No. 16-476

In the Supreme Court of the United States

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

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, 17 OTHER STATES, AND THE GOVERNORS OF KENTUCKY, MARYLAND, AND NORTH DAKOTA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Federal law does not directly prohibit sports wagering in States where the practice is legal. But the Professional and Amateur Sports Protection Act ("PASPA") prohibits a State, other than Nevada or several other exempted States, to "license" or "authorize" sports wagering. See 28 U.S.C. § 3702. The *en banc* Third Circuit, over two dissents, has interpreted this provision as prohibiting the States from modifying their laws to repeal existing prohibitions on sports wagering.

The question on which this Court granted certiorari is:

Whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York v. United States*, 505 U.S. 144 (1992)?

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. §§ 3701 *et seq.*, prohibits States from exercising core regulatory powers reserved to them and their citizens under the Tenth Amendment—namely, the power to "license" or "authorize by law" conduct that a State had previously chosen to prohibit. The Third Circuit, sitting *en banc*, has interpreted PASPA as prohibiting States from amending or repealing their own laws and requiring them to enforce laws that the citizens of those States or their elected representatives have voted to repeal. If this Court affirms that decision, Congress could compel the entire machinery of state government—legislatures, executives and courts—to maintain and enforce repealed state laws at the behest of the federal government.

The Constitution does not permit this result. To be sure, Congress undoubtedly has the power to preempt state law when it enacts a federal regulatory regime in furtherance of one of its enumerated powers. But PASPA far exceeds Congress's power to preempt state law—and conflicts with this Court's federalism jurisprudence—in two significant ways.

First, this Court's preemption cases all presuppose that the federal government has made an affirmative decision to regulate in a particular field and displace contrary state law. Congress, however, has not chosen to regulate sports betting. Instead, PASPA prevents state legislatures from making modifications to their *own* laws and then makes those

laws (and the apparatus of state government required to enforce them) instruments of federal policy. *Second*, PASPA (as interpreted by the *en banc* Third Circuit) cannot be reconciled with this Court's anti-commandeering jurisprudence because it requires state legislatures to maintain, and state executive officials to enforce, laws the citizenry would have repealed. PASPA thus offends the ultimate sovereignty of the People to determine whether, and in what circumstances, to delegate their powers and restrict their liberties through state law.

Amici curiae States submit this brief in support of Petitioners because PASPA impermissibly skews the federal-state balance. *Amici* States take no position on the wisdom of sports wagering, nor would all *amici* likely legalize sports betting even if permitted. But all *amici* do have a profound interest in the principle that—absent a validly enacted federal regulatory scheme—Congress cannot prevent the States from enacting, modifying, or repealing their own laws. If the Third Circuit's decision is upheld, Congress could prevent the States from repealing prohibitions—or altering existing regulations—in countless areas of traditional state concern, such as the sale or use of pharmaceuticals, medical devices, firearms, lottery tickets, or credit arrangements, to name a few.

Such proscriptions would insulate Congress from, and force the States to assume, the political accountability inherent in implementing federal policies. That result not only conflicts with this Court's jurisprudence, but also offends notions of residual state and individual sovereignty, both of

which are protected by the Tenth Amendment and have been recognized since before the Founding.

SUMMARY OF ARGUMENT

Our system of dual sovereignty limits the degree of control that Congress can exercise over state regulation. Indeed, the Constitution effectively provides Congress with two means to influence or displace state policy choices. First, Congress 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). Second, when Congress decides "to regulate matters directly" through an affirmative federal regime, the Supremacy Clause authorizes "pre-empt[ion] [of] contrary state regulation." *Id.* at 178.

With PASPA, Congress has selected neither option: It has not provided States with incentives to prohibit sports wagering nor has it enacted a federal sports betting regime to displace contrary state law. Instead, PASPA prohibits States from modifying their *own* laws to "authorize" or "license" sports wagering and, under the *en banc* Third Circuit's reading, compels States to enforce their own preexisting betting prohibitions, even if the people or their elected representatives have voted to repeal them.

