No. 13-1715

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Plaintiffs-Appellees,

vs.

GOVERNOR OF THE STATE OF NEW JERSEY, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
For the District of New Jersey

MEMORANDUM IN SUPPORT OF REHEARING BY AMICI CURIAE THE STATES OF WEST VIRGINIA, GEORGIA, AND KANSAS AND THE COMMONWEALTH OF VIRGINIA

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici States support rehearing because the panel majority's opinion ratifies federal intrusion into State sovereignty by disregarding the anti-commandeering doctrine and expanding the doctrine of preemption. Under the panel majority's reasoning, Congress could command the States to enact and implement federal policy so long as Congress *prohibits*, rather than *affirmatively* directs, the enactment of new State laws. *Amici* submit this memorandum to highlight the errors in the panel majority's "affirmative/negative command distinction." Op. at 72. Importantly, *amici* take no position on the wisdom of the state and federal sports wagering laws in this case, because their concern is not *what* Congress regulates but *how* it does so.

BACKGROUND

On September 17, 2013, a majority of a three-judge panel of this Court ruled that the Professional Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 *et seq.*, does not contravene the anti-commandeering doctrine. PASPA prohibits forty-six States from "authoriz[ing]" or "licens[ing]" sports wagering as a matter of State law or regulation. Neither PASPA nor any other federal law imposes a federal regulatory scheme relating to sports wagering. As the panel majority admitted, PASPA does nothing more than "supersede state law." Op. at 55.

[1] *Amici* States have separately moved for leave of Court to file this Memorandum.

Amici States had argued before this Court that laws like PASPA, which seek only to regulate the way States regulate, unconstitutionally commandeer state legislatures. The panel majority disagreed, creating out of whole cloth an "affirmative/negative command distinction." *Id.* at 72. In its view, the anti-commandeering doctrine applies to a federal law that "impose[s] an affirmative requirement that the states act," but not to one that "only *stops* the states from doing something." *Id.* at 72, 93. Coining a new phrase, the panel majority explained that the latter sort of law constitutes a permissible "law of pre-emption." *Id.* at 93.

In dissent, Judge Vanaskie concluded that PASPA violates the prohibition on federal commandeering because it "directs how *states* must treat" sports wagering. Dissent at 1. He found "illusory" the majority's "distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty." *Id.* at 9. In his view, the constitutionality of the law "does not turn on the phraseology used by Congress in commanding the states how to regulate." *Id.* at 9-10. Judge Vanaskie also disagreed with the notion that Congress may preempt state law without setting forth either "a federal regulatory or deregulatory scheme." *Id.* at 12.

SUMMARY OF THE ARGUMENT

In conflict with Supreme Court precedent, the panel majority's decision draws a false distinction between "affirmative" and "negative" federal commands on state legislatures and officials. The Supreme Court held in *New York v. United States* that even where Congress has the authority to create a federal regulatory or deregulatory regime, it lacks the power to directly require the States to legislate or regulate in a particular way. This prohibition on commandeering ensures that Congress does not avoid political accountability by forcing the States to implement federal policy rather than doing so itself. Contrary to the panel majority's holding, those concerns apply with equal force whether Congress compels or forbids States from acting.

The panel majority also vastly overstated the nature of federal preemption. The Supreme Court has never held that Congress may create a "law of preemption" that does nothing more than dictate State law, without setting forth a federal regulatory or deregulatory scheme. The Supremacy Clause ensures that when Congress chooses to enact federal policy through federal law, the States may not contravene the federal government. In those circumstances, Congress may take the additional step of expressly barring State law that might disrupt the federal regime. The Supremacy Clause is not, however, a free-wheeling grant of authority to

Congress to interfere with State law when it has not adopted a federal scheme. That is not preemption, but rather unlawful commandeering.

This Court should grant rehearing.

ARGUMENT

I. THE PANEL MAJORITY'S NARROWING OF THE ANTI-COMMANDEERING DOCTRINE CONFLICTS WITH SUPREME COURT PRECEDENT.

The Supreme Court has made clear that Congress may not "regulate state governments' regulation." *New York v. United States*, 505 U.S. 144, 166 (1992). But that is precisely what the panel majority has permitted here. It would allow Congress to pass laws that "simply bar[] certain acts" by the States "under any and all circumstances." Op. at 77.

The panel majority rested its decision on a false "affirmative/negative command distinction." *Id.* at 72. In its view, it is one thing to "tell[] the states what to do" and altogether another to "bar[] them from doing something they want to do." *Id.* at 67. But as the dissent points out, this distinction is "illusory." Dissent at 9. Restraining a person's actions exerts just as much control over the individual as does dictating his actions.

