

Nos. 13-967, 13-979 and 13-980

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**In the Supreme Court of the United States**

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CHRIS CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL.,  
PETITIONERS

*v.*

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

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

*v.*

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

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STEPHEN M. SWEENEY, PRESIDENT OF THE  
NEW JERSEY SENATE, ET AL., PETITIONERS

*v.*

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

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.*, prohibits States and other governmental entities from, among other things, “licens[ing], or authoriz[ing] by law or compact,” gambling on sporting events. 28 U.S.C. 3702(1). PASPA also prohibits persons from sponsoring, operating, advertising, or promoting sports gambling schemes pursuant to state law. 28 U.S.C. 3702(2). PASPA exempts state-sponsored sports gambling schemes in four States that were already in operation at the time of PASPA’s enactment. 28 U.S.C. 3704(a)(1)-(2). The questions presented are:

1. Whether PASPA’s prohibition on state licensing and authorization of sports gambling violates the Tenth Amendment.
2. Whether PASPA’s exemption of pre-existing state-sponsored sports gambling schemes in four States deprives the other 46 States of equal sovereignty.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-82a)<sup>1</sup> is reported at 730 F.3d 208. The opinion of the

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<sup>1</sup> For ease of reference, all Pet. App. citations in this brief will be to the appendix to the petition for a writ of certiorari in No. 13-967.

district court (Pet. App. 83a-136a) is reported at 926 F. Supp. 2d 551.

#### JURISDICTION

The judgment of the court of appeals was entered on September 17, 2013. Petitions for rehearing were denied on November 15, 2013 (Pet. App. 156a-157a). The petitions for writs of certiorari in No. 13-967 and No. 13-979 were filed on February 12, 2014. The petition for a writ of certiorari in No. 13-980 was filed on February 13, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. The Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. 3701 *et seq.*, was enacted in 1992 “to stop the spread of State-sponsored sports gambling and to maintain the integrity” of professional and amateur sports. S. Rep. No. 248, 102d Cong., 1st Sess. 4 (1991) (Senate Report). PASPA’s restrictions on state-sponsored sports gambling schemes apply both to the States themselves and to private parties. State and local governments may not “sponsor, operate, advertise, promote, license, or authorize by law or compact,” sports gambling schemes. 28 U.S.C. 3702(1). Private parties are prohibited from sponsoring, operating, advertising, or promoting such schemes pursuant to state or local law or compact. 28 U.S.C. 3702(2). These restrictions apply to any “lottery, sweepstakes, or other betting, gambling, or wagering scheme” that is “based \* \* \* 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.” 28 U.S.C. 3702.



The Attorney General can seek to enjoin violations of PASPA in federal court. See 28 U.S.C. 3703. PASPA also authorizes professional and amateur sports organizations to seek injunctions against violations of PASPA that involve betting on one of their competitive games. See *ibid.*

At the time that PASPA was enacted, state-sponsored sports gambling schemes were already in operation in four States (Delaware, Montana, Nevada, and Oregon). Congress adopted grandfathering provisions that exclude those pre-existing schemes from the general prohibitions of PASPA. See 28 U.S.C. 3704(a)(1)-(2); Senate Report 8; 138 Cong. Rec. S7276 (daily ed. June 2, 1992) (statement of Sen. DeConcini). As explained by the Senate Judiciary Committee, “[a]lthough the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively \* \* \* or to prohibit lawful sports gambling schemes \* \* \* that were in operation when the legislation was introduced.” Senate Report 8. PASPA grandfathers only the particular sports gambling schemes that were in existence when it was enacted, and does not permit the introduction of other sports gambling schemes in those States. See *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293, 301-304 (3d Cir. 2009) (finding that 28 U.S.C. 3704(a)(1) does not permit the Delaware lottery to offer betting on National Basketball Association games because the lottery did not offer such betting when PASPA was enacted), cert. denied, 559 U.S. 1106 (2010).

