Nos. 16-476 and 16-477

In the Supreme Court of the United States

CHRISTOPHER J. CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL., PETITIONERS

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC., PETITIONER

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.*, makes it unlawful for States and other governmental entities to "sponsor, operate, advertise, promote, license, or authorize by law or compact," sports-gambling schemes. 28 U.S.C. 3702(1). PASPA also prohibits private persons from operating sports-gambling schemes pursuant to state law. 28 U.S.C. 3702(2). The question presented is whether PASPA's preemption of state laws authorizing sports-gambling schemes violates the Tenth Amendment.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in these cases because they involve a constitutional challenge to a federal statute. At the Court's invitation, the Acting Solicitor General filed an amicus brief on behalf of the United States at the petition stage.

STATEMENT

A. The Professional And Amateur Sports Protection Act

In 1992, Congress enacted the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq*. At the time, States facing budget problems were "considering a wide variety of State-sponsored gambling schemes," including state sports lotteries and state-authorized private schemes like "casino-style sports books." S. Rep. No. 248, 102d Cong., 1st Sess. 5 (1991) (Senate Report). Congress concluded that "State-sanctioned sports gambling w[ould] promote gambling among our Nation's young people," and it sought to halt the spread of sports gambling "sponsored or authorized by a State." *Id.* at 4, 6.

PASPA imposes separate restrictions on States and private parties. States and other governmental entities may not "sponsor, operate, advertise, promote, license, or authorize by law or compact" sports-gambling schemes. 28 U.S.C. 3702(1). Private parties may not "sponsor, operate, advertise, or promote" sports-gambling schemes "pursuant to the law or compact" of a governmental entity. 28 U.S.C. 3702(2). Subject to limited exceptions, both sets of restrictions apply to any "lottery, sweepstakes, or other betting, gambling, or wagering scheme" based on professional or amateur sports. 28 U.S.C. 3702; see 28 U.S.C. 3704(a)(4).

PASPA is enforceable only through civil suits for declaratory or injunctive relief. The Attorney General may sue to enjoin violations of the statute, and sports leagues may seek injunctions against violations involving their games. 28 U.S.C. 3703.

Congress included a grandfathering provision that exempted a few then-existing state-run sports lotteries, 28 U.S.C. 3704(a)(1), and casino-based sports-gambling

in Nevada, which was "authorized by a [Nevada] statute" when PASPA was enacted, 28 U.S.C. 3704(a)(2). See Senate Report 8. Congress also provided an exception for casino-based sports gambling authorized by New Jersey within one year of PASPA's effective date. 28 U.S.C. 3704(a)(3). New Jersey did not avail itself of that exception. Pet. App. 4a.

B. The 2012 Act And *Christie I*

1. New Jersey's constitution generally provides that "[n]o gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof" have been approved by voters. Art. IV, § 7, Para. 2. The constitution has long included exceptions allowing the legislature to "authorize by law" casino gambling in Atlantic City and betting at racetracks. *Id.* Para. 2(D) and (F). Until recently, there was no comparable exception for sports gambling, and such gambling was expressly prohibited by statute. Pet. App. 4a; see N.J. Stat. Ann. § 2A:40-1 (West 2010).

In 2011, New Jersey amended its constitution to allow the legislature to "authorize by law" sports gambling at casinos and racetracks. N.J. Const. Art. IV, § 7, Para. 2(D) and (F). The legislature may not authorize gambling on college events held in New Jersey or involving New Jersey teams. *Ibid.*

After the amendment, the New Jersey Legislature enacted the 2012 Sports Wagering Act (2012 Act), 2011 N.J. Laws 1723-1730. The 2012 Act authorized licensed casinos and racetracks to conduct sports gambling under the regulatory framework governing their other gambling activities. *NCAA* v. *Governor of N.J.*, 730 F.3d 208, 217 (3d Cir. 2013) (*Christie I*), cert. denied, 134 S. Ct. 2866 (2014).

2. The Nation's principal professional sports leagues and the National Collegiate Athletic Association, respondents here, filed a suit challenging the 2012 Act under PASPA. The defendants, who are petitioners here, included state officials and the New Jersey Thoroughbred Horsemen's Association (NJTHA), a racetrack operator that wished to conduct sports gambling. *Christie I*, 730 F.3d at 217.[1]

Petitioners did not deny that the 2012 Act conflicted with PASPA by "licens[ing]" or "authoriz[ing] by law" sports-gambling schemes. 28 U.S.C. 3702(1). Instead, they argued that Section 3702(1) violated the Tenth Amendment's anti-commandeering rule. The district court rejected that argument and enjoined the 2012 Act. *Christie I*, 730 F.3d at 217.

3. A divided panel of the court of appeals affirmed. *Christie I*, 730 F.3d at 226-237. Contrasting PASPA with statutes that this Court has found to violate the anti-commandeering rule, the court noted that Section 3702(1) "does not *require* or coerce the states to lift a finger" because "they are not required to pass laws," "to expend any funds," or to "enforce federal law." *Id.* at 231. Instead, "PASPA sets forth a prohibition" barring States from licensing or authorizing sports gambling. *Ibid.* The court emphasized that "statutes prohibiting the states from taking certain actions have never been struck down" on commandeering grounds. *Ibid.*

The court of appeals rejected petitioners' contention that Section 3702(1)'s preemption of state laws "authoriz[ing]" sports-gambling schemes requires States to

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[1] Although there are some differences between petitioners here and the defendants in *Christie I*, see Pet. App. 6a n.2, we refer to both groups as "petitioners" for simplicity.

enact, maintain, or enforce prohibitions on sports gambling. *Christie I*, 730 F.3d at 232. The court explained that, under Section 3702(1), "a state may repeal its sports wagering ban" or "keep a complete ban," while "decid[ing] how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be." *Id.* at 233.

C. The Present Controversy

1. Three days after this Court declined to review the Third Circuit's decision, the New Jersey Legislature passed a bill purporting to "partially repeal[]" the State's prohibitions on sports gambling to the extent they applied at racetracks and casinos. Pet. App. 83a (brackets and citation omitted). Governor Christie vetoed that bill, calling it "a novel attempt to circumvent the Third Circuit's ruling." J.A. 128. Two months later, the legislature passed another bill with the same features. S. 2460, 216th Leg. (N.J. 2014) (2014 Act). Pet. App. 218a-222a. This time, the Governor signed the bill into law.

The 2014 Act purports to repeal all New Jersey gambling laws "to the extent they apply" to sports gambling that meets five conditions: (1) it is conducted "at a casino or gambling house" in Atlantic City or a "horse racetrack"; (2) it consists of wagering by persons "situated at such location"; (3) the persons placing wagers are over 21; (4) the operator of the casino or racetrack consents to the scheme; and (5) the scheme does not include wagers on New Jersey college events. Pet. App. 219a-220a.

