No. 16-477

In The
Supreme Court of the United States

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NATIONAL BASKETBALL ASSOCIATION, NATIONAL FOOTBALL LEAGUE, NATIONAL HOCKEY LEAGUE, OFFICE OF THE COMMISSIONER OF BASEBALL, doing business as MAJOR LEAGUE BASEBALL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR THE PETITIONER

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PRELIMINARY STATEMENT

In our opening brief we wrote that the 2014 Repealer was valid for "two alternative" reasons. NJTHA Br. 14. As a result of what Respondents and the United States have written in their briefs, the 2014 Repealer is valid for a third reason.

First, the NJTHA, State Petitioners, and many *amici*[1] contend that PASPA's most natural meaning is that it commands the States to prohibit sports wagering. Respondents and the United States do not dispute that if PASPA is interpreted this way, it is unconstitutional.

Second, the NJTHA contends that PASPA is susceptible of a construction that permits the Court to avoid deciding the constitutional question presented. Under this avoidance construction, adopted by Judges Fuentes and Restrepo, PASPA does not prohibit the States from repealing state laws against sports wagering, and New Jersey's 2014 Repealer does not violate PASPA because it is a valid partial repeal.

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[1] The briefs filed by the following *amici* have endorsed this interpretation of PASPA: (a) States of West Virginia, 17 other States, and the Governors of Kentucky, Maryland, and North Dakota; (b) National Governors Association, National Conference of State Legislatures, Council of State Governments, National League of Cities, and International Municipal Lawyers Association; (c) Pacific Legal Foundation, Competitive Enterprise Institute, Cato Institute, and Wisconsin Institute for Law and Liberty; (d) American Gaming Association; (e) Constitutional Law Scholars; (f) Congressman Frank J. Pallone, Jr., and (g) John T. Holden.

Third, Respondents proffer what they contend is a savings interpretation of PASPA that "does not require states to maintain or enforce anything." Resp. Br. 36. On this view, PASPA provides the States with many sports-betting choices, such as a full repeal of sports-betting prohibitions and some partial repeals of sports-betting prohibitions. *Id.* at 36-41.

Respondents' construction of PASPA is not only flawed as a matter of statutory interpretation, but fails to save PASPA's constitutionality. NJTHA Br. 42-49. Yet even under Respondents' construction, New Jersey's 2014 Repealer does not violate PASPA. Respondents contend that PASPA prohibits the 2014 Repealer because that law "ensured that sports-gambling schemes would be operated *only* by state-licensed gambling venues." Resp. Br. 13 (emphasis added). But Respondents' description of the 2014 Repealer is wrong.

The 2014 Repealer does not apply "only" to "state-licensed gambling venues." It also applies to venues that are not state-licensed gambling venues, such as former racetrack racecourses. Thus, even under Respondents' reading of PASPA, the 2014 Repealer does not violate PASPA because it is a valid, partial repeal of sports-betting prohibitions.

ARGUMENT

I

The Construction Of PASPA Proposed By Respondents And The United States Is Unreasonable And Fails To Save PASPA's Constitutionality.

Petitioner NJTHA, State Petitioners, and several *amici* contend that the most natural meaning of PASPA is that it commands the States to maintain state law prohibitions against sports wagering and, therefore, PASPA violates the anti-commandeering doctrine. The United States agrees that "[i]f Section 3702(1) compelled States to * * * maintain prohibitions on sports gambling, it would violate the Tenth Amendment." U.S. Br. 19; see also *id.* at 8 ("Section 3702 would violate the Tenth Amendment if it commanded the States to * * * maintain prohibitions on sports gambling."); *id.* at 12 ("And because Congress cannot force States to *enact* specific regulations, it also cannot compel them to *maintain* specific regulations that they happen to have enacted already.").