In addition, PASPA offered an exception for any casino-based sports gambling scheme that was authorized by a State within one year of PASPA’s effective

date. 28 U.S.C. 3704(a)(3). That exception was subject to conditions that effectively confined it to New Jersey.<sup>2</sup> However, New Jersey chose not to establish state-sponsored sports gambling within the time permitted under that exception. See *In re Petition of Casino Licensees for Approval of a New Game, Rulemaking and Authorization of a Test*, 633 A.2d 1050, 1051 (N.J. Super. Ct. App. Div.), *aff'd*, 647 A.2d 454 (N.J. 1993) (*per curiam*). As a result, New Jersey is subject to PASPA's general restrictions on state-sponsored sports gambling.

2. In 2011, New Jersey amended its constitution to permit the legislature to “authorize” wagering “on the results of any professional, college, or amateur sport or athletic event” at casinos and racetracks throughout the State. See N.J. Const. Art. 4, § 7, Para. 2(D)-(E). That new constitutional provision retains prohibitions on gambling “on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.” *Id.* § 7, Para. 2(D).

The New Jersey Legislature then enacted the Sports Wagering Law, which authorizes “wagering at casinos and racetracks on the results of certain professional or collegiate sports or athletic events.” 2011 N.J. Laws 1723. To implement that statute, New Jersey promulgated regulations setting forth the

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<sup>2</sup> The exception was available only if casino gambling had been in operation in a State for the preceding ten years and had been confined to a single municipality in the State. 28 U.S.C. 3704(a)(3)(A)-(B). New Jersey was the only State that could satisfy those conditions. See 138 Cong. Rec. at S7280 (statement of Sen. Grassley) (recognizing New Jersey to be the only eligible State).

procedures by which Atlantic City casinos and race-tracks throughout New Jersey could obtain licenses and conduct sports gambling. See N.J. Admin. Code § 13:69N (2014). As a result of those constitutional, statutory, and regulatory provisions, sports gambling in New Jersey may be authorized and conducted only pursuant to a state-issued license. See N.J. Stat. Ann. § 5:12A-2 (West 2012).

3. a. In August 2012, before New Jersey issued any license for sports gambling, respondent sports organizations brought suit against the Governor and other state officials under PASPA. The sports organizations contended that, as a matter of law, New Jersey's efforts to authorize and license sports gambling schemes violate PASPA. Pet. App. 139a-140a.

In response, petitioners raised numerous constitutional challenges to PASPA. First, they asserted that PASPA's regulation of sports gambling exceeds Congress's power under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3. Second, they claimed that 28 U.S.C. 3702(1), which prohibits States from licensing or authorizing sports gambling by law or compact, violates the Tenth Amendment anti-commandeering principle recognized by this Court in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). Third, they argued that 28 U.S.C. 3704(a)(1)-(2), which grandfathered pre-existing state-authorized sports gambling schemes in four states, deprives the 46 other states of equal sovereignty. Finally, they argued that the grandfather provisions violate the Due Process Clause of the Fifth Amendment. Following the assertion of those defenses, the United States intervened to defend the consti-

tutionality of PASPA pursuant to 28 U.S.C. 2403. See Pet. App. 87a; see also *id.* at 93a-133a.

The district court rejected all of petitioners' constitutional claims. See Pet. App. 83a-136a. The court found that PASPA is a constitutionally permissible exercise of Congress's Commerce Clause authority. *Id.* at 93a-101a. The court further concluded that PASPA does not offend anti-commandeering principles because it does not obligate state governments to adopt, enforce, or administer federal law, but instead merely prohibits them from sponsoring sports gambling. *Id.* at 101a-125a. The court also held that PASPA's grandfather provisions do not offend principles of equal sovereignty or the equal protection component of the Due Process Clause. *Id.* at 125a-133a. The court accordingly entered judgment in favor of the sports organizations, enjoining the New Jersey defendants from implementing the state-sponsored sports wagering initiative. *Id.* at 136a.

b. The court of appeals affirmed. Pet. App. 1a-59a.

