Federal Gaming Law

PASPA & SPORTS

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Sports Wagering in General

Sports wagering has held a special place in gaming law and gaming law policy for centuries. Even when other forms of gaming were prohibited in Roman Times, wagering on sporting events and races was permitted. In U.S. gaming law history, sports and race wagering have taken two distinct and opposite paths. Horse race wagering, while experiencing a short period of prohibition, has generally been permitted under federal law and the laws of many states. However, sports wagering has been, with rare exception, prohibited under federal law and the laws of most states.

The materials for sports wagering will start with the most direct law addressing sports wagering, namely, the Professional and Amateur Sports Protection Act and recent efforts by Delaware and New Jersey to determine the scope and constitutionality of the Act.

In Nevada

Nevada has long had broad based commercial sports wagering. In Nevada, a non-restricted gaming license is required for operating a sports pool. What is not always obvious is that a sports pool license is separate and distinct from a casino operator's license and a race book operator's license.

Nevada is the only state in the Nation that has a long history of regulated legal sports wagering. The regulations regarding sports wagering can be found in Nevada Gaming Commission Regulation 22,

The Professional and Amateur Sports Protection Act

The Professional and Amateur Sports Protection Act of 1992 was an act to limit sports wagering in the United States. The Act was introduced by Senator DeConcini of Arizona as a measure in response to the impending threat of state-sponsored sports lotteries. As one might expect, there was strong opposition from states that currently had sports wagering and sports lotteries and thus there is a grandfathering clause to exempt such activities.

The Statutes

Current Section Chapter 178. Professional and Amateur Sports Protection

§ 3701. 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.

§ 3702. 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.

§ 3703. 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.

§ 3704. 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)).

Delaware and the Lottery Exemption

In 1976, the state of Delaware had a sports lottery product that consisted of parlay wagering on NFL games. The product was not financially successful and was short lived. In 2009, Delaware sought to restart its sports based state lottery with Las Vegas style sports wagering products. At first the sports leagues challenged the plan as unconstitutional under Delaware's sate constitution. The Delaware supreme court held in an advisory opinion that the lottery plan did not violate the state's constitution.

Supreme Court of Delaware.

IN RE: REQUEST OF the GOVERNOR FOR AN ADVISORY OPINION.

No. 150, 2009.

-- May 27, 2009

Before STEELE, Chief Justice, HOLLAND, BERGER, JACOBS and RIDGELY, Justices. Lawrence C. Ashby (argued), Richard D. Heins, Catherine A. Gaul and Toni-Ann Platia, Ashby & Geddes, Wilmington, Delaware for the Negative Position. Andre G. Bouchard (argued), David J. Margules, Joel Friedlander, James J. Merkins, Jr., and Sean M. Brennecke, Bouchard Margules & Friedlander, P.A., Wilmington, Delaware, for the Affirmative Response. Kenneth J. Nachbar (argued), Michael Houghton, Geoffrey A. Sawyer, III, and Brenda R. Mayrack, Morris Nichols Arsht & Tunnell LLP, Wilmington, Delaware for Amicus Curiae The National Football League.

Pursuant to 10 Del. C. § 141 and 29 Del. C. § 2102, you asked the Justices for their opinions regarding the proper construction of Article II, Section 17 of the Delaware Constitution in relation to your initiative to reinstitute a sports lottery. To assist you and the General Assembly in fulfilling your respective constitutional duties to enact a balanced budget before the end of the fiscal year, we agreed to expedite our response. For the reasons that follow, we answer your question in part, but conclude that certain aspects of your question cannot be answered on the current record.

FACTS

In a March 19, 2009 letter to this Court, providing a basic outline of the proposed sports lottery, you described the sports lottery as follows:

(a) The sports lottery would be under control of the state. Specifically, the state would have the power and the duty to operate and administer the sports lottery and promulgate rules and regulations for that purpose. The state would control, among other things, the type and number of games to be conducted, the payouts from the sports lottery games, price or prices of tickets for any game, the licensing of agents for sports lotteries, the regulation of licensed agents, vendors and other persons involved in the sports lottery, advertising standards, and security arrangements. In general, the applicable elements of control exercised by the State over the video lottery pursuant to 29 Del. C. § 4801, et seq. would be extended to the sports lottery.

(b) The sports lottery would be operated for the purpose of raising funds. Specifically, my proposal would mandate that proceeds from the sports lottery, less amounts returned to winning players, be returned to the state at a rate of no less than 50% of the total win. All amounts returned to the state for its use would be used for administration of the Delaware Lottery and/or contributed to the General Fund.

(c) The games offered by the sports lottery would be, at all times, "lotteries" within the meaning of that term in Article II, Section 17. The games offered as part of a sports lottery would be structured so that, in every case, the outcome is determined by chance. To achieve that, games offered through the sports lottery would involve a "line" or a similar mechanism, the purpose of which would be to make the outcome of wagering on the winner of the contest a 50/50 proposition and to ensure that approximately equal amounts of wagers accrue on each side of the game. For example, a "line" might be the predicted point spread between two teams. Or, for "total" games, the "line" would be a number representing the total score for that game, and the player would select either the "over" (more points than the line would be scored) or the "under" (less points than the line would be scored). Using the "line" template to ensure that the game is decided by chance, the State Lottery is contemplating one or more of the following games.

(i) Single Game Lottery: Players must select the winning team in any given contest with a line.

(ii) Total Lottery: Players must select whether the total scoring in a game will be over or under the total line.

(iii) Parlay Lottery: Players must select the winning outcome on multiple elements, such as the winner of two or more games, the winner of two or more over-under bets.

No game would offer a pay-out based on pool or pari-mutuel wagering.

In your initial letter, you requested the Justices' opinions regarding the following question:

Is the proposed Delaware sports lottery, as described above, in whole or in part, a permissible lottery under State control under Article II, Section 17 of the Delaware Constitution of 1897?

In a March 31, 2009 supplemental letter, you forwarded a copy of House Bill 100, which was the then-pending enabling statute for the proposed sports lottery.

We appointed Andre G. Bouchard of Bouchard, Margules & Friedlander P.A., to present an affirmative response and Lawrence C. Ashby of Ashby & Geddes, to present a negative response to your question.1 We also asked counsel to consider the following subsidiary issues that we concluded might affect our ability to answer your question:

(1) May the Justices, in their discretion, opine on the constitutionality of a proposed statute that has been introduced by the General Assembly, but not yet passed?

(2) If not, please reformulate the Governor's question and specify any factual limitations that would allow the Justices to answer his request as fully as possible. Please analyze the issue as reformulated.

(3) If the Justices may opine on the Governor's request as submitted, please address whether it is constitutionally permissible to delegate to the Director of the State Lottery the authority to "provide for the features and attributes" of any sports lottery games. In addition, please address whether there are any essential characteristics that any such games must possess to qualify as a permissible lottery under the constitution.

On April 6, 2009, Members of the General Assembly offered House Substitute No. 1 for House Bill 100. Although we expressed concern, in an April 30, 2009 letter, that the circumstances underlying your initial request for our opinions may have significantly changed and were in flux (possibly mooting your initial request), we agreed to maintain the original briefing schedule.

The General Assembly then passed House Substitute No. 1 to House Bill 100, as amended, by the requisite majority, and you signed that legislation on May 14, 2009. That same day, you renewed your request for our opinions, informing us that you had instructed the Department of Finance and the Delaware Lottery Office to begin implementing a sports lottery. You also reiterated the need for a timely response to enable you to work with the General Assembly to craft and pass a balanced budget for fiscal year 2010 before June 30, 2009.

On May 21, 2009, we heard oral argument. In addition to hearing counsel for both sides of the issues, we allowed the National Football League (we had already allowed the NFL to submit a brief as amicus curiae) to participate in the argument.

DISCUSSION

When presented with a request for an Opinion of the Justices, the individual Justices may give the Governor "their opinions in writing touching the proper construction of any provision in the Constitution of this State ., or the constitutionality of any law or legislation passed by the General Assembly."2 It is well within the Justices' discretion to decide whether and to what extent to answer questions the Governor presents.3 Because we are convinced that your questions touch upon the proper construction of Article II, Section 17 of the Delaware Constitution, we answer your questions (to the extent possible), to better enable you and the General Assembly to discharge your respective constitutional duties to present and enact a balanced budget.

The fact that you have already signed H.S. No. 1 to H.B. 100 does not prevent us from providing an advisory opinion. 10 Del. C. § 141(a) contemplates an opinion about "the constitutionality of any law" as well as "legislation passed" (but presumably as yet unsigned). For example, in 1978 the Justices answered a question presented by Governor du Pont concerning legislation that he had already signed.4 In that case, the Justices recognized the Governor's need to "commit funds and hire personnel."5 In 1981, the Justices similarly answered a question concerning legislation already signed by Governor du Pont because his request "establishe[d] a need for [an] opinion due to present constitutional duties awaiting performance by the Governor."6

In your May 14, 2009 letter renewing your request for our opinions, you advised us that: "Over the next several weeks, the State will begin working with the video lottery agents, potential vendors, and other interested parties to create a sports lottery." You also advised us of your view that the potential revenue generated by a sports lottery is "an important component" of constructing a balanced budget. Therefore, it is clear

that our opinions may assist you in committing funds, hiring personnel, and addressing the current budgetary situation.

To determine whether the proposed sports lottery, in whole or in part, constitutes a permissible lottery under Article II, Section 17 of the Delaware Constitution, we must address several subsidiary issues. They are: (1) whether the sports lottery will be under State control; (2) whether it is constitutionally permissible to delegate to the Director of the State Lottery the authority to "provide for the features and attributes" of the sports lottery; (3) whether lotteries, as permitted by the Delaware Constitution, must be games of pure chance or predominately chance; and finally (4) depending on our answers to those questions, whether the three specific games described in your original letter are constitutionally permissible.

The Proposed Sports Lottery Will be "Under State Control"

Article II, Section 17(a) of the Delaware Constitution permits "[l]otteries under State control for the purpose of raising funds."7 Here, we each conclude that the State will control all significant aspects of the sports lottery. As with the currently operating video lottery, the State Lottery Director will control the sports lottery. The Lottery Director will be responsible for determining the "[t]ype and number of sports lottery games to be conducted, the price or prices for any sports lottery games, the rules for any sports lottery games, and the payout and manner of compensation to be paid to winners of sports lottery games." H.S. No. 1 to H.B. 100 requires the Lottery Director to "administer the sports lottery in a manner which will produce the greatest income for the State while minimizing or eliminating the risk of financial loss to the State."

The Lottery Director will oversee the State's purchasing or leasing of all sports lottery machines,8 which shall appear "exclusively at facilities operated by video lottery agents licensed by the State."9 As is the case with the video lottery's proceeds, the Lottery Director will manage the daily or weekly transfer of the sports lottery's proceeds to the State Lottery Fund.10

The Lottery Director will also oversee the licensing of a risk manager, who "must be a bookmaker currently licensed to operate, and operating, sports books in the United States."11 The risk manager may be an independent contractor and need not be a State employee. Although the risk manager will be responsible for defining certain crucial aspects of the sports lottery, the State frequently hires outside experts without relinquishing its inherent control. We note that the State already contracts with outside entities in its control and operation of the video lottery.12

For the above reasons, we conclude that the sports lottery satisfies the State control requirement found in Article II, Section 17(a) of the Delaware Constitution.

H.S. No. 1 to H.B. 100 Does Not Impermissibly Delegate Legislative Power

We further conclude that the sports lottery legislation does not impermissibly delegate legislature power to the Lottery Director.

The General Assembly need not spell out every detail concerning the administration of a law.13 A statute does not unlawfully delegate legislative power, if the statute "establish[es] adequate standards and guidelines for the administration of the declared legislative policy and for the guidance and limitation of those in whom

discretion has been vested."14 This nondelegation principle is intended to prevent "arbitrary and capricious action, and to assure reasonable uniformity in the operation of the law."15

We have previously recognized that "[t]he preciseness of the statutory standards will vary with both the complexity of the area at which the legislation is directed and the susceptibility to change of the area in question."16 It also is well established that, at times, the General Assembly may better achieve its legislative goals by deferring to an administrative agency's greater skill and knowledge.17 For example, the General Assembly relies on the Department of Natural Resources and Environmental Control to fix and regulate hunting seasons and bag limits as necessary to "protect, manage and conserve all forms of protected wildlife of this State."18

We conclude that H.S. No. 1 to H.B. 100 does not impermissibly delegate legislative powers to the Lottery Director. In that legislation, the General Assembly established adequate standards and guidelines by requiring the Lottery Director to initiate a sports lottery governed by those rules and regulations that the Lottery Director believes "will produce the greatest income for the State while minimizing or eliminating the risk of financial loss to the State."19 H.S. No. 1 to H.B. 100 explicitly defines a sports lottery as "a lottery in which the winners are determined based on the outcome of any professional or collegiate event, including racing, held within or without the State, but excluding collegiate sporting events that involve a Delaware college or university and amateur or professional sporting events that involve a Delaware team ."20

In this case, the scope of the delegation is comparable to the scope of the authority delegated to the Lottery Director over existing State lotteries. In administering the video lottery, the Lottery Director is responsible for determining the "[t]ype and number of games to be conducted," the "[p]rice or prices of tickets for any game," the "[n]umber and sizes of the prizes on the winning tickets," and the "[m]anner of selecting the winning tickets."21 The General Assembly reasonably deferred to the Lottery Director's skill and knowledge in creating the specific sports lottery games, and no reasons are cited to us creating concern that the Lottery Director would exceed his authority or otherwise act in an arbitrary or capricious manner.

We, therefore, conclude that H.S. No. 1 to H.B. 100 does not impermissibly delegate legislative authority to the Lottery Director.

The Delaware Constitution Permits Lotteries Involving an Element of Skill

The next issue we must address is whether the fact that the sports lottery involves an element of skill precludes it from being a "lottery" authorized by the Delaware Constitution.

Although Article II, Section 17 authorizes State controlled lotteries, the Delaware Constitution does not define the term "lottery." We are fortunate, however, to have the benefit of analyses by two distinguished Delaware jurists' concerning the meaning of the term "lottery." Then Delaware District Court Judge Walter K. Stapleton addressed this issue in National Football League v. Governor of the State of Delaware, where the NFL sought injunctive relief barring Delaware from conducting a lottery based on the NFL's games.22 Judge Stapleton found "three elements necessary to a lottery: prize, consideration and chance."23 For reasons discussed below, Judge

Stapleton determined that lotteries, as permitted by the Delaware Constitution, need not be matters of pure chance.24 Rather, the element of chance "may be accompanied by an element of calculation or even of certainty" provided that "chance is the dominant or controlling factor."25

One year later, Governor du Pont asked the then three Delaware Supreme Court Justices for an advisory opinion addressing whether pool or parimutuel wagering on jai alai exhibitions constitutes a lottery under state control within the constitutional exception.26 Although Chief Justice Herrmann and Justice Duffy did not address whether the Delaware Constitution authorizes lotteries that involve an element of skill, Justice McNeilly explicitly adopted Judge Stapleton's "cogent analysis" and lottery definition.27

In our opinion, Judge Stapleton convincingly and correctly interpreted Article II, Section 17. He described a split of authority concerning whether a lottery may incorporate an element of skill as follows:

Under the English rule, a lottery consists in the distribution of money or other property by chance, and nothing but chance, that is, by doing that which is equivalent to drawing lots. If merit or skill play any part in determining the distribution, there is no lottery. In the United States, however, by what appears to be the weight of authority at the present day, it is not necessary that this element of chance be pure chance, but it may be accompanied by an element of calculation or even of certainty; it is sufficient if chance is the dominant or controlling factor. However, the rule that chance must be the dominant factor is to be taken in the qualitative or causative sense. 28

Judge Stapleton concluded that "[a]bsent clear language in the Constitution supporting a contrary rule," one should read Article II, Section 17 consistent with the majority, dominant factor rule.29 Although it is not without significance that a majority of jurisdictions in the United States apply the dominant factor rule, we find Judge Stapleton's historical review of the Delaware legislature's interpretation of the term "lottery" entirely persuasive, independent of any jurisdictional "headcount."

Judge Stapleton explained that, by two separate two-thirds votes in 1972 and 1973 (with an intervening election), the General Assembly amended Article II, Section 17 to authorize State lotteries .30 He noted that "[t]he same Legislature that gave final approval to the constitutional amendment in its second session in 1974 established the State Lottery and State Lottery Office."31 "In doing so, it construed the term lottery broadly: " 'Lottery" or "state lottery" or "system" shall mean the public gaming systems or games established and operated pursuant to this chapter and including all types of lotteries.' "32 Judge Stapleton also determined that " 'Games' or 'gaming' embrace a far wider range of activities than those based on pure chance."33 Finally, Judge Stapleton noted that the same legislature that finalized amending Article II, Section 17 "contemplated that some lottery games would be related to or based on sporting events."34 We agree with and adopt Judge Stapleton's conclusion that "[g]iven the near contemporaneous approval of the lottery amendment and the lottery statute," we should defer to the legislature's interpretation of the term "lottery."

