No. 13-967

In the

Supreme Court of the United States

CHRISTOPHER J. CHRISTIE,
Governor of New Jersey, et al.

Petitioners,

v.

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Federal law does not directly prohibit sports wagering where it occurs in a State in which it is legal. But the Professional and Amateur Sports Protection Act (PASPA) makes it unlawful for a State, other than Nevada and several other exempted States, to "license" or "authorize" sports wagers. 28 U.S.C. § 3702.

The questions presented are:

1. Does PASPA's prohibition on state licensing or authorization of sports wagering commandeer the regulatory authority of the States, in violation of the Tenth Amendment?

2. Does PASPA's discrimination in favor of Nevada and other exempted States violate the fundamental principle of equal sovereignty?

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) and Cato Institute (Cato) respectfully submit this brief *amicus curiae*, in support of Governor Christopher J. Christie, et al. (New Jersey).[1]

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government. PLF attorneys have participated in numerous federalism cases in this Court, including *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), *Gonzales v. Raich*, 545 U.S. 1 (2005), *United States v. Morrison*, 529 U.S. 598 (2000), *United States v. Lopez*, 514 U.S. 549 (1995). Because of its history and experience on these issues, PLF believes that its perspective will aid this Court in considering New Jersey's petition.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case is of central concern to Cato because it implicates the basic principles of federalism as a safeguard for liberty.

SUMMARY OF ARGUMENT

The Constitution's federalist structure ensures a careful balance of power where states retain considerable sovereignty, while still subject to the overarching authority of the national government. *See*, *e.g.*, *The Federalist* No. 62 (Madison) (the Constitution creates a system where every state has an equal share in government); *The Federalist* No. 45 (Madison) (state governments "may be regarded as constituent and essential parts of the federal government"). Thus, in our constitutional structure, no state may be treated differently from any other state absent compelling circumstances. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (*NAMUDNO*). In the recent Voting Rights Act cases, this Court reaffirmed states' equal sovereignty, which previously had been limited to the admission of new states. *See South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966).

New Jersey's petition for a writ of certiorari raises an important constitutional issue: whether the principle of equal sovereignty, recently reaffirmed by

this Court in *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013), applies to legislation passed pursuant to Congress's Commerce Clause power. The principle of equal sovereignty is an important aspect of federalism that requires the federal government to respect the equal dignity of the states by regulating them on equal terms. *See id.* at 2622. Congress may depart from equal treatment only when the disparate treatment is "sufficiently related" to the issue addressed by the legislation. *See id.*; *Katzenbach*, 383 U.S. 301.

Here, purportedly exercising its Commerce Clause power, the federal government prohibited most states from authorizing or licensing sports-gambling, but allows three states to permit it. Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-04. This is not a case where a rule of general application has disparate effects in different states—for example, a facially nondiscriminatory law regulating banking has greater impact in New York than Wyoming simply by virtue of New York's larger banking system. Rather, PASPA directly regulates how states exercise their sovereign power on unequal terms. It forbids most states from legalizing or licensing sports gambling but grants an exclusive privilege to Nevada to continue doing so, in addition to more limited exemptions for Delaware and Oregon. *See id.*

Whether the principle of equal sovereignty applies to Commerce Clause legislation is an important question of federal law that this Court should resolve. As Justice Ginsburg recognized in her *Shelby County* dissent, statutes enacted under congressional powers other than the Fifteenth Amendment, most notably statutes enacted pursuant to the Commerce Clause, raise "equal sovereignty" issues. 133 S. Ct. at 2649

(Ginsburg, J., dissenting) (questioning whether the majority's decision rendered PASPA and other laws unconstitutional). Evidence from the founding and this Court's precedents until the early twentieth century support the extension of this principle to Commerce Clause legislation. Yet, some of this Court's cases construed this principle narrowly—limiting it only to the introduction of new states. *NAMUDNO* and *Shelby County* rejected this understanding but did not explain whether the principle had been fully restored. *See Shelby County*, 132 S. Ct. at 2622.