After determining that the sporting organizations had Article III standing (Pet. App. 11a-24a), the court of appeals addressed petitioners' constitutional defenses. The court began by rejecting the claim that PASPA's restrictions on state-sponsored sports gambling exceed Congress's commerce power. The court reasoned that organized sporting contests such as those conducted by the sporting organizations are economic activities with substantial effects on interstate commerce, as is wagering on those contests, and that prohibiting states from licensing sports wagering

is a rational means of regulating commerce in this area. *Id.* at 25a-30a.<sup>3</sup>

The court of appeals also rejected petitioners' claim that PASPA violates the Tenth Amendment's commandeering prohibition. Pet. App. 30a-53a. The majority first noted that because PASPA is a valid exercise of Congress's Commerce Clause power, it renders conflicting state laws invalid under the Supremacy Clause. The court also explained that the preemption of state laws via the Supremacy Clause does not constitute impermissible commandeering. *Id.* at 37a (A "[S]tate's sovereignty is [not] violated when it is precluded from following a policy different than that set forth by federal law.").

The court of appeals then compared the prohibition on state licensing and authorization of sports gambling in 28 U.S.C. 3702(1) with the federal statutory provisions invalidated on anti-commandeering grounds in *New York* and *Printz*. Pet. App. 39a-46a. The court noted that the laws in *New York* and *Printz* obligated state governments to take affirmative actions in support of the federal regulatory schemes. By contrast, 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." *Id.* at 39a.

The court of appeals found it "hard to see how Congress can 'commandeer' a state, or how it can be found to regulate how a state regulates, if it does not require it to do anything at all." Pet. App. 39a-40a. The court noted that, under this Court's Tenth

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<sup>3</sup> Petitioners do not seek review of this portion of the court of appeals' judgment.

Amendment precedents, “statutes prohibiting the states from taking certain actions have never been struck down,” even when the statutes (unlike PASPA) “require the expenditure of some time and effort or the modification or invalidation of contrary state laws.” *Id.* at 40a (citing *Reno v. Condon*, 528 U.S. 141, 150 (2000), and *South Carolina v. Baker*, 485 U.S. 505, 515 (1988)).

The court of appeals rejected petitioners’ contention that Section 3702(1) affirmatively obligates States to enact and maintain laws banning sports gambling. The court explained that the mere absence of state prohibitions on sports gambling does not constitute “authoriz[ing]” gambling “by law or compact,” 28 U.S.C. 3702(1), and hence PASPA leaves States free to repeal their laws prohibiting sports gambling if they wish. Pet. App. 40a-43a.

The court of appeals acknowledged the concern that affirmative federal obligations on States could be disguised as conditional prohibitions—for example, by recasting the background-check requirement in *Printz* as a rule prohibiting States from issuing handgun permits unless state officials perform background checks. Pet. App. 43a. But the court pointed out that the specter of an affirmative mandate masquerading as a conditional prohibition was irrelevant in this case, because PASPA’s prohibition on state authorization and licensing of sports gambling is an unconditional one, which “simply bars certain acts under any and all circumstances.” *Ibid.*

The court of appeals also noted that, independent of Section 3702(1)’s restrictions on state licensing and authorization, Section 3702(2) prohibits individuals from engaging in sports gambling schemes pursuant

to state law. Pet. App. 49a. Thus, “even if the provision that offends New Jersey, [Section] 3702(1), were excised from PASPA, [Section] 3702(2) would still plainly render the Sports Wagering Law inoperative by prohibiting private parties from engaging in gambling schemes pursuant to that authority.” *Ibid.* The court reasoned that Section 3702(2) thus has an independent preemptive effect on the New Jersey gambling law. *Ibid.*

Finally, the court of appeals rejected petitioners’ equal sovereignty challenge. Pet. App. 53a-56a. The court declined to invalidate PASPA simply because the grandfather clauses permit state-sponsored sports wagering in four States. The court questioned the applicability of the equal sovereignty concept to Commerce Clause legislation, but held that even if that doctrine were applicable, PASPA’s prohibitions were “*precisely tailored*” to Congress’s goal of preventing the expansion of state-sponsored sports wagering. *Id.* at 54a-56a.

Judge Vanaskie dissented. He disagreed with the panel majority’s anti-commandeering analysis, but agreed with the majority in all other respects. Pet. App. 60a-82a.

#### ARGUMENT

The court of appeals held that Section 3702(1) of PAFSA, which bars States from licensing and authorizing sports gambling schemes, violates neither the anti-commandeering principle of the Tenth Amendment nor principles of equal sovereignty. That decision is correct and does not conflict with any decision of this Court or any other court of appeals. And because PASPA independently prohibits private parties from conducting state-authorized sports gambling

schemes, New Jersey’s casinos and racetracks may not lawfully engage in sports betting regardless of how the constitutionality of Section 3702(1) is resolved. Further review is not warranted.