That is impermissible. Congress cannot "regulate state governments' regulation." *New York*, 505 U.S. at 166. That is because "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress'

instructions." *Id.* at 162. But that is precisely what the court of appeals held that PASPA does: It requires state legislatures to maintain unpopular laws on the books, state executives to police those laws, and (presumably) state judges to enforce them. So interpreted, PASPA erodes our federal constitutional design in which both the national and state governments are presumed to have sovereignty to regulate in their respective spheres.

Two lines of this Court's federalism jurisprudence confirm that Congress, through PASPA, has exceeded its legitimate powers.

First, this Court's preemption cases make clear that Congress can displace state law if—and only if—it enacts an affirmative federal regime pursuant to one of its enumerated powers. This Court has never understood the Supremacy Clause to allow Congress to prohibit States from repealing their own laws in the absence of an affirmative federal regime that requires protection. While PASPA's prohibition on state authorizations of sports wagering may bear superficial similarity to an "express" preemption clause, every such clause that this Court has considered was enacted in support of a federal regulatory or deregulatory program. *See infra* pp. __. PASPA's naked attempt to regulate the machinery of state government without enacting a federal rule to displace contrary state laws is not a valid exercise in preemption.

Second, the *en banc* Third Circuit's reading of PASPA violates the Tenth Amendment's core anti-commandeering principles. It does so by prohibiting

States from repealing their own existing laws, which amounts to a blockade of the State's ability to return residual sovereignty to the people—or their delegates in the legislature—who first consented to the law. If permitted to stand, the Third Circuit's decision threatens the constitutional balance of power between States and the federal government. For this reason too, the Court should vacate the decision below and reinforce the appropriate line between permissible preemption and impermissible commandeering.

ARGUMENT

I. PASPA Exceeds Congress's Legitimate Powers And Usurps Powers Reserved To The States Under The Tenth Amendment

A. PASPA Is Not An Exercise In Legitimate Preemption Because Congress Has Not Enacted An Affirmative Regulatory Or Deregulatory Scheme

1. This Court has made plain that state-law preemption, under the Supremacy Clause, occurs only when the federal government acts to defend the integrity of its own efforts. This occurs in three instances. *First*, Congress might "enact[] a statute containing an express preemption provision." *Arizona v. United States*, 567 U.S. 387, 399 (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." *Ibid.*

The common thread linking all three forms of preemption—express, conflict, and field—is the federal government's affirmative decision to govern the country directly. See, *e.g.*, *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981). With conflict or field preemption, the Court's analysis turns entirely on the affirmative federal law. Indeed, the inquiry in each case reduces to whether a federal law *implicitly* displaces a state law. Conflict preemption occurs when, after close scrutiny of the federal law, the Court concludes either that (1) compliance with the challenged state law has become "'a physical impossibility,'" *Arizona*, 567 U.S. at 399 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)), or (2) the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *ibid.* (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). Field preemption, in turn, occurs when 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).

Although resolution of express-preemption cases tend to focus on a specific preemption clause—often a single statutory sentence—the express-preemption clauses at issue always exist as one part of an affirmative federal law.* This Court has recognized

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* 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); *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (Federal Employees' Group Life Insurance Act of 1954); *Arizona*, 567 U.S. 387 (Immigration Reform and Control Act of

that express preemption clauses make explicit what is implicit in conflict or field preemption cases: some state laws cannot be reconciled with an affirmative federal scheme. See *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1977 (2011) (describing an "express preemption clause" as "the best evidence of Congress' preemptive intent" (internal quotations omitted)). In other words, the Supremacy Clause allows Congress to enact "a statute *containing* an express preemption provision" that makes clear which state laws must give way to the new federal regime without waiting for a court to make that determination. *Arizona*, 567 U.S. at 399 (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).

1986); *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012) (Federal Meat Inspection Act); *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 555 U.S. 285 (2009) (Employee Retirement Income Security Act of 1974); *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); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (Federal Cigarette Labeling and Advertising Act); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (National Traffic and Motor Vehicle Safety Act); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (Medical Device Amendments to the Federal Food, Drug and Cosmetic Act); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (Airline Deregulation Act); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (Federal Railroad Safety Act); *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) (Employee Retirement Income Security Act of 1974).

