Nos. 16-476, 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.,
Respondents.

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

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION, COMPETITIVE ENTERPRISE INSTITUTE, CATO INSTITUTE, AND WISCONSIN INSTITUTE FOR LAW & LIBERTY IN SUPPORT OF PETITIONERS

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Question Presented

Is it constitutionally sporting for Congress to tell states what laws they can and cannot repeal?

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Interest of Amici

Pacific Legal Foundation (PLF), Competitive Enterprise Institute (CEI), Cato Institute (Cato), and Wisconsin Institute for Law and Liberty respectfully submit this brief amicus curiae in support of Petitioners, Governor Christopher Christie, David L. Rebuck, Frank Zanzuccki, New Jersey Thoroughbred Horsemen's Association, Inc, and New Jersey Sports & Exposition Authority.[1]

Founded in 1973, PLF defends limited government, property rights, and free enterprise in courts nationwide. PLF has extensive experience litigating constitutional and free enterprise issues as counsel and amicus curiae in this Court. *See, e.g., Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Friedrichs v. Cal. Teachers Ass'n*, 136 S. Ct. 1083 (2016) (mem.); *Christie v. N.C.A.A.*, 134 S. Ct. 2866 (*cert. denied* June 3, 2014); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

CEI is a nonprofit 501(c)(3) organization incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation. In the last decade, it has been extensively involved in the issue of federal gambling regulation, producing

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[1] Rule 37 statement: *Amici* have obtained the consent of all parties to file this brief. Letters evidencing such consent have been filed with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* funded its preparation or submission.

numerous studies and op-eds, and submitting testimony to congressional committees—all aimed at enhancing consumer freedom and reducing the prevalence of black markets.

Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

Through education, litigation, and participation in public discourse, the Wisconsin Institute for Law & Liberty (WILL) seeks to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society. Because these goals are undermined by the dissolving separation of powers among the branches of the federal government and among the federal and state governments, WILL operates the Center for Competitive Federalism, which seeks to advance the competitive federalism envisioned by our founders that respects the separate spheres of the federal and state governments and the limits imposed by our constitutional structure on both of them.

This case is of central concern to amici because the anti-commandeering doctrine is essential to preserving federalism and thereby individual liberty.

Introduction and Summary of Argument

"[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to [its] instructions." *New York v. United States*, 505 U.S. 144, 162 (1992). Yet the federal Professional and Amateur Sports Protection Act (PASPA) dictates what states' own sports betting laws shall be. *See* 28 U.S.C. § 3702 (forbidding states from "authoriz[ing]" sports betting "by law"). The Constitution forbids Congress from commandeering the states whether by compelling them to enact a new policy or to continue enforcing an existing one long after it has proven ineffective, unpopular, or both. *New York*, 505 U.S. at 162.

That the states voluntarily adopted the sports betting bans that PASPA now compels them to maintain is irrelevant. Today, New Jersey officials and voters have no say in the state's own gambling laws. Federal law commands that those laws remain what they were 25 years ago, and state officials must continue to enforce them, because any reform would "authorize" sports betting. That separates this case from Congress' constitutional power to directly regulate individuals and to preempt conflicting state laws. Congress may give states a choice of regulating to federal standards or ceding the issue to federal control. But Congress cannot deny states that choice and simply dictate what their own laws shall be.

Allowing Congress to hijack states' law-making authority to prevent reform would undermine the two primary values underlying the anti-commandeering principle: federalism and political accountability. *New York*, 505 U.S. at 161-69. A loophole in the anti-commandeering principle would frustrate federalism

by allowing Congress to block state experimentation and innovation. And it would reduce political accountability by obscuring the politicians who should be held accountable if a policy proves ineffective, unpopular, or worse. For those reasons, this Court should reverse the Third Circuit and hold that PASPA unconstitutionally commandeers the states.

Argument

I.

The Constitution Forbids the Federal Government from Commandeering States

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). This system, federalism, provides decentralized government "sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* at 458; *see* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987).