Respondents are not quite as forthright as the United States, but their repeated insistence that "PASPA does not require states to maintain existing prohibitions against sports gambling," effectively provides the same answer. Resp. Br. 19-20; see also *id.* at 36 ("PASPA does not require states to maintain or enforce anything."); *id.* at 45 ("PASPA does not prohibit states from repealing their sports-gambling prohibitions.").

If the Court adopts the natural meaning of PASPA and concludes that Senator Bradley was correct that it "prohibited" States "from allowing sports betting," 138 Cong. Rec. S17434-01, at S17435, 1992 WL 275344 (daily ed. Oct. 7, 1992) (statement of Sen. Bradley), there is no question that it is unconstitutional. To avoid this inevitable conclusion, Respondents and the United States must construe PASPA to allow States a choice to lift their prohibitions on sports gambling. But to avoid the otherwise inevitable conclusion that the 2014 Repealer is valid, they must simultaneously construe PASPA to prevent States from lifting the prohibition for too *few* people or at too *few* locations. Resp. Br. 42-46; U.S. Br. 20-24.

This construction provides no criteria to determine how few is too few. It is, therefore, a wholly indeterminate standard. For example, if a State were to lift the prohibition on sports gambling, but only as applied to sports gambling conducted by churches and other charitable organizations, would that repeal cover enough people and enough locations to comply with this interpretation of PASPA? Or would the answer vary from State to State depending on how many churches were located in a particular State? Further, this construction is an unnatural one because it imputes to Congress a preference for legal sports betting by *more* people in *more* places rather than *fewer* people in *fewer* places. See NJTHA Br. 42-47.

In any event, this construction fails to save PASPA. That's because Respondents and the United States are fundamentally wrong about the distinction

between constitutionally-permissible preemption and constitutionally-impermissible commandeering.

They contend that the distinction is between affirmative commands to act and negative prohibitions from acting; that is, between "*thou shalt*" and "*thou shalt not*." Resp. Br. 19. But that can't be the proper distinction, for most any affirmative command can be rephrased as a negative prohibition from acting – and vice versa.[2] Indeed, if that were the distinction, anti-commandeering doctrine critics would be correct that it is unprincipled and manipulable.[3]

And their proposed distinction makes hash of this Court's reliance on *Coyle* v. *Smith*, 221 U.S. 559 (1911), as the precedential foundation of its modern anti-commandeering doctrine. *New York* v. *United States*, 505 U.S. 144, 162 (1992) (citing *Coyle* for the proposition

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[2] Respondents' allusion to the Ten Commandments illustrates the point. The negative command, "Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's," *Exodus* 20:17 (King James), is rephrased in the Bible itself as a positive command, "Let your conversation be without covetousness; and be content with such things as ye have," *Hebrews* 13:5 (King James).

[3] See, *e.g.*, Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1054-55 (1995) ("Although one can use verbal wordplay to make it sound as though commandeering and preemption frustrate accountability in different ways, this is merely definitional manipulation without substance. Prohibiting commandeering but not preemption in the name of securing the accountability of state government is simply arbitrary.").

that the recent statements "were not innovations," because while "Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"). In *Coyle*, the unconstitutional act of Congress required no affirmative action by the State of Oklahoma; it merely prohibited the State from moving its capital.

Respondents may think that *Coyle* speaks only to the Equal Footing Doctrine and has nothing to do with the anti-commandeering doctrine. See Resp. Br. 27 n.4. This Court in *New York* said otherwise. See also *Coyle*, 221 U.S. at 565 ("That one of the original thirteen states could now be shorn of such powers by an act of Congress would not be for a moment entertained.").