Therefore, we conclude that Article II, Section 17 of the Delaware Constitution authorizes "not only games of pure chance but also games in which chance is the dominant determining factor."35

We Adopt Judge Stapleton's Factual Findings Concerning Parlay Lotteries

In your initial request for our opinions, you described three potential sports lottery games:

(i) Single Game Lottery: Players must select the winning team in any given contest with a line.

(ii) Total Lottery: Players must select whether the total scoring in a game will be over or under the total line.

(iii) Parlay Lottery: Players must select the winning outcome on multiple elements, such as the winner of two or more games, the winner of two or more over-under bets.

Because it is for the Lottery Director to decide the actual structure of the sports lottery's games, we have the benefit of only the above broad descriptions. Because Judge Stapleton addressed these lottery variations after trial and on a complete record, to that extent we adopt, and are able to rely on, his factual findings in arriving at our opinions.

To address the constitutionality of the three specific games comprising Delaware's Scoreboard lottery, Judge Stapleton required six days of evidentiary hearings, presentation of expert testimony, and extensive briefing.36 Judge Stapleton described those three games, all based on regularly scheduled NFL games, as follows:

In Football Bonus, the fourteen games scheduled for a given weekend are divided into two pools of seven games each. A player must mark the lottery ticket with his or her projections of the winners of the seven games in one or both of the two pools and place a bet of $1, $2, $3, $5 or $10. To win Football Bonus, the player must correctly select the winner of each of the games in a pool. If the player correctly selects the winners of all games in both pools, he or she wins an "All Game Bonus". The amounts of the prizes awarded are determined on a pari-mutuel basis, that is, as a function of the total amount of money bet by all players.

In Touchdown, the lottery card lists the fourteen games for a given week along with three ranges of possible point spreads. The player must select both the winning team and the winning margin in each of three, four or five games. The scale of possible bets is the same as in Bonus and prizes are likewise distributed on a pari-mutuel basis to those who make correct selections for each game on which they bet.

Touchdown II, the third Scoreboard game, was introduced in mid-season and replaced Touchdown for the remainder of the season. In Touchdown II, a "line" or predicted point spread on each of twelve games is published on the Wednesday prior to the games. The player considers the published point spread and selects a team to "beat the line", that is, to do better in the game than the stated point spread. To win, the player must choose correctly with respect to each of from four to twelve games. Depending upon the number of games bet on, there is a fixed payoff of from $10 to

$1,200. There is also a consolation prize for those who beat the line on nine out ten, ten out of eleven or eleven out of twelve games.37

Judge Stapleton determined that in each of those games, chance is the predominate factor. He noted that the outcome of all NFL games involves an element of chance, citing "the weather, the health and mood of the players and the condition of the playing field."38 Because the three Scoreboard games required players to select the winners of multiple games, "the element of chance that enters each game is multiplied by a minimum of three and a maximum of fourteen games."39 Judge Stapleton also determined that "[Touchdown II's] designated point spread or 'line' is designed to equalize the odds on the two teams involved" and "injects a further factor of chance."40 He found it noteworthy that "[n]one of the games permits head-to-head or single game betting."41 Despite counsel's stipulation of facts before us, we must emphasize that wide areas of disagreement exist between studies, and internal inconsistencies within studies, addressing single game betting and the issue of whether chance or skill predominates.

Under Judge Stapleton's view of the Scoreboard games, all would be considered parlay lotteries. Because we can and do rely on Judge Stapleton's factual findings, we agree with his conclusion that chance is the dominant factor in parlay lotteries, which require players to select the winners of two or more games.42

That said, because we lack the benefit of actual evidence concerning single game bets and the extent to which "the line" introduces chance and causes it to predominate over skill or merely manages the money flow, we cannot opine on the constitutionality of single game bets.

CONCLUSION

Recognizing the difficulties that you and the General Assembly face in presenting a balanced budget for fiscal year 2010, we have attempted to answer your questions to the fullest extent possible. In our opinion, the sports lottery, as defined by H.S. No. 1 to H.B. 100, satisfies the State control requirement of Article II, Section 17 and does not impermissibly delegate legislative authority to the Lottery Director.43 We further conclude that the Delaware Constitution allows lotteries to involve an element of skill, but only where chance predominates. Without specific details of the exact nature of an interplay of sports betting options, however, all that we can currently opine is that the Lottery Director's designed games must assure that chance is the predominant factor.

FOOTNOTES

1. We greatly appreciate the pro bono service of the teams of attorneys who assisted in presenting the affirmative and negative responses to your question. We thank David J. Margules, Joel Friedlander, James J. Merkins, Jr., and Sean M. Brennecke, for assisting with the affirmative response. Similarly, we recognize the efforts of Richard D. Heins, Catherine A. Gaul, and Toni-Ann Platia in presenting the negative response.

2. 10 Del. C. § 141(a):(a) The Justices of the Supreme Court, whenever the Governor of this State or a majority of the members elected to each House may by resolution require it for public information, or to enable them to discharge their duties, may give them their opinions in writing touching the proper construction of any provision in

the Constitution of this State, or of the United States, or the constitutionality of any law or legislation passed by the General Assembly, or the constitutionality of any proposed constitutional amendment which shall have been first agreed to by two-thirds of all members elected to each House;see also 29 Del. C. § 2102 (authorizing the Governor to seek advisory opinions "whenever the Governor requires it for public information or to enable the Governor to discharge the duties of office with fidelity").

3. See In re Request of Governor for Advisory Opinion, 722 A.2d 307, 309 (Del.1998).

4. See Opinion of the Justices, 385 A.2d 695 (Del.1978); see also, e.g., Opinion of the Justices, 425 A.2d 604 (Del.1981); Opinion of the Justices, 283 A.2d 832 (Del.1971); Opinion of the Justices, 233 A.2d 59 (Del.1967); Opinion of the Justices, 233 A.2d 59 (Del.1967); Opinion of the Justices, 177 A.2d 205 (Del.1962).

5. Opinion of the Justices, 385 A.2d at 696.

6. Opinion of the Justices, 425 A.2d at 605.

7. It is undisputed that the proposed sports lottery is intended to raise funds.

8. H.S. No. 1 to H.B. 100 defines sports lottery machines as "any machine in which bills, coins or tokens are deposited in order to play a sports lottery game. A machine shall be considered a sports lottery machine notwithstanding the use of an electronic credit system making the deposit of bills, coins or tokens unnecessary."

9. See id.

10. Id.

11. Id. Similarly, the Lottery Director will oversee the sports lottery technology system provider, which "must be licensed to operate lotteries in the United States." Id.

12. We rely on the examples provided by counsel presenting the affirmative argument. See, e.g., 29 Del. C. § 4805(a)(11) (providing for payment of contracts for "promotional, advertising or operational services"); 29 Del. C. § 4805(b)(4) (authorizing the Lottery Director to contract "for the operation of any game or part thereof and . for the promotion of the game or games"); 29 Del. C. § 4820(d)(requiring the Lottery Director to hire an "independent laboratory to test video lottery machines"); 29 Del. C. § 4833(d) (the Tri-State Lotto Commission's functions "shall be carried out by . independent contractors, agents, employees and consultants as may be appointed by the Commission"); see also 7 Del. C. § 4214 (allowing DNREC to retain "geologists, engineers, or other expert consultants and such assistants"); 4 Del. C. § 404 (the Division of Alcohol and Tobacco Enforcement may "engage the services of experts and persons"); 3 Del. C. § 904 (authorizing Agricultural Lands Preservation Foundation to "retain by contract auditors, accountants, appraisers, legal counsel, surveyors, private consultants, financial advisors or other contractual services"); 2 Del. C. § 1309(7) (authorizing Transportation Authority to "employ consulting engineers, architects, attorneys . real estate counselors, appraisers, accountants, construction and financial experts, superintendents, managers and such other consultants and employees").

13. See Marta v. Sullivan, 248 A.2d 608, 609 (Del.1968).

14. Id.; see also Opinion of the Justices, 425 A.2d at 607.

15. Marta, 248 A.2d at 609.

16. Atlantis I Condominium Ass'n v. Bryson, 403 A.2d 711, 713 (Del.1979) (citations omitted).

17. See Raley v. State, 1991 WL 235357, at *3 (Del.1991) ("[T]he legislature was aware of the difficulties in legislating environmental controls. It simply chose to defer to DNREC's greater skill and knowledge to better accomplish the legislative goals.").

18. See 7 Del. C. §§ 102-103.

19. See H.S. No. 1 to H.B. 100.

20. Id.

21. See 29 Del. C. § 4805(a).

22. See generally 435 F.Supp. 1372 (D.Del.1977).

23. Id. at 1383.

24. Id. at 1384-85.

25. Id. at 1384.

26. See generally Opinion of the Justices, 385 A.2d 695.

27. Id. at 709.

28. NFL, 435 F.Supp. at 1383-84 (citations omitted).

29. Id. at 1384.

30. Id.

31. Id. (citation omitted).

32. Id. (citing 29 Del. C. § 4803(b)).

33. Id. Judge Stapleton explained:Black's Law Dictionary 808 (4th ed.1968) defines games as "a sport, pastime or contest. A contrivance which has for its object to furnish sport, recreation or amusement". The same source defines gaming as follows: An agreement between two or more persons to play together at a game of chance for a stake or wager which is to become the property of the winner, and to which all contribute. "Gaming" and "gambling", in statutes are similar in meaning and either one comprehends the idea that, by a bet, by chance, by some exercise of skill, or by the transpiring of some event unknown until it occurs, something of value is, as the conclusion of premises agreed, to be transferred from a loser to a winner. Id. at 1384 n. 22.

34. Id. at 1384 (citing 29 Del. C. § 4805(b)(4)).

35. See id. at 1385.

36. Id. at 1376.

37. Id.

38. Id. at 1385.

39. Id.

40. Id.

41. Id. at 1385.

42. Logic suggests little meaningful distinction between a parlay lottery of two as opposed to three games. It is the single bet that raises factual issues about whether skill or chance predominates, and the role of the "line."

43. Because Opinions of the Justices "do not arise in a case or controversy, and are not an opinion of the Supreme Court . they are not binding in later litigation." See In re Request of Governor for Advisory Opinion, 722 A.2d 307, 309 (Del.1998).

- See more at: http://caselaw.findlaw.com/de-supreme-court/1404923.html#sthash.EaibHXcz.dpuf

In late July 2009, the leagues filed suit against the state in federal court (a copy of the complaint is in these materials). The leagues then moved for a TRO, a permanent injunction and summary judgment.

Please read the following complaint and district court opinion regarding the league's motion:

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

THE OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, THE NATIONAL BASKETBALL ASSOCIATION, a joint venture, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, THE NATIONAL FOOTBALL LEAGUE, an unincorporated association, and THE NATIONAL HOCKEY LEAGUE, an unincorporated association,	)	
Plaintiffs,	)	
v.	)	C.A. No. 09-538 (GMS)
JACK A. MARKELL, Governor of the State of Delaware, and WAYNE LEMONS, Director	)	

of the Delaware State Lottery Office,)
)
) Defendants.
)

MEMORANDUM ORDER

1. On July 24, 2009, the plaintiffs filed the complaint in this action alleging, among other things, that the Delaware Sports Lottery Act (the "Act"), 29 Del. C. § 4825, and the regulations proposed pursuant to the Act violate the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 et seq. and the Delaware Constitution, Del. Const. art. II, § 17. (D.I. 1.)

2. On July 28, 2009, pursuant to Fed. R. Civ. P. 65(a), the plaintiffs filed a motion for a preliminary injunction seeking to enjoin the defendants from commencing any "sports lottery" that permits: "(i) single-game sports betting, (ii) betting on sports other than professional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976." (D.I. 8.)3. In the exercise of its discretion, the court has considered the applicable law, and carefully reviewed: (1) the pleadings filed thus far in this matter (D.I. 1); (2) the federal statute at issue; (3) the plaintiffs' motion for preliminary injunction (D.I. 8) ; (4) the plaintiffs' opening brief and attachments in support of their motion for preliminary injunction (D.I. 9-12); (5) the parties' additional submissions filed in this case, including the plaintiffs' ten-page, single-spaced, letter brief (D.I. 14), and the defendants' three-page, single-spaced, letter brief filed on August 3, 2009 (D.I. 15), as well as the defendants' four affidavits filed on August 4, 2009 (D.I. 17).

4. The court has also considered the arguments of counsel for the parties during a one-hour teleconference in this matter conducted on July 29, 2009 (D.I. 13). After giving due consideration to all of these things, the court concludes that a preliminary injunction is not warranted in this case. The court will, therefore, deny the plaintiffs' motion.

5. With good reason, federal courts are typically reluctant to grant the type of relief requested here. Indeed, the Third Circuit has made clear that a "preliminary injunction is an extraordinary remedy that should be granted only if: (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest." NutraSweet Co. v. Vit-Mar Enterprises, Inc., 176 F.3d 151, 153 (3d Cir. 1999) (citation omitted). "A plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." See Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 192 (3d Cir. 1990) ("Only if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief should the injunction issue.")

6. First, based on the record as it stands, the court is not convinced that the plaintiffs will 2
"likely succeed on the merits" in this case. NutraSweet, 176 F.3d at 153. In fact, both sides vigorously and ably contend that they are entitled to win on the merits. Indeed, the plaintiffs propose, despite the nascent nature of this action, that the court and the parties go straight into the summary judgment phase of the litigation. Specifically, at page 2 of their August 3, 2009 letter brief, the plaintiffs "ask the Court [] to treat plaintiffs' motion [for injunctive relief] as one for summary judgment." (D.I. 14 at 2.) In addition, at page 7 of their letter brief, the plaintiffs write; "plaintiffs respectfully request that the Court treat their motion for a preliminary injunction as one for summary judgment on Count I of the Complaint, alleging violation of [the Professional and Amateur Sports Protection Act] PASPA." (Id. at 7.) Indeed, the plaintiffs propose, "that the Court schedule a summary judgment proceeding such that this matter can be decided prior to the first week of September 2009," and generously offer to rely on the combination of their brief in support of their motion for a preliminary injunction and their letter brief of August 3. (Id.)

7. In this matter, as whenever a party invokes the authority of the court, the ends of justice dictate a judge, where possible, proceed with deliberation and caution – especially when a party seeks extraordinary relief of the type at issue here. On the current record, the court is simply not in a position to give either side a nod on the merits. Indeed, there may exist factual disputes as to what, if anything, the State of Delaware actually did in the past with respect to sports gambling; or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue. On this record, and in light of these critical issues, the court cannot say that the plaintiffs will likely succeed on the merits.

8. Second, the court is not certain that the plaintiffs have demonstrated irreparable harm, so as to warrant the court granting preliminary injunctive relief. In enacting the federal legislation

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at issue here, Congress appears to have made specific findings as to the "harm" it intended to address. Nevertheless, and contrary to what the plaintiffs seem to suggest, in the context of a motion under Fed. R. Civ. P. 65(a), and considering the language of the actual statute at issue, these findings do not mandate or require under all circumstances that this court grant preliminary injunctive relief. In other words, this court is not convinced that the underlying statutorily defined harm is dispositive of the question as to whether the plaintiffs are entitled to preliminary injunctive relief or per se establishes the existence of the threat of irreparable harm that might necessitate the issuance of a preliminary injunction. To the contrary, Third Circuit precedent requires that the court consider this factor along with and in the context of each of the factors courts traditionally consider when confronted with a request for a preliminary injunction. See NutraSweet, 176 F.3d at 153; see also Opticians Ass'n, 920 F.2d at 192 ("[w]hen ruling on such a motion, the district court must consider four factors").

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9. In addition, it is noteworthy that when asked some 32 years ago by the National Football League, a party to this action, to grant preliminary injunctive relief barring the State of Delaware from instituting a lottery game based on games of the NFL, an issue at least related to the matter before the court today, in denying the NFL's request for a temporary restraining order, a respected, indeed, a distinguished judge of this court and now the Third Circuit Court of Appeals, Judge Walter K. Stapleton, wrote the following:

> I should add that the plaintiffs have not demonstrated that the existence of gambling on its games, per se, has or will damage its good will or reputation for integrity. By this, I do not suggest that an association of the NFL with a gambling enterprise in the minds of the public would not have a deleterious effect on its business. Such an association presupposes public perception of the NFL sponsorship or approval of a gambling enterprise or at least confusion on this score . . . . I do find, however, that the existence of gambling on NFL games, unaccompanied by any confusion with respect to sponsorship, has not injured the NFL and there is no reason to believe it will do so in the future. The record shows that extensive gambling on the NFL has existed for many years and that this fact of common public knowledge has not injured plaintiffs, or their reputation.

Nat'l Football League v. Governor of the State of Delaware, 435 F. Supp. 1372, (D. Del. 1977).