A. The Anti-Commandeering Principle Protects Federalism, the Political Process, and Liberty

To preserve federalism, the Constitution forbids Congress from "commandeering" the states, either by requiring states to adopt a policy or by compelling state officials to implement it. *See Printz v. United States*, 521 U.S. 898, 927-28 (1997); *New York*, 505

U.S. at 161; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 288 (1981). This Court has twice struck down federal laws under this principle. In *New York*, it declared unconstitutional a federal law purporting to require states to either regulate nuclear waste disposal according to federal standards or accept possession of it. 505 U.S. at 169-70. And in *Printz*, this Court invalidated a federal law requiring state officials to perform background checks for prospective gun sales. 521 U.S. at 933-35.

Together, these cases establish that states alone set state policy and the federal government sets federal policy; Congress can no more dictate what state policy shall be than the states can dictate policy to Congress. *See id.* at 918-28. Absent this constitutional restraint, the federal government could enlarge its power immeasurably by pressing the states and their officers into service at no cost to itself. *See id*. at 922. That would threaten federalism, the political process, and, most importantly, liberty. *See id*. at 918-28.

Commandeering would threaten federalism by converting states from independent sovereigns into instrumentalities of the federal government. The Framers consciously rejected such a system, after seeing the problems it created under the Articles of Confederation. *See id.* at 919-20; The Federalist No. 15, at 109 (Alexander Hamilton) (J. Cooke ed., 1961). "[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *New York*, 505 U.S. at 166. States cannot be "reduce[d] . . . to puppets of a ventriloquist Congress." *Brown v. E.P.A.*, 521 F.2d 827, 839 (9th Cir. 1975). Preserving state autonomy

from federal encroachment allows states to discover better public policies through experimentation. *See San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973): *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Federal commandeering, on the other hand, threatens to impose one-size-fits-all policies on states and stifle innovation. *See* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1581 (1994) ("To put it bluntly, we need long-term sources of regulatory creativity more than we need short-term efficiency.").

Commandeering also undermines the political process by obscuring the officials who are responsible for a given policy. *See* 505 U.S. at 182-83. If it were permissible, state officials might take the fall for unpopular policies over which they have no control. Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. Rev. 1, 8 (2015). Likewise, federal politicians could claim credit for addressing a serious problem while foisting the difficult questions of how to do so and at what cost onto state officials. *Id.*; *see also* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2201 (1998). "The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).[2]

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[2] Because federalism violations undermine the political process, political safeguards are insufficient to protect federalism on their own. Courts must intervene when the federal government violates the Constitution's structural protections for federalism.

Finally, federal commandeering of states undermines federalism's protection of individual liberty. *Printz*, 521 U.S. at 921; *see also Gregory*, 501 U.S. at 459; The Federalist No. 51, at 323 (James Madison). Although it might seem counterintuitive, "freedom is enhanced by the creation of two governments." *Alden v. Maine*, 527 U.S. 706, 758 (1999). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 564 U.S. 211, 222 (2011). Commandeering, however, encourages further expansion of federal power, by allowing federal officials to avoid the costs and political repercussions of their policy choices. *See Printz*, 521 U.S. at 930. As the federal government grows and state autonomy shrinks, our liberty is diminished.

B. The Federal Government Can Enforce Its Chosen Policies Without Commandeering the States

The anti-commandeering principle does not limit *what* the federal government can do, only *how* it may do it. Consequently, this Court has steadfastly refused to balance the principle against short-term political expediency. "*No matter how powerful the federal interest involved*, the Constitution simply does not give Congress the authority to require the States to

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See Gregory, 501 U.S. at 460-61; John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311, 1404 (1997). "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

regulate." *New York*, 505 U.S. at 178 (emphasis added). "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id*. at 187.

The Court should continue to adhere to that hard line. The federal government has plenty of options to address pressing issues without eroding the Constitution's structural protections. It can directly regulate the activity itself and preempt contrary state regulation. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000). It can give states a choice of cooperating or ceding an area to federal regulation—so-called "conditional preemption." *See New York*, 505 U.S. at 167-68. Or it can use its spending power, under appropriate circumstances, to entice states to cooperate, provided that it does not cross the line between encouraging state participation and coercing it. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578-79 (2012).