The anti-commandeering doctrine is rooted in the fundamental decision made at the constitutional convention to opt for a national government that acts directly on the people rather than one that acts through the States on the people. If the national government attempts to require a State to govern according to Congress' instructions by using a State against its will to regulate its people, that is impermissible commandeering. If the national government directly regulates the people, and requires a State to stand aside, that is permissible preemption.[4]

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[4] A police officer commandeers a car whether he gets in the passenger seat and orders the driver to "follow that car!" or pulls

Preemption involves Congress telling the people what they must do, what they may do, or what they can't do. The federal law can prohibit an activity, see, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1 (2005) (upholding federal prohibition of marijuana); tightly regulate an activity, see, *e.g.*, *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312 (2008) (describing the Medical Device Amendments of 1976 as "impos[ing] a regime of detailed federal oversight"); or provide that people have a federal right to freely engage in that activity, see, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (describing federal deregulation as "ensur[ing] that the States would not undo federal deregulation with regulation of their own"). The people must obey that federal law. And the courts, both state and federal, must decide cases in accordance with that federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2.

The federal law stands on its own bottom, can be enforced without regard to state law, and requires nothing of state law or state action other than to give way to superior federal law. See Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 252 (2000) (noting that "the Supremacy Clause says that courts must apply all valid rules of federal law. To the extent that applying state law would keep them from doing so, the

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the driver out of the car and drives it himself – with or without issuing an affirmative command, the officer is using the car for his own ends, not the driver's. By contrast, a police officer does not commandeer anything if he stays in his own patrol car, turns on the siren, and affirmatively commands drivers blocking his way to move to the side.

Supremacy Clause requires courts to disregard the state rule and follow the federal one."); Allison H. Eid, *Preemption and the Federalism Five*, 37 Rutgers L.J. 1, 38 (2005) (noting that preemption is the "doctrinal descendant of the Supremacy Clause," which "acts as a conflict-of-laws principle that instructs courts to apply federal law in the event of a conflict with state law").

There is no federal anti-sports-betting regulatory scheme that directly governs the people's conduct and displaces state law. As Judge Vanaskie stated: "Unlike in *Morales* and other preemption cases in which federal legislation limits the actions of state governments, in this case, there is no federal scheme regulating or deregulating sports gambling by which to preempt state regulation. PASPA provides no federal regulatory standards or requirements of its own." Pet. App. 190a.

Respondents point to a number of federal statutes in a futile attempt to cobble together a federal regulatory or deregulatory sports-gambling scheme. Resp. Br. 49-50. But none of these statutes create a federal scheme prohibiting sports betting in a state where sports betting is not already prohibited by state law.[5]

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[5] Respondents cite to five statutes. Resp. Br. 49. Almost all of them specifically exclude a situation where the underlying conduct is legal by state law (18 U.S.C. 1955; 18 U.S.C. 1301; 31 U.S.C. 5362(10)). One of them is limited to bribery in sporting contests (18 U.S.C. 224(a)) and specifically states that it is not intended "to occupy the field in which this section operates to the exclusion of a law on any State * * * and no law of any State * * * which would be valid in the absence of the section shall be declared invalid" (*id.*

As Judge Vanaskie pointed out, PASPA is the only statute that tries to regulate the States under the Commerce Clause even though there is no federal regulatory or deregulatory scheme. Pet. App. 190a n.4.

Unless there is a federal rule displacing state law that directly governs the people's conduct – whether constraining that conduct or providing a right to engage in that conduct (or some combination of the two) – there is no predicate for preemption. Contrary to the suggestion of Respondents and the United States, there is no federal power to simply dictate a "federal policy" regarding the content of state law.

As Judge Niemeyer has explained:

> Congress may govern directly the *people* * * * [b]ut it may not govern the *states* for the purpose of indirectly exacting its will on the people. Preemption involves the *direct* federal governance of the people in a way that supersedes concurrent state governance of the same people, not a federal usurpation of state government * * * for federal ends.

Petersburg Cellular Partnership v. *Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000).

This core constitutional principle remains true whenever a state legislature removes a state law prohibition on private conduct. If state officials are compelled by federal law to treat that state law prohibition

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at 224(b)). The final one (18 U.S.C. 1084) is limited to a situation where an interstate wire is used.

on private conduct as still valid and binding law – even as to only one location or one narrow circumstance – there is still federal usurpation of state government for federal ends, not direct federal governance of the people that supersedes concurrent state governance of the same people.