1. a. 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). On only two occasions, in *New York v. United States*, 505 U.S. 144 (1992), and in *Printz*, has this Court held federal statutory provisions to offend this rule against commandeering the machinery of state governments. See *Reno v. Condon*, 528 U.S. 141, 149-151 (2000) (rejecting such a challenge).

As the court of appeals recognized (Pet. App. 39a-46a), the statutory provision at issue in this case differs fundamentally from the provisions invalidated on anti-commandeering grounds in *New York* and *Printz*. In *New York*, the “take title” provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Nuclear Waste Policy Act), 42 U.S.C. 20216 *et seq.*, obligated States either to take ownership and possession of nuclear waste and assume liability for the operators’ damages, or to regulate the waste in accordance with Congress’s instructions. 505 U.S. at 153-154, 175-76. In *Printz*, the Brady Handgun Violence Prevention Act (Brady Act), Pub. L. No. 103-159, 107 Stat. 1536, obligated state law-enforcement officers to conduct background checks in connection with the transfer of handguns. 521 U.S. at 903. Thus, the statutes at issue in those cases turned the States into involuntary agents of the federal government, forcing them to enact federally prescribed legislation



or execute federal law, and expend state funds in the implementation of federal regulatory programs.

In contrast, PASPA does not obligate States to enact any law or to implement or administer any federal regulatory requirement. Indeed, PASPA does not require States to do anything. New Jersey was able to comply with PASPA for more than 20 years without taking any legislative or administrative action and without expending any resources. 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. Pet. App. 41a-43a. The court of appeals was therefore correct to hold that PASPA does not commandeer the governmental machinery of New Jersey, or any other State, in any way.

Petitioners concede that *New York* and *Printz* “involved affirmative commands to the States,” but they assert that those decisions establish a far broader rule, under which Congress may not enact legislation that restricts a State's ability to license or otherwise affirmatively authorize private conduct. 13-967 Pet. 15, 20. That reading of *New York* and *Printz* is belied by the Court's express formulation of its anti-commandeering holdings in *Printz*:

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivi-

sions, to administer or enforce a federal regulatory program.

521 U.S. at 935; see also *id.* at 918 (examining whether the Brady Act required “the forced participation of the States’ executive in the actual administration of a federal program”). Thus, this Court itself has framed the anti-commandeering principle as a restraint on Congress’s power to require States affirmatively to “enact or enforce” federally prescribed regulatory requirements.

This Court’s subsequent decision in *Condon, supra*, confirms the limits of the anti-commandeering principle and illustrates why PASPA does not run afoul of that principle. See Pet. App. 33a-34a, 46a-47a. In *Condon*, South Carolina challenged the constitutionality of the Driver’s Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721 *et seq.*, which prohibits States from selling personal information obtained in connection with a motor vehicle record. 528 U.S. at 143. In rejecting South Carolina’s anti-commandeering claim, the Court explained that “the DPPA does not require the States in their sovereign capacity to regulate their own citizens,” “does not require the South Carolina Legislature to enact any laws or regulations,” and “does not require state officials to assist in the enforcement of federal statutes regulating private individuals.” *Id.* at 151. The Court in *Condon* “accordingly conclude[d] that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.” *Ibid.*

Likewise here, PASPA does not require the States to regulate their own citizens, does not require them to enact any laws or regulations, and does not require state officials to assist in the enforcement of federal

laws.<sup>4</sup> It is therefore just as “consistent with the constitutional principles enunciated in *New York* and *Printz*” as the law upheld in *Condon*. See 528 U.S. at 151

Petitioners suggest that the Third Circuit’s reasoning would permit Congress to recast impermissible commands to State legislatures as conditional prohibitions—for example, by prohibiting a State from licensing particular private activity except in conformity with federal conditions, thereby effectively compelling the State to conform its licensing requirements to federally imposed terms. 13-967 Pet. 27-28. But as the court of appeals pointed out, PASPA does nothing of the sort. Pet. App. 43a. It does not prohibit States from licensing sports gambling unless they do so in accordance with federally prescribed standards. Instead, it flatly prohibits state licensing and authorization of sports gambling. See *ibid.* (PASPA “simply bars certain acts under any and all circumstances”).<sup>5</sup>