Federalism principles also counsel strongly in favor of granting New Jersey's petition. States are better positioned to craft state-specific solutions to local concerns, thereby serving as laboratories for novel policies. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). Further, government closest to the people has superior knowledge of local conditions and is more responsive to the people affected. *See The Federalist* No. 10 (Madison) (explaining that "the great and aggregate interests" are entrusted to Congress, while "the local and particular to the State legislatures"). State control over local issues also avoids confusion among the voters over which level of government—and which set of elected officials—should be held accountable for policy decisions. *See* W. Dane Carey, *Two Lessons of Anticommandeering: The Preemptive Significance of the Professional and Amateur Sports Protection Act*, 11 Willamette Sports L.J. 1, 10 (2013) (citing PASPA as example of the accountability problem). Congress's unchecked Commerce Clause power to discriminate among the states would undermine these federalism policies.

Finally, it is important to provide guidance on the scope and application of the principle of equal sovereignty both to Congress (as it considers updating the Voting Rights Act) and to the lower courts (as they consider other laws that raise equal sovereignty issues).

The petition should be granted.

I

THE EXTENT OF CONGRESS'S COMMERCE CLAUSE POWER TO DISCRIMINATE AMONG THE STATES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD RESOLVE

A. The Framers Understood the Commerce Clause To Incorporate the Equal Sovereignty Principle

The historical account of the Constitutional Convention demonstrates that the Framers intended for Congress to tax and regulate citizens in the individual states on equal terms. As Professor Thomas B. Colby explains, the Framers "maintained as perhaps *their single most pressing goal* the need to effectuate the Madisonian proposal by vesting Congress with the power to enact regulations and duties governing interstate commerce, *so long as those regulations and duties were uniform throughout the United States*." Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 Va. L. Rev. 249, 273 (2005) (emphasis added). And, with the final draft of Congress's Article I powers, the Framers believed that they had succeeded:

> [I]n the minds of the Framers, the total effect of the Uniformity Clause, the Commerce Clause, and the Port Preference Clause was to effectuate fully Madison's proposal—to empower Congress to enact regulations governing, and to impose duties upon, commerce, as long as those regulations and duties were uniform throughout the United States.

Id. at 283; *see also* Thomas L. Skinner III, *The Pendulum Swings: Commerce Clause and Tenth Amendment Challenges to PASPA*, 2 UNLV Gaming L.J. 311, 329-36 (2011) (The Committee of Detail, charged with writing the Constitution, incorporated equal treatment out of a concern that Congress would use its Commerce Clause power to disadvantage politically weaker states); Nelson Lund, *The Uniformity Clause*, 51 U. Chi. L. Rev. 1193, 1212 (1984) (Congress' power to regulate commerce was intended to establish uniform rules for shipping and to preempt state laws that interfered with free trade.).

The ratification of the Constitution and early experience under it are rife with evidence that the Commerce Clause power did not allow regulations inconsistent with the equal sovereignty principle. *See* Colby, *supra*, at 284-88; 3 *Debates on the Adoption of the Federal Constitution* 260 (Ayer Co. 1987) (Jonathan Elliot ed., 1888) (Madison's statement in the Virginia Convention that the "power for the regulation of commerce" will allow for needed "uniform regulations"); *The Federalist* No. 53 (Madison) (the Commerce Clause was intended to allow trade to be regulated by uniform laws rather than many inconsistent state laws). Experience under the Articles

of Confederation demonstrated to the Founders that the federal government needed the power to craft a single, national commercial policy. *See The Federalist* No. 42 (Madison). But, at the same time, they were concerned that this power could be abused to benefit some states at the expense of others. In his *Commentaries*, Justice Story explained that the Founders were concerned that

> [t]he agriculture, commerce, or employments of one State might be built up on the ruins of those of another, and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors.