In their effort to treat PASPA as a routine example of preemption, Respondents conflate two very different aspects of national power. The first involves the national power to regulate the people directly (and thereby displace contrary state law). The second involves directly regulating the States as market participants, such as by requiring the States to comply with minimum wage and maximum hours laws, *Garcia* v. *San Antonio Metro. Transit Author.*, 469 U.S. 528 (1985), with laws prohibiting age and disability discrimination in employment, *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001); with laws governing the issuance of bonds, *South Carolina* v. *Baker*, 485 U.S. 505 (1988); and with laws governing the sale of data. *Reno* v. *Condon*, 528 U.S. 141 (2000). But it is a dangerous sleight of hand to suggest, as Respondents do, that by exercising the power to directly regulate States as market participants, the national government can bootstrap itself into some additional power to dictate the extent to which a State may allow its people to engage in private activity.

PASPA makes it unlawful for a governmental entity to "sponsor, operate, advertise, [or] promote" sports gambling. Those prohibitions are directed to a State in

its role as market participant, not as a sovereign regulator. But PASPA also makes it unlawful for a governmental entity to "authorize by law or compact" sports gambling. This prohibition is not directed to a State in its role as a market participant. Instead, this prohibition is directed to a State in its role as the sovereign regulator of its own people.[6]

Respondents repeatedly emphasize PASPA's prohibitions on a State's commercial activity as a market participant. They try to elide the distinction between a State's own commercial activity and the activity of private parties subject to a State's sovereign regulatory control. They describe PASPA as prohibiting States from operating sports-gambling schemes themselves, and repeatedly characterize PASPA's prohibition on state authorization by law of sports gambling as prohibiting private parties from conducting such schemes "in the states' stead," or as if private parties are the State's "agent." Resp. Br. i; see also *id.* at 1, 2, 8, 29, 40. But none of these terms appear anywhere in the text of PASPA.

A private party does not conduct business "in the states' stead," or as the State's "agent," simply because

[6] PASPA also has an intermediate prohibition that makes it unlawful for a governmental entity to "license" sports gambling. This can be read as directed to a State in its role as a market participant (as the owner of any intellectual property can license others to use that property) or as directed to a State in its role as a sovereign regulator of its own people (as only a sovereign can issue, *e.g.*, drivers licenses). If read as the former, it has no application in this case; if read as the latter, it has the same constitutional infirmities as "authorize by law."

there are a limited number of locations where its business is permitted. An extreme case demonstrates the point: If a State were to repeal its prohibitions against prostitution, but only in areas that had already become red light districts, would that make prostitutes state agents? Even a highly-regulated private business with monopoly power does not operate "in the states' stead." See *Nat'l Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179, 198-99 (1988); *Jackson* v. *Metro. Edison Co.*, 419 U.S. 345, 351-52 (1974).

Under Respondents' approach, so long as Congress required the States as employers to provide a $15 per hour minimum wage, it could also prohibit States as sovereigns from authorizing businesses in the State to pay less than $15 per hour. Similarly, so long as Congress required the States as borrowers to meet certain standards when issuing bonds, it could also prohibit States as sovereigns from authorizing businesses in the State to issue bonds that fail to meet those standards. That is an invitation to Congress to evade responsibility for restrictions on private conduct.

Respondents and the United States wish they could rewrite PASPA so that it worked like an ordinary federal statute with preemptive effect, and said something like, "Any provision in state law to the contrary notwithstanding, it shall be unlawful for any person to operate a sports-gambling scheme." That wished-for statute is not what Congress enacted in PASPA. Even now, after five years of litigation up and down the

federal judiciary, no one has identified a single other statute that works the peculiar way PASPA does.[7]

PASPA's impact on the NJTHA demonstrates that PASPA is an unconstitutional federal statutory outlier. The NJTHA is not being subjected to direct federal governance of its activity, with the state officials being compelled to stand aside. Instead, the NJTHA is being subjected to the federal government's usurpation of state government for federal ends.