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<sup>4</sup> Petitioners attempt to distinguish *Condon* on the ground that South Carolina there was acting as a market participant, not as a sovereign. 13-967 Pet. 21. But *Condon* addressed South Carolina’s status as a market participant not in response to the State’s anti-commandeering claim, but in response to a different constitutional objection—namely, the claim “that the DPPA is unconstitutional because it regulates the States exclusively.” 528 U.S. at 151. To the extent that States undertake to act as market participants in sports gambling schemes, the restrictions that apply to them under PASPA are equally applicable to private parties. Compare 28 U.S.C. 3702(1) (unlawful for “governmental entity to sponsor, operate, advertise, [or] promote” sports gambling), with 28 U.S.C. 3702(2) (same prohibition for private parties). New Jersey has not contended that the Tenth Amendment immunizes States from federal laws that regulate them as market participants.

<sup>5</sup> Of course, this Court has sustained Congress’s power to enact a statute under which a State may choose to adopt regulations

The court of appeals therefore was not called on to decide whether, or in what circumstances, the Tenth Amendment’s anti-commandeering principle might be offended by conditional federal restrictions. Indeed, the court emphasized that it “t[ook] seriously the argument that many affirmative commands can be easily recast as prohibitions,” and declared that “[t]he anti-commandeering principle may not be circumvented so easily.” Pet. App. 43a. Thus, neither the court of appeals’ decision nor PASPA itself provides an occasion for this Court to address the constitutionality of the kinds of conditional prohibitions hypothesized by petitioners.

b. Section 3702(1) of PASPA does subject States to a limitation on their legislative and administrative authority: it prohibits States from licensing or “authoriz[ing] by law or compact” any sports gambling scheme. But there is nothing constitutionally suspect about federal legislation that disables a State from enacting or implementing a particular regulatory program. The constitutionality of such legislation follows directly from the Supremacy Clause, which makes a federal law enacted pursuant to the Constitution “the supreme Law of the Land” and requires inconsistent state laws to give way. U.S. Const. Art. VI, Cl. 2. By virtue of the Supremacy Clause, the federal government, acting within the scope of its enumerated powers, is free to enact laws that preclude States from enacting and implementing otherwise permissible legislation. See *Gregory v. Ashcroft*, 501 U.S. 452, 460

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satisfying federal standards and the federal government will assume regulatory responsibility if the State chooses not to do so. See *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288-289 (1981).

(1991) (“As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.”).

Nor is there anything novel or constitutionally suspect about federal legislation that, like Section 3702(1), operates by expressly prohibiting States from enacting particular laws. See, *e.g.*, 15 U.S.C. 376a(e)(5)(A) (“No State, local, or tribal government, nor any political authority of 2 or more State, local, or tribal governments, may enact or enforce any law or regulation” placing specified restrictions on delivery of “cigarettes or smokeless tobacco” by common carriers.); 23 U.S.C. 102(a) (“No State or political subdivision of a State may enact or enforce a law” whose “principal purpose” is to restrict access of motorcycles to federally funded highways.); 23 U.S.C. 127(b) (“No State may enact or enforce any law denying reasonable access” of trucks “to and from the Interstate Highway System to terminals and facilities for food, fuel, repairs, and rest.”); 49 U.S.C. 508(c) (“No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law” prohibiting, penalizing, or imposing “liability for furnishing or using” driver “safety performance records in accordance with” federal regulations.).

In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), this Court was presented with one such federal statute, which “expressly pre-empts the States from ‘enact[ing] or enforce[ing] any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier.’” *Id.* at 383 (quoting 49 U.S.C. App. 1305(a)(1) (1988)) (brackets in original). The Court applied that provision to invalidate state laws

regulating air fare advertising, without suggesting that such an exercise of preemptive authority under the Supremacy Clause might somehow run afoul of the Tenth Amendment. See *id.* at 383-391; see also *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428 (2014) (discussing *Morales*); *American Trucking Ass'ns, Inc. v. City of L.A.*, 133 S. Ct. 2096, 2102 (2013).