1 Joseph Story, *Commentaries on the Constitution of the United States* § 957 (Thomas Cooley ed. 1873); *see United States v. Ptasynski*, 462 U.S. 74, 81-82 (1983) (discussing the Uniformity Clause); *see also* Lund, *supra*, at 1211-12 (explaining that discrimination amongst the states was one of the concerns of "faction" discussed in *The Federalist* No. 10). 3 Annals of Cong. 378-79 (1792) (remarks of Hugh Williamson regarding the Founders concern that Congress might use its power to impose unequal burdens on the states); Address of Luther Martin to the Maryland Legislature (Nov. 29, 1787), *reprinted in* 3 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 205 (rev. ed. 1937) (arguing that Congress should also be forbidden from imposing taxes on the states that have disparate effects, even if facially uniform). This risk threatened the Founders' vision to unify the young nation.

The text of the Constitution recognized this requirement because the Commerce Clause was originally held to be limited to taxing and spending, and the regulation of shipping and navigation. *See* Colby, *supra*, at 283-84 (explaining this limited understanding of the Commerce Clause), *see also* John Copeland Nagle, *Site-Specific Laws*, 88 Notre Dame L. Rev. 2167, 2172-73 (2013) (site-specific laws are "constitutionally suspect, contrary to the value of uniformity, prone to capture by special interests, tainted by flawed procedures, and precedent for undesirable future laws"). The Constitution expressly forbids Congress from treating the states on unequal terms when exercising either of these powers. *See* U.S. Const. art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States."); U.S. Const. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.").

The Court enforced this equal treatment limitation in the Commerce Clause until the early twentieth century. *See James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 326-27 (1917)[2] (upholding a regulation of the interstate shipment of liquor as uniform); *Knowlton v. Moore*, 178 U.S. 41,

[2] After upholding the challenged regulation as consistent with this required uniformity, the Court went on to consider whether it was unconstitutional because it had a disparate effect on different states. *See James Clark Distilling Co.*, 242 U.S. at 327. It was in this context that the Court explained that there is no requirement that Commerce Clause regulation be uniform— *i.e.* that it have the same impact on every state. *See id.* As Colby, *supra*, at 299, and Skinner, *supra*, at 335, have explained, this part of the opinion, if taken out of context, overstate the Court's holding.

101-02 (1900) (explaining that the Uniformity, Port, and Commerce Clauses worked together to implement Madison's vision of a prohibition against discrimination amongst the states under the Commerce Clause); *Wilkerson v. Rahrer*, 140 U.S. 545, 561 (1891) (upholding a federal law that allowed variation in state law as uniform despite varying effects in different states); *Smith v. Turner*, 48 U.S. (7 How.) 283, 311, 386 (1849) (reporting the arguments of both sides as endorsing the noncontroversial proposition that regulation of commerce "must be uniform throughout the nation"); *Gibbons v. Ogden*, 22 U.S. 1, 177-78 (1824) (reporting the Attorney-General interpretation of "regulate" in the Commerce Clause as "necessarily implies uniformity" and that the Commerce Clause must be understood as if it read "uniformly regulate").

Despite this historical evidence and long-standing recognition that Congress cannot discriminate amongst the states under the Commerce Clause, this Court has ruled in other cases that the principle of equal treatment applies only to the admission of new states. *See Katzenbach*, 383 U.S. at 328-29, *abrogated by Shelby County*, 133 S. Ct. 2612 ("The doctrine of the equality of States . . . applies *only* to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.") (emphasis added); *see also Currin v. Wallace*, 306 U.S. 1, 13-14 (1939) (rejecting a "uniformity" requirement for Commerce Clause legislation, but in the context of a challenge to a statute setting out a general standard with disparate effects rather than subjecting states to unequal treatment); *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950) (denying any uniformity

requirement); *Hodel v. Indiana*, 452 U.S. 314, 332 (1981) (same). *NAMUDNO* and *Shelby County* overrule the premise on which these cases were founded—that the principle of equal sovereignty applies only to the admission of new states—but do not explain whether the principle has been restored to Commerce Clause legislation. *See Shelby County*, 132 S. Ct. at 2622. As Congress and the lower courts implement this Court's decision in *Shelby County*, this Court's resolution of this inconsistent understanding of the Commerce Clause will be essential.