This Court has carefully distinguished laws that unconstitutionally commandeer the states from Congress' preemption power. *New York*, 505 U.S. at 160. Preemption is constitutional because "'if a State does not wish'" to participate "'the full regulatory burden will be borne by the Federal Government.'" *Id*. at 161 (quoting *Hodel*, 452 U.S. at 288). Congress can incentivize states to cooperate with it, but states must have the option to decline participation. *See* Ernest Young, *Federalism as a Constitutional Principle*, 83 U. Cin. L. Rev. 1057, 1074 (2015) ("Congress must *persuade*, not command, States to participate in

cooperative federalism schemes."). If the state may withdraw from the issue and let "the full regulatory burden" fall on the federal government, it has not been commandeered. *New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288). If the state does not retain this right, however—if it must embrace some policy chosen by Congress—it has been unconstitutionally commandeered.

II.

Congress Cannot Constitutionally Forbid States from Repealing or Amending Their Own Laws

"[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). Either way, the federal government dictates what state law shall be, leaving states no right to refuse to participate in the federal policy. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 578-79 (interpreting *New York* as recognizing a state right of refusal to participate in any federal scheme). This Court has already rejected the argument that the anti-commandeering principle is limited to when the federal government affirmatively requires a state to enact a new policy. *See Printz*, 521 U.S. at 927-28 (the anti-commandeering principle does not distinguish between a requirement that a state affirmatively enact a policy and a requirement that it implement or enforce one). It should do so again here. A federal power to forbid states from amending or repealing their own laws poses the same federalism and political

accountability problems that have previously concerned this Court.

A. A Federal Power To Prevent States from Reforming Their Own Laws Would Undermine Federalism

Allowing the federal government to forbid states from amending their own laws would undermine federalism by blocking state experimentation and innovation. If many states have similar laws on an issue but one or more of them are considering reform, Congress could simply forbid states from "authorizing" any activity currently forbidden. It is impossible to predict what policy innovations such a regime might sacrifice. But recent state efforts to take advantage of the benefits of federalism give some indication.

For instance, if Congress could forbid states from amending their own laws, the ongoing federalism revolution in marijuana policy may never have happened. Over the last decade, several states have experimented with decriminalizing or legalizing marijuana, notwithstanding the continuing federal criminal prohibition. *See* Erwin Chemerinsky, et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 81-89 (2015). This federalism revolution has only been possible because "the federal government cannot require states to enact *or maintain on the books* any laws prohibiting marijuana." *Id.* at 102-03 (emphasis added); *see* Austin Raynor, *The New State Sovereignty Movement*, 90 Ind. L.J. 613, 626 (2015); Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. Colo. L. Rev. 1105, 1107 (2014).

State-level reform does not bar the federal government from enforcing federal policy, of course. However, the results of state experimentation can inform both the federal government and other states. Many states have followed their neighbors' lead and reformed their laws. *See* Jacob Sullum, *Victories for Eight of Nine Marijuana Initiatives Hasten the Collapse of Prohibition*, Reason.com (Nov. 9, 2016)[3] (voters in eight more states legalized recreational marijuana in the 2016 elections). And Congress has forbade prosecution under federal law of any individual who possesses marijuana pursuant to these state reforms. *See* Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015); *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016) (forbidding federal prosecutions for activity permitted by state law). If the federal government could forbid this reform experiment, states would not have had the breathing room to pursue this effort, depriving other states and the federal government of the benefit of seeing the results of the experiment.

Limiting the anti-commandeering principle to save PASPA would not only threaten marijuana or gambling reform, it could block any sort of state-level reform that federal politicians, rightly or wrongly, may oppose. The federal government could forbid states from authorizing state officials not to participate enforcing federal immigration laws. *See* Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 Yale L. & Pol'y Rev. 87 (2016). Congress could prevent

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[3] http://reason.com/blog/2016/11/09/victories-for-eight-of-nine-marijuana-in.

the further spread of right-to-work laws or, if those laws someday prove unwise, require states to maintain them anyway. *Cf.* Richard Vedder & Jonathan Robe, *The High Cost of Big Labor: An Interstate Analysis of Right to Work Laws*, Competitive Enterprise Institute (2014).[4] It could forbid states from increasing gun control or relaxing existing gun regulations. *See Printz*, 521 U.S. at 933-35. It could forbid states from modifying school curricula or testing requirements. *But see Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). And Congress could block states from altering controversial bathroom policies in light of local debates over social norms. *Cf. G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).