10. Today, the court sees some irony in the fact that Judge Stapleton made his findings 16 years before the Congressional findings that underpin PASPA, and that another 16 years have elapsed since the passage of that Act and the reappearance of the NFL, along with other parties plaintiff, before this court making similar claims to being in imminent danger of having their reputations and good will compromised because of yet another attempt by Delaware to engage in gambling activity associated with professional football and other sports. The irony is this: during the course of the court's discussion with counsel on July

29, 2009, counsel for the defendants made
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some, apparently fact based assertions which, while certainly not the equivalent of evidence based findings of a court or the Congress of the United States, are, at least relevant to the court's consideration of the issue of irreparable harm when asked to grant a request for preliminary injunctive relief. Counsel observed:
For example, the New York Times reported two years ago that the Motorcity Casino is owned by the same person who owns the Detroit Red Wings . . . Marian Ilitch co-owns the Detroit Red Wings with her husband Michael, Michael owns the Detroit Tigers . . . In the NBA, the Sacramento Kings [are] owned by the same people who own the Palms Casino in Las Vegas. . . The Chairman and CEO of Harrah's owns a stake in the Celtics [that would be the Boston Celtics] . . . There [are] plenty of instances where the NFL and other sports leagues allow broadcast affiliates to broadcast betting information, betting lines, injury reports . . . advice on which side of a bet to be on . . . Major League Baseball recently loosened its policy on casino and gambling sponsorship, so Harrah's Casino is a signature partner of the Mets. . . The Mohegan Sun Hotel & Casino operates a Mohegan Sports Bar at Yankee Stadium. The Brewers, the Braves, the Diamondbacks, the Angels, the Dodgers, the Marlins and the Cubs [all MLB baseball clubs] all have sponsorship deals with casinos and gambling interests or state lotteries. . . The NHL hosted its 2009 Player Awards in the Palms Casino.
(D.I. 13 at)
21-22.
11. ruling in 1977, that is, the Congress has enacted PASPA. This court cannot and will not ignore either the plain language of the statute or the Congressional findings that led to its passage. In spite of these findings, however, it is important to note, particularly within the context of a request for a preliminary injunction, that it is not readily apparent that Congress determined the harm it found demands the award of preliminary injunctive relief. In other words, despite its findings, by the plain language of the statute, the Congress seems to have left in tact the ability of judicial officers to apply
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Clearly, circumstances have changed materially since Judge Stapleton issued his well-settled and proven principles of equity when deciding whether to grant the type of relief requested here. Simply put, unlike other enactments of Congress which, upon the judgment or finding of a named party or official, seem to require the court do a thing such as issue an injunction, e.g., the Emergency Price Control Act of 1942[1] which provides that an injunction "shall be granted without bond," PASPA, under the sub-heading "Injunctions" provides: "A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States." 28 U.S.C. § 3703. Thus, it seems reasonable to conclude that a district court may still determine whether the requirements for the issuance of a preliminary injunction have or have not been met, even in light of PASPA.
12. Third, the court cannot say, at this stage in the proceedings, that granting the injunction will result in irreparable harm to the defendants. However, the court also cannot say that granting an injunction in this case is in the public interest. In fact, given that the defendants claim they intend to use monies raised from the activities at issue in this case to balance the State's budget, the converse may very well be true. At this juncture in the proceedings, the court cannot say either way. As such, the public interest factor is, at best, neutral on the issue of whether to grant a preliminary injunction.
[1] 50 U.S.C. Appx. § 901 et seq. (repealed 1956). 7
13. In considering and balancing the preliminary injunction factors, and in light of the

present record, at this early stage of the case, the court concludes that a preliminary injunction is not appropriate.
Therefore, IT IS HEREBY ORDERED that the plaintiffs' motion for preliminary injunction (D.I. 8) is DENIED.

Dated: August 10, 2009 /s/ Gregory M. Sleet CHIEF, UNITED STATES

DISTRICT JUDGE

Upon learning of their unsuccessful attempt at stopping the state lottery in the federal district court, the leagues appealed the denial of the TRO with the 3rd Circuit Court of Appeals. Please read the following order and opinion from the 3rd Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-3297

OFFICE OF COMMISSIONER OF BASEBALL, et al. Appellants

v. JACK A. MARKELL, GOVERNOR OF THE STATE OF DELAWARE, et al.

(D. Del. No. 09-cv-00538)

Present: MCKEE, FUENTES and HARDIMAN, Circuit Judges

We determine that there is no factual issue with respect to the merits in this case. We conclude, as a matter of law, that the Delaware sports lottery, planned to commence September 1, 2009, pursuant to the authority granted in 29 Del. Code § 4805, violates the Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701 *et seq.,* and is not covered by the exemption in 28 U.S.C. § 3704(a)(1). Accordingly, there is no need to address the issue of irreparable harm. An opinion of this Court will follow.
Dated: August 24, 2009 PDB/cc: All Counsel of Record

By the Court,
/s/ Theodore A. McKee Circuit Judge

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3297

OFC COMM BASEBALL, an unincorporated association doing business as Major League Baseball; NATL BASKETBALL ASSN, a joint venture; NATL COLLEGIATE ATHLETIC ASSN, an unincorporated association; NATL FOOTBALL LEAGUE, an unincorporated association; NATL HOCKEY LEAGUE, an unincorporated association,

Appellants,

v.
JACK A. MARKELL, Governor of the State of Delaware; WAYNE LEMONS, Director of the Delaware State Lottery Office,

Appellees.

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 09-cv-00538)
District Judge: Honorable Gregory M. Sleet

Argued August 24, 2009
Before: McKEE, FUENTES and HARDIMAN, Circuit
Judges.

(Filed: August 31, 2009)

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OPINION OF THE COURT

HARDIMAN, Circuit Judge.

In this interlocutory appeal we review an order of the United States District Court for the District of Delaware denying a motion for preliminary injunction filed by the National Football League, the National Basketball Association, the National Hockey League, the Office of the Commissioner of Baseball, and the National Collegiate Athletic Association (collectively, Leagues). The Leagues sought to enjoin Delaware state officials from implementing certain elements of its Sports Lottery Act (Act), Del. Laws Ch. 28 (H.B. No. 100) (2009), 29 Del. Code § 4801 et seq., on September 1, 2009. As we shall explain, we need not decide whether the District Court's denial of the Leagues' preliminary injunction was proper because we hold as a matter of law that elements of Delaware's sports lottery violate federal law.

I.

In March 2009, the Governor of Delaware, Jack Markell, proposed legislation authorizing sports betting and table gaming at existing and future facilities in Delaware. On March 19, Governor Markell sought an advisory opinion from the Delaware Supreme Court pursuant to 10 Del. Code § 141 and 29 Del. Code § 2102, regarding the constitutionality of his proposal under the Delaware Constitution. In a letter to the Delaware Supreme Court, Governor Markell described three types of

proposed sports gambling: (1) point-spread bets on individual games; (2) over/under bets on individual games; and (3) multi-game parlay bets.1 On May 14 — while the request for an advisory opinion from the Delaware Supreme Court was pending — Governor Markell signed the Act into law. In re Request of Governor for an Advisory Opinion (In re Request of Governor), --- A.2d ---, No. 150, 2009, 2009 WL 1475736, at *2 (Del. May 29, 2009).

After hearing oral argument, the Delaware Supreme Court issued an opinion on May 29, which found that multi-game betting would not violate state law. In analyzing the legality of the Act and the "lotteries" proposed pursuant to the Act, the Delaware Supreme Court relied heavily on Judge Stapleton's decision in National Football League v. Governor of the State of Delaware (NFL), 435 F. Supp. 1372 (D. Del. 1977). That case concerned the NFL's challenge to a sports betting scheme known as "Scoreboard" that Delaware conducted during the 1976 season. Scoreboard was comprised of three

1 Under regulations proposed pursuant to the Act, Delaware intends to offer three games: Single Game Lottery, Total Lottery, and Parlay Lottery. In Single Game Lottery, bettors must select the winning team in a single sports contest against a point spread. In Total Lottery, the bettor gambles on whether the total number of points scored by both teams in a single contest will be over or under a specified sum. The final game, Parlay Lottery, combines elements of the first two games in asking bettors to correctly choose the winners of two or more sports contests, or two or more over/under bets, or some combination of winners and over/under bets.

games: Football Bonus, Touchdown, and Touchdown II. In Football Bonus, the State offered two pools of seven NFL games each and bettors had to predict the winners — without a point spread — in one or both of the pools. In Touchdown, bettors selected both the winners and point spreads for either three, four, or five NFL games. Finally, Touchdown II — which replaced Touchdown midway through the season — required bettors to pick the winners, against the point spread, for between four and twelve NFL games. All of the Scoreboard games conducted in 1976 were confined to betting on the NFL, and all required that the bettor wager on more than one game at a time.

In NFL, Judge Stapleton held such wagering was permissible under the Delaware Constitution because chance is the "dominant factor" in multi-game (parlay) betting. The Delaware Supreme Court reached the same conclusion in its advisory opinion, In re Request of Governor, 2009 WL 1475736, at *8, but did not decide the constitutionality of single-game betting, except to recognize that it differs from the parlay games addressed by Judge Stapleton. Id. The Delaware Supreme Court did not address the federal statutory question presented in this appeal.

Following receipt of the Delaware Supreme Court's advisory opinion, on June 30 the State published its proposed regulations to implement the Act (Regulations). According to the Regulations, Delaware intends to implement a sports betting scheme that would include wagers "in which the winners are determined based on the outcome of any professional or collegiate sporting event, including racing, held within or without the State, but excluding collegiate sporting events that

involve a Delaware college or university, and amateur or professional sporting events that involve a Delaware team." A168. Delaware's proposed sports betting scheme includes single-game betting in addition to multi-game (parlay) betting, as the Regulations define the term "maximum wager limit" to include "the maximum amount that can be wagered on a single sports lottery wager be it head-to-head or parlay . . . ." A168 (Regulations § 2.0, definition of "maximum wager limit") (emphasis added).

Delaware intends to commence its sports betting scheme on September 1, 2009, in time for the start of the upcoming NFL regular season. Though the NFL is its focus, Delaware intends to conduct — and the Regulations sanction — betting on all major professional and college sports.

II.

On July 24, the Leagues filed a complaint against Governor Markell and Wayne Lemons, the Director of the Delaware State Lottery Office (collectively, Delaware or State), claiming that elements of Delaware's proposed sports betting scheme violate the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701, et seq.2 Although PASPA has

2 The PASPA claim was brought at Count I. The Leagues also brought a claim under state law at Count II, which alleged that the sports betting scheme violates Section 17 of the Delaware Constitution because it does not constitute a permissible "lottery." The state-law claim is not at issue in this appeal.

broadly prohibited state-sponsored sports gambling since it took effect on January 1, 1993, the statute also "grandfathered" gambling schemes in individual states "to the extent that the scheme was conducted by that State" between 1976 and 1990.

Four days after filing their complaint, the Leagues filed a motion for preliminary injunction, requesting that the District Court enjoin the State "from commencing, instituting, operating and maintaining a proposed 'sports lottery' to the extent that such lottery permits (i) single-game sports betting, (ii) betting on sports other than professional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976" pending final adjudication of the Leagues' action.

The District Court held a scheduling conference on July 29 at which it urged the parties to reach an agreement by which the State would "stand down" pending an expedited adjudication of the merits. A268. The parties could not reach such an agreement, however, so the District Court asked for written submissions and held a conference on August 5. Following the conference, the court orally denied the Leagues' motion and scheduled a trial for December 7. On August 10, the District Court issued a 13-paragraph memorandum order explaining its reasons for denying the injunction.

In its memorandum order, the District Court found that the Leagues had not shown a likelihood of success on the merits. Office of Comm'r of Baseball v. Markell, --- F. Supp. 2d ---, 2009 WL 2450284, at *1 (D. Del. Aug. 10, 2009). Noting that "both sides vigorously and ably contend that they are entitled to win on the merits," the District Court stated: "On the current

record, the court is simply not in a position to give either side a nod on the merits. Indeed, there may exist factual disputes as to what, if anything, the State of Delaware actually did in the past with respect to sports gambling; or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue." Id. at *2. The District Court also noted that the Leagues suggested in their letter brief that the court treat their motion for preliminary injunction as a motion for summary judgment and questioned whether the Leagues had demonstrated both the requisite irreparable harm and that the balance of the equities fell in their favor. See id. at *2-4.

On August 7 — prior to receipt of the District Court's memorandum opinion — the Leagues filed their notice of appeal. Three days later, the Leagues filed a motion to expedite their appeal and their opening brief. On August 12, Delaware filed a motion to dismiss the appeal and its opposition to the Leagues' motion to expedite. On August 13, we granted the Leagues' motion to expedite, issued a briefing schedule, and set oral argument for August 24.

It is often noted that the wheels of justice move slowly — and for good reason. As the procedural history of this case demonstrates, however, that is not always the case. When a party seeks injunctive relief, the stakes are high, time is of the essence, and a straightforward legal question is properly presented to us, prudence dictates that we answer that question with dispatch.

III.

We begin, as always, by considering whether we have jurisdiction to hear this appeal. The Leagues claim we have jurisdiction under 28 U.S.C. § 1292(a), which provides: "courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing, or dissolving injunctions." (emphasis added). The State disagrees, arguing that we must apply the test set forth in Carson v. American Brands, Inc., 450

U.S. 79 (1981), which requires the Leagues to show that the District Court's denial of the motion for preliminary injunction (1) will have a serious, perhaps irreparable, consequence; and (2) can be effectively challenged only by immediate appeal. Id. at 83; see also Stringfellow v. Concerned Neighbors In Action, 480 U.S. 370, 379 (1987).

In arguing that the Leagues must establish the Carson factors, Delaware relies on dicta from some of our prior cases stating that both orders expressly denying injunctions and orders having the practical effect of denying injunctions must meet the two-prong Carson test. See Vuitton v. White, 945 F.2d 569, 574 (3d Cir. 1991); Ross v. Zavarella, 916 F.2d 898, 902 (3d Cir. 1990). But none of the cases upon which Delaware relies involved express denials of injunctive relief; rather, they dealt with orders that were alleged to have the practical effect of denying injunctive relief. Accordingly, the Leagues need not demonstrate that the order will have a "serious, perhaps irreparable, consequence" and can be "effectively challenged" only by immediate appeal. See Cohen v. Bd. of Trs. of Univ. of Med., 867 F.2d 1455, 1464 (3d Cir. 1989). The language of §1292(a)(1) is clear and the Leagues need not satisfy any

jurisdictional hurdle beyond the fact that they have appealed from an order refusing to enter an injunction.

We next turn to the scope of our review under 28 U.S.C. § 1292(a). We have adopted a broad view of appellate jurisdiction under this section. See Kershner v. Mazurkiewicz, 670 F.2d 440, 445 (3d Cir. 1982); see also 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3921.1, at 28 (2d ed. 1996) ("Jurisdiction of the interlocutory appeal [under § 1292(a)(1)] is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development."). Moreover, we have held that "[w]hen an appeal is taken from an order made appealable by statute, we have all the powers with respect to that order listed in 28 U.S.C. § 2106."3 United Parcel Serv., Inc. v. U.S. Postal Serv., 615 F.2d 102, 107 (3d Cir. 1980). Accordingly, we have broad authority to decide this case as appropriate under § 2106.

Having determined that we have authority to address all aspects of this case, we must determine whether it is proper to exercise that authority. "As a general rule, when an appeal is

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Section 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal." Callaway v. Block, 763 F.2d 1283, 1287 n.6 (11th Cir. 1985). This ordinarily requires that we review the decision to grant or deny a preliminary injunction for abuse of discretion, employing the standard four-factor test. See Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999). Nevertheless, the Supreme Court has held the "general rule" of limited review is one of "orderly judicial administration, not a limit on judicial power." Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 757 (1986), overruled on other grounds by Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992).

In Thornburgh, the Supreme Court considered whether this Court properly exercised its jurisdiction in striking down portions of a Pennsylvania statute following an appeal from the district court's partial denial of a preliminary injunction. See id. at 755-57. The Supreme Court acknowledged that review of a preliminary injunction is normally limited to the injunction itself, but explained: "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." Id. At the same time, the Supreme Court cautioned: "A different situation is presented . . . when there is no disagreement as to the law, but the probability of success on the merits depends on facts that are likely to emerge at trial." Id. at 757 n.8. In affirming this Court's decision to

address the merits of the plaintiff's case, the Supreme Court quoted from our opinion:

> Thus, although this appeal arises from a ruling on a request for a preliminary injunction, we have before us an unusually complete factual and legal presentation from which to address the important constitutional issues at stake. The customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law.