B. Applying the Equal Sovereignty Principle to Commerce Clause Legislation Furthers Important Federalism Values

The principle of equal sovereignty recognizes that there is a distinction between local issues, which are the province solely of the states, and national issues, which are entrusted to Congress. *See Lopez*, 514 U.S. at 567-68; *The Federalist* No. 10 (Madison) ("[T]he great and aggregate interests" are entrusted to Congress, while "the local and particular to the State legislatures[.]"); John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 Chap. L. Rev. 63 (2001) (The principle underlying the "General Welfare" Clause is that the federal government's proper role is to pursue general programs, rather than address state-specific issues.). When Congress regulates generally, without regard to particular states, it is much more likely to be regulating a national issue. *Cf. The Federalist* No. 14 (Hamilton) (Congress's powers are limited to those enumerated so that it can pursue those objects which concern all members of the Republic, and which would otherwise

be beyond the ability of the states to address.). But where Congress adopts balkanizing, state-specific legislation, it is far more likely to be regulating a local issue and has a weaker claim to the legitimate exercise of power.

Equal sovereignty recognizes and promotes this distinction between national and local issues by allowing Congress to adopt general regulatory policies, despite the possibility that states will be impacted differently. *See NAMUDNO*, 557 U.S. at 203. For example, the equal sovereignty principle does not prohibit Congress from setting a national minimum wage, notwithstanding the fact that its impact will differ according to each state's preexisting wage rates or the cost of living. But the equal sovereignty principle would be implicated if a federal statute purported to set a different federal minimum wage for each state *without regard to any neutral criteria*. *See Shelby County*, 133 S. Ct. at 2622.

The states are best equipped to deal with local problems; they are, in Justice Brandeis's words, "laboratories" for experimenting with novel policies to fit local conditions. *See Liebmann*, 285 U.S. at 311 (Brandeis, J. dissenting). State governments are more responsive to the constituencies affected by such state-specific policies and more aware of the local conditions that they are addressing. Dylan Oliver Malagrino, *Off the Board:* NCAA v. Christie *Challenges Congress to "Move the Line" on the Professional and Amateur Sports Protection Act*, 118 Penn. St. L. Rev. 375, 401 (2013). Denying states the ability to pursue experimental legislation may "be fraught with serious consequences to the nation." *Liebmann*, 285 U.S. at 311.

The principle of equal sovereignty also ensures that democracy operates more effectively. If Congress dictates state-specific policies, rather than adopting general rules that are national in scope, voters will be less clear about whom to hold accountable for those policies' failure. *See* Carey, *supra*, at 10 (PASPA forbids states from responding to the will of their electorate and creates confusion for citizens over whom to hold accountable.). This is particularly true in cases like this one, where Congress outright prohibits states from changing their own laws, thereby exacerbating the risk that voters will be confused about which politicians are responsible for the prohibition against sports-gambling. *See id.* The equal sovereignty principle is one way to promote federalism's values—experimentation, responsiveness, and accountability.

C. This Court Should Grant the Petition To Give Congress and the Lower Courts Guidance As To Whether and How the Principle of Equal Sovereignty Applies

This case gives the Court an opportunity to determine the extent and application of the principle of equal sovereignty in areas outside Commerce Clause legislation. As the dissent in *Shelby County* noted, the principle raises questions about many other statutes beyond the Voting Rights Act. *See* 133 S. Ct. at 2649 (Ginsburg, J., dissenting) (asking whether PASPA and various provisions providing criteria for siting federal facilities or spending federal funds violate the principle of equal sovereignty). Without such guidance, the lower courts and Congress will be left to speculate on

Congress's authority to discriminate among the states under the Commerce Clause.

