No. 09-914

In the Supreme Court of the United States

JACK A. MARKELL, GOVERNOR OF THE STATE OF DELAWARE, AND WAYNE LEMONS, DIRECTOR OF THE DELAWARE STATE LOTTERY OFFICE,
Petitioners,

v.

THE OFFICE OF THE COMMISSIONER OF BASEBALL, THE NATIONAL BASKETBALL ASSOCIATION, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NATIONAL FOOTBALL LEAGUE, AND THE NATIONAL HOCKEY LEAGUE,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the grandfather clause of the rarely-litigated Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701-3704, authorizes Delaware to conduct only the same state-sponsored gambling that it conducted during the grandfathered period, or also permits the State to offer new forms of gambling and gambling on different sports.

2. Whether the court of appeals acted within its discretion in deciding the merits of the parties' dispute in the context of a preliminary injunction motion, after determining that there were no disputes of material fact.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents state that:

The Office of the Commissioner of Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, and the National Hockey League have no parent companies.

No publicly held company owns 10% or more of the stock of the Office of the Commissioner of Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, or the National Hockey League.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

INTRODUCTION

This case involves a straightforward statutory-interpretation question concerning a rarely-litigated federal law as to which there is no division of authority. The issue is remarkably narrow. It is relevant to less than a handful of States, and there is no dispute that those States may conduct the same sports betting schemes they conducted before Congress enacted the Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701-3704 ("PASPA").

The only disputed question is whether Delaware's ambitious plans for sports lotteries crossed the statutory line. The court of appeals correctly found that they did. The grandfather clause at issue here authorizes Delaware to conduct a sports gambling scheme only "to the extent that the scheme was conducted by that State" before PASPA's enactment. 28 U.S.C. § 3704(a)(1). The undisputed facts demonstrate that Delaware's proposed expansions into new types of sports lotteries fall well outside of the scope of that grandfather clause. Because the statute clearly limits Delaware's proposed expansion, Delaware's invocation of the Tenth Amendment plain-statement rule is misplaced. More fundamentally, a State's interest in raising revenue must yield to federal law and is not the kind of essential sovereign function that triggers a plain-statement rule.

STATEMENT

A. The Federal And State Statutes

Following extensive hearings, Congress determined that sports betting "threaten[ed] to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling," "undermine[d] public confidence in the character of professional and amateur sports," and "promote[d] gambling among . . . young people." S. Rep. No. 102-248 at *5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3555. Based on these findings, Congress enacted PASPA in 1992 to broadly prohibit any "governmental entity" from sponsoring, operating, promoting, or authorizing:

> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . ., on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702.

The statute includes a narrow grandfather clause applicable to only four States: Delaware, Montana, Nevada, and Oregon. *See* Pet. App. 18a; Pet. 8-9 & n.3. That clause excepts from PASPA's general prohibitions against sports betting:

> a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, *to the extent that the scheme was conducted* by that State or

> other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990.

28 U.S.C. § 3704(a)(1) (emphasis added).

For four months in 1976, Delaware conducted a limited sports lottery involving multi-game (parlay) betting on the outcomes of professional football games. Pet. App. 3a, 19a. Thirty-three years later, in 2009, Delaware enacted the Sports Lottery Act, Del. Code Ann. tit. 29, § 4825, to authorize *all* forms of sports betting, Pet. App. at 2a-3a, except that the Sports Lottery Act does not permit gambling on contests involving Delaware-based teams. *Id*. at 4a. On June 30, 2009, Delaware published proposed regulations stating that it planned to offer single-game betting on all events in all non-Delaware sports, beginning on September 1, 2009. *Id*. at 2a n.1 & 4a.

B. The Procedural Background

Respondents are four major professional sports leagues and the National Collegiate Athletic Association (the "Sports Leagues"). They filed suit in the United States District Court for the District of Delaware, alleging that Delaware's proposed sports betting violated both PASPA and the Delaware Constitution and seeking a preliminary injunction on their PASPA claim. *Id*. at 5a & n.2.