2. Respondents sued again, arguing that the 2014 Act conflicts with Section 3702(1) by "licens[ing]" and "authoriz[ing] by law" sports-gambling schemes. The district court held that New Jersey had impermissibly

authorized sports gambling and enjoined state officials from "giving operation or effect" to the 2014 Act. Pet. App. 113a; see *id.* at 76a-113a.

3. A divided panel of the court of appeals affirmed. Pet. App. 47a-75a. The court then granted rehearing en banc and affirmed by a 9-3 vote. *Id.* at 1a-46a.

a. The en banc court held that the 2014 Act conflicts with PASPA because it "authorize[s] by law" sports gambling. Pet. App. 12a-16a. The court explained that although the 2014 Act is "artfully couched in terms of a repealer," it "essentially provides that, notwithstanding any other prohibition by law, casinos and racetracks shall hereafter be permitted to have sports gambling." *Id.* at 14a. Focusing on substance rather than form, the court held that the 2014 Act "is an authorization." *Ibid.*

The en banc court acknowledged that some language in *Christie I* suggested that, as a categorical matter, "a repeal *cannot* constitute an authorization." Pet. App. 13a (emphasis added). The court rejected that suggestion as "unnecessary dicta." *Id.* at 23a. It explained that "a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization.'" *Ibid.* And because the court held that the 2014 Act impermissibly authorizes sports gambling, it did not address respondents' alternative argument, also made by the United States as amicus curiae, that the 2014 Act "license[s]" sports gambling by permitting it only at facilities licensed to conduct other gambling. *Id.* at 16a n.7.

The en banc court reaffirmed *Christie I*'s holding that PASPA "does not run afoul of anti-commandeering principles." Pet. App. 18a. The court explained that "PASPA does not command states to take affirmative

actions," such as enacting or maintaining prohibitions on sports gambling. *Id.* at 23a. It added that PASPA does not put States to a "binary choice" between repealing their prohibitions on sports gambling entirely or retaining total bans. *Id.* at 24a. Instead, "PASPA allows states to 'choose among many different potential policies on sports wagering that do not include licensing or affirmative authorization by the State.'" *Id.* at 23a (brackets and citation omitted).

b. Judge Fuentes, joined by Judge Restrepo, dissented, concluding that the 2014 Act does not conflict with Section 3702(1). Pet. App. 27a-34a. Judge Vanaskie dissented separately, concluding that Section 3702(1) violates the Tenth Amendment. *Id.* at 35a-46a.

SUMMARY OF ARGUMENT

I. Section 3702(1)'s preemption of state laws authorizing sports-gambling schemes does not violate the Tenth Amendment.

A. Congress may not commandeer the States by *requiring* them to enact, maintain, or enforce specific federally prescribed regulations. It may, however, *prohibit* States from adopting laws that conflict with federal policy. Those preemptive statutes constrain the States' legislative freedom by placing some policies out of bounds. And if a State transgresses those boundaries by amending its laws in a manner that is found to be preempted, state law may revert to its pre-amendment status until the legislature can act again. But that is not commandeering; it is the necessary result of the Supremacy Clause.

B. When Congress enacted PASPA, many States were considering state-sanctioned sports gambling as a solution to their fiscal problems. Congress responded by prohibiting States themselves from operating sports-

gambling schemes and prohibiting private parties from operating such schemes pursuant to state law. As petitioners do not dispute, those direct federal regulations of activities affecting interstate commerce do not raise any Tenth Amendment concern. In Section 3702(1), Congress also preempted state laws that "license" or "authorize by law" sports-gambling schemes. Like all preemptive legislation, that prohibition blocks some States from adopting their favored policies. It is not commandeering, however, because it does not conscript the States to enact, maintain, or enforce any particular laws. States need only *refrain* from licensing or authorizing by law sports-gambling schemes.

C. Petitioners' primary Tenth Amendment challenge to Section 3702(1) is that it is not a preemption provision at all. They incorrectly insist that States "authorize by law" sports gambling whenever they fail to prohibit it, and that Section 3702(1) thus must be construed as "a direct command to States to prohibit sports betting." NJTHA Br. 34-35. To the contrary, when Section 3702(1) speaks of "authorization *by law*," it naturally refers to "affirmative enabling action." *County of Washington* v. *Gunther*, 452 U.S. 161, 169 (1981). And any doubt about the most natural reading of Section 3702(1) would be eliminated by the cardinal principle that statutes must be construed to avoid, not create, constitutional problems. Section 3702 would violate the Tenth Amendment if it commanded the States to enact or maintain prohibitions on sports gambling. That problem evaporates if the statute is construed to preempt state laws that affirmatively authorize sports-gambling schemes.

D. Section 3702(1) validly preempts the 2014 Act. New Jersey wishes to do what PASPA prohibits: to authorize sports gambling at its licensed casinos and racetracks. Had New Jersey implemented that policy through a new provision expressly authorizing those facilities to engage in sports gambling or granting them an exemption from its gambling laws, there would be little question that the State had "authorize[d] by law" sports gambling. The analysis is no different now that New Jersey has reached the same substantive policy through a purported "partial repeal." The 2014 Act is preempted because it is, in substance, an "authoriz[ation] by law" of sports-gambling schemes at a handful of state-licensed facilities. The fact that Section 3702(1) prevents New Jersey from effectuating this particular "partial repeal" is not commandeering, because it imposes no greater constraint on the State's legislative freedom than any federal statute disabling a State from adopting its preferred policy. New Jersey is free to repeal its sports-wagering laws altogether, to keep them on the books unchanged, or to amend them in any manner that does not "license" or "authorize by law" sports-gambling schemes.

II. Even if Section 3702(1)'s preemption of state laws authorizing sports-gambling schemes were invalid, PASPA's remaining provisions would be severable and would independently preempt the 2014 Act.

A. New Jersey asserts (Br. 53) that if Section 3702(1)'s prohibition on state laws authorizing sports-gambling schemes is invalid, PASPA must be "struck down in its entirety." That remarkable assertion inverts this Court's approach to severability. There is no basis for invalidating PASPA's remaining provisions because those provisions would remain fully functional

and would continue to serve Congress's objectives. Indeed, the statute's practical effect would be largely unchanged. Section 3702(1) would still prohibit States from operating sports-gambling schemes themselves. And although a state law authorizing private sports-gambling schemes would not be expressly preempted by Section 3702(1), Section 3702(2) would still prohibit any private party from conducting the schemes the law purported to authorize.

B. Throughout this litigation, respondents and the United States have argued that the 2014 Act violates Section 3702(1)'s prohibition on state laws that "license" sports-gambling schemes because it allows sports gambling only at licensed casinos and racetracks. Petitioners have never offered any persuasive response. And because it is severable, Section 3702(1)'s independent prohibition on state laws that "license" sports gambling provides a ready alternative ground for upholding the Third Circuit's determination that the 2014 Act is validly preempted.