When added to an affirmative federal law, an express preemption clause protects the federal scheme from interference by inconsistent state laws.

Express preemption clauses exist to protect federal *deregulatory* regimes as well as regulatory regimes. In 1978, for instance, Congress enacted the Airline Deregulation Act ("ADA"), which marked a transition in that industry from complex government regulation to "maximum reliance on competitive market forces." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (internal quotations omitted). "To 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, after Congress "deregulated trucking" in 1980, *Rowe v. N.H. Motor Transport Ass'n,* 552 U.S. 364, 368 (2008), it passed a law expressly "pre-empt[ing] state trucking regulation" in 1994 to ensure that the States would not "undo federal deregulation," *ibid.* (internal quotations omitted).

All of this Court's federal-preemption jurisprudence—whether concerning express, conflict, or field preemption—underscores that the Supremacy Clause establishes a rule of priority between federal and state law. The Constitution, of course, "establishes a system of dual sovereignty between the States and the Federal Government," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and "[f]rom the existence of two sovereigns follows the possibility that [state and federal] laws can be in conflict or at cross-

purposes," *Arizona*, 567 U.S. at 398–99. For this reason, the Supremacy Clause "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.* at 399 (quoting U.S. Const. art. VI, cl. 2).

2. The *en banc* Third Circuit's analysis ignores the necessary predicate that Congress must make an affirmative decision to regulate (or deregulate) before federal law can be found to preempt state law. Instead, the Third Circuit concluded that "congressional action in passing laws in *otherwise pre-emptible fields* has withstood attack in cases where the states were not compelled to enact laws or implement federal statutes or regulatory programs themselves." JA 19a. The upshot of the Third Circuit's analysis is that Congress may preempt states from legislating in an area even if Congress *declines* to establish a federal regulatory regime, so long as the area is "otherwise pre-emptible." See *ibid.*

This analysis cannot withstand scrutiny. The very cases on which the Third Circuit relied—*Hodel* and *FERC v. Mississippi*, 456 U.S. 742 (1982)—demonstrate its error. In both *Hodel* and *FERC*, Congress explicitly chose *not* to exclude States from regulating in a particular area, but instead protected an affirmative federal scheme by conditioning the States' participation in the field. 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. . . ."); *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."). By contrast, PASPA contains no federal standards for States to consider, but instead prohibits States from experimenting with their own regulatory schemes.

In short, this Court has never understood the Supremacy Clause to bestow upon Congress authority to bar States from acting in "otherwise pre-emptible fields" when no affirmative federal regime requires protection. See JA 19a. Instead of providing Congress with warrant to prohibit state legislation whenever and however it desires, this Court's cases make clear that the Supremacy Clause may only be used by Congress when state action risks stymying an affirmative federal regime. See *New York*, 505 U.S. at 178 ("The Constitution . . . gives Congress the authority to regulate matters *directly* and to pre-empt contrary state regulation.") (emphasis added).

For this reason, PASPA's attempt to prohibit States from repealing their own sports wagering laws—without enacting any affirmative federal regulation concerning sports wagering—is not a legitimate exercise of preemption under the Supremacy Clause.

B. PASPA Unlawfully Commandeers The States.

PASPA also violates the guarantees to the States and their citizens provided by the Tenth Amendment and this Court's anti-commandeering case law. Under the Tenth Amendment, Congress may not "regulate state governments' regulation." *New York*, 505 U.S. at 166. PASPA, however, as interpreted by the *en banc* Third Circuit, does precisely that by prohibiting States (with a few grandfathered exceptions) from repealing their own sports-wagering bans. This interpretation fundamentally misapprehends this Court's anti-commandeering jurisprudence.

The *en banc* Third Circuit upheld PASPA because, in its view, the statute does not "present[] states with a binary choice—either maintain a complete prohibition on sports wagering or wholly repeal state prohibitions." JA 17a–18a. It concluded that Congress still left "sufficient room under PASPA to craft their own policies." JA 23a. The court declined, however, to explain exactly which actions, short of a total repeal of all sports-wagering laws, PASPA would allow.