The district court denied the Sports Leagues' motion for a preliminary injunction. *Id*. at 21a-28a. Among other things, the court stated that it was "not in a position to give either side a nod on the merits" because "there may exist factual

disputes"—though no such disputes were identified. *Id.* at 24a.

The Sports Leagues appealed, and the United States Court of Appeals for the Third Circuit expedited the appeal so that it could reach a decision before September 1, 2009, the date Delaware intended to commence taking bets on National Football League ("NFL") games. *See id.* at 4a, 6a. After full briefing and argument, the court of appeals unanimously held that, on the undisputed facts of this case, "elements of Delaware's sports lottery violate federal law." *Id.* at 2a. The court then vacated and remanded for further proceedings. *Id.* at 20a.

The court of appeals explained that it is appropriate to decide the merits of an issue on appeal from a preliminary-injunction ruling if the "district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." *Id.* at 9a (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986)). Because "the parties agree upon what Delaware did in 1976 and what Delaware intends to do now," the court concluded that this case was "ripe for adjudication as matter of law." *Id.* at 12a.

On the merits, the court of appeals rejected Delaware's argument that PASPA's grandfather clause "allows it to conduct *any* 'sports lottery under State control.'" *Id.* at 13a (quoting Del. C.A. Br. 32) (emphasis added). The grandfather clause permits a State to conduct a gambling scheme only "to the extent that the scheme was conducted by

that State" between 1976 and 1990. 28 U.S.C. § 3704(a)(1). The court explained that this provision does not authorize all gambling by affected States. Instead, in the court's view, it authorizes States to conduct the same schemes they conducted between 1976 and 1990. Pet. App. 13a-17a.

Because the court of appeals determined that PASPA's plain language is "unmistakabl[e]," it rejected Delaware's reliance on a plain-statement rule and "generalized notions of 'state sovereignty.'" *Id.* at 18a. The court also found PASPA's legislative history unilluminating because it "offer[s] no consistent insight into Congressional intent." *Id.* at 17a n.5.

Finally, the court of appeals emphasized the limits of its holding. Delaware may "institute multi-game (parlay) betting on at least three NFL games, because such betting is consistent with the scheme to the extent it was conducted in 1976." *Id.* at 20a. In addition, "*de minimis* alterations," such as changes to the times and places at which tickets are sold, "may differ from the lottery as conducted in 1976, as long as they do not effectuate a substantive change . . . ." *Id.* at 19a.

Without dissent, the court of appeals denied a petition for rehearing or rehearing *en banc*. *Id.* at 59a-60a. The district court then entered a final order permanently enjoining Delaware from conducting lotteries based on non-NFL sports or fewer than three games, while noting that PASPA does not prevent Delaware from conducting lotteries based on three or more NFL games. Final

Order, *Office of the Comm'r of Baseball v. Markell*, No. 09-538 (D. Del. Nov. 9, 2009).

In keeping with the court of appeals' decision, Delaware re-introduced parlay betting based on the outcomes of NFL games, in time for the start of the NFL's regular season. Pet. 20-21.

ARGUMENT

I. THE COURT OF APPEALS' INTERPRETATION OF PASPA DOES NOT WARRANT THIS COURT'S REVIEW

A. There Is No Division Of Authority

This case does not satisfy any of this Court's criteria for *certiorari*. First, there is no division of authority on the interpretation of PASPA. Indeed, the decision below is the first time a court of appeals has addressed any issue under PASPA. The court of appeals' decision thus necessarily does not conflict with any decision of another court of appeals. Nor does it conflict with any decision of *any* other court. Nor was there a dissent, from either the panel decision or the denial of rehearing en banc. And even the district court here did not resolve the merits. Thus, no judge of any court, at any level, has ever accepted Delaware's position on the merits.