ARGUMENT

I. SECTION 3702(1)'S PREEMPTION OF STATE LAWS AUTHORIZING SPORTS-GAMBLING SCHEMES DOES NOT VIOLATE THE TENTH AMENDMENT

This case turns on the fundamental distinction between commandeering and preemption. Congress may not *require* States to enact or maintain federally prescribed regulations. But it may—and routinely does—*prohibit* States from adopting laws that conflict with federal policy. Although those preemptive statutes necessarily constrain the States' legislative latitude, they are not impermissible commandeering because they do not conscript the States to act as federal agents. To be

sure, when a State modifies its laws in a way that a federal statute does not permit, state law may revert, at least temporarily, to its pre-amendment status. But *that* is not commandeering; it is the necessary consequence of the Supremacy Clause.

New Jersey believes that the State's economic interests would be best served by authorizing sports gambling at its casinos and racetracks. Whatever the merits of that policy, Congress has placed it off limits in an exercise of its authority to preempt state law in matters covered by the Commerce Clause. A State prevented from adopting its preferred policy by such preemptive federal legislation may be *frustrated*, but it is not *commandeered*. And that does not change when the State tries to evade federal law by adopting the preempted policy through a "partial repeal" rather than a new enactment. At bottom, although petitioners' objection is framed in the language of the Tenth Amendment, it rests on a policy disagreement with PASPA's preemption of state law.

A. The Tenth Amendment Does Not Prevent Congress From Preempting State Laws That Conflict With Federal Statutes

1. Under the Tenth Amendment, "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz* v. *United States*, 521 U.S. 898, 925 (1997). That anti-commandeering rule derives from our constitutional structure, which does not "confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992).

This Court has twice found a violation of the anti-commandeering rule, in *New York* and *Printz*. The

statute at issue in *New York* directed States either to take ownership of nuclear waste or to regulate it according to Congress's instructions. 505 U.S. at 153-154. The Court invalidated that provision because Congress lacked authority "to impose either option as a free-standing requirement"—and, in particular, because the second option would have "present[ed] a simple command to state governments to implement legislation enacted by Congress." *Id.* at 175-176. Similarly, the statute at issue in *Printz* "compell[ed] state officers to execute federal laws" by requiring them to conduct background checks. 521 U.S. at 905.

Those statutes were invalid because they sought to conscript the States into enacting or enforcing specific federally prescribed regulations. And because Congress cannot force States to *enact* specific regulations, it also cannot compel them to *maintain* specific regulations that they happen to have enacted already. That, too, would allow Congress to "employ state governments as regulatory agencies." *New York*, 505 U.S. at 163. But if a law "does not require the States in their sovereign capacity to regulate their own citizens" and "does not require state officials to assist in the enforcement of federal statutes," then it is "consistent with the constitutional principles enunciated in *New York* and *Printz*." *Reno* v. *Condon*, 528 U.S. 141, 151 (2000).

2. This Court's decisions distinguish between impermissible commandeering and permissible preemption. Congress may not require the States to enact or maintain specific laws, but it is free to preempt state laws that conflict with federal policy. And if a State amends its law in a manner that is found to be preempted, the State cannot claim that it has been com-

mandeered merely because its statutory scheme reverts to pre-amendment law until its legislature acts again.

"A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981). The constitutionality of such legislation follows directly from the Supremacy Clause, which makes federal law "the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. "Under this principle, Congress has the power to preempt state law," and "[t]here is no doubt that Congress may withdraw specified powers from the States." *Arizona* v. *United States*, 567 U.S. 387, 399 (2012).

Congress exercises that authority in many ways. It may expressly or impliedly prohibit state laws with particular features.[2] It may bar *all* state regulation in specified fields, either to allow exclusive federal regulation or to implement a deregulatory policy.[3] Or it may conditionally preempt state law by "ma[king] compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field." *Printz*, 521 U.S. at 926; see, *e.g.*, *Hodel*, 452 U.S. at 288. In all of those forms, preemptive federal statutes "obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important." *Hodel*, 452 U.S. at 290. And when a court finds a state law invalid on preemption grounds, it

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[2] See, *e.g.*, 7 U.S.C. 1639i(b) (food labeling); 12 U.S.C. 4122(a) (mortgages); 21 U.S.C. 360k(a) (medical devices); 21 U.S.C. 387p(a)(2) (tobacco products).

[3] See, *e.g.*, 29 U.S.C. 1144(a) (employee benefit plans); 49 U.S.C. 14501(c)(1) (motor carriers); 49 U.S.C. 41713(b)(1) (air carriers).

necessarily requires the State to tolerate, at least temporarily, a legal regime different from the one originally chosen by the legislature—by, for example, reverting to prior law. As this Court has explained, "the Supremacy Clause permits no other result." *Ibid.*

In that circumstance, there is no conflict between the Supremacy Clause and the Tenth Amendment because preemptive federal legislation does not compel States to enact or maintain federally prescribed regulations. States remain free to adopt any policy that Congress has not placed out of bounds. And if a court invalidates a state law that transgresses those boundaries, the legislature is not stuck with the resulting legal regime—instead, it may choose any policy that is not preempted. This Court was thus careful to note that the anti-commandeering rule does not disturb the fundamental principle that "[t]he Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests." *New York*, 505 U.S. at 188.

B. Section 3702(1) Preempts State Laws That Authorize Sports-Gambling Schemes

Congress enacted PASPA in response to a wave of proposals to use state-sanctioned sports-gambling to address the States' fiscal woes. A few States had already incorporated sports betting into their state lotteries, and "[m]any" others were considering following suit. Senate Report 5. States were also contemplating proposals to authorize and tax private schemes, such as "bets on sports at off-track betting parlors" and "casino-style sports books." *Ibid.* Congress feared that "State-sanctioned sports gambling" would promote betting by minors and threaten the integrity of sports, and it determined that "[t]he answer to State budgetary problems

should not be to increase the number of lottery players or sports bettors." *Id.* at 4, 7.

Congress did not adopt comprehensive regulations on sports gambling, which was already subject to various state and federal laws. Senate Report 6-7; see, *e.g.*, 18 U.S.C. 1084, 1301-1308, 1955. Instead, PASPA focuses on the particular issue that prompted congressional action: state-sanctioned schemes. PASPA addresses those schemes through three categories of prohibitions: regulations of the States' own activities, regulations of private conduct, and preemption of specified state laws.