Faced with the NJTHA's argument that Respondents lacked the clean hands necessary to obtain equitable relief, the district court declined to enjoin the NJTHA. Respondents did not cross-appeal from that decision. The injunction runs only against state officials. It forbids state officials from giving effect to the state legislature's decision to lift prior state law prohibitions on the NJTHA's conduct. Because of the injunction against the state officials, the NJTHA faces the prospect of a state court prosecution for violating a state law that the state legislature has repealed.

In an effort to escape the plain commandeering the injunction displays, Respondents contend that "the injunction does not require New Jersey to *enforce* its state-law prohibitions." Resp. Br. 44 n.11. This is a

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[7] The breadth of the search underscores the failure: PASPA is not an anti-discrimination statute, does not enforce the Reconstruction Amendments, and does not impose economic sanctions on a foreign nation. Cf. U.S. Br. 24-25 & n.7. Nor does PASPA govern foreign affairs, require state adjudicators to apply federal law, or hortatorily call on state administrative agencies to "consider" federal suggestions. Cf. Resp. Br. 50-51.

remarkable assertion. If true, what *would* the injunction require?

The United States makes a similar argument that the "injunction does not compel the officials to take specific acts or to bring particular enforcement actions," but "merely requires [state officials] to respect the court's determination that the 2014 Act is preempted." U.S. Br. 27. But how do state officials show "respect" for the determination that a repealed law is still valid other than by enforcing that law? Cf. *First Nat. Bank in St. Louis v. State of Missouri*, 263 U.S. 640, 660 (1924) ("To demonstrate the binding quality of a statute, but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law.").

Perhaps the United States means that while state officials are not compelled to bring "particular enforcement actions," they must bring *some* enforcement actions in accordance with their ordinary exercise of enforcement discretion. If so, due to the injunction, the NJTHA still faces the risk of prosecution by state officials for violating a state law that the state legislature has repealed.

The United States suggests that "if the injunction raised concerns, the solution would be to limit respondents to declaratory relief." U.S. Br. 28 n.9. This "solution" jumps from the anti-commandeering frying pan into the advisory opinion fire. What saves a declaratory judgment sought by a party with a coercive claim is

precisely that it can, if necessary, be relied upon for coercive relief like an injunction, as 28 U.S.C. 2202 contemplates. Compare *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937), with *Muskrat* v. *United States*, 219 U.S. 346 (1911); see also Richard H. Fallon, Jr. *et al.*, Hart and Wechsler's The Federal Courts and The Federal System at 1155-1156 (7th ed. 2015) ("Indeed, if a federal declaratory judgment lacked any significant preclusive effect, mightn't it constitute a constitutionally forbidden advisory opinion?").

If the injunction means anything, it means that the NJTHA faces the prospect of a state court prosecution for violation of a state law that the state legislature has repealed.[8] That's commandeering.

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[8] Respondents complain that the 2014 Repealer "does not repeal *any* of New Jersey's myriad prohibitions on sports gambling; indeed, it did not eliminate a single word from those laws." Resp. Br. 42. But as the United States has correctly argued in a different case pending this term, it makes no difference whether a legislature acts by changing the text of a preexisting law or by enacting an entirely new statute; in either case, "courts must give effect to either type of enactment as a duly-enacted law." Brief for the Federal Respondents at 36, *Patchak* v. *Zinke*, No. 16-498 (Sept. 11, 2017).

II

The Prohibition Of Private Sports Gambling "Pursuant To The Law Or Compact Of A Governmental Entity" Is Not Independent Of The Prohibition Of A "Governmental Entity" Authorizing Sports Gambling "By Law Or Compact."

PASPA makes it unlawful for "(1) a governmental entity to * * * 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," sports gambling. The secondary prohibition against "a person" is not an independent prohibition on private conduct. It is, instead, both textually and functionally dependent on the primary prohibition on the conduct of a "governmental entity."