If this Court were to create a loophole in the anti-commandeering principle, it would also likely impact "cooperative federalism" arrangements, in which the federal government and states cooperate to develop and implement a federal policy. *See* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. Envtl. L.J. 179 (2005). In environmental policy, for instance, these arrangements often involve Congress setting a federal standard that states agree to implement. *See* Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1243-50 (1977). These arrangements can themselves be coercive. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 575-89 (Congress can encourage state cooperation but

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[4] *Available at* http://cei.org/sites/default/files/Richard%20Vedder%20and%20Jonathan%20Robe%20-20An%20Interstate%20Analysis%20of%20Right%20to%20Work%20L.

cannot use an inducement so strong that it becomes coercive); Mario Loyola & Rick Esenberg, *Shining a Light on Coercion in Federal "Assistance" to States: A Model Policy for Resisting Federal Coercion*, WILL Report, July 2016.[5] Even if kept within their proper scope, giving Congress free reign to forbid states reforming their own laws would make cooperative federalism arrangements far more treacherous. Any state that voluntarily agreed to cooperate at one time could find itself coerced into enforcing a costly, ineffective, or unpopular policy forever, if Congress forbade subsequent state reform. This would obviously discourage state participation, undermining benefits that can be derived from cooperative federalism.

B. A Federal Power To Forbid State Reform Would Frustrate Political Accountability

A federal prohibition against states amending their own laws poses the same political accountability concerns as a federal requirement that states affirmatively enact a policy. *See New York*, 505 U.S. at 168-69. In either case, federal politicians can ensure the continued enforcement of their preferred policies while avoiding political consequences. *See Printz*, 521 U.S. at 930 ("Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes."). Federal politicians would be shielded from the backlash if the policy proves wrongheaded, unpopular, or too expensive. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88

[5] *Available at* http://www.will-law.org/wp-content/uploads/2016/07/Resist-FInal.pdf.

Colum. L. Rev. 1, 61-62 (1988). Instead, state politicians will suffer the fallout. *See Printz*, 521 U.S. at 930; *see also Three Faces of Federalism*, *supra* at 1580 n.65. These incentive effects are the same whether a state's initial adoption of the policy was voluntary or not.

Accountability would be reduced at the state level also because a federal bar against state reform will neuter the impact of state voters punishing state politicians for existing policies. *See New York*, 505 U.S. at 168-69. State officials should rightly be held accountable for the policies they enact, including when they choose to participate in cooperative federalism arrangements that prove unpopular or unwise. *See id*. at 168. But where a politician has no choice because federal law dictates that a policy must be maintained, any votes cast in disapproval of that policy are wasted. Yet, if a policy is written into state law and enforced by state officials, voters will understandably mistake it as a state policy and vote accordingly. This case furnishes an example: New Jersey voters approved a referendum by an overwhelming 2-to-1 margin calling for the reform of the state's sports gambling laws. *See New Jersey Voters Endorse Making Sports Betting Legal*, Chicago Tribune, Nov. 8, 2011.[6] The voters apparently acted on the mistaken belief that the state had a say in its own laws.

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[6] *Available at* http://articles.chicagotribune.com/2011-11-08/sports/chi-new-jersey-voters-endorse-making-sports-betting-legal-20111108_1_amateur-sports-protection-act-legal-bets-oregon-and-montana.