First, Section 3702(1) provides that States may not "sponsor, operate, advertise, [or] promote" sports-gambling schemes. Those prohibitions bar States from incorporating sports betting into their lotteries or otherwise conducting sports gambling themselves. And although those prohibitions directly govern States, the Commerce Clause allows Congress to regulate the States' own activities affecting interstate commerce without violating the Tenth Amendment. See *Condon*, 528 U.S. at 151; *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988). Accordingly, as petitioners do not dispute, Section 3702(1)'s prohibition on state-run sports gambling raises no commandeering issue.

Second, Section 3702(2) makes it unlawful for a private person to "sponsor, operate, advertise, or promote" a sports-gambling scheme "pursuant to the law" of a State. Those prohibitions effectively nullify state laws authorizing private sports-gambling schemes by making the operation of such schemes a violation of federal law. But again, as petitioners do not dispute, that prohibition is entirely consistent with the Tenth Amendment. The anti-commandeering rule does not "shield[] the States

from pre-emptive federal regulation of *private* activities affecting interstate commerce." *Hodel*, 452 U.S. at 291.

Third, Section 3702(1) provides that it is unlawful for a State or other governmental entity to "license, or authorize by law or compact," sports-gambling schemes. Those prohibitions enforce the same federal policy as Section 3702(2) by expressly preempting state laws that license or authorize private sports-gambling schemes.[4] Preempting those laws undoubtedly prevents some States from adopting their favored policies—indeed, that was the point. But Section 3702(1)'s preemption of state laws that conflict with federal policy is not impermissible commandeering because it does not compel the States to enact, maintain, or enforce federally prescribed regulations. "PASPA does not *require* or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law." Pet. App. 25a (citation omitted). Instead, a State need only refrain from licensing or authorizing by law sports-gambling schemes.

C. Section 3702(1) Does Not Compel States To Enact Or Maintain Prohibitions On Sports Gambling

Petitioners' principal Tenth Amendment challenge to Section 3702(1) is that it is not a preemption provision at

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[4] Section 3702(1) differs from the typical formulation of preemption provisions by specifying that "[i]t shall be unlawful" for a State to license or authorize sports-gambling schemes. 28 U.S.C. 3702(1). But that is equivalent to the common formulation that "no state may" enact specified laws. See, *e.g.*, 7 U.S.C. 1639i(b); 15 U.S.C. 6760(b); 21 U.S.C. 387p(a)(2)(A); 42 U.S.C. 300aa-22(e). This Court "do[es] not require Congress to employ a particular linguistic formulation when preempting state law." *Coventry Health Care of Mo., Inc.* v. *Nevils*, 137 S. Ct. 1190, 1199 (2017).

all. Instead, petitioners insist that Section 3702(1) must be construed as "a direct command to States to prohibit sports betting." NJTHA Br. 34-35; see N.J. Br. 40 (same). A statute imposing that command would indeed violate the Tenth Amendment. But Section 3702(1) is not such a statute. Petitioners' contrary interpretation contradicts both Section 3702(1)'s text and the fundamental canon that statutes should be construed to avoid—not create—constitutional difficulties.

1. Petitioners' argument rests on the premise that a State "authorize[s] by law" sports-gambling schemes whenever it does not prohibit them. Petitioners note that "the word 'authorize' can be defined to reach any circumstance where the legislature 'permits a thing to be done.'" N.J. Br. 42 (brackets and citation omitted); see NJTHA Br. 31. It is true that "the word 'authorize' sometimes means simply 'to permit'" or to fail to prohibit. *County of Washington* v. *Gunther*, 452 U.S. 161, 169 (1981). But it "ordinarily denotes affirmative enabling action." *Ibid.*[5] And several textual and contextual cues confirm that ordinary meaning here.

First, Section 3702(1) speaks not simply of "authoriz[ation]," but of "authoriz[ation] *by law*." 28 U.S.C. 3702(1) (emphasis added). The 2014 Act's selective and conditional permission to engage in conduct that is generally prohibited certainly qualifies, but one would not ordinarily say that private conduct is "authorized by law" simply because the government has not prohibited it. Mere "lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law."

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[5] See, *e.g.*, *Black's Law Dictionary* 133 (6th ed. 1990) ("To empower; to give a right or authority to act."); 1 *Oxford English Dictionary* 798 (2d ed. 1989) ("To give formal approval to; to sanction, approve, countenance.").

NCAA v. *Governor of N.J.*, 730 F.3d 208, 232 (3d Cir. 2013), cert. denied, 134 S. Ct. 2866 (2014).

Second, the phrase "authorize by law" appears in a list with "sponsor, operate, advertise, promote, [and] license," all of which convey affirmative approval or encouragement. Under the familiar principle that words are known by the company they keep, the fact that "several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham* v. *United States*, 511 U.S. 368, 371 (1994).[6]

Third, Section 3702(1) parallels Section 3702(2), which makes it unlawful for private persons to conduct sports-gambling schemes "pursuant to the law" of a State. 28 U.S.C. 3702(2). One would not naturally describe a person conducting a sports-gambling operation that is merely left unregulated as acting "pursuant to" state law.

Finally, Section 3702(1) applies not just to States, but to all "governmental entit[ies]"—a term broadly defined to include any "political subdivision of a State." 28 U.S.C. 3701(2). If Section 3702(1) were "a direct command to States to prohibit sports betting" (NJTHA Br. 34-35), it would impose the same command on *all* covered governmental entities. But petitioners could not plausibly maintain that Congress commanded every county, district, and municipality in the Nation to prohibit sports betting.

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[6] That inference is reinforced by the phrase "authorize by law *or compact*." 28 U.S.C. 3702(1) (emphasis added). The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, permits certain gaming on Indian lands only if it is affirmatively authorized by a "compact" between the tribe and the State. 25 U.S.C. 2710(d)(1)(C) and (3); see 28 U.S.C. 3701(2), 3704(b) (cross-referencing IGRA).

2. If there were any doubt about the most natural reading of Section 3702(1)'s text, it would be eliminated by the "cardinal principle" that a statute must be construed to avoid constitutional problems "unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). If Section 3702(1) compelled States to enact or maintain prohibitions on sports gambling, it would violate the Tenth Amendment. That problem evaporates if the statute is construed to preempt state laws that affirmatively authorize sports-gambling schemes. That by itself provides sufficient reason to reject petitioners' interpretation.

Petitioners do not deny that their reading of Section 3702(1) would create constitutional difficulties. Just the opposite: they invite the Court to adopt that reading *because* it is "obviously unconstitutional" and they wish to see Section 3702(1) struck down. NJTHA Br. 35; see N.J. Br. 40. This Court should decline petitioners' invitation to interpret a statute to manufacture, rather than eliminate, constitutional problems.