Textually, the secondary prohibition on a "person" engaging in sports gambling "pursuant to the law or compact of a governmental entity" is plainly a reference to the "authoriz[ation] by law or compact" that the primary prohibition in that same sentence tells a "governmental entity" not to provide. The United States ignores this obvious textual point in suggesting that, if the "authorize by law" provision in §3702(1) is unconstitutional, the "pursuant to law" provision in §3702(2) nonetheless remains in effect. It proposes treating PASPA as if the words "law or" were deleted from §3702(1), but not from §3702(2). U.S. Br. 32. But if PASPA is treated as if the words "law or" were deleted from §3702(1), it must be treated as if those words were also deleted from the interdependent §3702(2), making it unlawful for

> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by ~~law or~~ compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the ~~law or~~ compact of a governmental entity,
>
> a [sports-gambling scheme].[9]

The resulting §3702(2) would obviously have no application in this case.

Functionally, if there is no primary violation by a "governmental entity," there is no predicate for a secondary violation by a private person acting "pursuant to" the forbidden "law or compact of a governmental entity." If New Jersey's 2014 repeal of its prohibition on sports betting at particular locations is valid, then the legal status under New Jersey law of betting on sports at Monmouth Park is the same as the legal status under New Jersey law of wearing a hat, singing a song, writing a poem, or hugging one's child – and only in a totalitarian state would it be said that these activities are done "pursuant to the law * * * of a governmental entity."

Yet even if the prohibition against a "person" "pursuant to the law or compact of a governmental entity"

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[9] This assumes, along with the United States, that the "by compact" provision survives. That provision is not at issue in this case, and might survive either as an aspect of Congressional power over Indian tribes, see, *e.g.*, *United States* v. *Lara*, 541 U.S. 193, 200 (2004), or as an aspect of Congressional power to withhold consent to interstate compacts. U.S. Const. Art. I, § 10.

were treated as independent of the prohibition of a "governmental entity" authorizing sports gambling "by law or compact," that would not aid Respondents in this case. The district court declined to grant any relief against the NJTHA. Respondents did not cross-appeal from that determination. In the absence of a cross-appeal, they cannot gain greater rights than they obtained from the district court judgment. *Jennings* v. *Stephens*, 135 S. Ct. 793, 798 (2015).

III

New Jersey's 2014 Repealer, Correctly Described, Does Not Violate PASPA Even Under The Interpretation Of PASPA Suggested By Respondents And The United States.

The NJTHA submits that PASPA is susceptible of a construction that avoids the constitutional question: PASPA can be construed to allow States to repeal state law prohibitions to whatever extent the State chooses, either in whole or in part. This construction, unlike the construction offered by Respondents and the United States, avoids the perverse result that the *more* sports betting a State allows, the *closer* it comes to compliance with PASPA. See *supra* at 4; NJTHA Br. 42-57. The NJTHA's avoidance construction actually avoids the constitutional question, while the construction offered by Respondents and the United States not only fails to avoid the need to decide the constitutional question, but also fails to save PASPA's constitutionality. See *supra* at 4-15.

There is yet another way the Court can avoid the need to decide the constitutional question.[10] New Jersey's 2014 Repealer, when correctly described, does not violate PASPA even under the interpretation of PASPA suggested by Respondents and the United States.

Respondents provide a litany of choices that they say their reading of PASPA gives to the States:

(1) States can fully repeal all state law prohibitions against sports gambling (Resp. Br. 37);

(2) States can alter state law sports-betting penalties (*ibid.*);

(3) States can create exemptions from sports-betting prohibitions to allow for *de minimis* friendly sports wagers (*ibid.*);

(4) States can control the extent to which they choose to enforce sports-gambling prohibitions (*ibid.*);

(5) States can change sports-betting laws (*id.* at 40);

(6) States can decriminalize sports wagers between social acquaintances (*ibid.*); and

[10] The NJTHA has never abandoned its argument that the 2014 Repealer is consistent with PASPA, but even if it had, the possibility of a statutory interpretation that avoids a constitutional question would still be properly before the Court. *Matal* v. *Tam*, 137 S. Ct. 1744, 1755 (2017).