But the test for commandeering, as established by this Court, does not depend on whether federal legislation provides States with more latitude than a mere "binary choice," JA 17a. Instead, this Court's anti-commandeering doctrine operates to ensure that both the federal and state governments remain directly accountable for their respective actions. For that reason, the relevant inquiry is whether Congress has forced state governments to effectuate federal policy, thereby obscuring its own involvement. And this, of course, can occur even when Congress grants

states more than a "coercive binary choice." JA 23a. PASPA, for example, obscures lines of political accountability where, as here, it operates to require a State to enforce complete prohibitions on sports betting despite the fact that the State, acting through its citizens, has authorized a partial repeal.

1. PASPA Blurs Lines Of Political Accountability That Animate This Court's Anti-Commandeering Cases.

a. When drafting the Constitution, the Framers created a dual-sovereignty structure, which deliberately eschewed a regime in which Congress could "employ state governments as regulatory agencies." *New York*, 505 U.S. at 163. This decision was deliberate; indeed, that was the structure under the Articles of Confederation, and "[t]he inadequacy of th[at] governmental structure was responsible in part for the Constitutional Convention." *Ibid.* 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 resulting dual-sovereignty structure drives the anti-commandeering doctrine's focus on ensuring that accountability is properly directed. 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., 2003)). Likewise, "a State's government [would] represent and remain

accountable to its own citizens." *Printz*, 521 U.S. at 920. 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.'" *Ibid.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

The anti-commandeering doctrine helps preserve our dual-sovereignty system. It does so by mandating that both state and federal governments receive the appropriate credit or blame for their respective actions, as well as the electoral benefits and burdens for their governance decisions. 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." *Ibid.*

But when Congress forces States to implement federal policy, the state officials may "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. For this reason, this Court has emphasized that transparency and accountability animate the anti-commandeering doctrine. That the States may have to "absorb the [financial] costs of implementing a federal program" is not dispositive. *Printz*, 521 U.S.

at 930. Nor does the federal program's importance, *New York*, 505 U.S. at 178, or the State's consent, *id.* at 182, matter. The material inquiry is simply whether the federal government has positioned the State to assume any resulting "blame for [the federal program's] burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

Although accountability as a constitutional guidepost "may appear 'formalistic,'" the nature of our Constitution, which places great emphasis on "the form of our government," demands it. *New York*, 505 U.S. at 187. Dual sovereignty, and the accountability principles that flow from it, are as structurally important to our founding charter as the limits on congressional authority. Federalism, indeed, "is one of the Constitution's structural protections of liberty," *Printz*, 521 U.S. at 921, which delivers critical "'double security'" against tyranny and the abuse of power, *id.* at 922 (quoting The Federalist No. 51, p. 323 (James Madison)). By preserving this strict separation, "'[t]he different governments will control each other, at the same time that each will be controlled by itself.'" *Ibid.*

b. The *en banc* Third Circuit's defense of PASPA, and employment of a novel "coercive binary choice" test, fails to acknowledge that federal laws blocking States from considering all policy choices can also mask accountability, thus running afoul of the anti-commandeering doctrine. When a State denies a person a license or permit, the person has no reason to lay blame with Congress. Rather, barring unusual familiarity with the U.S. Code, he is more likely to blame the most obvious culprit: the state official whom he sought the license from directly.

History has recognized the human inclination to "shoot the messenger." 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 punished as traitors those who would take out their frustration on the town criers who reported the King's news. 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).

Critically, this Court has found irrelevant that a person may uncover federal government involvement with a little research. In *Printz*, for instance, this Court found that Congress had impermissibly shifted political accountability to state chief law enforcement officers ("CLEOs") when it forced them to conduct background checks during handgun sales, reasoning that the person wishing to buy a handgun will see "the CLEO and not some federal official" as the one "stand[ing] between [him] and immediate possession of his gun." 521 U.S. at 930. The Court recognized that "it will likely be the CLEO, not some federal official, who will be blamed for any error," even if the error was plainly caused by the "designated federal database." *Ibid.*

In short, if a federal law requires States to retain and enforce an unpopular state law to advance federal policy, the federal government has run afoul of this Court's anti-commandeering jurisprudence. This is true anytime the federal government clouds its own accountability; it simply does not matter if the federal government allows the States leeway beyond a binary, unpalatable choice. The Third Circuit's contrary conclusion is erroneous and, accordingly, it cannot stand.