3. Petitioners contend (N.J. Br. 44-45; NJTHA Br. 33-34) that PASPA's legislative history compels the conclusion that Congress sought to conscript the States into maintaining prohibitions on sports gambling. Even the most convincing legislative history could not overcome the ordinary meaning of the statutory text or the canon of constitutional avoidance—let alone both. In any event, the legislative record, taken as a whole, reinforces the conclusion that Congress simply sought to prohibit sports-gambling schemes bearing a State's imprimatur.

Petitioners observe (N.J. Br. 43-44; NJTHA Br. 34) that PASPA's supporters sometimes condemned "legalized" sports gambling, *e.g.*, Senate Report 7, or said that PASPA would prevent States from "allowing" it, 138 Cong. Rec. 33,823 (1992) (Sen. Bradley). But those statements must be understood in the context in which they were made. States were actively considering either getting into the sports-betting business themselves or authorizing selected private parties to do so for the States' economic benefit. Senate Report 5. There is no indication that States were considering broader repeals of their existing prohibitions, and no suggestion that Congress was concerned about that possibility. *Ibid.*; see Resp. Br. 28-29, 39-41. Given that context, and particularly given PASPA's text, the references to "legalizing" or "allowing" sports betting should be understood to refer to the proposals under consideration at the time: state-run sports lotteries and state-authorized schemes at selected venues such as "casino[s]" or "off-track betting parlors." Senate Report 5.

D. Section 3702(1) Validly Preempts The 2014 Act

New Jersey wishes to do what PASPA prohibits: to authorize sports gambling at its licensed casinos and racetracks, but nowhere else. It could have implemented that policy by passing a statute expressly authorizing casinos and racetracks to engage in sports gambling, by enacting a new provision granting those facilities an express exemption from its gambling laws, or by "partially repealing" those laws to the extent they apply to sports gambling at casinos and racetracks. Those three formal paths lead to identical substantive results.

Had New Jersey followed either of the first two, there would have been little question that it had "authorize[d]

by law" sports gambling. The new enactment—whether framed as an authorization or an exemption—would have been straightforwardly preempted by PASPA. And New Jersey could not have complained that it was being required to leave in place laws it had chosen to repeal. The preemption of New Jersey's chosen enactment simply would have left state law as it was before. Indeed, that is exactly what happened when New Jersey took a version of the first path in 2012. *Christie I*, 730 F.3d at 226-237.

The analysis is no different now that New Jersey has reached the same substantive policy through a novel formal mechanism crafted "to sidestep federal law." J.A. 128. After all, "the Supremacy Clause cannot be evaded by formalism." *Haywood* v. *Drown*, 556 U.S. 729, 742 (2009). The 2014 Act is preempted by Section 3702(1) because it is, in substance, an "authoriz[ation] by law" of sports gambling. The fact that Section 3702(1) prevents New Jersey from effectuating this particular "partial repeal" is not unconstitutional commandeering, because it imposes no greater constraint on the State's legislative freedom than any preemptive federal statute that prevents a State from adopting its preferred policy. And although Section 3702(1) forecloses New Jersey's favored approach to sports gambling, it leaves the State ample room to select from a variety of policies that are not impermissible authorizations. See pp. 28-30, *infra*.

1. The 2014 Act is preempted by Section 3702(1) because it is an "authorization by law"

The NJTHA contends (Br. 49-57) that the 2014 Act is not preempted by Section 3702(1) because a state law styled as a "partial repeal" can *never* be an "authoriz[ation] by law." Petitioners did not include that statutory argument in their certiorari petitions, and

New Jersey does not advance it now. Petitioners were correct to abandon the argument. As the court of appeals held, the 2014 Act is an authorization by law of sports gambling within the ordinary meaning of Section 3702)(1). A contrary interpretation would eviscerate PASPA.

Ordinarily, to "authorize by law" is to take some "affirmative enabling action," *Gunther*, 452 U.S. at 169, or "to give a right or authority to act," *Black's Law Dictionary* 133 (6th ed. 1990). The mere absence of a legal prohibition does not suffice. See pp. 17-18, *supra*. But New Jersey law as modified by the 2014 Act is not silent on, or indifferent to, sports gambling. The State generally prohibits all such gambling, but provides a narrow, conditional exception tailored to advance the State's economic interests by encouraging sports gambling at a handful of state-licensed casinos and racetracks. 2014 Act § 1; see Pet. App. 12a-13a.

That regime is naturally described as "authoriz[ing] by law" gambling at the favored venues. Suppose, for example, that a State enacted a law providing that "no person may provide teeth-whitening services, except that the foregoing prohibition shall not apply to a licensed dentist who provides such services to adults." One would naturally say that licensed dentists were "authorize[d] by law" to provide teeth-whitening services to adult patients. And that would be equally true if the State had enacted a statute providing that "no person may provide teeth-whitening services" and then "partially repealed" that statute "to the extent it applies to licensed dentists who provide such services to adults." That is essentially what New Jersey has done. Petitioners can scarcely disagree, because the 2014 Act was an exercise of the legislature's authority under the state

constitution to "*authorize by law*" sports gambling at casinos and racetracks. N.J. Const. Art. IV, § 7, Para. 2(D) and (F) (emphasis added).

The NJTHA's contrary interpretation would gut PASPA, because virtually any authorization could be reformulated as a "partial repeal." For example, the 2012 Act placed sports gambling under New Jersey's existing regulatory framework for other gambling. Petitioners conceded that the 2012 Act conflicted with Section 3702(1)—indeed, it was "precisely what PASPA says the states may not do." *Christie I*, 730 F.3d at 227. Yet the 2012 Act could have been reformulated as a statute "partially repealing" prohibitions on sports gambling to the extent they applied to casinos and racetracks that conducted sports gambling in conformity with the regulations governing their other gambling activities. And virtually any other authorization could likewise be reframed as a "partial repeal" conditioned on compliance with sufficiently detailed requirements. States may not evade preemptive federal legislation through such manipulation of state-law labels.

Petitioners imply (N.J. Br. 3, 10-11) that New Jersey adopted the 2014 Act in reliance on statements by the Third Circuit and the United States that PASPA would allow it "to repeal [its sports-gambling] prohibitions in whole or in part." Br. in Opp. 11, *Christie* v. *NCAA*, 134 S. Ct. 2866 (2014) (Nos. 13-967, 13-979, and 13-980); see *Christie I*, 730 F.3d at 233. PASPA does indeed leave States free to modify or repeal their sports-gambling laws in a variety of ways. See pp. 28-29, *infra*. In context, the Third Circuit and the government were referring to such permissible partial repeals—*i.e.*, partial repeals that do not amount to affirmative authoriza-

tions of sports-gambling schemes at a handful of favored venues. Neither the Third Circuit nor the government suggested that PASPA would allow a gambit like the 2014 Act or that federal law could be evaded through state-law labeling. One of the petitioners previously acknowledged as much: When first presented with a "partial repeal" like the 2014 Act, Governor Christie rejected it as a "novel attempt to circumvent the Third Circuit's ruling" and "[i]gnor[e] federal law." J.A. 128.