As shown more fully below, the Supreme Court has certainly never distinguished between federal laws that *prohibit* State action and those that *compel* it. The accountability principles that underlie the Supreme Court's pathmarking

decisions in *New York* and *Printz* apply with equal force to affirmative and negative commands. It does not matter how Congress couches its directives; it is unlawful either way.

A. The Anti-Commandeering Doctrine Ensures That State and Federal Governments Each Remain Directly Accountable to Their Citizens for Their Own Actions.

Rooted in the Tenth Amendment, the anti-commandeering doctrine embodies the principle that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162. As the Supreme Court has explained, the Framers deliberately rejected a system of government in which Congress would "employ state governments as regulatory agencies." *Id.* at 163. They instead established dual sovereigns, with each directly responsible to its citizens for its own actions. *Printz v. United States*, 521 U.S. 898, 920 (1997). This "structural protection[] of liberty," *id.* at 921, provides an important "'double security'" against tyranny and the abuse of power, *id.* at 922 (quoting *The Federalist* No. 51, at 323 (James Madison)). By keeping federal and state government strictly apart, "'[t]he different governments will control each other, at the same time that each will be controlled by itself.'" *Id.*

The anti-commandeering doctrine safeguards this system of dual sovereignty and clear accountability. If the citizens of a State do not agree with a certain State

policy, for example, "they may elect state officials who share their view." *New York*, 505 U.S. at 168. And if that view is contrary to the national view, it "can always be pre-empted under the Supremacy Clause," and then "federal officials [will] suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* But where Congress commandeers and forces States to implement federal policy, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id.* at 169.

In its cases, the Supreme Court has stressed that maintaining clear lines of political accountability is the touchstone of the anti-commandeering doctrine. Although commandeering can be a way for Congress to save a few federal dollars, it does not matter whether the States must actually "absorb the costs of implementing a federal program." *Printz*, 521 U.S. at 930. Nor is the importance of the federal program, *New York*, 505 U.S. at 178, or a State's consent, *id.* at 182, relevant. Contrary to the panel majority's suggestion, concerns about misplaced political blame were not simply an afterthought. Op. at 63, 86 n.15. Rather, the critical question is whether the federal government has put States "in the position of taking the blame for [the federal program's burdensomeness and for its defects." *Printz*, 521 U.S. at 930.

B. A Federal Law Prohibiting State Action Can Just as Easily Shift Political Blame as Can a Federal Law Requiring State Action.

Federal laws that prohibit State action—particularly ones restricting or conditioning a State's ability to issue licenses—could result in precisely the sort of misplaced blame that the anti-commandeering doctrine aims to prevent. Provided that there is some nexus to interstate commerce, the panel majority would permit Congress to pass laws that enact no federal regime and that simply restrict a State's ability to issue licenses, permits, or authorizations. But when a State denies an individual his driver's license, building permit, medical license, or fishing license, the individual is unlikely to blame Congress, which did not enact some form of direct national regulation. For the average American, who is not familiar with every nook and cranny of the United States Code, the more obvious culprits are the State officials who stand between the citizen and the desired license.

This human propensity to "shoot the messenger" has long been recognized. Sophocles wrote in *Antigone* that "[n]o one likes the bringer of bad news." Sophocles, *Antigone* (c. 441 B.C.), *reprinted in* Sophocles: *The Complete Plays* 352 (Paul Roche transl., Signet Classics 2001). Shakespeare wrote in *Antony and Cleopatra* that "[t]he nature of bad news infects the teller." William Shakespeare, *Antony and Cleopatra* (c. 1606), *reprinted in The Unabridged William Shakespeare* 1135 (William George Clark & William Aldis Wright eds. 1989). English law historically protected town criers because of the people's tendency to

lash out at these bearers of the King's news. Any harm to a town crier—shooting the messenger, so to speak—was considered treason. *See Top town crier to be crowned as Hebden Bridge hits* 500, BBC, http://news.bbc.co.uk/local/bradford/hi/people_and_places/arts_and_culture/newsid_8931000/8931369.stm (last updated Aug. 20, 2010).

Significantly, Congress's ability to shift blame could extend to topics that strike at the core of American life and for which the federal government would very likely want to avoid responsibility. For instance, with the recent controversy over long-term brain damage in football players, Congress could decide that children should not be playing the sport. But rather than enact what could be extremely unpopular restrictions at the national level, the federal government could prohibit the States from authorizing or licensing youth football leagues. Just as in *Printz*, it will be the State and "not some federal official" who is blamed for the policy. 521 U.S. at 930.