2. Barring States From Repealing Their Own Laws Raises Particular Tenth Amendment Concerns.

The most pernicious aspect of the *en banc* Third Circuit's decision is that it interprets PASPA as forbidding the States from repealing their own laws. In 2013, the Third Circuit panel that first construed PASPA found that, at minimum, PASPA allowed States to "repeal[] [their] ban on sports wagering." JA 158a. Although this opinion was flawed for other reasons, See *infra* Part __, it at least recognized the commonsense notion that States have the prerogative to revisit their own legislation. On *en banc* review, however, the Third Circuit held that PASPA barred even the "selective repeal of certain [state-law] prohibitions." JA 23a. From a federalism perspective, this forced federal ossification of state law raises two additional (and fatal) concerns.

a. Any attempt by Congress to freeze in place existing state laws would violate the people's residual rights under the Tenth Amendment to recover their

powers and liberties by repealing prohibitions that no longer enjoy popularity.

This residual right of the people to change their own laws predates the Constitution and permeates the philosophy of natural rights that animated the American founding. In the 1600s, John Locke distinguished between the People's "Supream [sic] Power" and the legislature's derivative "Fiduciary Power." John Locke, Two Treatises of Government § 149 (P. Laslett ed. 1965). James Wilson, in turn, explained that Americans possessed the right to amend or alter the form of their constitution because "the supreme or sovereign power of the society resides in the citizens at large." James Wilson, *Lectures on Law Delivered in the College of Philadelphia*, *in* 1 The Works Of James Wilson 1, 14 (James DeWitt Andrews ed., 1896).

The principle that the people have the right to determine and alter the character of their government finds it most famous expression in the second paragraph of the Declaration of Independence, which proclaims that governments "deriv[e] their just Powers from the Consent of the Governed." The Declaration of Independence para. 2 (U.S. 1776). And this principle even transcended the Federalist/Anti-Federalist divide. James Madison repeatedly cited the people's "supreme" or "ultimate" authority in his contributions to the Federalist Papers and explained that all governmental power derived from and was responsible to its citizens. The Federalist No. 37, 39, 46 (James Madison), in The Federalist Papers 223, 239, 291 (Clinton Rossiter ed., 2003). The Anti-Federalist Federal Farmer agreed, writing that the

people, as the wielders of "the supreme power . . . reserve all powers not expressly delegated by them to those who govern." Letter from the Federal Farmer No. 16, in 2 The Complete Anti-Federalist 323 (Herbert J. Storing, ed., 1981).

To be sure, the framers of the Constitution recognized that the people could delegate their sovereignty to a properly-constituted government. But part of what made such delegation legitimate was the principle that bodies like state legislatures were ultimately responsible to and agents of the people, and that the people would have lawful mechanisms to change the terms of the delegation or reclaim power altogether. See James Wilson, *Lectures on Law Delivered in the College of Philadelphia*, in 1 THE WORKS OF JAMES WILSON 1, 14–15 (James DeWitt Andrews ed., 1896). For example, instructions provided to the drafters of North Carolina's constitution in 1776 make clear that "[t]he principal supreme power is possessed by the people at large, [and] the derived and inferior power by the[ir] servants," and "[w]hatever is constituted and ordained by the principal supreme power can not be . . . abrogated by any other power, *but the same power that ordained may . . . abrogate its own ordinances*." Instructions to the Delegates From Mecklenburg, North Carolina, to the Provincial Congress at Halifax (1776), in 1 THE FOUNDERS' CONSTITUTION 56 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added). In other words, the people retained the power to abrogate or repeal ordinances enacted by their lawful representatives.