2. Preemption of a specific partial repeal or other amendment is not commandeering

Petitioners contend (N.J. Br. 36-40; NJTHA Br. 47) that if Section 3702(1) prevents New Jersey from adopting the "partial repeal" in the 2014 Act, it is necessarily commandeering because it compels the State to maintain laws it has repealed. That argument rests on a misunderstanding of the anti-commandeering rule.

a. Congress does not offend the Tenth Amendment when it "curtail[s] or prohibit[s] the States' prerogatives" through preemptive legislation. *Hodel*, 452 U.S. at 290. That remains true whether the State arrives at the preempted policy by legislating "up" (adding to existing law) or "down" (repealing existing law). The Tenth Amendment inquiry turns on the substantive interaction between state and federal law—not the state law's label or the process by which it was adopted.

Preemptive federal legislation thus routinely bars some amendments to state law, including "partial repeals." For example, Congress has prohibited States from imposing an electricity tax that "discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers." 15 U.S.C. 391. A State could not evade that prohibition by first providing a

nondiscriminatory tax credit and then, sometime later, partially repealing that credit to the extent it applied to out-of-state entities.[7] Similarly, if a federal statute prohibited States from penalizing companies for doing business in a particular country, a State could not partially repeal a tax exemption (or other benefit) to the extent it applied to companies doing business there. Cf. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 366-374 (2000). Such preemption of particular repeals of existing state statutes "follows directly from the Constitution's instruction that a state law may not be enforced if it conflicts with federal law." *Riley* v. *Kennedy*, 553 U.S. 406, 427 (2008).[8]

b. Petitioners err in asserting (N.J. Br. 3-4) that Section 3702(1)'s preemption of the 2014 Act must be a commandeering violation because it "compels New Jersey officials to maintain in force, as state law, prohibitions against sports wagering that, as far as the New

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[7] Equivalent examples could be constructed based on many other statutes preempting state laws differentiating between specified classes of entities. See, *e.g.*, 12 U.S.C. 25b(b)(1); 15 U.S.C. 6733(b); 31 U.S.C. 313(f)(1); 47 U.S.C. 332(c)(3)(A).

[8] The Court made that observation in the context of Section 5 of the Voting Rights Act of 1965, 52 U.S.C. 10304 (Supp. III 2015), which "routine[ly]" required a State to "administer a law it ha[d] repealed" because the repealing legislation had been denied preclearance. *Riley*, 553 U.S. at 427. Section 5's preclearance requirement is an extraordinary measure, enacted pursuant to Congress's power to enforce the Fourteenth and Fifteenth Amendments, that subjects state law to prior federal approval. See *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2618 (2013). But once the federal government has withheld such approval, the preemption of a particular repeal of state law does not depend on the extraordinary nature of Section 5. Rather, as the Court observed in *Riley*, it "follows directly" from the Supremacy Clause. 553 U.S. at 427.

Jersey Revised Statutes are concerned, no longer exist." The Tenth Amendment bars Congress from "commandeer[ing] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 161 (brackets and citation omitted). That sort of commandeering occurs when Congress directs States to enact (or maintain) a particular "regulatory program." *Ibid.* But it is different when, as here, preemptive federal legislation simply prevents a State from giving effect to some "specific partial repeal" or other amendment. Pet. App. 24a. In that circumstance, state law may revert to its pre-amendment condition until the legislature can act again. But the legislature is not conscripted into leaving any particular law on the books—it is free immediately to amend its laws again. The State is simply disabled from adopting the prohibited policy, whether it does so through a new enactment or a partial repeal.

The point would be obvious if, instead of styling the 2014 Act as a "partial repeal," New Jersey had enacted a new statutory provision specifying that the sports-gambling schemes at issue "are authorized" or "shall be exempt" from all state gambling laws. Both provisions would be preempted by PASPA, and both could be excised without reviving statutory provisions that "no longer exist." N.J. Br. 4. To allow New Jersey to avoid preemption by adopting the same substantive policy through a different formal mechanism would provide a roadmap for flouting the Supremacy Clause.

c. Petitioners assert (N.J. Br. 29-30; NJTHA Br. 38-39) that Section 3702(1) should be deemed a commandeering violation because it raises political accountability concerns like those described in *New York*.

There, the Court observed that when "the Federal Government directs the States to regulate," state officials may "bear the brunt of public disapproval" even though it was "federal officials who devised the regulatory program." 505 U.S. at 169. But that concern arises only when state officials "cannot regulate in accordance with the views of the local electorate *in matters not preempted by federal regulation*." *Ibid.* (emphasis added). When Congress preempts state law, it acts "in full view of the public," and it is thus Congress that will "suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* at 168. Here, petitioners do not suggest that there is any confusion among New Jersey voters about which sovereign is responsible for the State's inability to authorize sports betting at Atlantic City casinos.

d. Petitioners also assert (N.J. Br. 36-37) that the district court's injunction itself constitutes a commandeering violation. The court enjoined state officials from "giving operation or effect to the 2014 Law." Pet. App. 113a. That injunction does not compel the officials to take specific acts or to bring particular enforcement actions. Cf. NJTHA Br. 37. It merely requires them to respect the court's determination that the 2014 Act is preempted. That instruction reflects the uncontroversial principle that preempted laws "are *ipso facto* invalid" and that "*all* state officials" have a duty "to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law." *Printz*, 521 U.S. at 913. An injunction requiring compliance with that duty poses no independent commandeering concern because "the power of federal courts to enforce

federal law * * * presupposes some authority to order state officials to comply." *New York*, 505 U.S. at 179.[9]

3. Section 3702(1) does not put States to a binary choice between maintaining total prohibitions on sports gambling or repealing their sports-gambling laws entirely

Finally, petitioners assert that if Section 3702(1) preempts the partial repeal in the 2014 Act, it leaves the States "a binary choice of repealing *all* or *none* of its prohibitions on sports gambling." NJTHA Br. 43-44; see N.J. Br. 45-48. Petitioners further contend that, by putting the States to that choice, Congress impermissibly sought to coerce them to maintain total prohibitions on sports betting. Petitioners are wrong on both counts.

a. Section 3702(1) preempts only state laws that "license, or authorize by law or compact," sports-gambling schemes. That provision leaves States free to adopt a variety of regulatory approaches to sports gambling between a complete prohibition and total deregulation. Most obviously, PASPA is directed only at "lotter[ies], sweepstakes, or other betting, gambling, or wagering scheme[s]." 28 U.S.C. 3702. Because the statute addresses only those organized "scheme[s]," it does not reach casual, informal activities such as social wagers among families and friends. Changes to state laws regulating such activities do not implicate PASPA at all—and, indeed, some States do not prohibit social sports wagering. See, *e.g.*, Colo. Rev. Stat. § 18-10-102(2)(d) (2016); Haw. Rev. Stat. § 712-1231(a) (2016).