B. The Question Is Not Extraordinarily Important

In the absence of any division in authority, an issue should be of exceptional jurisprudential

importance, or at least frequently recurring, to warrant this Court's review. Sup. Ct. R. 10(c). This issue is not. The Sports Leagues are aware of only one other decision that has ever addressed PASPA since the statute's enactment nearly two decades ago in 1992. *See Flagler v. U.S. Attorney for N.J.*, No. 06-3699 (JAG), 2007 WL 2814657, at *3 (D.N.J. Sept. 25, 2007) (dismissing Tenth Amendment challenge to PASPA for lack of standing). There are two evident reasons for the lack of PASPA-related decisions. The statute is clear and to the point. And the grandfather clause at issue here affects only four States, with only a minimal impact even on those four.

As Delaware acknowledges, the question presented here is "relevant only to the few States that had sports-gambling schemes prior to [PASPA's] enactment." Pet. 3. In theory, the grandfather clause affects four States: Delaware, Montana, Nevada, and Oregon. Pet. App. 18a; Pet. 8-9 & n.3. But the question would matter only if a State conducted limited sports gambling during the grandfathered period and later wanted to expand that gambling. Oregon no longer offers sports gambling, *see* 73d Oregon Leg. Assembly, HB 3466 (2005), and Montana has not attempted to take advantage of the grandfather clause in a way that has generated litigation. Nevada has had substantial sports gambling on a continuous basis. Thus, it is not clear that the issue has or will have practical significance in *any* State other than Delaware.

Even for Delaware, the practical impact is minimal. Delaware's only asserted interest is "to raise revenues in the manner it deems fit." Pet. 2. But it has been clear at least since *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that States' ability to raise revenues is limited by federal law. The application of federal law to limit a State's ability "to raise revenues in the manner it deems fit," *vel non*, hardly gives rise to a question of exceptional importance that should be settled by the Court.

Moreover, Delaware indisputably has greater freedom to raise revenues than the 46 States in which PASPA prohibits sports gambling altogether. Thus, Delaware enjoys a substantial advantage over every State east of Montana and remains free to raise revenues from sports gambling in the same way it did 33 years ago, when it last treated sports gambling as a revenue source. Indeed, consistent with the court of appeals' decision, Delaware has gone ahead and conducted parlay betting on NFL games. *See* Pet. 20-21.

Delaware has not shown that *additional* forms of sports gambling would enable it to raise significant *additional* funds. Prior to the Third Circuit's ruling, Delaware itself was projecting total sports gambling revenues of just $17 million for fiscal year 2010—$14 million of which was attributed to an increase in the State's existing video lottery revenues due to "crossover" traffic, and only $3 million of which was directly attributable to sports betting—a trivial percentage of the State's $3.1 billion budget. C.A. App. 284-85,

329-30. And that included the projected revenue from NFL parlay-game betting. Thus, Delaware Governor Markell (one of the named petitioners) has assured the public that, "[w]hile we are disappointed the [court of appeals'] decision does not provide the flexibility we had hoped for, Delaware is still the only state east of the Rocky Mountains that can offer a legal sports lottery on NFL football . . . . We continue to believe this is an opportunity to create jobs and generate revenue . . . ." Statement by Gov. Jack A. Markell (quoted in A.J. Perez, *Court Gives Delaware More Specific Guidelines For Parlay Betting*, USA TODAY, Aug. 31, 2009).

Even if Delaware stood to gain significant additional revenues from additional forms of sports gambling, those revenues would likely come at the expense of neighboring States (or perhaps other forms of entertainment in Delaware). The net effect on the fiscs of the several States is thus unclear. Maryland, for example, offers gambling on horse races, and recently authorized slot-machine gambling, citing the stiff competition it was facing from neighboring States like Delaware. *See* Md. Dep't of Labor, Licensing & Regulation, *Slot Machines and the Racing Industry: A Review of Existing Data in Maryland and Neighboring States* (2007), http://www.gov.state.md.us/documents/SlotsAndRacing.pdf; Tom LoBianco & Emily Kimball, *Maryland OKs Slots*, WASH. TIMES, Nov. 4, 2008. PASPA's grandfather clause gives Delaware a competitive advantage over other States like Maryland by enabling it to offer limited sports gambling as well. Delaware's desire to

increase that competitive advantage even further is hardly a matter of exceptional jurisprudential importance warranting this Court's review. That is especially so because, as shown next, the court of appeals' decision is correct and follows directly from the statutory text.[1]

