principle of Equal Sovereignty is a fundamental one that is not to be narrowly confined.

The response of the United States underscores the need for this Court to settle the standard of review for sovereignty discrimination. Like the lower courts in this case, the United States evidently believes – even though this Court has stated that "any disparate, geographic coverage must be sufficiently related to the problem it targets," *Shelby County*, 133 S. Ct. at 2627 (internal quotations omitted) – that the appropriate standard of review is the rational basis test. See U.S. Opp. at 22 ("the relationship between the statutory exceptions and Congress's underlying statutory goals is obvious and manifestly rational").

That cannot be right, because it would render the principle of Equal Sovereignty far from fundamental; indeed, it would be wholly redundant. Cf. *District of Columbia* v. *Heller*, 554 U.S. 570, 628 n.27 (2008) ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

But if lower courts and the United States believe that the rational basis test is the appropriate standard of review for sovereignty discrimination, then it is imperative for this Court to clarify this important issue.

III. Respondents' Remaining Reasons For Denying Certiorari Are Insubstantial.

1. Respondents Leagues, more than the United States, argue that "there will be time enough to consider" the questions raised by Petitioners "when the circuits are split." Leagues Opp. at 14. But there is no requirement under Rule 10 that petitioners await the development of a conflict in the lower courts.[4] Importance of the question presented is an independent reason for granting certiorari, as is conflict with this Court's own decisions. See Sup. Ct. R. 10; see also S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 6.31(b), p. 482 (10th ed. 2013) ("Decisions invalidating * * * state statutes * * * are ordinarily sufficiently important to warrant Supreme Court review without regard to the existence of a conflict."). Moreover, in order to wait for the development of a lower court conflict regarding PASPA, a sister State or States would have to separately shoulder the burden that New Jersey has borne here by amending its laws and perhaps its constitution. See Leagues Opp. at 15 n.1 (citing cases denying standing to challenge PASPA).

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[4] There is similarly no requirement under Rule 10 that the challenge is "likely to recur." Leagues Opp. at 16. Further, respondents Leagues ignore the impact of this case on the New Jersey equine industry and the liberty interests of the people of New Jersey. See *infra* 13 n.7.

2. Respondents say petitioners' challenges are "largely academic." Leagues Opp. at 17 (regarding commandeering challenge); *id.* at 30 (regarding equal sovereignty challenge); see also U.S. Opp. at 9-10, 18 (regarding commandeering challenge, the United States contends that "[t]he existence of * * * Section 3702(2) substantially diminishes the practical significance of petitioners' [commandeering] challenge"). These arguments are without merit.

Respondents argue that petitioners' commandeering challenge is largely academic because even if Section 3702(1) of PASPA is unconstitutional, Section 3702(2) of PASPA would still render inoperative New Jersey's Sports Wagering Law. Leagues Opp. at 17; U.S. Opp. at 9-10, 18. But, as discussed *supra*, the prohibition on private conduct in Section 3702(2) applies only if the State has first violated the prohibition on state licensing and authorization in Section 3702(1). Not only is the limit on private conduct dependent on a prior violation by the State, but the same constitutional flaw invalidates both sections: each is concerned only with what the State blesses with its imprimatur; each is an unconstitutional attempt to regulate the State's regulation of the people's commerce rather than a direct regulation of the people's commerce.

With regard to petitioners' Equal Sovereignty challenge, respondents Leagues argue that this challenge is largely academic because if the exception for Nevada and three other States contained in Section 3704 of PASPA is unconstitutional, the appropriate

remedy would be to invalidate only the exception, leaving every State subject to PASPA's prohibition – and leaving New Jersey and Nevada alike in violation. Leagues Opp. at 30.

This is an argument about the appropriate remedy for a constitutional violation. The question of appropriate remedy is ubiquitous, particularly in cases involving constitutional requirements of equality. As this Court has long recognized, "when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984) (quoting *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931)). If uncertainty about which of these alternative remedies is ultimately proper were a sufficient reason to deny review, equality claims would never be heard.[5]

[5] Moreover, PASPA has no severability clause, and the legislative history makes clear that PASPA would never have been enacted without the exception for Nevada and three other States. As Senator Hatch explained regarding this exception, "we had no choice." 138 Cong. Rec. S7274-02, 1992 WL 116822, at *S7278 (1992).

3. Respondents say certiorari should be denied because New Jersey could have exempted itself from PASPA. Leagues Opp. at 30; U.S. Opp. at 24. This is irrelevant. Not only did the window of opportunity open and close on the citizens of New Jersey before an intervening election[6] could have had an effect on their legislature, but federalism is designed to protect the people's liberty,[7] not merely the interests of state government. *Bond* v. *United States*, 131 S. Ct. 2355 (2011). For that reason, this Court granted New York's petition for review in *New York* v. *United States*, 505 U.S. 144 (1992), even though New York had supported and benefited from the statute it challenged in that case.

[6] The window closed on January 1, 1994, see 28 U.S.C. 3704(a)(3)(A), and officials elected in November 1993 took office in mid-January 1994.

[7] Indeed, the economic viability of the New Jersey equine industry, including the thousands of people employed therein, may well be hanging in the balance. NJTHA Pet. at 7-9.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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