In his dissenting opinion, Judge Vanaskie recognized the political accountability concerns that PASPA raises. "Instead of directly regulating or banning sports gambling, Congress passed the responsibility to the states." Dissent at 10-11. Accordingly, "when New Jersey fails to authorize or license sports gambling, its citizens will understandably blame state officials even though state

regulation of gambling has become a puppet of the federal government whose strings are in reality pulled (or cut) by PASPA." *Id.* at 11.

C. The Supreme Court's Anti-Commandeering Cases Do Not Distinguish between Federal Laws That Prohibit State Action and Those That Compel It.

Contrary to the panel majority's opinion, the Supreme Court has never held that commandeering occurs *only* when a federal law requires affirmative action by the States. In *New York*, the Supreme Court held that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions." 505 U.S. at 162. Congress may not "conscript state governments as its agents" or "regulate state governments' regulation." *Id.* at 178, 166.

None of this language even begins to suggest that Congress runs afoul of the anti-commandeering doctrine only where it compels affirmative State action. Indeed, a federal law prohibiting State action would fall squarely within the scope of all these statements. Consider a law that seeks to limit fishing by prohibiting the States from issuing fishing licenses, rather than regulating fishing at the federal level. That would be an attempt to "require the States to govern according to Congress's instructions," "conscript state governments as [Congress's] agents," and "regulate state governments' regulation." The panel majority claims that "it is hard to see" how Congress could commandeer a State "if it does not require it to

do anything at all." Op. at 71. There is nothing hard about this example, however. By prohibiting a State from issuing fishing licenses, Congress has directly mandated what the State's fishing policy shall be.

To be sure, the offending federal laws in both *New York* and *Printz* required affirmative State action. But those laws could just as easily have been written as prohibitions on State action. The Supreme Court could not have intended in those cases to limit the anti-commandeering doctrine to "affirmative" requirements, as that would have robbed those decisions of any real meaning.

That is the fatal flaw in the panel majority's reasoning. Congress could continue to govern in exactly the same objectionable way—making States implement a federal restriction on the activity in question rather than doing so itself—by slighting rewriting its law. The panel majority claims to take this argument "seriously," but offers no serious rebuttal. *Id.* at 77. It argues that the affirmative requirement in *Printz* cannot be recast as a prohibition without also imposing an affirmative condition: "that the states *refrain* from issuing handgun permits *unless* background checks are conducted by their officials." *Id.* But what about the law at issue in *New York*? Instead of requiring States to enact certain regulations governing the disposal of radioactive waste, Congress could put limitations on the ability of States to license the disposal of such waste. That

rewritten law includes no affirmative condition but achieves the same end as that found unlawful in *New York*.

The panel majority also places great weight on *South Carolina v. Baker*, 485 U.S. 505 (1988), and *Reno v. Condon*, 528 U.S. 141 (2000), but neither is an anti-commandeering case. Both of those cases concerned federal laws regulating the States' actions as market participants, rather than controlling the States' regulation of private activities. *Condon* involved the federal Driver's Privacy Protection Act (DPPA), which regulated the behavior of States and private actors in the market for drivers' personal information. *Id*. at 149-151 ("The DPPA regulates the States as the owners of databases."); *id* at 149 (describing "drivers' personal information" as "an article in interstate commerce"). *Baker* involved a regulation of States and private actors in the bond market. 485 U.S. at 510 (explaining that the law "covers not only state bonds but also bonds issued by the United States and private corporations"). As Judge Vanaskie explained in dissent, PASPA is not such a law. Dissent at 16-17.

If anything, *Condon* supports the notion that Congress impermissibly commandeers even where it prohibits State action. The Supreme Court there broadly characterized the unconstitutional laws in *New York* and *Printz* as federal laws "seek[ing] to control or influence the manner in which States regulate private parties." 528 U.S. at 150 (citation omitted). The words "control or influence"

suggest all sorts of federal efforts, including both laws expressly directing the States to take action and laws instructing the States to forbear from certain action.