These accountability concerns should not be dismissed lightly. Although it is easy to presume that voters will recognize when the federal government is dictating policy to states, that presumption rests on a too cheery view of politics. In reality, politics is defined by widespread political ignorance. *See* Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (2013); Frank Bruni, *America the Clueless*, N.Y. Times, May 11, 2013.[7] This ignorance extends to basic civics. A 2006 poll found that only 42 percent of Americans can name all three branches of government established by the Constitution. *See* Ilya Somin, *Political Ignorance in America*, *in The State of the American Mind: 16 Leading Critics on the New Anti-Intellectualism* 163 (2015).[8] Most Americans cannot name a single member of this Court, even though surveys show that an overwhelming majority (more than 90 percent) believe that its decisions affect their daily lives. *See* Robert Green & Adam Rosenblatt, C-Span/PSB Supreme Court Survey (2017).[9]

Pervasive political ignorance is a rational response to incentives and the incomprehensible size of modern government. *See Democracy and Political Ignorance*, *supra* at 61-89. The chances that any one person's vote will impact an election, much less a

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[7] *Available at* http://www.nytimes.com/2013/05/12/opinion/sunday/bruni-america-the-clueless.html.

[8] *Available at* http://www.soamcontest.com/sites/default/files/201603/Somin-%20Political%20Ignorance%20in%20America.pdf.

[9] *Available at* https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%20Supreme%20Court%20Survey%20COMPREHENSIVE%20AGENDA%20sent%2003%2013%2017.pdf.

particular policy issue, is statistically insignificant, roughly the same as being struck by lightning. *See* Andrew Gelman, *What Are the Chances Your Vote Matters?*, Slate (Nov. 7, 2016);[10] National Weather Service, *How Dangerous is Lightning?*, NOAA.gov.[11] In a world where attention is at a premium, anything that blurs which government officials are responsible for a policy reduces voters' ability to hold the responsible officials accountable. Forbidding the federal government from depriving states of a choice in what their own laws are would make the responsibility clearer and improve accountability. If the federal government wishes to see a policy maintained, it must either induce states to participate, subject to political checks, or enforce the policy itself, in which case it faces the political backlash directly.

By preserving political accountability, the anti-commandeering principle aligns government with the preferences of the governed and creates incentives for states to find better, smarter ways to promote the public interest, without necessarily favoring more or less government. Like federalism generally, the anti-commandeering principle favors neither conservative nor liberal results, and should enjoy bipartisan support. *See* Heather K. Gerken, *A New Progressive Federalism*, Democracy (2012);[12] Heather K. Gerken, *Foreword: Federalism All The Way Down*, 124 Harv.

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[10] *Available at* http://www.slate.com/articles/news_and_politics/politics/2016/11/here_are_the_chances_your_vote_matters.html.

[11] *Available at* http://www.lightningsafety.noaa.gov/odds.shtml.

[12] *Available at* http://democracyjournal.org/magazine/24/a_new_progressive_federalism.

L. Rev. 4, 44-55 (2010); Robert D. Alt, *Is Federalism Conservative?*, Nat'l Rev., Apr. 29, 2003.[13] Consequently, all should be concerned about the risks of creating an easily manipulated loophole in this core constitutional protection.

C. PASPA Forces States To Regulate Activity That They Would Prefer To Leave Unregulated

By forbidding states from amending their own sports betting laws, PASPA dictates to states what their own laws must be and, therefore, violates the anti-commandeering principle.

As mentioned above, New Jersey voters have emphatically rejected the state's sports betting ban. For good reason: it has failed. The last 25 years have seen the dramatic growth of the black market for sports betting. *See* Press Release, American Gaming Association, *Americans to Bet $4.2 Billion on Super Bowl 50* (Jan. 27, 2016)[14] (nearly 97 percent of sports bets, worth more than $100 billion are wagered illegally); National Gambling Impact Study Commission, *Final Report* (June 1999)[15] (between $80 billion and $380 billion in illegal sports bets are placed annually). The size of this illegal market also makes it more difficult for states to investigate and prosecute truly bad actors. *See* Dr. David Forrest & Rick Parry, *The Key to Sports Integrity in the United*

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[13] *Available at* http://www.nationalreview.com/article/206732/Federalism-conservative-robert-d-alt.

[14] https://www.americangaming.org/newsroom/press-releases/americans-bet-42-billion-super-bowl-50.

[15] https://babel.hathitrust.org/cgi/pt?id=pur1.32754071462216.