C. The Court Of Appeals' Decision Is Correct

The court of appeals' holding turns on a straightforward reading of an uncomplicated statutory text. And the court did not even definitively draw the precise line between permitted and prohibited sports gambling. Instead, it merely rejected Delaware's extreme argument that conducting a single type of sports lottery—a

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[1] The federal question here has even less importance if single-game sports betting violates the Delaware Constitution, as the Sports Leagues asserted as a separate claim for relief in their complaint. *See* Pet. App. 5a n.2. In March 2009, when Delaware's Governor asked for an advisory opinion on the constitutionality of Delaware's proposed sports betting, the Justices of the Delaware Supreme Court opined that single-game gambling would comply with the State Constitution only if "chance is the dominant or controlling factor." *In re Request of the Governor for an Advisory Opinion*, No. 150, 2009 WL 1475736, at *5 (Del. May 29, 2009) (citation omitted). Though the Justices declined to opine on the constitutionality of single-game betting without a factual record, they suggested that single-game betting poses a serious constitutional concern by explaining that, when a district court upheld NFL parlays against a state constitutional challenge in 1977, the court "found it noteworthy that '[n]one of the games permit[ted] head-to-head or single game betting.'" *Id.* at *8 (citation omitted).

multi-game NFL parlay—during the grandfathered period was the proverbial nose under the tent that entitles it to offer *any* sports lottery today, including single-game gambling and gambling on different sports. *See* Pet. App. 13a-14a, 19a-20a.

1. PASPA's grandfather clause covers "a lottery, sweepstakes, or other betting, gambling, or wagering scheme . . . *to the extent that the scheme was conducted by that State*" between January 1, 1976 and August 31, 1990. 28 U.S.C. § 3704(a)(1) (emphasis added). The simple reality is that Delaware did not conduct a gambling scheme on either single games or sports other than NFL football during the relevant time frame. *See* Pet. App. 12a; Oral Arg. Tr. at 76:11-77:4.

Delaware's attempts to show ambiguity in the statutory text fail. Delaware contends that "conducted" does not really mean *conducted*, but rather *authorized*. Pet. 24. (In Delaware's view, a Delaware statute *authorized* more betting than was actually *conducted* during the grandfathered period, and so Delaware is entitled to engage in more gambling under the grandfather clause if the clause permits anything that was previously authorized. *Id.* at 7.) As the court of appeals explained, however, the two words do not mean the same thing, and PASPA itself uses them to mean different things. Pet. App. 14a-15a. In the very next subsection, Congress distinguished between "conducted" and "authorized" by exempting certain betting that had been "authorized by a statute" in effect in 1991 *and* "conducted" between 1989 and 1991. 28 U.S.C. § 3704(a)(2). The fact that Section

3704(a)(2) uses the term "authorized," and expressly contrasts it with "conducted," makes it all the more clear that Section 3704(a)(1) does not use "conducted" to mean "authorized." *See, e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994).

Delaware also argues that the term "scheme" must "be read at a level of generality." Pet. 26. Delaware's position in the lower courts was that the grandfathered "scheme" is simply a sports lottery under state control, such that (in Delaware's view) the State may now introduce "any" state-controlled sports lottery of any kind. Pet. App. 13a-14a.[2] In this Court, Delaware strives to make its position appear more plausible by stating that the term "scheme" should be read to look to the "essential parameters" of the gambling that occurred during the grandfathered period, so as to "permit[] lotteries that follow the same structure as the prior lotteries but vary as to details . . . ." Pet.