Petitioners argue that the Supremacy Clause is irrelevant to the anti-commandeering question because it is not a grant of authority to Congress. 13-967 Pet. 22; 13-980 Pet. 30. That argument misses the point. As the court of appeals held (Pet. App. 25a-30a) and petitioners no longer contest, Congress properly enacted PASPA pursuant to its commerce power. The Supremacy Clause demonstrates that the principles of federalism embodied in the Tenth Amendment are not offended by the enactment of federal legislation supported by one of Congress's enumerated powers that disables a State from pursuing regulatory goals otherwise within the State's competence. As the court of appeals pointed out, "[t]he import of [petitioners'] argument \* \* \* is that impermissible [c]ommandeering may occur even when all a federal law does is supersede state law via the Supremacy Clause." *Id.* at 31a. The court of appeals properly rejected that proposition.

Petitioners acknowledge that the federal government may divest state legislatures of the power to regulate in an entire field without thereby running afoul of the anti-commandeering principle. But they suggest that Congress may do so only when it undertakes to impose its own regulatory requirements on the field. 13-967 Pet. 25; 13-979 Pet. 16, 22. Petition-

ers cite no authority for such a limitation on federal preemption. If Congress wishes to do so, it is free to preempt state regulation precisely in order to leave an area unregulated. But in any event, PASPA does not merely limit the regulatory reach of the States; it directly regulates private conduct as well, by prohibiting “person[s]” from sponsoring, operating, advertising, or promoting, “pursuant to the law or compact of a governmental entity,” sports gambling schemes. 28 U.S.C. 3702(2).

c. Petitioners claim that Section 3702(1) poses the kind of concerns regarding political accountability that animated this Court’s decisions in *New York* and *Printz*. 13-967 Pet. 18-19; 13-980 Pet. 26-27. But the federal laws at issue in *New York* and *Printz* created the risk that legislative and executive actions undertaken by a State at the direction of the federal government would be misunderstood to be the product of the State’s own policy choices, while the federal government itself would escape accountability for the burdens of its regulatory programs by hiding behind the States. See *New York*, 505 U.S. at 168-169; *Printz*, 521 U.S. at 930.

Section 3702(1) does not pose those risks. There is no risk that the electorate will blame state legislators and officers for enacting or enforcing unpopular legislation, because PASPA does not require the States to take any legislative or executive action at all. If voters wonder why a State is not licensing or otherwise affirmatively authorizing sports gambling, they need look no further than PASPA’s explicit prohibitions, the clarity of which petitioners do not dispute. The risk of confusion regarding the reasons for a State’s failure to act is no greater here than it is when federal

law has preemptive force in a field of activity, preventing States from enacting legislation on a particular subject matter. In both instances, “it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.” *New York*, 505 U.S. at 168.<sup>6</sup>

d. Petitioners’ anti-commandeering claim is directed solely at Section 3702(1), the provision of PASPA that disallows States from authorizing or licensing sports gambling schemes. As noted above, Section 3702(2) of PASPA independently prohibits private parties from conducting sports gambling under a State’s aegis. The existence of that separate prohibition on private action in Section 3702(2) substantially diminishes the practical significance of petitioners’ challenge to the constitutionality of Section 3702(1). For even if the Tenth Amendment did permit New Jersey to authorize and license sports gambling in contravention of Section 3702(1), New Jersey’s casinos and racetracks could not engage in such gambling schemes without violating Section 3702(2). See Pet. App. 49a. Thus, state-sponsored sports betting will be unlawful in New Jersey regardless of how the constitutional challenge in this case is resolved. The fact that PASPA will continue to prohibit private parties from conducting state-sponsored sports gambling under Section 3702(2) militates against further review

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<sup>6</sup> Indeed, the risk is even smaller here. The Court has allowed federal legislation to preempt a field even when the legislation contains no express provision to that effect. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2501-2503 (2012). Here, the reason for the State’s inaction is plain on the face of the federal law.



of the court of appeals' decision regarding the constitutionality of Section 3702(1).