States: Legalized, Regulated Sports Betting (Sept. 27, 2016).[16]

PASPA deprives states of their sovereign power to define their own laws according to their voters' wishes. The Third Circuit's interpretation of "authorize . . . by law" leaves no room for state legislatures or executive officials to change policy. If the legislature's repeal of the sports-betting prohibition at casinos and racetracks violates PASPA, what about an executive enforcement policy that does the same thing? A public enforcement policy that forbids the use of state resources to investigate and punish bets placed at casinos and racetracks has the same effect as the law at issue here. So does legislation or an enforcement policy that focuses on protecting the young, the elderly, and known gambling addicts, or bets placed under circumstances that suggest coercion. Simply put, PASPA compels states to maintain, forever, the sports gambling laws they enforced in 1992. Daniel L. Wallach, *Daily Fantasy Sports and PASPA: How to Assess Whether the State Regulation of Daily Fantasy Sports Contests Violates Federal Law*, *in The Oxford Handbook of American Sports Law* (forthcoming 2017) (explaining that PASPA has created confusion whether states can adopt new regulations for daily fantasy sports).

PASPA is readily distinguishable from a constitutionally permissible preemption statute. Unlike a preemption statute, PASPA announces no federal policy on sports betting. "[T]here is no federal scheme regulating or deregulating sports gambling by

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[16] https://www.americangaming.org/sites/default/files/research-files/FINAL%20SPORTS%20INTEGRITY%20REPORT.pdf.

which to preempt state regulation. PASPA provides no federal regulatory standards or requirements of its own." *See N.C.A.A. v. Governor of New Jersey*, 730 F.3d 208, 247 (3d Cir. 2013) (Vanaskie, J., dissenting).

Instead of announcing a federal standard, and facing the political consequences that would come with it, Congress chose to force states to bear these burdens. This also distinguishes PASPA from a preemption statute. The defining characteristic of preemption statutes is that states retain the option to refuse to participate, at which point enforcement falls to the federal government. *See supra* Part I.B. PASPA denies New Jersey this option. The decision below does not withdraw the state from regulating sports gambling. Instead, it reinstates the rejected state ban, which the state must once again enforce. Under PASPA, the states bear "the full regulatory burden" of prohibiting sports betting, not Congress. *See New York*, 505 U.S. at 161 (quoting *Hodel*, 452 U.S. at 288).

In past commandeering cases, this Court has highlighted the novelty of the statutes at issue. *See Printz*, 521 U.S. at 925. PASPA is also unique in that it regulates the states rather than individuals, and discriminates among them. Congress could not accomplish the result it seeks through PASPA by regulating individuals directly. According to the original meaning of the Commerce Clause, Congress must regulate uniformly among the states. *See* Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 Va. L. Rev. 249, 273 (2005); Nelson Lund, *The Uniformity Clause*, 51 U. Chi. L. Rev. 1193, 1212 (1984). Like the Equal Sovereignty doctrine, it forbids Congress from discriminating among the states as states. *See Shelby*

County, Ala. v. Holder, 133 S. Ct. 2612 (2013) (fundamental principle of equal sovereignty limits Congress' ability to regulate some states differently from others); *see also id.* at 2649 (Ginsburg, J., dissenting) (questioning PASPA's constitutionality under *Shelby County*).

Ultimately, the only thing that distinguishes this case from *New York* is that, more than a quarter century ago, state politicians approved of the sports betting bans that PASPA now compels the states to maintain. From the perspective of present politicians and voters, the impact of PASPA and the law at issue in *New York* is precisely the same. A state's past endorsement of a policy should not change the court's analysis under the anti-commandeering principle. *See New York*, 505 U.S. at 182 ("[T]he departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

Conclusion

Congress cannot command states to adopt or enforce its preferred policy. That's precisely what PASPA does by requiring states to maintain (and thus continue enforcing) sports betting prohibitions long after the states and their voters have rejected them. Allowing Congress to forbid states from reforming their own laws would threaten federalism values and political accountability. Therefore, this Court should reject the invitation to create a loophole in the anti-

commandeering principle, reverse the decision below, and hold that PASPA is unconstitutional.

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Respectfully submitted,

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