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[2] *See* Appellees' Combined Mot. to Dismiss App. 18 ("The 'scheme' that was previously conducted in Delaware was a sports lottery under state control. . . . So long as the particular games fit the definition of a 'lottery,' *Delaware is not confined to any particular sport or league or team, or to any particular attribute of a game that was played more than 30 years ago.*") (emphasis added); *see also* Appellees' Answering Br. In Opp'n to Appellants' App. 33 ("The scheme Delaware authorized and conducted was a sports lottery under State control in which the winners of lottery games were affiliated with the outcome of sporting events. That is 'the scheme' that Delaware may now implement.") (citation omitted); Appellees' Pet. for Reh'g *En Banc* 9 ("[T]he only legal constraint on Delaware is the breadth of what constitutes a 'lottery' under State control, a question of State law.").

26. If the State is changing its position to a narrower one than it took in the court of appeals, it did not properly preserve that position below, and this Court should deny the petition for that reason alone. But it appears that the State is not really changing its position because it concludes that "the 'scheme' that Delaware conducted was a lottery under state control in which winners of lottery games were affiliated with the outcomes of sporting events." *Id.* In other words, Delaware's bottom line continues to be that it may conduct *any* sports lottery of any kind.

However framed, petitioners' position is untenable. The statute refers not only to a "scheme," but to "a lottery, sweepstakes, or other betting, gambling, or wagering scheme." 28 U.S.C. § 3704(a)(1). Thus, the term "scheme" is not synonymous with just any lottery or betting; instead, lottery and betting *modify* "scheme," making clear that the statute refers to the specific scheme conducted during the grandfathered period, not just any scheme.

More fundamentally, as the court of appeals explained, Delaware's position falters on the fact that PASPA permits a gambling scheme only "to the extent that" the scheme was conducted during the grandfathered period. Pet. App. 14a. That removes any doubt that the relevant "scheme" is the gambling the State actually conducted during the grandfathered period. Delaware tries to construe "to the extent that" to mean "if," Pet. 25, but it does not. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 109

(1993) ("By reading the words 'to the extent' to mean nothing more than 'if,' the Department has exceeded the scope of available ambiguity."); *id.* at 105-06 (distinguishing "if" and "to the extent" and emphasizing Congress used latter, not former); *id.* at 117-18 (Thomas, J., dissenting) (noting that Congress used "to the extent," and "[t]hat limitation does not mean that the exception is available to a contract 'if' it provides guaranteed benefits"). If Congress had intended to provide that *if* a State had a sports lottery in the past, it could run *any* sports lottery without limitation in the future, there were any number of more direct ways to say so. If, by contrast, Congress wanted to permit sports betting schemes only to the extent that States actually conducted such schemes, it used the precise words one would expect.

The petition maintains that its reading of "to the extent" to mean "if" is corroborated by a different provision concerning casino gambling, 28 U.S.C. § 3704(a)(3). But the court of appeals correctly observed that the structure and syntax of the two provisions are not directly parallel. Pet. App. 16a. Accordingly, even if "to the extent" means "if" in § 3704(a)(3), that unusual meaning of "to the extent" would come from differences in surrounding text and context. It should not support an inference that "to the extent" means "if" either generally or in § 3704(a)(1).[3]

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[3] In any case, it is far from apparent that even § 3704(a)(3) uses "to the extent" to mean "if." For example, it is not clear whether limitations on the manner in which gambling was

Indeed, the differences in the surrounding text underscore the error in Delaware's interpretation. Section 3704(a)(3) permits schemes "conducted exclusively in casinos . . . , but only to the extent that . . . *such scheme or a similar scheme* was authorized" at an earlier point in time. 28 U.S.C. § 3704(a)(3) (emphasis added). The plain import of that provision is that a scheme is permitted to the extent that the scheme *or a similar one* was previously authorized. In contrast, § 3704(a)(1) exempts schemes in operation in a State "to the extent that *the scheme* was conducted" during the grandfathered period. *Id.* § 3704(a)(1) (emphasis added). Thus, neither provision permits *any* scheme—whether similar to the previous scheme or not—so long as a State once had some other scheme. Moreover, § 3704(a)(1) is clearly the narrower provision because it does not embrace similar schemes, but expressly requires that "*the* scheme" in operation be the same one conducted during the grandfathered period.