Petitioners suggest briefly that if Congress may not constitutionally prohibit States from authorizing sports gambling schemes under Section 3702(1), it follows that Congress may not prohibit private parties from engaging in state-authorized gambling under Section 3702(2). 13-967 Pet. 26-27. That suggestion is a non sequitur. While the Tenth Amendment limits the capacity of the federal government to regulate the States themselves, it does not “shield[] the States from pre-emptive federal regulation of *private* activities affecting interstate commerce.” *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 291 (1981). Congress is perfectly free to prohibit private parties from engaging in commercial activities that the States have chosen to authorize. See *id.* at 289-291. Nothing in *New York* or *Printz* suggests otherwise.<sup>7</sup>

2. Petitioners also renew their contention that PASPA violates principles of equal sovereignty by grandfathering sports gambling schemes already in existence when PASPA was enacted. 13-967 Pet. 31-

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<sup>7</sup> Nor could petitioners colorably argue that Section 3702(1) is not severable from the rest of PASPA. Even in the absence of Section 3702(1), PASPA would continue to accomplish Congress’s underlying goal of preventing the expansion of state-sponsored sports gambling. Cf. *New York*, 505 U.S. at 186-187 (holding take-title provision of Nuclear Waste Policy Act to be severable because “[t]he Act is still operative and it still serves Congress’ objective” without the provision). And there is no evidence that Congress would have preferred to allow the wholesale expansion of state-sponsored sports betting throughout the United States in the absence of that provision.

34; 13-979 Pet. 31-41. The court of appeals correctly rejected that contention. Pet. App. 53a-58a.

Petitioners ground their equal sovereignty claim primarily in this Court’s recent decisions in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009) (*Northwest Austin*), and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). But *Northwest Austin* and *Shelby County* involve “sensitive areas of state and local policymaking,” and Congress was legislating in an area that “the Framers of the Constitution intended the States to keep for themselves”—“the power to regulate elections.” *Shelby Cnty.*, 133 S. Ct. at 2623-2624 (citation omitted). As the court of appeals pointed out (Pet. App. 54a-55a), concerns for federal intrusion into state prerogatives have less salience where, as here, Congress is exercising the quintessentially federal power of regulating interstate commerce. While the Constitution expressly prescribes geographic uniformity in the exercise of certain legislative powers, the Commerce Clause is not among them. See *Curriu v. Wallace*, 306 U.S. 1, 14 (1939) (“There is no requirement of uniformity in connection with the commerce power \* \* \* such as there is with respect to the power to lay duties, imposts and excises.”); see also *Hodel v. Indiana*, 452 U.S. 314, 332 (1981) (“A claim of arbitrariness cannot rest solely on a statute’s lack of uniform geographic impact.”); *Secretary of Agric. v. Central Roig Ref. Co.*, 338 U.S. 604, 616 (1950) (Under the Commerce Clause, Congress may devise “a national policy with due regard for the varying and fluctuating interests of different regions.”).<sup>8</sup>

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<sup>8</sup> Even in areas (unlike interstate commerce) where the Constitution does include a geographic uniformity requirement, the

Consistent with that principle, other legislation under the Commerce Clause has effectuated different treatment among the States. For instance, a provision in the Clean Air Act, 42 U.S.C. 7401 *et seq.*, has the effect of exempting only California from its preemption provisions regarding vehicle emission standards. See 42 U.S.C. 7543(b); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. New York State Dep't of Env'tl. Conservation*, 810 F. Supp. 1331, 1337-1338 (N.D.N.Y. 1993). Similarly, the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, exempts only Hawaii from its preemption provisions. See 29 U.S.C. 1144(b)(5). It is also routine for Congress to differentiate between or among States through long-standing and deep-rooted legislative practices such as the targeting of pilot programs and certain appropriations to particular States.<sup>9</sup>

Moreover, even in the uniquely sensitive sphere of state voting laws, *Northwest Austin* and *Shelby County* did not suggest that federal legislation may not distinguish among States. To the contrary, *Shelby Coun-*

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Court has held that “geographically defined classifications” are permitted, so long as there is not “actual geographic discrimination.” *United States v. Ptasynski*, 462 U.S. 74, 84-85 (1983) (discussing the Uniformity Clause in Art. I, § 8, Cl. 1).