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[9] Even if the injunction raised concerns, the solution would be to limit respondents to declaratory relief, not to invalidate Section 3702(1). See 28 U.S.C. 2201(a).

In addition, PASPA addresses schemes, not their customers. Section 3702's prohibitions reach those who "sponsor, operate, advertise, or promote" a scheme. That supply-side focus is confirmed by the absence of penalties or enforcement mechanisms other than injunctive relief. 28 U.S.C. 3703. Accordingly, PASPA does not prevent a State from repealing or modifying its criminal and civil laws applicable to those who wager in—but do not operate—sports-gambling schemes.

More broadly, while a State may not confer a special right to conduct sports-gambling schemes on a handful of state-licensed entities, PASPA would not prohibit a range of deregulatory measures that would not constitute "licens[ing]" or "authoriz[ation] by law." For example, one would not naturally say that a State had "authorize[d] by law" sports-gambling schemes if it eliminated prohibitions on sports gambling involving wagers by adults or wagers below a certain dollar threshold. A person who engaged in those activities would not readily be described as acting "pursuant to" state law. 28 U.S.C. 3702(2). And if a State had originally chosen not to regulate sports gambling at all, its later enactment of laws barring betting by minors or wagers above a certain threshold would not readily be regarded as "authoriz[ing] by law" the sports gambling left unprohibited. The result should be the same if a State adopts an identical regime by repealing existing prohibitions.

b. Petitioners misconceive PASPA in attempting to analogize it to conditional-spending provisions or conditional-preemption provisions like the one in *Hodel*, 452 U.S. at 288. Such provisions seek "to encourage a State to regulate in a particular way," and they thus include express conditions and standards for the regulation that Congress is trying to encourage the State to

adopt. *New York*, 505 U.S. at 166; see *id.* at 167-168. PASPA is not such a statute. It is traditional preemptive legislation that places certain policies—*i.e.*, state-licensed and state-authorized sports-gambling schemes—unconditionally out of bounds. It does not address States' broader policies toward sports gambling, much less seek to coerce States into leaving their existing policies in place.

Petitioners assert that it would be "bizarre" for Congress to have barred States from authorizing regulated sports gambling at casinos, but done nothing to stop the States from repealing their existing prohibitions altogether or adopting policies that would result in more sports betting rather than less. N.J. Br. 44; NJTHA Br. 46, 55. There is no anomaly. When it enacted PASPA, Congress likely assumed that States would largely maintain their longstanding general prohibitions on sports gambling, because there was no indication that States were considering broad repeals. See Resp. Br. 28-29, 39-41. But PASPA is not—and was not intended to be—a mechanism to coerce States to do so. Instead, it is a narrow provision focused on the specific proposals that led Congress to act: state-run sports gambling and state-sanctioned schemes at casinos and similar venues.

* * * * *

In the end, petitioners' commandeering argument reduces to the assertion (N.J. Br. 4) that Section 3702(1) is unconstitutional because it leaves New Jersey no "realistic means to repeal state-law prohibitions on sports wagering applicable at casinos and racetracks" while preserving those prohibitions in all other contexts. But the fact that preemptive federal legislation bars a

State's preferred policy does not amount to impermissible commandeering. If it did, there would be little left of the Supremacy Clause.

II. PASPA'S REMAINING PROVISIONS ARE SEVERABLE FROM SECTION 3702(1)'S PROHIBITION ON STATE LAWS AUTHORIZING SPORTS-GAMBLING SCHEMES AND INDEPENDENTLY PREEMPT THE 2014 ACT

Petitioners do not challenge the constitutionality of any portion of PASPA other than its prohibition on state laws authorizing sports-gambling schemes. New Jersey nonetheless asserts (Br. 53) that if that single prohibition is invalidated, PASPA must be "struck down in its entirety." That remarkable assertion inverts this Court's approach to severability, which seeks to preserve rather than destroy the legislature's handiwork. There is no basis for invalidating PASPA's other provisions because they would remain fully functional and would continue to serve Congress's objectives. And those remaining provisions also provide an alternative ground for affirmance, because Section 3702(1)'s prohibition on state laws that "license" sports-gambling schemes independently preempts the 2014 Act.

A. PASPA's Remaining Provisions Are Severable

1. "'Generally speaking, when confronting a constitutional flaw in a statute,'" this Court seeks "'to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (citation omitted). So long as the statute remains "fully operative as a law," its other provisions may not be struck down unless it is "evident" that, in light of the Court's constitutional holding, Congress "would have preferred" no law at all to a law with

the unconstitutional provision severed. *Id.* at 509 (citation omitted); see *United States* v. *Booker*, 543 U.S. 200, 246, 265 (2005).

The application of that standard is straightforward here. With the relevant language excised, Section 3702 would provide as follows:

> It shall be unlawful for—
>
> > (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by ~~law or~~ compact, or
> >
> > (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
>
> a [sports-gambling scheme].

28 U.S.C. 3702.

That modified statute would remain "fully operative as a law," because no part of it is dependent on the excised language. *Free Enter. Fund*, 561 U.S. at 509 (citation omitted). It would also function in a manner "consistent with Congress' basic objectives in enacting [PASPA]." *Booker*, 543 U.S. at 259. Indeed, the statute's practical effect would be largely unchanged. Without the excised language, Section 3702(1) would still prohibit States from operating sports-gambling schemes themselves. And although a state law authorizing private sports-gambling schemes would not be expressly preempted by Section 3702(1), Section 3702(2) would prohibit private parties from conducting the schemes the law purported to authorize. Here, for example, even if the 2014 Act were not preempted by Section 3702(1), "[Section] 3702(2) would still plainly render the [2014 Act] inoperative by prohibiting private parties from engaging in gambling schemes pursuant to

that authority." *Christie I*, 730 F.3d at 236 (discussing the 2012 Act).

2. New Jersey's contrary arguments are wholly unpersuasive. First, New Jersey asserts (Br. 56) that Congress would not have wanted to prohibit private parties from conducting sports-gambling pursuant to state law if it could not prohibit States from authorizing them to do so. That is like saying that without suspenders, there is no need for a belt. Congress prevented state-authorized sports gambling by both preempting state authorizations (Section 3702(1)) and prohibiting the underlying private conduct (Section 3702(2)). Without the former, the latter becomes even more important to achieving Congress's obvious objective.

Second, New Jersey contends (Br. 54-55) that if Congress had known it could not bar States from authorizing private sports-gambling schemes, it would not have prohibited States from licensing those schemes to ensure they are "responsibly operated." But Section 3702(2) independently prohibits private parties from operating sports-gambling schemes pursuant to a State's authorization. Congress had good reason to preempt state laws purporting to license the schemes it had independently prohibited private parties from operating.