In the U.S. Constitution, the people expressly delegated to the federal government, subject to the constitutional amendment process, the right to enact laws in certain enumerated areas that would bind the entire nation and displace contrary state law. See U.S. Const. arts. I, § 8; V; VI, cl. 2. But the people did not delegate all of their sovereign power to the federal government. Rather, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X (emphasis added). This reservation of rights, and the division of authority between the state and federal governments, was ultimately intended to preserve the ultimately sovereignty of the people. See, *e.g.*, *New York*, 505 U.S. at 181 ("the Constitution divides authority between federal and state governments for the *protection of individuals*") (emphasis added); see also *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

While the Constitution is clearer on the allocation of regulatory authority between the federal government and the States, the Tenth Amendment is silent as to who should exercise all reserved power—the States or the people. See *Thornton*, 514 U.S. at 847 (Thomas, J., dissenting). Instead, the Constitution leaves "to the people of each State to determine which 'reserved' powers their state government may exercise." *Id.* at 848.

In other words, the Tenth Amendment protects—and the remainder of the Constitution does not disturb—the sovereign right of the people to

determine what reserved powers and liberties to retain for themselves and which to delegate or constrict. Put differently, the people of each State and their elected representatives—not Congress—get to decide whether to enact or repeal legislation in an area within the State's reserved powers (so long as the State's decision is not contrary to a valid, affirmative federal regulatory regime).

For this reason, this Court recognizes that federal laws should be narrowly construed "when Congress legislates in an area traditionally governed by the States' police powers." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188–89 (2014). This canon of construction protects the primacy of state power in areas the Constitution leaves to the States. See *Ah Sin v. Wittman*, 198 U.S. 500, 505–06 (1905).

Understanding the principles animating the Tenth Amendment lays bare the errors in the Third Circuit's decision. Properly understood, the Tenth Amendment enshrines the right of the People, through their elected state representatives, to recover their powers or liberties by repealing state laws. Allowing Congress to cement in place prohibitions within the State's reserved powers that citizens have voted to remove is simply anathema to the reasons why the Framers thought it necessary to include the Tenth Amendment in the Constitution.

This case provides a study as to how (absent PASPA) a State's citizenry can exercise its residual sovereignty under the Tenth Amendment to recover their liberties. There can be little doubt that regulation of sports wagering falls comfortably within

the reserved or "police powers" of the States. Indeed, because "[t]he suppression of gambling is concededly within the police powers of a state, . . . legislation prohibiting it, or acts which may tend to facilitate it, will not be interfered with by the court[s] unless such legislation [effects] a clear, unmistakable infringement of rights secured by the fundamental law." *Ah Sin*, 198 U.S. at 505–06 (internal quotation marks omitted).

Acting within this framework, the New Jersey Legislature, which had historically prohibited sports wagering, sought out ways in 2010 to financially bolster its struggling casinos and racetracks. JA 4a Public hearings ensued, which convinced state lawmakers that sports wagering might provide a necessary boost to New Jersey's gaming establishments. For that reason, the New Jersey Legislature provided its citizenry, via a 2011 constitutional referendum, the chance to decide whether the economic benefits of sports gaming outweighed the perceived drawbacks. *Ibid.* Sixty-four percent of those who voted decided that the benefits of sports gaming carried the day. *Ibid.*

Because there exists no contrary affirmative federal regime, New Jersey took action comfortably within the rights and powers reserved to it under the Tenth Amendment. The Third Circuit's construction of PASPA, which (as discussed above) is unmoored from the principles underlying federal preemption, denied New Jersey its right to do so. And in so doing, the Third Circuit handcuffed New Jersey's citizenry by freezing in time prohibitions that no longer make sense to it.