(7) States can decide to take a hands-off approach to sports betting by choosing to stand "on the sidelines" (*id.* at 39).

Even though Respondents say PASPA leaves at least these seven broad choices to the States, they say the 2014 Repealer is not permissible because it ensures "that sports-gambling schemes would be operated *only* by state-licensed gambling venues." Respondents' Br. 13 (emphasis added). This argument suffers from a fundamental factual flaw in its premise – the text of the 2014 Repealer is not limited "only" to "state-licensed gambling venues."[11]

The 2014 Repealer repeals all laws, rules, and regulations that prohibit sports betting at Atlantic City casinos and at any "running or harness horse racetrack" in New Jersey. Pet. App. 219a. Section 1 of the Repealer defines "running or harness horse racetrack" to include "*any former racetrack where such a meeting was conducted within 15 years prior to the effective date of this act, excluding premises other than those where the racecourse itself was located*." Pet. App. 220a (emphasis added). The United States incorrectly analogizes the 2014 Repealer to a state law that repealed a

[11] The United States, in its amicus brief, is internally inconsistent as to the venues within the scope of the 2014 Repealer. On the one hand, the United States incorrectly writes that "New Jersey wishes * * * to authorize sports gambling at its licensed casinos and racetracks, but nowhere else." U.S. Br. 20. It isn't until the penultimate sentence of its brief (p.35) that the United States corrects itself and reluctantly acknowledges that the 2014 Repealer "*almost* exclusively" applies to "entities that hold state licenses to conduct other gambling" (emphasis added).

prohibition on teeth-whitening to the extent that it applies to licensed dentists who provide such services to adults. U.S. Br. 22. But the correct analogy would be to a state law that repealed a prohibition on teeth-whitening to the extent that it applies to adult customers at a current dentist office or *any other office that has been used as a dentist office at any time during the past 15 years*.

As noted in our opening brief (p.12 n.6), it is undisputed that there are two "former" racetracks in New Jersey – Garden State Park ("GSP") and Atlantic City Racecourse. Both of these "former" racetracks are venues within the scope of the 2014 Repealer's repeal of sports-betting prohibitions.

Neither of these "former" racetracks holds a gambling license or, for that matter, any kind of license. For example, the site of the former GSP "racecourse" has for many years been the site of a private shopping mall where businesses such as Home Depot, Bed Bath & Beyond, Best Buy, and Barnes & Noble are located. See http://marketplaceatgardenstatepark.com/. The stores in the mall are not "state-authorized" or "state-licensed" gambling venues. Respondents' premise, therefore, that the 2014 Repealer applies "only" to "state-licensed gambling venues" is factually wrong.

There are two other errors in Respondents' description of the text of the 2014 Repealer. First, under the Repealer, even as to "state-licensed" casinos and current racetracks, the repeal of sports-betting prohibitions is not limited to the licensed operator of a

casino or racetrack. Rather, under section 1 of the 2014 Repealer, sports betting can be conducted by "any person" who has the consent of the "operator" of the casino or racetrack, whether "any person" holds a gambling license or not.[12] Pet. App. 219a. Second, even if a licensed operator of a casino or racetrack conducted sports wagering at their venue, the State's gaming and horse racing regulatory agencies – the Division of Gaming Enforcement, the Casino Control Commission, and the New Jersey Racing Commission – have no authority under the 2014 Repealer to license or otherwise regulate their sports-betting activity. J.A. 263-282.

If the Court accepts Respondents' interpretation of PASPA and applies it to an accurate description of the plain text of the 2014 Repealer, then PASPA does not prohibit the 2014 Repealer. The 2014 Repealer fits squarely within the scope of at least two of the seven choices that Respondents have identified as permitted by PASPA.