Id. at 757 (quoting Am. Coll. of Obstetricians & Gynecologists v. Thornburgh, 737 F.2d 283, 290 (3d Cir. 1984)). The approach taken in Thornburgh has been embraced by a number of our sister courts of appeals. In an appeal from the grant of a preliminary injunction in Campaign for Family Farms v. Glickman, 200 F.3d 1180 (8th Cir. 2000), the Court of Appeals for the Eighth Circuit exercised its discretion to reach the merits of the underlying dispute, determining that it was "faced with a purely legal issue on a fixed . . . record." Id. at 1186-87. The court explained: "[t]he considerations that caution against a broad scope of review in the usual interlocutory appeal — that is, a tentative and provisional record with conflicting material facts — simply are not present here." Id. at 1187. Likewise, in Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005), the Court of Appeals for the Eleventh Circuit assessed the merits of the plaintiff's First Amendment claim on appeal after the district court denied his request for a preliminary injunction. Finding that the facts of the case were

"simple and straightforward, and the record need[ed] no explanation," id. at 1274, the court explained that "we do not think it necessary or prudent to confine our opinion to holding that [the plaintiff] has shown a likelihood of success on the merits, when it is altogether clear that [the plaintiff] will succeed on the merits of its First Amendment claims," id. at 1272 (emphasis in original). Finally, in Doe v. Sundquist, 106 F.3d 702 (6th Cir. 1997), the Court of Appeals for the Sixth Circuit considered the merits of the plaintiffs' claim following a denial of their preliminary injunction motion. The court noted that "[i]f an issue unaddressed by the district court is presented with sufficient clarity and completeness and its resolution will materially advance the progress of the litigation," consideration of that issue is proper. Id. at 707 (internal quotation marks and citation omitted). The court explained that "[t]he sort of judicial restraint that is normally warranted on interlocutory appeals does not prevent us from reaching clearly defined issues in the interest of judicial economy." Id. (citation omitted).

In light of Thornburgh and its progeny, we must determine whether the record in this appeal presents "a pure question of law" that is "intimately related to the merits of the grant [or denial] of preliminary injunctive relief," United Parcel Serv., 615 F.2d at 107, or whether the Leagues' "probability of success on the merits depends on facts that are likely to emerge at trial," Thornburgh, 476 U.S. at 757 n.8. For the reasons that follow, we conclude that this case falls into the former category.

In denying the Leagues' motion for preliminary injunction, the District Court hypothesized that "there may exist factual disputes as to what, if anything, the State of Delaware

actually did in the past with respect to sports gambling or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue." Markell, 2009 WL 2450284, at *2 (emphasis added). Contrary to the District Court's supposition, we have reviewed the record and cannot find any material issues of fact in dispute. As the Leagues rightly argue, Judge Stapleton's opinion in NFL is the definitive word regarding the scope and extent of Delaware's gambling scheme as it was conducted in 1976; the State neither challenged Judge Stapleton's findings 33 years ago nor does so now. Likewise, the parties do not dispute the scope and extent of the sports gambling scheme that Delaware intends to implement on September 1. As counsel for Delaware properly and candidly conceded at oral argument, the State intends to conduct widespread betting on both professional and college sports beyond the scope of the football-only parlays permitted in 1976. In sum, the parties agree upon what Delaware did in 1976 and what Delaware intends to do now. Given the absence of any disputed issue of material fact — as confirmed by both parties at oral argument — we conclude that this case does not turn on a "legal issue that might be seen in any different light after final hearing," United Parcel Serv., 615 F.2d at 107, and is ripe for adjudication as a matter of law. Therefore, we will proceed to assess the merits of the Leagues' claim that Delaware's sports betting scheme violates PASPA.4

IV.

4 Because we reach the merits of this case, we need not consider the parties' arguments regarding irreparable harm and the balancing of the equities.

We begin our legal analysis with the statutory language. PASPA prohibits any person or governmental entity from sponsoring, operating, advertising or promoting:

> 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.

28 U.S.C. § 3702. The statute contains four exceptions, only one of which is relevant here. That exception provides that PASPA's general prohibition against sports betting shall not apply to: "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." 28 U.S.C. § 3704(a) (emphasis added). Not surprisingly, the parties view PASPA's language differently, with both sides claiming that the plain language requires a favorable result on the merits.

A.

Delaware contends that its sports betting scheme qualifies for the exception in § 3704(a)(1), claiming: "[t]he plain language of the pertinent PASPA exemption allows Delaware to

reintroduce a sports lottery under State control because Delaware conducted such a scheme at some time between January 1, 1976, and August 31, 1990." Del. Br. at 3. The State also contends that the exemption "is broad in scope, and nowhere states that it restricts Delaware to operating particular lottery games for a particular sport." Id. at 32. In Delaware's view, § 3704(a)(1) allows it to conduct any "sports lottery under State control," id., because it did so in 1976. Although the State acknowledges, as it must, that the exception permits its lottery only "to the extent that the scheme was conducted," it argues that the word "scheme" refers neither to the three particular games it offered in 1976, nor to parlay betting in general, nor even to wagering on NFL games, but to a "sports lottery under State control in which the winners of lottery games were affiliated with the outcome of sporting events." Id. at 33.

Even assuming that Delaware's interpretation of the word "scheme" were persuasive, we must reconcile that interpretation with the statutory language "to the extent that the scheme was conducted by that State." (emphasis added). The State claims that this phrase merely "identifies a condition (i.e., that a State must have conducted a sports lottery in the past in order to be permitted to operate a sports lottery in the future)," id. at 34, rather than limiting the State's gaming authority to either the particular sports or types of games previously offered. Delaware argues that because state law previously authorized a broad lottery encompassing many types of games and many sports, it may now institute a broad lottery with those features.

In contrast to Delaware's argument, the Leagues contend that the exception in § 3704(a)(1) applies only to lotteries or

other schemes "to the extent" that such lottery or scheme "was conducted" by the State between January 1, 1976 and August 31, 1990. The Leagues insist that it is not sufficient that a particular lottery may have been contemplated, or even authorized, but rather we must consider the specific means by which the lottery was actually conducted.

We agree with the Leagues' interpretation. As the exception found at § 3704(a)(2) makes clear, there is a distinction between wagering schemes that were merely "authorized" and those that were "conducted." See 28 U.S.C. § 3704(a)(2) (which applies to a wagering scheme that was both

(i) "authorized by a statute as in effect on October 2, 1991," and (ii) "actually was conducted during the period beginning September 1, 1989 and ending on October 2, 1991"). Whatever the breadth of the lottery authorized by Delaware state law in 1976, PASPA requires us to determine "the extent" — or degree — to which such lottery was conducted. We cannot hold — as the State impliedly suggests — that Congress meant to conflate "authorized" and "conducted." See BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994) ("It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another."); Alaka v. Attorney General, 456 F.3d 88, 97-98 (3d Cir. 2006) ("It is a fundamental canon of statutory construction that where sections of a statute do not include a specific term used elsewhere in the statute, the drafters did not wish such a requirement to apply."). Thus, the sole exception upon which Delaware relies — applicable to wagering schemes dating back to 1976 — applies only to schemes that were "conducted." 28 U.S.C. § 3704(a)(1).

While minimizing the importance of the language of § 3704(a)(2), Delaware asks us to draw parallels to § 3704(a)(3), which provides:

> 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 State regulation authorized by that State's constitution and applicable solely to such municipality[.]

(emphasis added). Delaware argues that the phrase "to the extent" must mean the same thing in § 3704(a)(1) as it does in § 3704(a)(3), where the phrase identifies a condition. We reject this argument out of hand because the exception contained in § 3704(a)(3) — which deals with casinos — differs in subject matter, structure, and syntax from the language of § 3704(a)(1).

As a fallback position, Delaware argues that PASPA is ambiguous such that resort to legislative history is necessary. We disagree, because as we have noted:

> A statutory provision is not ambiguous simply because by itself, [it is] susceptible to differing

constructions because in addition to the statutory language . . . itself, we take account of the specific context in which that language is used, and the broader context of the statute as a whole. We assume, for example, that every word in a statute has meaning and avoid interpreting one part of a statute in a manner that renders another part superfluous.

Disabled in Action v. SEPTA, 539 F.3d 199, 210 (3d Cir. 2008) (internal quotations and citations omitted). Applying these principles of statutory construction, we find unambiguous the phrase "to the extent that the scheme was conducted by that State," so our "inquiry comes to an end." Kaufman v. Allstate

N.J. Ins. Co., 561 F.3d 144, 155 (3d Cir. 2009) (citation omitted).5

5 Delaware spends several pages of its brief explaining the legislative history and citing statements from various legislators. These statements are inconclusive at best. When we view them in their entirety rather than focusing on "cherrypicked" snippets, they offer no consistent insight into Congressional intent. For example, the Senate Report upon which Delaware relies, Del. Br. at 13, states that the exemption in § 3704(1) "is not intended to prevent . . . Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law. . . . At the same time, paragraph (1) does not intend to allow the expansion of sports lotteries into head-to-head betting . . . ." A152 (Senate Report). This excerpt from the Senate Report is unhelpful in two respects. First, it is at odds with PASPA's statutory language.

Because we do not find PASPA ambiguous, we find unpersuasive Delaware's argument that its sovereign status requires that it be permitted to implement its proposed betting scheme. See Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) ("[A]bsent an unmistakably clear expression to alter the usual constitutional balance between the States and the Federal Government, [federal courts] will interpret a statute to preserve rather than destroy the States' substantial sovereign powers.") (internal quotations omitted). PASPA unmistakably prohibits state-sponsored gambling, 28 U.S.C. § 3702, subject to certain exceptions, 28 U.S.C. § 3704. Through PASPA, Congress has "altered the usual constitutional balance" with respect to sports wagering, although Delaware retains the right to implement a

Second, it contradicts Delaware's claim that single-game wagering is permitted. Similarly unhelpful are the many statements of individual legislators cited by Delaware because such "cherry-picked" statements cannot be deemed to reflect the views of other legislators, much less of a majority of those who enacted the statute. Szehinskyi v. Attorney General, 432 F.3d 253, 256, (3d Cir. 2005) ("[Appellant's] selective invocation of fragments of the floor debate is an object lesson in the perils of appealing to this particular kind of legislative history as a guide to statutory meaning. This case is a perfect illustration of the well-known admonition that what individual legislators say a statute will do, and what the language of the statute provides, may be far apart indeed. The law is what Congress enacts, not what its members say on the floor."). In sum, we conclude that "[t]he legislative history is more conflicting than the text is ambiguous," Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950), and does not support the State's position.

sports wagering scheme "to the extent that the scheme was conducted" previously. Those words of limitation are not rendered nugatory by generalized notions of "state sovereignty."

Finally, Delaware argues that we cannot construe the language "to the extent that the scheme was conducted" so narrowly because doing so would render the PASPA exception a nullity. Certain aspects of Scoreboard were deemed impermissible by either Judge Stapleton, NFL, 435 F. Supp. at 1387-88 (holding that Touchdown II violated the lottery provision of the Delaware Constitution by utilizing a fixed-payoff scheme), or the Delaware Supreme Court, Op. of the Justices, 385 A.2d 695, 705 (Del. 1978) (striking down Football Bonus and Touchdown because they awarded prizes on a parimutuel basis in violation of the State's Constitution). Consequently, the State reasons that if it is confined to the exact scheme conducted in 1976, the exception would be illusory as applied to Delaware. The State argues that Congress could not have intended this result, especially when the legislative history makes clear that Delaware was one of only four states that were intended beneficiaries of the exception. See Conn. Nat'l Bank

v. Germain, 503 U.S. 249, 253 (1992) (courts should disfavor interpretations of statutes that render language superfluous). Delaware's reading overstates the narrowness of the exception provided by § 3704(a)(1). We do not hold that PASPA requires Delaware's sports lottery to be identical in every respect to what the State conducted in 1976. Certain aspects of the lottery may differ from the lottery as conducted in 1976, as long as they do not effectuate a substantive change from the scheme that was conducted during the exception

period. For example, as the State aptly noted — and the Leagues conceded — at oral argument, "to the extent the scheme was conducted" cannot mean that Delaware could institute a sports betting scheme for only four months as was done in 1976. Likewise, Delaware is neither limited to selling tickets at identical venues nor prohibited from allowing wagering on NFL teams that did not exist in 1976. Such de minimis alterations neither violate PASPA's language nor do violence to its central purposes, viz., to limit the spread of state-sponsored sports gambling and maintain the integrity of sports. By contrast, expanding the very manner in which Delaware conducts gambling activities to new sports or to new forms of gambling — namely single-game betting — beyond "the extent" of what Delaware "conducted" in 1976 would engender the very ills that PASPA sought to combat. In construing statutes, we consider the statute's overall object and policy, and avoid constructions that produce "odd" or "absurd" results or that are "inconsistent with common sense." Disabled in Action, 539 F.3d at 210 (internal citations omitted).

B.

In light of our reading of PASPA, we determine what scheme Delaware may conduct in 2009 with reference to the scheme it conducted in 1976. As Judge Stapleton held in NFL

— and as was not disputed in the proceedings before either the District Court or our Court in this matter — the only sports betting scheme "conducted" by Delaware in 1976 involved the three Scoreboard games. That betting scheme was limited to multi-game parlays involving only NFL teams. Thus, any effort

by Delaware to allow wagering on athletic contests involving sports beyond the NFL would violate PASPA. It is also undisputed that no single-game betting was "conducted" by Delaware in 1976, or at any other time during the time period that triggers the PASPA exception. See NFL, 435 F. Supp. at 1385 ("None of the [1976] games permits head-to-head or single game betting."). Because single-game betting was not "conducted" by Delaware between 1976 and 1990, such betting is beyond the scope of the exception in § 3704(a)(1) of PASPA and thus prohibited under the statute's plain language.

Under federal law, Delaware may, however, institute multi-game (parlay) betting on at least three NFL games, because such betting is consistent with the scheme to the extent it was conducted in 1976. Of course, we express no opinion regarding the legality of such a scheme under Delaware statutory or constitutional law.

For the foregoing reasons, we will vacate the order of the District Court and remand for proceedings consistent with this opinion.

N

Delaware Discussed

In class be prepared to discuss the following:

- the issues in each Delaware opinion
- the timeline of events
- the issues each side prepared to argue for each hearing
- the outcomes and their impact on gaming law policy

NEW JERSEY and THE CONSTITUTIONAL CHALLENGE TO PASPA

New Jersey

As you know from the reading above, PASPA was championed, in part by Senator Bradley from New Jersey. Additionally, New Jersey was afforded a special exemption under PASPA as follows:

> (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

Note the parameters are that the exemption in 1992 was for any state provided that it had commercial casino gaming through a 10-year period prior to 1992 and it enacts legislation to conduct sports wagering in casinos within 1-year of enactment of PASPA. In 1992, the only state that could qualify for the exemption was New Jersey. However, New Jersey never enacted sports wagering legislation within 1 year of enactment of PASPA.

Despite PASPA, in 2012, New Jersey enacted a law authorizing sports wagering at regulated casinos in New Jersey. That same year the NFL and NCAA filed an action to enjoin New Jersey from such authorization and to prevent sports wagering in New Jersey. See *National Collegiate Athletic Assn. v. Christie*, 926 F. Supp. 2d 551, 561 (NJ 2013). The NFL and NCAA were successful and the district court enjoined New Jersey from authorizing and regulating sports wagering. The Third Circuit Court of appeals agreed and the Supreme Court denied cert.

New Jersey then tried again stating that their prior authorization included a severance clause. As such while the authorization and regulation of sports wagering in casinos may not be permitted under PASPA, the authorization also de-criminalized the activity if it occurred within a licensed casino. The NFL and NCAA filed an action to enjoin New Jersey from allowing sports wagering in New Jersey. The District Court once again held in favor of the sports leagues. See *National Collegiate Athletic Assn. v. Christie,* 61 F.Supp.3d 488 (2014). The State appealed, and the Third Circuit once again agreed with the District Court. See *National Collegiate Athletic Assn. v. Governor of New Jersey* 832 F.3d 389 (2016).

The State appealed to the U.S. Supreme court and in a bit of a surprise, the Supreme Court granted Cert. That opinion follows:

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MURPHY, GOVERNOR OF NEW JERSEY, ET AL. *v.* NATIONAL COLLEGIATE ATHLETIC ASSN. ET AL.

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

No. 16–476. Argued December 4, 2017—Decided May 14, 2018*

The Professional and Amateur Sports Protection Act (PASPA) makes it unlawful for a State or its subdivisions "to sponsor, operate, adver- tise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events, 28 U. S. C. §3702(1), and for "a person to sponsor, operate, advertise, or promote" those same gambling schemes if done "pursuant to the law or compact of a governmental entity," §3702(2). But PASPA does not make sports gambling itself a federal crime. Instead, it allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations. §3703. "Grandfather" provisions allow existing forms of sports gambling to continue in four States, §3704(a)(1)–(2), and another provision would have permitted New Jersey to set up a sports gambling scheme in Atlantic City within a year of PASPA's enactment, §3704(a)(3).