PASPA is unique in that it directly regulates the ability of states to change their own laws, interfering with the relationship between the states and their residents and undermining the democratic process at the state level. *See* Carey, *supra*, at 13 (explaining that PASPAs unequal treatment of the states diminishes political accountability). PASPA's prohibition on gambling in only some states stands in stark contrast to the growing disagreement between the states and the federal government about the best approach to address marijuana criminalization. Because the Controlled Substances Act, 21 U.S.C. § 801, *et seq.*, directly regulates individuals rather than compelling states to retain a particular regulatory regime, states are free to change their own approach to deal with this problem and respond to popular will against criminalization. *See id.*; Robert A. Mikos, *On the Limits of Supremacy: When States Relax (or Abandon) Marijuana Bans*, Cato Policy Analysis No. 714 (2012).[3] This aspect of PASPA—that it directly regulates how states regulate their own residents—raises a similar sovereignty issue as in *Shelby County*. The laws that a state adopts to regulate its residents is as core to its sovereignty as the rules it uses to administer its elections. *See* Note, Steven L. Shur, *Police Blockade: How the Revitalization of the Tenth Amendment Could Pave the Way to Legalized Sports Betting in New Jersey*, 10 Rutgers J.L. & Pub. Pol'y 99, 109 (2013) (questioning the constitutionality of PASPA); *cf.*

[3] *Available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/PA714.pdf (last visited Mar. 12, 2014).

John G. Tamasitis, *"Things Have Changed in the South": How Preclearance of South Carolina's Voter Photo ID Law Demonstrates That Section 5 of the Voting Rights Act Is No Longer A Constitutional Remedy*, 64 S.C. L. Rev. 959, 988-91 (2013) (The Voting Rights Act's substantial federalism cost was that it did not allow a sovereign state to administer its own elections.).

The equal sovereignty concerns implicate other statutes, including the Clean Air Act and Congress's reconsideration of the Voting Rights Act in light of *Shelby County*. The Clean Air Act charges the Environmental Protection Agency with setting national standards for mobile sources of air pollution, *e.g.*, cars. 42 U.S.C. § 7521(a). These standards preempt any state regulations of this pollution. 42 U.S.C. § 7543(a). However, California alone is allowed to set its own, more rigorous, standard, subject to EPA review. 42 U.S.C. § 7543(b); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 525 (2d Cir. 1994) (noting that the CAA allows California alone to set its own unique standard, which other states may follow). The voters of any other state concerned about air pollution from these sources and believing that the national standard is not stringent enough do not enjoy the same sovereignty that California does. Their only alternative to the federal standard is to accept whatever standard California chooses. *See* 42 U.S.C. § 7507. A decision from this Court on the constitutionality of PASPA's grant of a *de facto* monopoly over sports-gambling to Nevada would give useful guidance to the lower courts in applying the principle of equal sovereignty to the Clean Air Act's waiver provision.

Similarly, granting this petition would allow the Court to give important guidance to Congress. The court below construed Congress's purpose in treating the states unequally under PASPA as the desire to prevent legal sports-gambling from spreading from Nevada. *NCAA v. Christie*, 730 F.3d 208, 239 (3d Cir. 2013). But this purpose incorporates discrimination amongst the states and would undermine the principle of equal sovereignty. The court below didn't decide that sports-gambling is harmful in states other than those exempted, or worse in the states regulated by PASPA. *See id.* If this reasoning is correct, Congress could likewise forbid those states that do not already have a minimum wage above the federal level from changing their laws or *vice versa*. It could similarly forbid a state that experiments with single-payer healthcare or an increase in its social safety net from abandoning these reforms by freezing state law in place, as it did here. The principle of equal sovereignty is designed to address these issues by allowing Congress to depart from uniformly regulating issues of national concern only if it can demonstrate that conditions amongst the states are so different that unequal treatment is necessary to address the issue.

CONCLUSION

In *Coyle v. Smith*, 221 U.S. 559, 567 (1911), this Court explained that the guaranty of equal treatment amongst the states by the federal government "is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution."

221 U.S. at 580. This Court has not articulated a consistent understanding of whether that equality has disappeared as a constitutional requirement. This Court should grant New Jersey's petition for the reasons above and to prevent "a few States in Congress [from] secur[ing] a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors." Story, *supra*, § 957.

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