1. If PASPA is construed, as Respondents and the United States argue, to permit full repeals by States of sports-betting prohibitions, it cannot logically

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[12] This provision simply recognizes the property rights of the operator lest anyone read the 2014 Repealer to allow anyone and everyone to engage in sports gambling at casinos, racetracks, and former racetracks despite the objections of the operator. The United States expresses confusion about identifying the operator of a former racetrack, U.S. Br. 35, but since former racetracks are included in the statutory definition of "racetrack," the operator is simply whoever has the appropriate property rights for that location.

prohibit partial repeals such as the 2014 Repealer. Judge Fuentes' reasoning on this point is unassailable:

> A repeal is defined as an "abrogation of an existing law by legislative act." When a statute is repealed, "the repealed statute, in regard to its operative effect, is considered as if it had never existed." If a repealed statute is treated as if it never existed, a partially repealed statute is treated as if the repealed sections never existed. The 2014 Repeal, then, simply returns New Jersey to the state it was in before it first enacted those prohibitions on sports gambling. In other words, after the repeal, it is as if New Jersey *never* prohibited sports wagering at casinos, gambling houses and horse racetracks. Therefore, with respect to those locations, there are no laws governing sports wagering. * * * [T]he permission to engage in such an activity is not affirmatively granted *by virtue of* it being prohibited elsewhere.

Pet. App. 30a-31a (footnotes omitted); see also Erwin Chemerinsky *et al.*, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 103 (2015); NJTHA Br. 26-30.

2. If PASPA allows States to stand "on the sidelines," then it does not prohibit the 2014 Repealer. That's because the 2014 Repealer requires New Jersey to remain "on the sidelines" with respect to sports

betting at selected venues, only some of which are state-licensed for other gambling activity.[13]

As explained by David L. Rebuck, the Director of New Jersey's Division of Gaming Enforcement ("DGE"), the 2012 Law "would have created a detailed regulatory regime for sports wagering" with "specific provisions governing the actual operation of sports pools." J.A. 265-266 ¶¶4-5. Under the 2014 Repealer, however, any sports wagering offered by casinos and racetracks will be "without state regulation by DGE." J.A. 268 ¶6. "DGE will have no role or say in any decision by a casino or racetrack to either internally operate a sports pool or hire a private company like William Hill to operate the casino's or racetrack's sports pool." J.A. 268-269 ¶7.

Similarly, the New Jersey Racing Commission, which "administers and enforces" "statutory provisions and regulations through investigations, penalties, fines, exclusions, and revocation of licenses" with respect to horse racing in New Jersey, will have "no role at all in sports wagering" under the 2014 Repealer and will have "no involvement at all in any of the sports wagering operations" at New Jersey racetracks. J.A. 275-276 ¶¶6, 8.

New Jersey's Casino Control Commission, which licenses New Jersey casinos as well as casino key employees, "will not be involved in any review or licensing

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[13] Gambling licenses issued by New Jersey to casinos and racetracks are not licenses to conduct sports betting. There is no such thing as a sports betting license issued by New Jersey.

of sports pool wagering employees" under the 2014 Repealer because under the Repealer "no statutory or regulatory provision requires licensure or oversight by the Commission of operators or employees of sports pools." J.A. 281 ¶¶7-8.

The fact that New Jersey as a matter of policy has decided to remain "on the sidelines" by repealing state laws prohibiting sports betting at a few locations does not mean there is no supervision over sports-betting activity. The NJTHA is the founding member of a private regulatory body called The Independent Sports Wagering Association ("TISWA"). J.A. 226 ¶7; J.A. 148-152. TISWA is designed to provide integrity and protect the public with respect to sports-betting activity. J.A. 226 ¶7. Successful private monitoring of sports betting already exists at venues where sports betting is legal. See generally Amicus Brief of American Gaming Association 18-20.

CONCLUSION

The judgment of the court of appeals should be reversed, with instructions to vacate the injunction and dismiss the complaint.

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