New Jersey did not take advantage of that option but has since had a change of heart. After voters approved an amendment to the State Constitution giving the legislature the authority to legalize sports gambling schemes in Atlantic City and at horseracing tracks, the legislature enacted a 2012 law doing just that. The NCAA and three major professional sports leagues brought an action in federal court against New Jersey's Governor and other state officials (hereinafter New Jersey), seeking to enjoin the law on the ground that it violates

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*Together with No. 16–477, *New Jersey Thoroughbred Horsemen's Assn., Inc.* v. *National Collegiate Athletic Assn. et al.*, also on certiorari to the same court.

PASPA. New Jersey countered that PASPA violates the Constitution's "anticommandeering" principle by preventing the State from modifying or repealing its laws prohibiting sports gambling. The District Court found no anticommandeering violation, the Third Circuit affirmed, and this Court denied review.

In 2014, the New Jersey Legislature enacted the law at issue in these cases. Instead of affirmatively authorizing sports gambling schemes, this law repeals state-law provisions that prohibited such schemes, insofar as they concerned wagering on sporting events by persons 21 years of age or older; at a horseracing track or a casino or gambling house in Atlantic City; and only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State. Plaintiffs in the earlier suit, respondents here, filed a new action in federal court. They won in the District Court, and the Third Circuit affirmed, holding that the 2014 law, no less than the 2012 one, violates PASPA. The court further held that the prohibition does not "commandeer" the States in violation of the Constitution.

Held:

1. When a State completely or partially repeals old laws banning sports gambling schemes, it "authorize[s]" those schemes under PASPA. Pp. 9–14.

(a) Pointing out that one accepted meaning of "authorize" is "permit," petitioners contend that any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to authorization. Respondents maintain that "authorize" requires affirmative action, and that the 2014 law affirmatively acts by empowering a defined group of entities and endowing them with the authority to conduct sports gambling operations. They do not take the position that PASPA bans all modifications of laws prohibiting sports gambling schemes, but just how far they think a modification could go is not clear. Similarly, the United States, as *amicus*, claims that the State's 2014 law qualifies as an authorization. PASPA, it contends, neither prohibits a State from enacting a complete repeal nor outlaws all partial repeals. But the United States also does not set out any clear rule for distinguishing between partial repeals that constitute the "authorization" of sports gambling and those that are permissible. Pp. 10–11.

(b) Taking into account the fact that all forms of sports gambling were illegal in the great majority of States at the time of PASPA's enactment, the repeal of a state law banning sports gambling not only "permits" sports gambling but also gives those now free to conduct a sports betting operation the "right or authority to act." The interpretation adopted by the Third Circuit and advocated by respondents

and the United States not only ignores the situation that Congress faced when it enacted PASPA but also leads to results that Congress is most unlikely to have wanted. Pp. 11–13.

(c) Respondents and the United States cannot invoke the canon of interpretation that a statute should not be held to be unconstitutional if there is any reasonable interpretation that can save it. Even if the law could be interpreted as respondents and the United States suggest, it would still violate the anticommandeering principle. Pp. 13–14.

2. PASPA's provision prohibiting state authorization of sports gambling schemes violates the anticommandeering rule. Pp. 14–24.

(a) As the Tenth Amendment confirms, all legislative power not conferred on Congress by the Constitution is reserved for the States. Absent from the list of conferred powers is the power to issue direct orders to the governments of the States. The anticommandeering doctrine that emerged in *New York* v. *United States,* 505 U. S. 144, and *Printz* v. *United States,* 521 U. S. 898, simply represents the recognition of this limitation. Thus, "Congress may not simply 'commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York, supra*, at 161. Adherence to the anticommandeering principle is important for several reasons, including, as significant here, that the rule serves as "one of the Constitution's structural safeguards of liberty," *Printz, supra*, at 921, that the rule promotes political accountability, and that the rule prevents Congress from shifting the costs of regulation to the States. Pp. 14–18.

(b) PASPA's anti-authorization provision unequivocally dictates what a state legislature may and may not do. The distinction be- tween compelling a State to enact legislation and prohibiting a State from enacting new laws is an empty one. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event. Pp. 18–19.

(c) Contrary to the claim of respondents and the United States, this Court's precedents do not show that PASPA's anti-authorization provision is constitutional. *South Carolina* v. *Baker*, 485 U. S. 505; *Reno* v. *Condon*, 528 U. S. 141; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264; *FERC* v. *Mississippi*, 456 U. S. 742, distinguished. Pp. 19–21.

(d) Nor does the anti-authorization provision constitute a valid preemption provision. To preempt state law, it must satisfy two requirements. It must represent the exercise of a power conferred on Congress by the Constitution. And, since the Constitution "confers upon Congress the power to regulate individuals, not States," *New York*, *supra*, at 177, it must be best read as one that regulates private

actors. There is no way that the PASPA anti-authorization provision can be understood as a regulation of private actors. It does not confer any federal rights on private actors interested in conducting sports gambling operations or impose any federal restrictions on private actors. Pp. 21–24.

3. PASPA's provision prohibiting state "licens[ing]" of sports gambling schemes also violates the anticommandeering rule. It issues a direct order to the state legislature and suffers from the same defect as the prohibition of state authorization. Thus, this Court need not decide whether New Jersey's 2014 law violates PASPA's anti-licensing provision. Pp. 24–25.

4. No provision of PASPA is severable from the provisions directly at issue. Pp. 26–30.

(a) Section 3702(1)'s provisions prohibiting States from "operat[ing]," "sponsor[ing]," or "promot[ing]" sports gambling schemes cannot be severed. Striking the state authorization and licensing provisions while leaving the state operation provision standing would result in a scheme sharply different from what Congress contemplated when PASPA was enacted. For example, had Congress known that States would be free to authorize sports gambling in privately owned casinos, it is unlikely that it would have wanted to prevent States from operating sports lotteries. Nor is it likely that Congress would have wanted to prohibit such an ill-defined category of state conduct as sponsorship or promotion. Pp. 26–27.

(b) Congress would not want to sever the PASPA provisions that prohibit a private actor from "sponsor[ing]," "operat[ing]," or "promot[ing]" sports gambling schemes "pursuant to" state law. §3702(2). PASPA's enforcement scheme makes clear that §3702(1) and §3702(2) were meant to operate together. That scheme—suited for challenging state authorization or licensing or a small number of private operations—would break down if a State broadly decriminalized sports gambling. Pp. 27–29.

(c) PASPA's provisions prohibiting the "advertis[ing]" of sports gambling are also not severable. See §§3702(1)–(2). If they were allowed to stand, federal law would forbid the advertising of an activity that is legal under both federal and state law—something that Congress has rarely done. Pp. 29–30.

832 F. 3d 389, reversed.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, KAGAN, and GORSUCH, JJ., joined, and in which BREYER, J., joined as to all but Part VI–B. THOMAS, J., filed a concurring opinion. BREYER, J., filed an opinion concurring in part and dissenting in part. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER, J., joined in part.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. ~~16–476 and~~ 16–477

PHILIP D. MURPHY, GOVERNOR OF NEW JERSEY, ET AL., PETITIONERS

16–476 *v.*

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

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

16–477 *v.*

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

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

[May 14, 2018]

JUSTICE ALITO delivered the opinion of the Court.

The State of New Jersey wants to legalize sports gambling at casinos and horseracing tracks, but a federal law, the Professional and Amateur Sports Protection Act, generally makes it unlawful for a State to "authorize" sports gambling schemes. 28 U. S. C. §3702(1). We must decide whether this provision is compatible with the system of "dual sovereignty" embodied in the Constitution.

I

A

Americans have never been of one mind about gambling,

and attitudes have swung back and forth. By the end of the 19th century, gambling was largely banned throughout the country,[1] but beginning in the 1920s and 1930s, laws prohibiting gambling were gradually loosened.

New Jersey's experience is illustrative. In 1897, New Jersey adopted a constitutional amendment that barred all gambling in the State.[2] But during the Depression, the State permitted parimutuel betting on horse races as a way of increasing state revenue,[3] and in 1953, churches and other nonprofit organizations were allowed to host bingo games.[4] In 1970, New Jersey became the third State to run a state lottery,[5] and within five years, 10 other States followed suit.[6]

By the 1960s, Atlantic City, "once the most fashionable resort of the Atlantic Coast," had fallen on hard times,[7] and casino gambling came to be seen as a way to revitalize the city.[8] In 1974, a referendum on statewide legalization failed,[9] but two years later, voters approved a narrower measure allowing casino gambling in Atlantic City alone.[10] At that time, Nevada was the only other State with legal

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[1] See Nat. Gambling Impact Study Comm'n, Final Report, p. 2–1 (1999) (Final Report); S. Durham & K. Hashimoto, The History of Gambling in America 34–35 (2010).

[2] See *Atlantic City Racing Assn.* v. *Attorney General*, 98 N. J. 535, 539–541, 489 A. 2d 165, 167–168 (1985).

[3] See Note, The Casino Act: Gambling's Past and the Casino Act's Future, 10 Rutgers-Camden L. J. 279, 287 (1979) (The Casino Act).

[4] *Id.*, at 288; see also N. J. Const., Art. 4, §7, ¶2(A); Bingo Licensing Law, N. J. Stat. Ann. §5:8–24 *et seq.* (West 2012).

[5] See State Lottery Law, N. J. Stat. Ann. §5:9–1 *et seq.*; The Casino Act, at 288; N. J. Const., Art. 4, §7, ¶2(C); Final Report, at 2–1.

[6] *Id.*, at 2–1.

[7] T. White, The Making of the President 1964, p. 275 (1965).

[8] See D. Clary, Gangsters to Governors 152–153 (2017) (Clary).

[9] See The Casino Act, at 289.

[10] See *ibid.*; N. J. Const., Art. 4, §7, ¶2(D).

casinos,[11] and thus for a while the Atlantic City casinos had an east coast monopoly. "With 60 million people living within a one-tank car trip away," Atlantic City became "the most popular tourist destination in the United States."[12] But that favorable situation eventually came to an end.

With the enactment of the Indian Gaming Regulatory Act in 1988, 25 U. S. C. §2701 *et seq.*, casinos opened on Indian land throughout the country. Some were located within driving distance of Atlantic City,[13] and nearby States (and many others) legalized casino gambling.[14] But Nevada remained the only state venue for legal sports gambling in casinos, and sports gambling is immensely popular.[15]

Sports gambling, however, has long had strong opposition. Opponents argue that it is particularly addictive and especially attractive to young people with a strong interest in sports,[16] and in the past gamblers corrupted and seriously damaged the reputation of professional and amateur sports.[17] Apprehensive about the potential effects of

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[11] Clary 146.

[12] *Id.*, at 146, 158.

[13] *Id.*, at 208–210.

[14] Casinos now operate in New York, Pennsylvania, Delaware, and Maryland. See American Gaming Assn., 2016 State of the States, p. 8, online at https://www.americangaming.org/sites/default/files/2016%20State%20of%20the%20States_FINAL.pdf (all Internet materials as last visited May 4, 2018).

[15] See, *e.g.*, Brief for American Gaming Assn. as *Amicus Curiae* 1–2.

[16] See, *e.g.*, Final Report, at 3–10; B. Bradley, The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474, 2 Seton Hall J. Sport L. 5, 7 (1992); Brief for Stop Predatory Gambling et al. as *Amici Curiae* 22–23.

[17] For example, in 1919, professional gamblers are said to have paid members of the Chicago White Sox to throw the World Series, an episode that was thought to have threatened baseball's status as the Nation's pastime. See E. Asinof, Eight Men Out: The Black Sox and

sports gambling, professional sports leagues and the National Collegiate Athletic Association (NCAA) long opposed legalization.[18]

B

By the 1990s, there were signs that the trend that had brought about the legalization of many other forms of gambling might extend to sports gambling,[19] and this sparked federal efforts to stem the tide. Opponents of sports gambling turned to the legislation now before us, the Professional and Amateur Sports Protection Act (PASPA). 28 U. S. C. §3701 *et seq.* PASPA's proponents argued that it would protect young people, and one of the bill's sponsors, Senator Bill Bradley of New Jersey, a former college and professional basketball star, stressed that the law was needed to safeguard the integrity of sports.[20] The Department of Justice opposed the bill,[21] but it was passed and signed into law.

PASPA's most important provision, part of which is directly at issue in these cases, makes it "unlawful" for a State or any of its subdivisions[22] "to sponsor, operate,

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the 1919 World Series 5, 198–199 (1963). And in the early 1950s, the Nation was shocked when several college basketball players were convicted for shaving points. S. Cohen, The Game They Played 183–238 (1977). This scandal is said to have nearly killed college basketball. See generally C. Rosen, Scandals of '51: How the Gamblers Almost Killed College Basketball (1978).

[18] See Professional and Amateur Sports Protection, S. Rep. No. 102–248, p. 8 (1991); Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 102d Cong., 1st Sess., 21, 39, 46–47, 59–60, 227 (1991) (S. Hrg. 102–499) (statements by representatives of major sports leagues opposing sports gambling).

[19] S. Rep. No. 102–248, at 5.

[20] S. Hrg. 102–499, at 10–14.

[21] App. to Pet. for Cert. in No. 16–476, p. 225a.

[22] The statute applies to any "governmental entity," which is defined

advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events. §3702(1). In parallel, §3702(2) makes it "unlawful" for "a person to sponsor, operate, advertise, or promote" those same gambling schemes[23]—but only if this is done "pursuant to the law or compact of a governmental entity." PASPA does not make sports gambling a federal crime (and thus was not anticipated to impose a significant law enforcement burden on the Federal Government).[24] Instead, PASPA allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations. §3703.

At the time of PASPA's adoption, a few jurisdictions allowed some form of sports gambling. In Nevada, sports gambling was legal in casinos,[25] and three States hosted sports lotteries or allowed sports pools.[26] PASPA contains "grandfather" provisions allowing these activities to continue. §3704(a)(1)–(2). Another provision gave New Jersey the option of legalizing sports gambling in Atlantic City—provided that it did so within one year of the law's

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as "a State, a political subdivision of a State, or an entity or organization . . . that has governmental authority within the territorial boundaries of the United States." 28 U. S. C. §3701(2).

[23] PASPA does not define the term "scheme." The United States has not offered a definition of the term but suggests that it encompasses only those forms of gambling having some unspecified degree of organization or structure. See Brief for United States as *Amicus Curiae* 28–29. For convenience, we will use the term "sports gambling" to refer to whatever forms of sports gambling fall within PASPA's reach.

[24] The Congressional Budget Office estimated that PASPA would not require the appropriation of any federal funds. S. Rep. No. 102–248, at 10.

[25] *Ibid.*

[26] *Ibid.*; 138 Cong. Rec. 12973.

effective date. §3704(a)(3).[27]

New Jersey did not take advantage of this special option, but by 2011, with Atlantic City facing stiff competition, the State had a change of heart. New Jersey voters approved an amendment to the State Constitution making it lawful for the legislature to authorize sports gambling, Art. IV, §7, ¶2(D), (F), and in 2012 the legislature enacted a law doing just that, 2011 N. J. Laws p. 1723 (2012 Act).

The 2012 Act quickly came under attack. The major professional sports leagues and the NCAA brought an action in federal court against the New Jersey Governor and other state officials (hereinafter New Jersey), seeking to enjoin the new law on the ground that it violated PASPA. In response, the State argued, among other things, that PASPA unconstitutionally infringed the State's sovereign authority to end its sports gambling ban. See *National Collegiate Athletic Assn.* v. *Christie*, 926 F. Supp. 2d 551, 561 (NJ 2013).

In making this argument, the State relied primarily on two cases, *New York* v. *United States*, 505 U. S. 144 (1992), and *Printz* v. *United States*, 521 U. S. 898 (1997), in which we struck down federal laws based on what has been dubbed the "anticommandeering" principle. In *New York*, we held that a federal law unconstitutionally ordered the State to regulate in accordance with federal standards, and in *Printz*, we found that another federal statute unconstitutionally compelled state officers to enforce federal law.

Relying on these cases, New Jersey argued that PASPA is similarly flawed because it regulates a State's exercise

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[27] Although this provision did not specifically mention New Jersey or Atlantic City, its requirements—permitting legalization only "in a municipality" with an uninterrupted 10-year history of legal casino gaming—did not fit anyplace else.

of its lawmaking power by prohibiting it from modifying or repealing its laws prohibiting sports gambling. See *National Collegiate Athletic Assn.* v. *Christie*, 926 F. Supp. 2d, at 561–562. The plaintiffs countered that PASPA is critically different from the commandeering cases because it does not command the States to take any affirmative act. *Id.*, at 562. Without an affirmative federal command to *do* something, the plaintiffs insisted, there can be no claim of commandeering. *Ibid.*

The District Court found no anticommandeering violation, *id.*, at 569–573, and a divided panel of the Third Circuit affirmed, *National Collegiate Athletic Assn.* v. *Christie*, 730 F. 3d 208 (2013) (*Christie I*). The panel thought it significant that PASPA does not impose any affirmative command. *Id.*, at 231. In the words of the panel, "PASPA does not require or coerce the states to lift a finger." *Ibid.* (emphasis deleted). The panel recognized that an affirmative command (for example, "Do not repeal") can often be phrased as a prohibition ("Repeal is prohibited"), but the panel did not interpret PASPA as prohibiting the repeal of laws outlawing sports gambling. *Id.*, at 232. A repeal, it thought, would not amount to "authoriz[ation]" and thus would fall outside the scope of §3702(1). "[T]he lack of an affirmative prohibition of an activity," the panel wrote, "does not mean it is affirmatively authorized by law. The right to do that which is not prohibited derives not from the authority of the state but from the inherent rights of the people." *Id.*, at 232 (emphasis deleted).