Delaware seizes on the court of appeals' recognition that *de minimis* and non-substantive changes, such as changes in the time or location of lotteries, would not necessarily mean that a State

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authorized would limit the scope of the § 3704(a)(3) exception. If so, then "to the extent" would not be synonymous with "if." The question has never been litigated under PASPA. What is clear, however, is that even if the surrounding text and context did somehow render "to the extent" an awkward synonym for "if" in § 3704(a)(3) (*e.g.*, a child is an orphan to the extent that both his or her parents are deceased), "to the extent" is used in its normal, dominant sense in § 3704(a)(1).

had changed from conducting one scheme to conducting another. Pet. 24; Pet. App. 19a. But that unremarkable proposition hardly means that anything goes, such that changes from multi-game to single-game betting, or from football to baseball betting, are non-substantive. "[T]he venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992). But both PASPA and the law generally do care about major substantive changes, and there is nothing *de minimis* about Delaware's proposed expansion of sports betting. Moreover, considering that Congress was attempting to stop the spread of sports gambling, giving four States free rein to offer any and all sports gambling in the future, beyond what they had previously offered, would have been a strange way to effectuate Congress's intent.

2. Delaware argues that this Court should apply the plain-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), to protect the State's "right to raise revenues in the manner it deems fit." Pet. 2; *see also id.* at 23-24. The court of appeals correctly held, however, that the application of a plain-statement rule would not change the outcome because the statute is unambiguous, as discussed above. *See, e.g., Salinas v. United States*, 522 U.S. 52, 60 (1997); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998); *Gregory*, 501 U.S. at 470.

Delaware's contention that the legislative history is ambiguous may reinforce the skepticism of some about legislative history, but it is irrelevant for purposes of *Gregory*. *See* Pet. 27, 29. The legislative history is undeniably muddled, and thus unhelpful. Some snippets, such as those stating that state schemes are protected if they were previously "authorized" by state law, are flatly contrary to the statutory text requiring that the schemes were "conducted." Pet. App. 17a n.5. Other portions of the legislative history are internally inconsistent, such as on the question whether a scheme must have been authorized or conducted. *Compare* S. Rep. No. 102-248, at 10 ("as long as it was authorized by State law"), *with id.* at 9 ("prohibition does not apply . . . to the extent that such scheme actually was conducted"); *compare also* 138 Cong. Rec. S7274, S7276 (1992) (Sen. DeConcini) ("an exemption for those sports gambling operations which already are permitted"), *with id.* at S7281 (Sen. DeConcini) ("prohibit sports lotteries in all the States except what is already being conducted"). And as Delaware acknowledges, other portions expressly reject the State's position on the specific question whether single-game betting is grandfathered for Delaware. Pet. 29 n.10; Pet. App. 17a n.5.

The muddled nature of the legislative history only confirms that the answer lies in the statutory text. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"). For purposes of *Gregory*'s plain-statement rule, a "statute can be unambiguous without addressing

every interpretive theory offered by a party. It need only be 'plain to anyone reading the Act' that the statute encompasses the conduct at issue." *Salinas*, 522 U.S. at 60 (quoting *Gregory*, 501 U.S. at 467). As explained above, that is the case here.

In any event, the *Gregory* plain-statement rule does not apply here for a number of additional reasons. The rule does not govern in every "area traditionally regulated by the States." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995) (quoting *Gregory*, 501 U.S. at 460). Instead, it applies only to "a decision of the most fundamental sort for a sovereign entity." *Id.* Or, as some other cases have phrased it, the rule applies only to "essential" state interests and functions. *Yeskey*, 524 U.S. at 209; *BFP*, 511 U.S. at 544. That limitation is important because in this day and age *most* federal regulatory statutes could probably be said to intrude on areas traditionally regulated by the States. Unless *Gregory* is to become the general rule, only the most serious intrusions on sensitive interests warrant a departure from normal interpretive principles.