Finally, New Jersey asserts (Br. 54-55) that Section 3702(1)'s prohibition on state-run schemes is merely "ancillary" to the prohibition on authorizing private schemes. In fact, stopping the spread of state-run schemes like "sports lotteries" was one of Congress's primary goals. Senate Report 8; see *id.* at 5, 7.

B. Section 3702(1)'s Prohibition On State Laws That "License" Sports-Gambling Schemes Independently Preempts The 2014 Act

1. Throughout this litigation, respondents and the government have argued that the 2014 Act impermissibly "license[s]" sports gambling by allowing it only at state-licensed facilities. Gov't Cert. Amicus Br. 17; Gov't C.A. Br. 10-13. The Act plainly does so: it repeals New Jersey's general prohibitions on sports gambling only "to the extent they apply" at casinos and racetracks. 2014 Act § 1. Under New Jersey law, the operators of casinos and racetracks must hold state gambling licenses. N.J. Stat. Ann. §§ 5:5-50 (West 2010), 5:12-96 (West Supp. 2011). The State has thus "license[d]" those facilities to conduct sports-gambling schemes along with their other state-licensed gambling operations. The court of appeals did not reach that argument because it held that the 2014 Act is preempted by Section 3702(1)'s prohibition on "authoriz[ations] by law." Pet. App. 16a n.7. But because it is severable, Section 3702(1)'s independent prohibition on state laws that "license" sports gambling provides a ready alternative ground for affirmance.

2. Petitioners have never identified any sound reason to question that conclusion. First, petitioners have argued (N.J. C.A. Br. 43-44) that, as a formal matter, the licenses held by casinos and racetracks are for other gambling, not sports betting. But when a State issues licenses to engage in particular activities and then allows licensed facilities (and only licensed facilities) to engage in additional, closely related activities, it is simply enlarging the existing licenses.

Second, petitioners have observed (N.J. C.A. Br. 44-45) that state gambling licenses are issued to entities

(casino and racetrack operators), whereas the 2014 Act applies to venues (casino and racetrack sites). But PASPA establishes a general bar on licensing "[sports] betting, gambling, or wagering scheme[s]." 28 U.S.C. 3702. That language does not draw any distinction between licensing entities and licensing venues.

Third, petitioners have asserted that the 2014 Act authorizes sports gambling at two "former racetrack" sites, one of which is now a shopping mall. 2014 Act § 1; see NJTHA Br. 12. But the inclusion of those sites does not alter the analysis. The 2014 Act permits sports gambling at a racetrack if "the operator of the * * * racetrack" consents. 2014 Act § 1. It is far from clear what entity, if any, could qualify as the "operator" of a defunct racetrack that is now a shopping mall. But even if the 2014 Act could be construed to permit sports gambling at such a site, New Jersey still has granted a special right to conduct sports-gambling schemes on a group consisting almost exclusively of entities that hold state licenses to conduct other gambling. That is manifestly a licensing scheme, and New Jersey cannot end-run Section 3702(1) merely by including two previously licensed sites.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 3701 provides:

Definitions

For purposes of this chapter—

(1) the term "amateur sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

2. 28 U.S.C. 3702 provides:

Unlawful sports gambling

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

3. 28 U.S.C. 3703 provides:

Injunctions

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of

the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

4. 28 U.S.C. 3704 provides:

Applicability

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1),

conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

5. S. 2460, 216th Leg. (N.J. 2014) provides:

AN ACT partially repealing the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events, deleting a portion of P.L.1977, c.110, and repealing sections 1 through 6 of P.L.2011, c.231.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) The provisions of chapter 37 of Title 2C of the New Jersey Statutes, chapter 40 of Title 2A of the New Jersey Statutes, chapter 5 of Title 5 of the Revised Statutes, and P.L.1977, c.110 (C.5:12-1

et seq.), as amended and supplemented, and any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such location or to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older situated at such location, provided that the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.

As used in this act, P.L. , c. (C.) (pending before the Legislature as this bill):

"collegiate sport contest or athletic event" shall not include a collegiate sport contest or collegiate athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place; and

"running or harness horse racetrack" means the physical facility where a horse race meeting with parimutuel wagering is conducted and includes any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act, excluding

premises other than those where the racecourse itself was located.

2. (New section) The provisions of this act, P.L. , c. (C.) (pending before the Legislature as this bill), are not intended and shall not be construed as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event but, rather, are intended and shall be construed to repeal State laws and regulations prohibiting and regulating the placement and acceptance, at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such locations.

3. Section 24 of P.L.1977, c.110 (C.5:12-24) is amended to read as follows:

24. "Gross Revenue"—The total of all sums actually received by a casino licensee from gaming operations, [including operation of a sports pool,] less only the total of all sums actually paid out as winnings to patrons; provided, however, that the cash equivalent value of any merchandise or thing of value included in a jackpot or payout shall not be included in the total of all sums paid out as winnings to patrons for purposes of determining gross revenue. "Gross Revenue" shall not include any amount received by a casino from casino simulcasting pursuant to the "Casino Simulcasting Act," P.L.1992, c.19 (C.5:12-191 et al.). (cf: P.L.2011, c.231, s.7)

4. (New section) The provisions of this act, P.L. , c. (C.) (pending before the Legislature as this bill), shall be deemed to be severable, and if any phrase, clause, sentence, word or provision of this act is declared to be unconstitutional, invalid, preempted or inoperative in whole or in part, or the applicability thereof to any person is held invalid, by a court of competent jurisdiction, the remainder of this act shall not thereby be deemed to be unconstitutional, invalid, preempted or inoperative and, to the extent it is not declared unconstitutional, invalid, preempted or inoperative, shall be effectuated and enforced.

5. Sections 1 through 6 of P.L.2011, c.231 (C.5:12A-1 through C.5:12A-6) are repealed.

6. This act shall take effect immediately.

STATEMENT

This bill implements the decision of the United States Court of Appeals for the Third Circuit in *National Collegiate Athletic Association v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013), wherein the court in interpreting the Professional and Amateur Sports Protection Act of 1992 (PASPA), 28 U.S.C. § 3701 *et seq.*, stated that it does "not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." *National Collegiate Athletic Association*, 730 F.3d at 232. The court further stated that "it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or *what the exact contours of the prohibition will be*." *Id.* at 233 (emphasis added). Moreover, the United States in its brief submitted to the Supreme Court of the United States in opposition to petitions for writs of certiorari in the above-referenced case wrote that

"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*." United States Brief to the Supreme Court in Opposition to Petitions for Writs of Certiorari (Nos. 13-967, 13-979, 13-980), dated May 14, 2014, at 11 (emphasis added).