New Jersey filed a petition for a writ of certiorari, raising the anticommandeering issue. Opposing certiorari, the United States told this Court that PASPA does not require 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." Brief for United States in Opposition in *Christie* v. *National Collegiate Athletic Assn.*, O. T. 2013, No. 13–967 etc., p. 11. See also Brief for Respondents in Opposition in No. 13–967 etc., p. 23 ("Nothing in that unambiguous language compels states to prohibit or maintain any existing prohibition on sports gambling"). We denied review. *Christie* v. *National Collegiate Athletic Assn.*, 573 U. S. ___ (2014).

Picking up on the suggestion that a partial repeal would be allowed, the New Jersey Legislature enacted the law now before us. 2014 N. J. Laws p. 602 (2014 Act). The 2014 Act declares that it is not to be interpreted as causing the State to authorize, license, sponsor, operate, advertise, or promote sports gambling. *Ibid.* Instead, it is framed as a repealer. Specifically, it repeals the provisions of state law prohibiting sports gambling insofar as they concerned the "placement and acceptance of wagers" on sporting events by persons 21 years of age or older at a horseracing track or a casino or gambling house in Atlantic City. *Ibid.* The new law also specified that the repeal was effective only as to wagers on sporting events not involving a New Jersey college team or a collegiate event taking place in the State. *Ibid.*

Predictably, the same plaintiffs promptly commenced a new action in federal court. They won in the District Court, *National Collegiate Athletic Assn.* v. *Christie,* 61 F. Supp. 3d 488 (NJ 2014), and the case was eventually heard by the Third Circuit sitting en banc. The en banc court affirmed, finding that the new law, no less than the old one, violated PASPA by "author[izing]" sports gambling. *National Collegiate Athletic Assn.* v. *Governor of N. J.*, 832 F. 3d 389 (2016) (case below). The court was unmoved by the New Jersey Legislature's "artful[]" attempt to frame the 2014 Act as a repealer. *Id.*, at 397. Looking at what the law "actually does," the court concluded that it constitutes an authorization because it

"selectively remove[s] a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators." *Id.*, at 397, 401. The court disavowed some of the reasoning in the *Christie I* opinion, finding its discussion of "the relationship between a 'repeal' and an 'authorization' to have been too facile." 832 F. 3d, at 401. But the court declined to say whether a repeal that was more complete than the 2014 Act would still amount to an authorization. The court observed that a partial repeal that allowed only "*de minimis* wagers between friends and family would not have nearly the type of authorizing effect" that it found in the 2014 Act, and it added: "We need not . . . articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, *if indeed such a line could be drawn*." *Id.*, at 402 (emphasis added).

Having found that the 2014 Act violates PASPA's prohibition of state authorization of sports gambling schemes, the court went on to hold that this prohibition does not contravene the anticommandeering principle because it "does not command states to take affirmative actions." *Id.*, at 401.

We granted review to decide the important constitutional question presented by these cases, *sub nom*. *Christie* v. *National Collegiate Athletic Assn.*, 582 U. S. ___ (2017).

II

Before considering the constitutionality of the PASPA provision prohibiting States from "author[izing]" sports gambling, we first examine its meaning. The parties advance dueling interpretations, and this dispute has an important bearing on the constitutional issue that we must decide. Neither respondents nor the United States, appearing as an *amicus* in support of respondents, contends that the provision at issue would be constitutional if petitioners' interpretation is correct. Indeed, the United

States expressly concedes that the provision is unconstitutional if it means what petitioners claim. Brief for United States 8, 19.

A

Petitioners argue that the anti-authorization provision requires States to maintain their existing laws against sports gambling without alteration. One of the accepted meanings of the term "authorize," they point out, is "permit." Brief for Petitioners in No. 16–476, p. 42 (citing Black's Law Dictionary 133 (6th ed. 1990); Webster's Third New International Dictionary 146 (1992)). They therefore contend that any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to an authorization. Brief for Petitioners in No. 16–476, at 42.

Respondents interpret the provision more narrowly. They claim that the *primary* definition of "authorize" requires affirmative action. Brief for Respondents 39. To authorize, they maintain, means "'[t]o empower; to give a right or authority to act; to endow with authority.'" *Ibid.* (quoting Black's Law Dictionary, at 133). And this, they say, is precisely what the 2014 Act does: It empowers a defined group of entities, and it endows them with the authority to conduct sports gambling operations.

Respondents do not take the position that PASPA bans all modifications of old laws against sports gambling, Brief for Respondents 20, but just how far they think a modification could go is not clear. They write that a State "can also repeal or enhance [laws prohibiting sports gambling] without running afoul of PASPA" but that it "cannot 'partially repeal' a general prohibition for only one or two preferred providers, or only as to sports-gambling schemes conducted by the state." *Ibid.* Later in their brief, they elaborate on this point:

"If, for example, a state had an existing felony prohi-

> bition on all lotteries, it could maintain the law, it could repeal the law, it could downgrade the crime to a misdemeanor or increase the penalty . . . . But if the state modified its law, whether through a new authorization or through an amendment partially repealing the existing prohibition, to authorize the state to conduct a sports lottery, that modified law would be preempted." *Id.*, at 31.

The United States makes a similar argument. PASPA, it contends, does not prohibit a State from enacting a complete repeal because "one would not ordinarily say that private conduct is 'authorized by law' simply because the government has not prohibited it." Brief for United States 17. But the United States claims that "[t]he 2014 Act's selective and conditional permission to engage in conduct that is generally prohibited certainly qualifies" as an authorization. *Ibid.* The United States does not argue that PASPA outlaws *all* partial repeals, but it does not set out any clear rule for distinguishing between partial repeals that constitute the "authorization" of sports gambling and those that are permissible. The most that it is willing to say is that a State could "eliminat[e] prohibitions on sports gambling involving wagers by adults or wagers below a certain dollar threshold." *Id.*, at 29.

B

In our view, petitioners' interpretation is correct: When a State completely or partially repeals old laws banning sports gambling, it "authorize[s]" that activity. This is clear when the state-law landscape at the time of PASPA's enactment is taken into account. At that time, all forms of sports gambling were illegal in the great majority of States, and in that context, the competing definitions offered by the parties lead to the same conclusion. The repeal of a state law banning sports gambling not only "permits" sports gambling (petitioners' favored definition);

it also gives those now free to conduct a sports betting operation the "right or authority to act"; it "empowers" them (respondents' and the United States's definition).

The concept of state "authorization" makes sense only against a backdrop of prohibition or regulation. A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State "authorizes" its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted.[28]

The United States counters that, even if the term "authorize," standing alone, is interpreted as petitioners claim, PASPA contains additional language that precludes that reading. The provision at issue refers to "authoriz[ation] *by law*," §3702(1) (emphasis added), and the parallel provision governing private conduct, §3702(2), applies to conduct done "pursuant to the law . . . of a governmental entity." The United States maintains that one "would not naturally describe a person conducting a sports-gambling operation that is merely left unregulated as acting 'pursuant to' state law." Brief for United States 18. But one might well say exactly that if the person previously was prohibited from engaging in the activity. ("Now that the State has legalized the sale of marijuana, Joe is able to sell the drug pursuant to state law.")

The United States also claims to find support for its interpretation in the fact that the authorization ban ap-

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[28] See, *e.g.*, A. McCullum, Vermont's legal recreational marijuana law: What you should know, USA Today Network (Jan. 23, 2018), online at https://www.usatoday.com/story/news/nation-now/2018/01/23/vermont-legal-marijuana-law-what-know/1056869001/ ("Vermont . . . bec[ame] the first [State] in the country to *authorize* the recreational use of [marijuana] by an act of a state legislature." (emphasis added)).

plies to all "governmental entities." It is implausible, the United States submits, to think that Congress "commanded every county, district, and municipality in the Nation to prohibit sports betting." *Ibid.* But in making this argument, the United States again ignores the legal landscape at the time of PASPA's enactment. At that time, sports gambling was generally prohibited by state law, and therefore a State's political subdivisions were powerless to legalize the activity. But what if a State enacted a law enabling, but not requiring, one or more of its subdivisions to decide whether to authorize sports gambling? Such a state law would not itself authorize sports gambling. The ban on legalization at the local level addresses this problem.

The interpretation adopted by the Third Circuit and advocated by respondents and the United States not only ignores the situation that Congress faced when it enacted PASPA but also leads to results that Congress is most unlikely to have wanted. This is illustrated by the implausible conclusions that all of those favoring alternative interpretations have been forced to reach about the extent to which the provision permits the repeal of laws banning sports gambling.

The Third Circuit could not say which, if any, partial repeals are allowed. 832 F. 3d, at 402. Respondents and the United States tell us that the PASPA ban on state authorization allows complete repeals, but beyond that they identify no clear line. It is improbable that Congress meant to enact such a nebulous regime.

C

The respondents and United States argue that even if there is some doubt about the correctness of their interpretation of the anti-authorization provision, that interpretation should be adopted in order to avoid any anti-commandeering problem that would arise if the provision

were construed to require States to maintain their laws prohibiting sports gambling. Brief for Respondents 38; Brief for United States 19. They invoke the canon of interpretation that a statute should not be held to be unconstitutional if there is any reasonable interpretation that can save it. See *Jennings* v. *Rodriguez*, 583 U. S. ___, ___(2018) (slip op., at 12). The plausibility of the alternative interpretations is debatable, but even if the law could be interpreted as respondents and the United States suggest, it would still violate the anticommandeering principle, as we now explain.

III

A

The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States. When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority "to do all . . . Acts and Things which Independent States may of right do." ¶32. The Constitution limited but did not abolish the sovereign powers of the States, which retained "a residuary and inviolable sovereignty." The Federalist No. 39, p. 245 (C. Rossiter ed. 1961). Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of "dual sovereignty." *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991).

The Constitution limits state sovereignty in several ways. It directly prohibits the States from exercising some attributes of sovereignty. See, *e.g.*, Art. I, §10. Some grants of power to the Federal Government have been held to impose implicit restrictions on the States. See, *e.g.*, *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328

(2008); *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396 (2003). And the Constitution indirectly restricts the States by granting certain legislative powers to Congress, see Art. I, §8, while providing in the Supremacy Clause that federal law is the "supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," Art. VI, cl. 2. This means that when federal and state law conflict, federal law prevails and state law is preempted.

The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

Although the anticommandeering principle is simple and basic, it did not emerge in our cases until relatively recently, when Congress attempted in a few isolated instances to extend its authority in unprecedented ways. The pioneering case was *New York* v. *United States*, 505 U. S. 144 (1992), which concerned a federal law that required a State, under certain circumstances, either to "take title" to low-level radioactive waste or to "regulat[e] according to the instructions of Congress." *Id.*, at 175. In enacting this provision, Congress issued orders to either the legislative or executive branch of state government (depending on the branch authorized by state law to take the actions demanded). Either way, the Court held, the provision was unconstitutional because "the Constitution does not empower Congress to subject state governments to this type of instruction." *Id.*, at 176.

Justice O'Connor's opinion for the Court traced this rule

to the basic structure of government established under the Constitution. The Constitution, she noted, "confers upon Congress the power to regulate individuals, not States." *Id.*, at 166. In this respect, the Constitution represented a sharp break from the Articles of Confederation. "Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly." *Id.*, at 163. Instead, Congress was limited to acting "'only upon the States.'" *Id.*, at 162 (quoting *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869)). Alexander Hamilton, among others, saw this as "'[t]he great and radical vice in . . . the existing Confederation.'" 505 U. S., at 163 (quoting The Federalist No. 15, at 108). The Constitutional Convention considered plans that would have preserved this basic structure, but it rejected them in favor of a plan under which "Congress would exercise its legislative authority directly over individuals rather than over States." 505 U. S., at 165.

As to what this structure means with regard to Congress's authority to control state legislatures, *New York* was clear and emphatic. The opinion recalled that "no Member of the Court ha[d] ever suggested" that even "a particularly strong federal interest" "would enable Congress to command a state government to enact *state* regulation." *Id.*, at 178 (emphasis in original). "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.*, at 166. "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.*, at 161 (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 288 (1981)). "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." 505 U. S., at 178.

Five years after *New York*, the Court applied the same principles to a federal statute requiring state and local law enforcement officers to perform background checks and related tasks in connection with applications for handgun licenses. *Printz*, 521 U. S. 898. Holding this provision unconstitutional, the Court put the point succinctly: "The Federal Government" may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.*, at 935. This rule applies, *Printz* held, not only to state officers with policymaking responsibility but also to those assigned more mundane tasks. *Id.*, at 929–930.

B

Our opinions in *New York* and *Printz* explained why adherence to the anticommandeering principle is important. Without attempting a complete survey, we mention several reasons that are significant here.

First, the rule serves as "one of the Constitution's structural protections of liberty." *Printz*, *supra*, at 921. "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities." *New York*, *supra*, at 181. "To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *Ibid.* "'[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.'" *Id.*, at 181–182 (quoting *Gregory*, 501 U. S., at 458).

Second, the anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.

See *New York*, *supra*, at 168–169; *Printz*, *supra*, at 929–930.

Third, the anticommandeering principle prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis. See, *e.g.*, E. Young, Two Cheers for Process Federalism, 46 Vill. L. Rev. 1349, 1360–1361 (2001).

IV

A

The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. See Brief for Respondents 19; Brief for United States 12. Noting that the laws challenged in *New York* and *Printz* "told states what they must do instead of what they must not do," respondents contend that commandeering occurs "only when Congress goes beyond precluding state action and affirmatively commands it." Brief for Respondents 19 (emphasis deleted).

This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded "affirmative" action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.

Here is an illustration. PASPA includes an exemption for States that permitted sports betting at the time of enactment, §3704, but suppose Congress did not adopt such an exemption. Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.

B

Respondents and the United States claim that prior decisions of this Court show that PASPA's anti-authorization provision is constitutional, but they misread those cases. In none of them did we uphold the constitutionality of a federal statute that commanded state legislatures to enact or refrain from enacting state law.

In *South Carolina* v. *Baker*, 485 U. S. 505 (1988), the federal law simply altered the federal tax treatment of private investments. Specifically, it removed the federal tax exemption for interest earned on state and local bonds unless they were issued in registered rather than bearer form. This law did not order the States to enact or maintain any existing laws. Rather, it simply had the indirect effect of pressuring States to increase the rate paid on their bearer bonds in order to make them competitive with other bonds paying taxable interest.

In any event, even if we assume that removal of the tax exemption was tantamount to an outright prohibition of the issuance of bearer bonds, see *id.*, at 511, the law would

simply treat state bonds the same as private bonds. The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage.

That principle formed the basis for the Court's decision in *Reno* v. *Condon*, 528 U. S. 141 (2000), which concerned a federal law restricting the disclosure and dissemination of personal information provided in applications for driver's licenses. The law applied equally to state and private actors. It did not regulate the States' sovereign authority to "regulate their own citizens." *Id.*, at 151.

In *Hodel*, 452 U. S., at 289, the federal law, which involved what has been called "cooperative federalism," by no means commandeered the state legislative process. Congress enacted a statute that comprehensively regulated surface coal mining and offered States the choice of "either implement[ing]" the federal program "or else yield[ing] to a federally administered regulatory program." *Ibid.* Thus, the federal law *allowed* but did not *require* the States to implement a federal program. "States [were] not compelled to enforce the [federal] standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever." *Id.*, at 288. If a State did not "wish" to bear the burden of regulation, the "full regulatory burden [would] be borne by the Federal Government." *Ibid.*

Finally, in *FERC* v. *Mississippi*, 456 U. S. 742 (1982), the federal law in question issued no command to a state legislature. Enacted to restrain the consumption of oil and natural gas, the federal law directed state utility regulatory commissions to consider, but not necessarily to adopt, federal "'rate design' and regulatory standards." *Id.*, at 746. The Court held that this modest requirement did not infringe the States' sovereign powers, but the Court warned that it had "never . . . sanctioned explicitly a federal command to the States to promulgate and enforce

laws and regulations." *Id.*, at 761–762. *FERC* was decided well before our decisions in *New York* and *Printz*, and PASPA, unlike the law in *FERC*, does far more than require States to *consider* Congress's preference that the legalization of sports gambling be halted. See *Printz*, 521 U. S., at 929 (distinguishing *FERC*).