II. THE PANEL MAJORITY VASTLY OVERSTATED THE NATURE OF FEDERAL PREEMPTION.

The real driver behind the panel majority's opinion appears to be its flawed understanding of federal preemption. In the panel majority's view, the anti-commandeering doctrine cannot possibly apply to federal laws that prohibit State action because such "law[s] of pre-emption" are expressly authorized by the Supremacy Clause. Op. at 93; *see also id.* at 68 n.11 ("[N]umerous federal laws are framed to prohibit States from enacting or enforcing laws contrary to federal standards, and these regulations all enjoy different preemptive qualities."); *id.* at 78 (asserting that New Jersey's argument "imperil[s] a plethora of acts currently termed as prohibitions on the states"). That is a vast overstatement of Congress's ability to preempt State law. The federal government does have "the power to restrict … the actions of States in preempted spheres," J.A.-44, and to protect "uniform national policies" with express preemption clauses, Op. at 67. But that does not give Congress free-wheeling authority to prohibit State action whenever and however it wishes. That is where preemption becomes unlawful commandeering.

The critical prerequisite to preemption under the Supremacy Clause is that the federal government establishes a "preempted sphere" or "uniform national

polic[y]" for which it is clearly accountable. Thus, when Congress imposes a federal regulatory scheme, it may expressly preempt State laws in protection of that scheme by prohibiting State laws that would impose inconsistent rules. If the federal scheme sets a regulatory ceiling, Congress might prohibit State laws that would create more regulation. Conversely, if the federal scheme sets a regulatory floor, a preemption clause might prohibit State laws that would be more permissive.

Like principles apply when Congress has established a federal deregulatory regime. Congress could, pursuant to the Supremacy Clause, bar State laws that might disrupt that regime. For example, in 1978 Congress enacted the Airline Deregulation Act ("ADA"), turning in that industry from a highly regulated regime to "maximum reliance on competitive market forces." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), 504 U.S. at 378. And "[t]o ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier." *Id.* at 378-79 (internal quotations omitted). In short, Congress adopted a federal deregulatory regime and then enacted an express preemption clause to protect that regime by prohibiting State action. *See also Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008).

As Judge Vanaskie notes in dissent, "the majority opinion does not cite any case that sustained a federal statute that purported to regulate the states under the Commerce Clause where there was no underlying federal scheme of regulation or deregulation." Dissent at 12 n.4. The preemption clause at issue in *American Trucking Associations v. City of Los Angeles*, 133 S. Ct. 2096 (2013), protects an elaborate federal regulatory scheme for motor carriers. The clause in *Farina v. Nokia Inc*., 625 F.3d 97 (3d Cir. 2010), is part of the federal deregulatory regime for wireless carriers. And the clause in the *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994), is integral to the federal regime for insecticides, fungicides, and rodenticides.

Hodel v. Va. Surface Mining & Reclamation Ass'n, 42 U.S. 264 (1981), and *FERC v. Mississippi*, 456 U.S. 742 (1982), are also preemption cases involving the protection of federal regulatory schemes. In both those cases, Congress protected the federal regime not by excluding the States, but by permitting them to remain in the field under certain conditions. *See Printz*, 521 U.S. at 925-26 ("In *Hodel* . . . we concluded that the Surface Mining Control and Reclamation Act of 1977 did not present [a Tenth Amendment] problem … because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field."); *FERC*, 456 U.S. at 765 ("PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive

scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards.").

Simply put, the Constitution does not give Congress blanket authority to prohibit State regulation when there is no federal regime to protect. This limitation flows directly from the Supremacy Clause, which makes "the Laws of the United States" the "supreme Law of the Land." U.S. Const. Art. VI., cl. 2. Congress has the power to establish "the Laws of the United States" and to take additional steps, including the express prohibition of contrary State law, to ensure their supremacy.

It does not have the power to pass a free-standing "law of pre-emption" and simply dictate State law. Op. at 93. That is what the Supreme Court meant when it said in *New York* that Congress may "hav[e] state law pre-empted by federal *regulation*," specifically suggesting a comprehensive scheme rather than a single provision of law. 505 U.S. at 167 (emphasis added). The panel majority's cavalier replacement of the word "regulation" with "law" is emblematic of its flawed understanding of preemption. Op. at 66.

Because Congress did not enact any federal regulatory scheme in PASPA to trigger preemption, PASPA does not preempt state laws via the Supremacy Clause. As the dissent recognized, "[u]nlike 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." Dissent at 12. Prohibiting State laws without establishing federal laws is not preemption to preserve an existing federal scheme; it is the forcing of States to create a *de facto* federal regime. That is commandeering and a violation of the Tenth Amendment.

CONCLUSION

This Court should grant rehearing.

Dated: November 4, 2013

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CERTIFICATE OF COMPLIANCE

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Dated: November 4, 2013 /s/Elbert Lin

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on this 4th day of November, 2013, the foregoing Motion for leave to file an *Amici* Memorandum was electronically filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. Service was accomplished on the following by the CM/ECF system:

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