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 BREYER, concurring in part and dissenting in part.

I agree with JUSTICE GINSBURG that 28 U. S. C. §3702(2) is severable from the challenged portion of §3702(1). The challenged part of subsection (1) prohibits a State from "author[izing]" or "licens[ing]" sports gambling schemes; subsection (2) prohibits individuals from "sponsor[ing], operat[ing], advertis[ing], or promot[ing]" sports gambling schemes "pursuant to the law . . . of a governmental entity." The first says that a State cannot authorize sports gambling schemes under state law; the second says that (just in case a State finds a way to do so) sports gambling schemes that a State authorizes are unlawful under federal law regardless. As JUSTICE GINSBURG makes clear, the latter section can live comfortably on its

own without the first.

Why would Congress enact both these provisions? The obvious answer is that Congress wanted to "keep sports gambling from spreading." S. Rep. No. 102–248, pp. 4–6 (1991). It feared that widespread sports gambling would "threate[n] to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling." *Id.,* at 4. And it may have preferred that state authorities enforce state law forbidding sports gambling than require federal authorities to bring civil suits to enforce federal law forbidding about the same thing. Alternatively, Congress might have seen subsection (2) as a backup, called into play if subsection (1)'s requirements, directed to the States, turned out to be unconstitutional—which, of course, is just what has happened. Neither of these objectives is unreasonable.

So read, the two subsections both forbid sports gambling but §3702(2) applies federal policy directly to individuals while the challenged part of §3702(1) forces the States to prohibit sports gambling schemes (thereby shifting the burden of enforcing federal regulatory policy from the Federal Government to state governments). Section 3702(2), addressed to individuals, standing alone seeks to achieve Congress' objective of halting the spread of sports gambling schemes by "regulat[ing] interstate commerce directly." *New York* v. *United States*, 505 U. S. 144, 166 (1992). But the challenged part of subsection (1) seeks the same end indirectly by "regulat[ing] state governments' regulation of interstate commerce." *Ibid.* And it does so by addressing the States (not individuals) directly and telling state legislatures what laws they must (or cannot) enact. Under our precedent, the first provision (directly and unconditionally telling States what laws they must enact) is unconstitutional, but the second (directly telling individuals what they cannot do) is not. See *ibid.*

As so interpreted, the statutes would make New Jersey's

victory here mostly Pyrrhic. But that is because the only problem with the challenged part of §3702(1) lies in its means, not its end. Congress has the constitutional power to prohibit sports gambling schemes, and no party here argues that there is any constitutional defect in §3702(2)'s alternative means of doing so.

I consequently join JUSTICE GINSBURG's dissenting opinion in part, and all but Part VI–B of the Court's opinion.