In sum, none of the prior decisions on which respondents and the United States rely involved federal laws that commandeered the state legislative process. None concerned laws that directed the States either to enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders. Therefore, none of these precedents supports the constitutionality of the PASPA provision at issue here.

V

Respondents and the United States defend the anti-authorization prohibition on the ground that it constitutes a valid preemption provision, but it is no such thing. Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides "a rule of decision." *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U. S. ___, ___(2015) (slip op., at 3). It specifies that federal law is supreme in case of a conflict with state law. Therefore, in order for the PASPA provision to preempt state law, it must satisfy two requirements. First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do. Second, since the Constitution "confers upon Congress the power to regulate individuals, not States," *New York*, 505 U. S., at 166, the PASPA provision at issue must be best read as one that regulates private actors.

Our cases have identified three different types of preemption—"conflict," "express," and "field," see *English* v. *General Elec. Co.*, 496 U. S. 72, 78–79 (1990)—but all of

them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.

This mechanism is shown most clearly in cases involving "conflict preemption." A recent example is *Mutual Pharmaceutical Co.* v. *Bartlett*, 570 U. S. 472 (2013). In that case, a federal law enacted under the Commerce Clause regulated manufacturers of generic drugs, prohibiting them from altering either the composition or labeling approved by the Food and Drug Administration. A State's tort law, however, effectively required a manufacturer to supplement the warnings included in the FDA-approved label. *Id.*, at 480–486. We held that the state law was preempted because it imposed a duty that was inconsistent—*i.e.*, in conflict—with federal law. *Id.,* at 493.

"Express preemption" operates in essentially the same way, but this is often obscured by the language used by Congress in framing preemption provisions. The provision at issue in *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374 (1992), is illustrative. The Airline Deregulation Act of 1978 lifted prior federal regulations of airlines, and "[t]o ensure that the States would not undo federal deregulation with regulation of their own," *id.*, at 378, the Act provided that "no State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any [covered] air carrier." 49 U. S. C. App. §1305(a)(1) (1988 ed.).

This language might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is phrased. As we recently explained, "we do not require Congress to employ a particular linguistic formulation when preempting state law." *Coventry Health Care of Mo., Inc.* v. *Nevils*, 581 U. S. ___,

___–___(2017) (slip op., at 10–11). And if we look beyond the phrasing employed in the Airline Deregulation Act's preemption provision, it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities (*i.e.*, covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints.

"Field preemption" operates in the same way. Field preemption occurs when federal law occupies a "field" of regulation "so comprehensively that it has left no room for supplementary state legislation." *R. J. Reynolds Tobacco Co.* v. *Durham County*, 479 U. S. 130, 140 (1986). In describing field preemption, we have sometimes used the same sort of shorthand employed by Congress in express preemption provisions. See, *e.g.*, *Oneok, Inc.* v. *Learjet, Inc.,* 575 U. S. ___, ___ (2015) (slip op., at 2) ("Congress has forbidden the State to take action in the *field* that the federal statute pre-empts"). But in substance, field preemption does not involve congressional commands to the States. Instead, like all other forms of preemption, it concerns a clash between a constitutional exercise of Congress's legislative power and conflicting state law. See *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372, n. 6 (2000).

The Court's decision in *Arizona* v. *United States*, 567 U. S. 387 (2012), shows how this works. Noting that federal statutes "provide a full set of standards governing alien registration," we concluded that these laws "reflect[] a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Id.*, at 401. What this means is that the federal registration provisions not only impose federal registration obligations on aliens but also confer a federal right to be free from any other registration requirements.

In sum, regardless of the language sometimes used by Congress and this Court, every form of preemption is

based on a federal law that regulates the conduct of private actors, not the States.

Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. (It does not give them a federal right to engage in sports gambling.) Nor does it impose any federal restrictions on private actors. If a private citizen or company started a sports gambling operation, either with or without state authorization, §3702(1) would not be violated and would not provide any ground for a civil action by the Attorney General or any other party. Thus, there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.

In so holding, we recognize that a closely related provision of PASPA, §3702(2), *does* restrict private conduct, but that is not the provision challenged by petitioners. In Part VI–B–2, *infra*, we consider whether §3702(2) is severable from the provision directly at issue in these cases.

VI

Having concluded that §3702(1) violates the anti-commandeering doctrine, we consider two additional questions: first, whether the decision below should be affirmed on an alternative ground and, second, whether our decision regarding the anti-authorization provision dooms the remainder of PASPA.

A

Respondents and the United States argue that, even if we disagree with the Third Circuit's decision regarding

the constitutionality of the anti-authorization provision, we should nevertheless affirm based on PASPA's prohibition of state "licens[ing]" of sports gambling. Brief for Respondents 43, n. 10; Brief for United States 34–35. Although New Jersey's 2014 Act does not expressly provide for the licensing of sports gambling operations, respondents and the United States contend that the law effectively achieves that result because the only entities that it authorizes to engage in that activity, *i.e.*, casinos and racetracks, are already required to be licensed. *Ibid.*

We need not decide whether the 2014 Act violates PASPA's prohibition of state "licens[ing]" because that provision suffers from the same defect as the prohibition of state authorization. It issues a direct order to the state legislature.[29] Just as Congress lacks the power to order a state legislature not to enact a law authorizing sports gambling, it may not order a state legislature to refrain from enacting a law licensing sports gambling.[30]

B

We therefore turn to the question whether, as petitioners maintain, our decision regarding PASPA's prohibition of the authorization and licensing of sports gambling operations dooms the remainder of the Act. In order for other PASPA provisions to fall, it must be "evident that

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[29] Even if the prohibition of state licensing were not itself unconstitutional, we do not think it could be severed from the invalid provision forbidding state authorization. The provision of PASPA giving New Jersey the option of legalizing sports gambling within one year of enactment applied only to casinos operated "pursuant to a comprehensive system of State regulation." §3704(a)(3)(B). This shows that Congress preferred tightly regulated sports gambling over total deregulation.

[30] The dissent apparently disagrees with our holding that the provisions forbidding state authorization and licensing violate the anticommandering principle, but it provides no explanation for its position.

[Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not." *Alaska Airlines, Inc.* v. *Brock,* 480 U. S. 678, 684 (1987) (internal quotation marks omitted). In conducting that inquiry, we ask whether the law remains "fully operative" without the invalid provisions, *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 509 (2010) (internal quotation marks omitted), but "we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole," *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 362 (1935). We will consider each of the provisions at issue separately.

1

Under 28 U. S. C. §3702(1), States are prohibited from "operat[ing]," "sponsor[ing]," or "promot[ing]" sports gambling schemes. If the provisions prohibiting state authorization and licensing are stricken but the prohibition on state "operat[ion]" is left standing, the result would be a scheme sharply different from what Congress contemplated when PASPA was enacted. At that time, Congress knew that New Jersey was considering the legalization of sports gambling in the privately owned Atlantic City casinos and that other States were thinking about the institution of state-run sports lotteries. PASPA addressed both of these potential developments. It gave New Jersey one year to legalize sports gambling in Atlantic City but otherwise banned the authorization of sports gambling in casinos, and it likewise prohibited the spread of state-run lotteries. If Congress had known that States would be free to authorize sports gambling in privately owned casinos, would it have nevertheless wanted to prevent States from running sports lotteries?

That seems most unlikely. State-run lotteries, which sold tickets costing only a few dollars, were thought more

benign than other forms of gambling, and that is why they had been adopted in many States. Casino gambling, on the other hand, was generally regarded as far more dangerous. A gambler at a casino can easily incur heavy losses, and the legalization of privately owned casinos was known to create the threat of infiltration by organized crime, as Nevada's early experience had notoriously shown.[31] To the Congress that adopted PASPA, legalizing sports gambling in privately owned casinos while prohibiting state-run sports lotteries would have seemed exactly backwards.

Prohibiting the States from engaging in commercial activities that are permitted for private parties would also have been unusual, and it is unclear what might justify such disparate treatment. Respondents suggest that Congress wanted to prevent States from taking steps that the public might interpret as the endorsement of sports gambling, Brief for Respondents 39, but we have never held that the Constitution permits the Federal Government to prevent a state legislature from expressing its views on subjects of public importance. For these reasons, we do not think that the provision barring state operation of sports gambling can be severed.

We reach the same conclusion with respect to the provisions prohibiting state "sponsor[ship]" and "promot[ion]." The line between authorization, licensing, and operation, on the one hand, and sponsorship or promotion, on the other, is too uncertain. It is unlikely that Congress would have wanted to prohibit such an ill-defined category of state conduct.

2

Nor do we think that Congress would have wanted to

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[31] See Clary 84–102.

sever the PASPA provisions that prohibit a private actor from "sponsor[ing]," "operat[ing]," or "promot[ing]" sports gambling schemes "pursuant to" state law. §3702(2). These provisions were obviously meant to work together with the provisions in §3702(1) that impose similar restrictions on governmental entities. If Congress had known that the latter provisions would fall, we do not think it would have wanted the former to stand alone.

The present cases illustrate exactly how Congress must have intended §3702(1) and §3702(2) to work. If a State attempted to authorize particular private entities to engage in sports gambling, the State could be sued under §3702(1), and the private entity could be sued at the same time under §3702(2). The two sets of provisions were meant to be deployed in tandem to stop what PASPA aimed to prevent: state legalization of sports gambling. But if, as we now hold, Congress lacks the authority to prohibit a State from legalizing sports gambling, the prohibition of private conduct under §3702(2) ceases to implement any coherent federal policy.

Under §3702(2), private conduct violates federal law only if it is permitted by state law. That strange rule is exactly the opposite of the general federal approach to gambling. Under 18 U. S. C. §1955, operating a gambling business violates federal law only if that conduct is illegal under state or local law. Similarly, 18 U. S. C. §1953, which criminalizes the interstate transmission of wagering paraphernalia, and 18 U. S. C. §1084, which outlaws the interstate transmission of information that assists in the placing of a bet on a sporting event, apply only if the underlying gambling is illegal under state law. See also 18 U. S. C. §1952 (making it illegal to travel in interstate commerce to further a gambling business that is illegal under applicable state law).

These provisions implement a coherent federal policy: They respect the policy choices of the people of each State

on the controversial issue of gambling. By contrast, if §3702(2) is severed from §3702(1), it implements a perverse policy that undermines whatever policy is favored by the people of a State. If the people of a State support the legalization of sports gambling, federal law would make the activity illegal. But if a State outlaws sports gambling, that activity would be lawful under §3702(2). We do not think that Congress ever contemplated that such a weird result would come to pass.

PASPA's enforcement scheme reinforces this conclusion. PASPA authorizes civil suits by the Attorney General and sports organizations but does not make sports gambling a federal crime or provide civil penalties for violations. This enforcement scheme is suited for challenging state authorization or licensing or a small number of private operations, but the scheme would break down if a State broadly decriminalized sports gambling. It is revealing that the Congressional Budget Office estimated that PASPA would impose "no cost" on the Federal Government, see S. Rep. No. 102–248, p. 10 (1991), a conclusion that would certainly be incorrect if enforcement required a multiplicity of civil suits and applications to hold illegal bookies and other private parties in contempt.[32]

3

The remaining question that we must decide is whether the provisions of PASPA prohibiting the "advertis[ing]" of sports gambling are severable. See §§3702(1)–(2). If these provisions were allowed to stand, federal law would forbid the advertising of an activity that is legal under both

[32] Of course, one need not rely on the Senate Report for the commonsense proposition that leaving §3702(2) in place could wildly change the fiscal calculus, "giv[ing] it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 362 (1935).

federal and state law, and that is something that Congress has rarely done. For example, the advertising of cigarettes is heavily regulated but not totally banned. See Federal Cigarette Labeling and Advertising Act, 79 Stat. 282; Family Smoking Prevention and Tobacco Control Act, §§201–204, 123 Stat. 1842–1848.

It is true that at one time federal law prohibited the use of the mail or interstate commerce to distribute advertisements of lotteries that were permitted under state law, but that is no longer the case. See *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 421–423 (1993). In 1975, Congress passed a new statute, codified at 18 U. S. C. §1307, that explicitly *exempts* print advertisements regarding a lottery lawfully conducted by States, and in *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 176 (1999), we held that the First Amendment protects the right of a radio or television station in a State with a lottery to run such advertisements. In light of these developments, we do not think that Congress would want the advertising provisions to stand if the remainder of PASPA must fall.

For these reasons, we hold that no provision of PASPA is severable from the provision directly at issue in these cases.

* * *

The legalization of sports gambling is a controversial subject. Supporters argue that legalization will produce revenue for the States and critically weaken illegal sports betting operations, which are often run by organized crime. Opponents contend that legalizing sports gambling will hook the young on gambling, encourage people of modest means to squander their savings and earnings, and corrupt professional and college sports.

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make.

Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA "regulate[s] state governments' regulation" of their citizens, *New York*, 505 U. S., at 166. The Constitution gives Congress no such power.

The judgment of the Third Circuit is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. ~~16–476 and~~ 16–477

PHILIP D. MURPHY, GOVERNOR OF NEW JERSEY, ET AL., PETITIONERS

16–476 *v.*

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

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

16–477 *v.*

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.

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

[May 14, 2018]

JUSTICE THOMAS, concurring.

I join the Court's opinion in its entirety. I write separately, however, to express my growing discomfort with our modern severability precedents.

I agree with the Court that the Professional and Amateur Sports Protection Act (PASPA) exceeds Congress' Article I authority to the extent it prohibits New Jersey from "authoriz[ing]" or "licens[ing]" sports gambling, 28 U. S. C. §3702(1). Unlike the dissent, I do "doubt" that Congress can prohibit sports gambling that does not cross state lines. *Post,* at 2 (opinion of GINSBURG, J.); see *License Tax Cases*, 5 Wall. 462, 470–471 (1867) (holding that Congress has "no power" to regulate "the internal commerce or domestic trade of the States," including the intrastate sale of lottery tickets); *United States* v. *Lopez*,

514 U. S. 549, 587–601 (1995) (THOMAS, J., concurring) (documenting why the Commerce Clause does not permit Congress to regulate purely local activities that have a substantial effect on interstate commerce). But even assuming the Commerce Clause allows Congress to prohibit intrastate sports gambling "directly," it "does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York* v. *United States*, 505 U. S. 144, 166 (1992). The Necessary and Proper Clause does not give Congress this power either, as a law is not "proper" if it "subvert[s] basic principles of federalism and dual sovereignty." *Gonzales* v. *Raich*, 545 U. S. 1, 65 (2005) (THOMAS, J., dissenting). Commandeering the States, as PASPA does, subverts those principles. See *Printz* v. *United States*, 521 U. S. 898, 923–924 (1997).

Because PASPA is at least partially unconstitutional, our precedents instruct us to determine "which portions of the . . . statute we must sever and excise." *United States* v. *Booker*, 543 U. S. 220, 258 (2005) (emphasis deleted). The Court must make this severability determination by asking a counterfactual question: "'Would Congress still have passed' the valid sections 'had it known' about the constitutional invalidity of the other portions of the statute?" *Id.,* at 246 (quoting *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 767 (1996) (plurality opinion)). I join the Court's opinion because it gives the best answer it can to this question, and no party has asked us to apply a different test. But in a future case, we should take another look at our severability precedents.

Those precedents appear to be in tension with traditional limits on judicial authority. Early American courts did not have a severability doctrine. See Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 769 (2010) (Walsh). They recognized that the judicial power is, fundamentally, the power to render judgments in individual

cases. See *id.*, at 755; Baude, The Judgment Power, 96 Geo. L. J. 1807, 1815 (2008). Judicial review was a by-product of that process. See generally P. Hamburger, Law and Judicial Duty (2008); Prakash & Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887 (2003). As Chief Justice Marshall famously explained, "[i]t is emphatically the province and duty of the judicial department to say what the law is" because "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). If a plaintiff relies on a statute but a defendant argues that the statute conflicts with the Constitution, then courts must resolve that dispute and, if they agree with the defendant, follow the higher law of the Constitution. See *id.,* at 177–178; The Federalist No. 78, p. 467 (C. Rossiter ed. 1961) (A. Hamilton). Thus, when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them. See Walsh 755–766. "[T]here was no 'next step' in which courts inquired into whether the legislature would have preferred no law at all to the constitutional remainder." *Id.*, at 777.