Here, neither Delaware's interest in maximizing its competitive advantage over neighboring States nor its more generalized desire "to raise revenues in the manner it deems fit" (Pet. 2) is a core state function. Maximizing revenues from a lottery is simply not on the same plane as determining, for example, the tenure of state judges. Indeed, regulating gambling on a nationwide basis has long been a federal function, as confirmed by this Court's decision more than a century ago in

Champion v. Ames (Lottery Case), 188 U.S. 321 (1903). A State might see fit to raise revenues in any number of ways—imposing duties on imports or exports or taxing federal banks—that would hardly represent essential state functions or exempt a State from governing federal law. *See, e.g.*, *M'Culloch*, 17 U.S. (4 Wheat.) at 327; U.S. Const. art. I, § 10, cl. 1; *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145-53 (1980) (state agencies' generalized interest in raising revenue did not justify taxation that intruded on federal regulatory scheme).

Moreover, "clear statement" rules are designed to "assur[e] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved." *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 544 (2002). There was no unintended intrusion on the States here. Congress specifically focused on the extent to which PASPA limited state-sponsored sports gambling. The grandfather clause at issue here applies *only* to schemes operated by "a State or other governmental entity," and its *sole* focus is to determine the extent to which a few States may continue to offer sports gambling—the precise question presented here. 28 U.S.C. § 3702(a)(1).

If any presumption applies here, it runs in the opposite direction. Exceptions to general rules, such as the grandfather clause's exception to PASPA's otherwise broad prohibitions on sports gambling, are generally construed narrowly. *City of Edmonds*, 514 U.S. at 731-32. The Court need not rely on any presumption, however, because the

statute's import is clear under the ordinary interpretive principles discussed above.

II. THE PROCEDURAL POSTURE OF THIS CASE DOES NOT WARRANT THIS COURT'S REVIEW

There is no reason to review the court of appeals' entirely unobjectionable procedural decision to decide the merits of the parties' dispute. It "has long been the rule" that, in reviewing preliminary injunction rulings, appellate courts may "proceed further and address the merits." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008); *see also Thornburgh*, 476 U.S. at 756 (approving of court of appeals' decision to reach the merits). As Delaware acknowledges, a court of appeals may resolve the merits in this posture when "a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." Pet. 30 (quoting *Thornburgh*, 476 U.S. at 757). The court of appeals expressly applied that very standard. Pet. App. 9a-12a.

Delaware objects only to the court of appeals' application of that well-settled legal standard. *See* Pet. 30-31. But the application of settled legal principles to the record of a particular case does not remotely warrant this Court's review. *See* Sup. Ct. R. 10. In addition, Delaware conceded in the court of appeals that the facts about its gambling scheme in 1976 and the scheme it currently wishes to implement are undisputed. Pet. App. 12a; Oral Arg. Tr. at 65:8-9; 65:19-66:6; 76:11-77:4. The court

of appeals was entitled to rely on that concession. *See* Pet. App. 12a.

Even now, Delaware's attempt to identify factual disputes only confirms that there are no *material* disputes of fact. Delaware asserts that it would like to introduce expert testimony to the effect that its proposed sports gambling would not be substantively different from the scheme it conducted during the grandfathered period, but instead would be a *de minimis* change akin to changing the time or location of a lottery. Pet. 24, 31-32. Given that the facts are undisputed, however, which side of the line they fall on is a question of law for the court, not for an expert witness. And the court of appeals quite rightly determined that offering entirely different games concerning entirely different sports is anything but a *de minimis* change. In any event, if all that is at issue is the scope of a *de minimis* change to the details of the Delaware scheme, that only underscores that this case does not implicate an essential sovereign interest or any exceptionally important question warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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