While not all of *amici* States have actively considered or attempted to pass sports wagering laws, nothing in the Third Circuit's reasoning suggests that its approach would be limited in future cases. Instead, the Third Circuit's reasoning renders uncertain the extent to which *any* state electorate may control a State's broad police powers free from federal interference. If allowed to stand, the Third Circuit's reading of PASPA could place at the mercy of the federal government state attempts to experiment with their respective—and often uniquely local—approaches to, *inter alia*, hunting and fishing licenses, lotteries, concealed-carry permits, speed limits, food and drug regulations, and even the days on which alcohol might be sold. The slope is indeed slippery and, given the threat to liberty that drove the Framers to enact the Tenth Amendment, the Third Circuit's interpretation of PASPA cannot stand.

b. In addition, allowing the federal government to freeze unpopular state laws in place results in commandeering of state executive branch officials as well as state legislatures. The New Jersey Constitution, for example, affords the State's law enforcement officers with no discretion to nullify the gambling prohibitions that the State finds outdated. See, *e.g.*, N.J. Const. art. V, § 1, ¶ 11 ("The Governor shall take care that the laws be faithfully executed.").

Federal commandeering of state executive-branch officials violates the Constitution just as much as legislative commandeering. Indeed, "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of

the . . . States." *Printz*, 521 U.S. at 922. Above and beyond anti-commandeering concerns, this Court has recognized that state executive-branch commandeering also offends separation of powers principles. By allowing Congress to force *state* executive branch officials to enforce *state* prohibitions in furtherance of a *federal* legislative anti-sports-gaming objective, PASPA gives Congress license to "act as effectively without the President as with him," *id.* at 923, which "shatter[s]" federal "unity" and "reduc[es]" the power of the Presidency, *ibid.*

"The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict." *Id.* at 919 (citing The Federalist No. 15). Thus, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Id.* at 925 (emphasis added). Because the Third Circuit's reading of PASPA would require state executive officials to enforce unpopular laws that would otherwise be repealed, the court's analysis is fundamentally flawed.

3. The Earlier Third Circuit Panel's "Affirmative/Negative" Distinction Likewise Has No Basis In Tenth Amendment Principles.

It may be tempting for this Court to avoid the problems inherent in prohibiting States from selectively repealing their own laws by construing PASPA consistent with the initial 2013 Third Circuit

panel's distinction between "affirmative" acts like compelling a state to issue licenses (which the court deemed impermissible commandeering) and "negative" acts like prohibiting States from amending existing laws (which the court deemed permissible preemption). JA 157a–160a. But this would be a mistake. While the affirmative/negative command distinction may provide some more flexibility to States than the *en banc* Third Circuit's "coercive binary choice" test, it still has no basis in this Court's jurisprudence.

The 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. As noted above, 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. Rather, the average American will blame the state officials who stand between the citizen and the desired license.

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 has no answer to the general principle that many affirmative commands can be easily recast as prohibitions.

II. Laws Like PASPA Harm States, Their Citizens, And Our System Of Dual Sovereignty.

If this Court deems PASPA constitutional, it would greatly expand the federal government's power.

Armed with the ability to shift political accountability to the States, Congress could act without fear of voting booth repercussions, especially in controversial issues likely to spark the most vociferous political response. The threat to state sovereignty cannot be countenanced.

Under the Third Circuit's analysis, Congress could, for instance, bar American children from playing football, in response to burgeoning concerns regarding the sport's long-term effect on the brain. Rather than risk the political fallout likely to result from restrictions on a sport that embodies Americana, Congress could simply prohibit States from licensing youth football leagues. Similarly, 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. In so doing, the resulting backlash due to new invasions of privacy would fall not on Congress but on the States. This is true even if a particular State would have decided to act otherwise.

The U.S. Constitution prohibits Congress from skirting its accountability in this fashion. In these examples (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 as in *Printz*, there would be legitimate concerns about misplaced blame despite the high-profile nature of these issues and the ease with which a person may discover the main driver of the relevant laws.

The genius inherent in our dual sovereign lies in the States' ability to act as a catalyst for change or a voice of dissent. Indeed, our system "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.'" *Gonzales 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 assuming it has the requisite Article I authority), 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.

Unless and until Congress does so, this Court's jurisprudence makes plain that the States have power to govern as they see fit. The Third Circuit's contrary view, which invites Congress to avoid taking ownership and allows it to force the States to advance preferred federal policy positions, cannot be reconciled with this Court's case law or the principles animating it. Because our federal system does not permit what the Third Circuit's analysis would allow, this Court cannot let that decision stand.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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