<sup>9</sup> Pilot programs and targeted appropriations can be done on a State-by-State basis. For example a recent program by the United States Department of Health and Human Services allowed pilot projects for at least three States related to chronic kidney disease. See 42 U.S.C. 280g-6 (Supp. V 2011). Similarly, funds have been appropriated only to certain States. See, *e.g.*, Office of Mgmt. & Budget, *List of Agencies in New Jersey*, <http://earmarks.omb.gov/earmarks-public/2009-appropriations-by-state/state-title/NEW%20JERSEY.html> (reporting designated appropriations to New Jersey for 2009) (last visited May 12, 2014).

*ty* reiterated that principles of equal sovereignty do not “operate[] as a *bar* on differential treatment” of States. 133 S. Ct. at 2624. Rather, with respect to Section 4 of the Voting Rights Act of 1965, the Court in *Shelby County* discerned no sufficient relationship between Section 4’s coverage criteria and the relevant burdens imposed by the Act. See, *e.g.*, *id.* at 2629 (coverage formula has “no logical relation” to current conditions”); *id.* at 2628 (“the failure to establish even relevance is fatal”). Thus, it was not the fact that Section 4 differentiated among States that ran afoul of the Constitution but instead the criteria on which such differentiation was based.

Here, in contrast, the relationship between the statutory exceptions and Congress’s underlying statutory goals is obvious and manifestly rational. The sports gambling schemes sanctioned by 28 U.S.C. 3704(a)(1) and (2) are those, and only those, that were already in operation when PASPA was enacted. See p. 3, *supra*. Congress thus balanced its desire to minimize the social and economic costs associated with state-sponsored sports gambling against the significant reliance interests of the few States where such gambling was already in operation.<sup>10</sup> Congress was under no constitutional obligation to ignore those reliance interests. The Court has recognized in a variety of constitutional contexts that “[t]he protec-

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<sup>10</sup> It is noteworthy in this regard that PASPA does not permit any of the States in which sports gambling was already taking place to authorize or license new sports gambling schemes in the future. See p. 3, *supra*. The line drawn by PASPA’s grandfathering provisions is thus not a line between favored and disfavored States, but rather a line between one class of sports gambling schemes (those already in existence) and another (future ones).

tion of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification.” *Nordlinger v. Hahn*, 505 U.S. 1, 13-14 & n.4 (1992) (quoting *Heckler v. Mathews*, 465 U.S. 728, 746 (1984)). Thus, the court of appeals correctly held that, even if the principles relied on by this Court in *Northwest Austin* and *Shelby County* extend beyond the particular sphere of local voting laws to the inherently federal sphere of interstate commerce, PASPA’s distinction between the maintenance of pre-existing sports gambling schemes in four States and the introduction of new ones throughout the country does not run afoul of those principles.<sup>11</sup>

Petitioners also suggest that the grandfathering provisions of PASPA are inconsistent with this Court’s decision in *Coyle v. Smith*, 221 U.S. 559 (1911). 13-967 Pet. 20. In *Coyle*, the Court invalidated a federal law that conditioned Oklahoma’s admission to the Union on the State’s commitment not to relocate its capital for a period of time following its admission. 221 U.S. at 562-563. That legislation ran afoul of the deeply rooted equal footing doctrine, under which Congress may not impair the “fundamental attributes of state sovereignty when it admits new States into the Union.” *Minnesota v. Mille Lacs Band of Chippewa*

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<sup>11</sup> We note that New Jersey itself drew a geographical distinction when it amended its own Constitution to remove the prior prohibition on sports gambling. As amended, New Jersey’s constitution continues to prohibit wagering “on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.” N.J. Const. Art. 4, § 7, Para. 2(D).

*Indians*, 526 U.S. 172, 204-205 (1999). That doctrine has no application to PASPA.

Finally, petitioners are not in a good position to complain that PASPA is discriminatory in that New Jersey was uniquely *advantaged* by the statute. As noted above, New Jersey was the only State permitted by PASPA to authorize new sports gambling after PASPA's enactment. See pp. 3-4, *supra*. New Jersey's free choice not to avail itself of that opportunity within the time offered should not now provide a basis for a claim of discriminatory treatment.

#### CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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