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 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 "authoriz[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.

not prohibit States from authorizing or licensing such schemes. Deleting the alleged "commandeering" directions would free the statute to accomplish just what Congress 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.