Despite this historical practice, the Court's modern cases treat the severability doctrine as a "remedy" for constitutional violations and ask which provisions of the statute must be "excised." See, *e.g., Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 329 (2006); *Booker*, *supra*, at 245; *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 686 (1987). This language cannot be taken literally. Invalidating a statute is not a "remedy," like an injunction, a declaration, or damages. See Harrison, Severability, Remedies, and Constitutional Adjudication, 83 Geo. Wash. L. Rev. 56, 82–88 (2014) (Harrison). Remedies "operate with respect to specific parties," not "on legal rules in the abstract." *Id.*, at 85; see also *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923) (explaining that

the power "to review and annul acts of Congress" is "little more than the negative power to disregard an unconstitutional enactment" and that "the court enjoins . . . not the execution of the statute, but the acts of the official"). And courts do not have the power to "excise" or "strike down" statutes. See 39 Op. Atty. Gen. 22, 22–23 (1937) ("The decisions are practically in accord in holding that the courts have no power to repeal or abolish a statute"); Harrison 82 ("[C]ourts do not make [nonseverable] provisions inoperative . . . . Invalidation by courts is a figure of speech"); Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. (forthcoming 2018) (manuscript, at 4) ("The federal courts have no authority to erase a duly enacted law from the statute books"), online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3158038 (as last visited May 11, 2018).

Because courts cannot take a blue pencil to statutes, the severability doctrine must be an exercise in statutory interpretation. In other words, the severability doctrine has courts decide how a statute operates once they conclude that part of it cannot be constitutionally enforced. See Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1333–1334 (2000); Harrison 88. But even under this view, the severability doctrine is still dubious for at least two reasons.

First, the severability doctrine does not follow basic principles of statutory interpretation. Instead of requiring courts to determine what a statute means, the severability doctrine requires courts to make "a nebulous inquiry into hypothetical congressional intent." *Booker*, *supra*, at 320, n. 7 (THOMAS, J., dissenting in part). It requires judges to determine what Congress would have intended had it known that part of its statute was unconstitutional.* But

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*The first court to engage in this counterfactual exploration of legislative intent was the Massachusetts Supreme Judicial Court in *Warren*

it seems unlikely that the enacting Congress had any intent on this question; Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional. See Walsh 740–741; Stern, Separability and Separability Clauses in the Supreme Court, 51 Harv. L. Rev. 76, 98 (1937) (Stern). Without any actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be. See Walsh 752–753; Stern 112–113. More fundamentally, even if courts could discern Con- gress' hypothetical intentions, intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and present- ment. See *Wyeth* v. *Levine*, 555 U. S. 555, 586–588 (2009) (THOMAS, J., concurring in judgment). Because we have "'a Government of laws, not of men,' " we are governed by "legislated text," not "legislators' intentions"—and espe- cially not legislators' *hypothetical* intentions. *Zuni Public School Dist. No. 89* v. *Department of Education*, 550 U. S.
81, 119 (2007) (Scalia, J., dissenting). Yet hypothetical intent is exactly what the severability doctrine turns on, at least when Congress has not expressed its fallback position in the text.

Second, the severability doctrine often requires courts to weigh in on statutory provisions that no party has stand- ing to challenge, bringing courts dangerously close to issuing advisory opinions. See Stern 77; Lea, Situational Severability, 103 Va. L. Rev. 735, 788–803 (2017) (Lea). If one provision of a statute is deemed unconstitutional, the severability doctrine places every other provision at risk of

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v. *Mayor and Aldermen of Charlestown*, 68 Mass. 84, 99 (1854). This Court adopted the *Warren* formulation in the late 19th century, see *Allen* v. *Louisiana*, 103 U. S. 80, 84 (1881), an era when statutory interpretation privileged Congress' unexpressed "intent" over the enacted text, see, *e.g., Church of Holy Trinity* v. *United States*, 143
U. S. 457, 472 (1892); *United States* v. *Moore*, 95 U. S. 760, 763 (1878).

being declared nonseverable and thus inoperative; our precedents do not ask whether the plaintiff has standing to challenge those other provisions. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 696–697 (2012) (joint dissent) (citing, as an example, *Williams* v. *Standard Oil Co. of La.*, 278 U. S. 235, 242–244 (1929)). True, the plaintiff had standing to challenge the unconstitutional part of the statute. But the severability doctrine comes into play only *after* the court has resolved that issue—typically the only live controversy between the parties. In every other context, a plaintiff must demonstrate standing for each part of the statute that he wants to challenge. See Lea 789, 751, and nn. 79–80 (citing, as examples, *Davis* v. *Federal Election Comm'n*, 554 U. S. 724, 733–734 (2008); *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 346, 350–353 (2006)). The severability doctrine is thus an unexplained exception to the normal rules of standing, as well as the separation-of-powers principles that those rules protect. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 101 (1998).

In sum, our modern severability precedents are in tension with longstanding limits on the judicial power. And, though no party in this case has asked us to reconsider these precedents, at some point, it behooves us to do so.

SUPREME COURT OF THE UNITED STATES

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

[May 14, 2018]

JUSTICE BREYER, concurring in part and dissenting in part.

I agree with JUSTICE GINSBURG that 28 U. S. C. §3702(2) is severable from the challenged portion of §3702(1). The challenged part of subsection (1) prohibits a State from "author[izing]" or "licens[ing]" sports gambling schemes; subsection (2) prohibits individuals from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" sports gambling schemes "pursuant to the law . . . of a governmental entity." The first says that a State cannot authorize sports gambling schemes under state law; the second says that (just in case a State finds a way to do so) sports gambling schemes that a State authorizes are unlawful under federal law regardless. As JUSTICE GINSBURG makes clear, the latter section can live comfortably on its

own without the first.

Why would Congress enact both these provisions? The obvious answer is that Congress wanted to "keep sports gambling from spreading." S. Rep. No. 102–248, pp. 4–6 (1991). It feared that widespread sports gambling would "threate[n] to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling." *Id.,* at 4. And it may have preferred that state authorities enforce state law forbidding sports gambling than require federal authorities to bring civil suits to enforce federal law forbidding about the same thing. Alternatively, Congress might have seen subsection (2) as a backup, called into play if subsection (1)'s requirements, directed to the States, turned out to be unconstitutional—which, of course, is just what has happened. Neither of these objectives is unreasonable.

So read, the two subsections both forbid sports gambling but §3702(2) applies federal policy directly to individuals while the challenged part of §3702(1) forces the States to prohibit sports gambling schemes (thereby shifting the burden of enforcing federal regulatory policy from the Federal Government to state governments). Section 3702(2), addressed to individuals, standing alone seeks to achieve Congress' objective of halting the spread of sports gambling schemes by "regulat[ing] interstate commerce directly." *New York* v. *United States*, 505 U. S. 144, 166 (1992). But the challenged part of subsection (1) seeks the same end indirectly by "regulat[ing] state governments' regulation of interstate commerce." *Ibid.* And it does so by addressing the States (not individuals) directly and telling state legislatures what laws they must (or cannot) enact. Under our precedent, the first provision (directly and unconditionally telling States what laws they must enact) is unconstitutional, but the second (directly telling individuals what they cannot do) is not. See *ibid.*

As so interpreted, the statutes would make New Jersey's

victory here mostly Pyrrhic. But that is because the only problem with the challenged part of §3702(1) lies in its means, not its end. Congress has the constitutional power to prohibit sports gambling schemes, and no party here argues that there is any constitutional defect in §3702(2)'s alternative means of doing so.

I consequently join JUSTICE GINSBURG's dissenting opinion in part, and all but Part VI–B of the Court's opinion.

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

[May 14, 2018]

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER joins in part, dissenting.

The petition for certiorari filed by the Governor of New Jersey invited the Court to consider a sole question: "Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York* v. *United States*, 505 U. S. 144 (1992)?" Pet. for Cert. in No. 16–476, p. i.

Assuming, *arguendo*, a "yes" answer to that question, there would be no cause to deploy a wrecking ball destroying the Professional and Amateur Sports Protection Act (PASPA) in its entirety, as the Court does today. Leaving out the alleged infirmity, *i.e.,* "commandeering" state

regulatory action by prohibiting the States from "author-iz[ing]" and "licens[ing]" sports-gambling schemes, 28 U. S. C. §3702(1), two federal edicts should remain intact. First, PASPA bans States themselves (or their agencies) from "sponsor[ing], operat[ing], advertis[ing], [or] promot[ing]" sports-gambling schemes. *Ibid.* Second, PASPA stops private parties from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" sports-gambling schemes if state law authorizes them to do so. §3702(2).[1] Nothing in these §3702(1) and §3702(2) prohibitions commands States to do anything other than desist from conduct federal law proscribes.[2] Nor is there any doubt that Congress has power to regulate gambling on a nationwide basis, authority Congress exercised in PASPA. See *Gonzales* v. *Raich*, 545 U. S. 1, 17 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").

Surely, the accountability concern that gave birth to the anticommandeering doctrine is not implicated in any federal proscription other than the bans on States' authorizing and licensing sports-gambling schemes. The concern triggering the doctrine arises only "where the Federal Government compels States to regulate" or to enforce federal law, thereby creating the appearance that state officials are responsible for policies Congress forced them to enact. *New York* v. *United States*, 505 U. S. 144, 168 (1992). If States themselves and private parties may not

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[1] PASPA was not designed to eliminate any and all sports gambling. The statute targets sports-gambling *schemes*, *i.e.,* organized markets for sports gambling, whether operated by a State or by a third party under state authorization.

[2] In lieu of a flat ban, PASPA prohibits third parties from operating sports-gambling schemes only if state law permits them to do so. If a state ban is in place, of course, there is no need for a federal proscription.

operate sports-gambling schemes, responsibility for the proscriptions is hardly blurred. It cannot be maintained credibly that state officials have anything to do with the restraints. Unmistakably, the foreclosure of sports-gambling schemes, whether state run or privately operated, is chargeable to congressional, not state, legislative action.

When a statute reveals a constitutional flaw, the Court ordinarily engages in a salvage rather than a demolition operation: It "limit[s] the solution [to] severing any problematic portions while leaving the remainder intact." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 508 (2010) (internal quotation marks omitted). The relevant question is whether the Legislature would have wanted unproblematic aspects of the legislation to survive or would want them to fall along with the infirmity.[3] As the Court stated in *New York*, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, . . . the invalid part may be dropped if what is left is fully operative as a law." 505 U. S., at 186 (internal quotation marks omitted). Here, it is scarcely arguable that Congress "would have preferred no statute at all," *Executive Benefits Ins. Agency* v. *Arkison*, 573 U. S. ___, ___ (2014) (slip op., at 10), over one that simply stops States and private parties alike from operating sports-gambling schemes.

The Court wields an ax to cut down §3702 instead of using a scalpel to trim the statute. It does so apparently in the mistaken assumption that private sports-gambling schemes would become lawful in the wake of its decision.

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[3] Notably, in the two decisions marking out and applying the anti-commandeering doctrine to invalidate federal law, the Court invalidated only the offending provision, not the entire statute. *New York* v. *United States*, 505 U. S. 144, 186–187 (1992); *Printz* v. *United States*, 521 U. S. 898, 935 (1997).

In particular, the Court holds that the prohibition on state "operat[ion]" of sports-gambling schemes cannot survive, because it does not believe Congress would have "wanted to prevent States from running sports lotteries" "had [it] known that States would be free to authorize sports gambling in privately owned casinos." *Ante,* at 26. In so reasoning, the Court shutters §3702(2), under which private parties are prohibited from operating sports-gambling schemes *precisely when state law authorizes them to do so*.[4]

This plain error pervasively infects the Court's severability analysis. The Court strikes Congress' ban on state "sponsor[ship]" and "promot[ion]" of sports-gambling schemes because it has (mistakenly) struck Congress' prohibition on state "operat[ion]" of such schemes. See *ante,* at 27. It strikes Congress' prohibitions on private "sponsor[ship]," "operat[ion]," and "promot[ion]" of sports-gambling schemes because it has (mistakenly) struck those same prohibitions on the States. See *ante,* at 27–28. And it strikes Congress' prohibition on "advertis[ing]" sports-gambling schemes because it has struck everything else. See *ante,* at 29–30.

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In PASPA, shorn of the prohibition on modifying or repealing state law, Congress permissibly exercised its authority to regulate commerce by instructing States and private parties to refrain from operating sports-gambling schemes. On no rational ground can it be concluded that Congress would have preferred no statute at all if it could

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[4] As earlier indicated, see *supra,* at 2, direct federal regulation of sports-gambling schemes nationwide, including private-party schemes, falls within Congress' power to regulate activities having a substantial effect on interstate commerce. See *Gonzales* v. *Raich*, 545 U. S. 1, 17 (2005). Indeed, according to the Court, direct regulation is precisely what the anticommandeering doctrine requires. *Ante,* at 14–18.

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tions would free the statute to accomplish just what Con- gress legitimately sought to achieve: stopping sports- gambling regimes while making it clear that the stoppage is attributable to federal, not state, action. I therefore dissent from the Court's determination to destroy PASPA rather than salvage the statute.

NEVADA – SPORTS WAGERING

In Nevada, sports wagering is legally defined as a sports pool:

NRS 463.0193 "Sports pool" defined. "Sports pool" means the business of accepting wagers on sporting events or other events by any system or method of wagering.

To operate a sports pool in Nevada, one must operate slots, table games or mobile gaming in the same location or have a primary book at another location in which slots, table games or mobile gaming are operated by the same licensee as the sports pool business. See the statute below:

NRS 463.245 Single establishment not to contain more than one licensed operation; exceptions; certain agreements for sharing of revenue prohibited.

1. Except as otherwise provided in this section:

(a) All licenses issued to the same person, including a wholly owned subsidiary of that person, for the operation of any game, including a sports pool or race book, which authorize gaming at the same establishment must be merged into a single gaming license.

(b) A gaming license may not be issued to any person if the issuance would result in more than one licensed operation at a single establishment, whether or not the profits or revenue from gaming are shared between the licensed operations.

2. A person who has been issued a nonrestricted gaming license for an operation described in subsection 1 or 2 of NRS 463.0177 may establish a sports pool or race book on the premises of the establishment only after obtaining permission from the Commission.

3. A person who has been issued a license to operate a sports pool or race book at an establishment may be issued a license to operate a sports pool or race book at a second establishment described in subsection 1 or 2 of NRS 463.0177 only if the second establishment is operated by a person who has been issued a nonrestricted license for that establishment. A person who has been issued a license to operate a race book or sports pool at an establishment is prohibited from operating a race book or sports pool at:

(a) An establishment for which a restricted license has been granted; or

(b) An establishment at which only a nonrestricted license has been granted for an operation described in subsection 3 of NRS 463.0177.

4. A person who has been issued a license to operate a race book or sports pool shall not enter into an agreement for the sharing of revenue from the operation of the race book or sports pool with another person in consideration for the offering, placing or maintaining of a kiosk or other similar device not physically located on the licensed premises of the race book or sports pool, except:

(a) An affiliated licensed race book or sports pool; or

(b) The licensee of an establishment at which the race book or sports pool holds or obtains a license to operate pursuant to this section.

This subsection does not prohibit an operator of a race book or sports pool from entering into an agreement with another person for the provision of shared services relating to advertising or marketing.

NRS 463.0177 "Nonrestricted license" and "nonrestricted operation" defined. *"Nonrestricted license" or "nonrestricted operation" means:*

1. A state gaming license for, or an operation consisting of, 16 or more slot machines;

2. A license for, or operation of, any number of slot machines together with any other game, gaming device, race book or sports pool at one establishment; or,

3. A license for, or the operation of, a slot machine route;

5. For the purposes of this section, the operation of a race book or sports pool includes making the premises available for any of the following purposes:

(a) Allowing patrons to establish an account for wagering with the race book or sports pool;

(b) Accepting wagers from patrons;

(c) Allowing patrons to place wagers;

(d) Paying winning wagers to patrons; or

(e) Allowing patrons to withdraw cash from an account for wagering or to be issued a ticket, receipt, representation of value or other credit representing a withdrawal from an account for wagering that can be redeemed for cash, whether by a transaction in person at an establishment or through mechanical means such as a kiosk or other similar device, regardless of whether that device would otherwise be considered associated equipment.

6. The provisions of this section do not apply to a license to operate interactive gaming.

NRS 463.245 started out as an effort to avoid a tax loophole exploited in the 1980s. While many believe Nevada taxes gross gaming revenue at 6.75%, it doesn't. Nevada actually has a graduated tax that starts at 3.5% (See NRS 463.370). A few clever operators realized that if each bank of slot machines was owned by a separate entity and space was leased to each bank by the casino owner, no bank would earn enough to reach the top tax level and the overall tax profile of the establishment would be reduced. In response, the legislature enacted NRS 463.245, known as the "one licensee rule." The one licensee rule essentially deems the entire gaming premises to be operated by one licensee and limits third-party gaming operations to a few exceptions.

In 2012, a new form of sports kiosk was regulatorily approved. Sports kiosks had been tried earlier, but were never that popular. In the early 2000s, the kiosk became more sophisticated and they evolved. At first it allowed players to access their accounts and see lines, then they evolved to add placing wagers, then they evolved to add accepting deposits, then they evolved to add account creation, finally, they evolved to add ticket out. In addition, these new kiosks were being placed at restricted gaming locations in Clark County, Nevada.

In 2013, the Nevada Resort Association sought a legislative fix to address this "book-in-a-box" system that they believed blurred the line between restricted and non-restricted gaming. As part of this effort NRS 463.425 was changed into its current form.