

# The Supreme Court Hears Argument in the New Jersey Sports Betting Case: Five Justices seem ready to let the States Decide Whether to Allow Sports Betting within their Borders



## By Mark Hichar

Partner with the Hinckley Allen law firm and Chair of its Gaming Law Practice Group. Mark represents operators of casinos, internet gaming and fantasy sports contest operators, and providers of lottery and gaming systems, software, equipment and services.

HinckleyAllen.com

On December 4, 2017, the U.S. Supreme Court heard argument in the case of Christie v. NCAA, et al<sup>1</sup> (the other respondents include the NFL, NBA, NHL and MLB). At issue is New Jersey's 2014 law which repealed the State's sports betting prohibitions, but only to the extent applicable to Atlantic City casinos and New Jersey horse racetracks.<sup>2</sup> Thus, the law allowed unregulated sports betting at such locations, which are otherwise regulated in respect of the gambling they offer. In a 9 to 3 decision, the U.S. Court of Appeals for the Third Circuit enjoined implementation of the law, holding that it was tantamount to state "authorization" of sports gambling at the specified locations and therefore violated the Professional and Amateur Sports Protection Act ("PASPA").<sup>3</sup> PASPA is the federal law that makes it unlawful for states to operate, promote, license or authorize gambling (including lotteries) based on sports events, and it also prohibits non-state operators from conducting sports betting pursuant to state law.

The legal question to be decided is whether PASPA "commandeers" states to maintain state-law prohibitions on sports betting in violation of the 10th Amendment to the U.S. Constitution (which reserves to the states or the people the powers not given to the federal government) and the Supreme Court's related decision in New York v. United States. That decision stated that it is unconstitutional for Congress to "directly... compel the States to require or prohibit [certain] acts."<sup>4</sup>



Former Solicitor General Theodore ("Ted") Olson, arguing on behalf of New Jersey, argued that PASPA's prohibition on states repealing their bans on sports gambling violates the 10th Amendment anti-commandeering principle just as do federal laws that compel states to enact state-law prohibitions. In both, he maintained, the federal government is dictating state law, and Congress cannot commandeer state law in pursuit of federal legislative goals. Olsen also argued that the lower court's injunction prohibiting New Jersey from implementing its "partial repeal" law constituted a federal requirement that states maintain and enforce their prohibitions on sports gambling at casinos and racetracks. This, he argued, is commandeering.

Former Solicitor General Paul Clement, arguing on behalf of the NCAA and other respondents, argued that PASPA does not commandeer, but rather preempts the 2014 New Jersey law. Commandeering, he argued, occurs only when Congress requires states to affirmatively act. Further, Clement argued that PASPA does not compel states to enact, maintain, consider, or enforce state-law prohibitions on sports gambling. Rather, PASPA merely prohibits states from sponsoring or operating sports gambling, from authorizing or licensing a third party to sponsor or operate sports gambling, and from

advertising or promoting sports gambling. Clement claimed that PASPA is a lawful preemption in which Congress prohibits states from engaging in certain activity unless the states comply with federal law and policy. Finally, the United States, as amicus curiae, argued that PASPA does not prohibit all repeals of sports gambling prohibitions, and perhaps some de minimis social sports betting could be made lawful. However, it argued that New Jersey's 2014 law was merely a tactic to circumvent federal preemption by enacting a partial repeal that amounted to authorization.

Many observers of the oral argument came away with the impression that a majority of the Supreme Court justices were leaning in favor of striking down PASPA as unconstitutional. This article examines the questions asked by Justices to see if such optimism is warranted.

### Leaning in favor of the leagues?

From their questions below, **Justices Ginsburg and Kagan** seemed skeptical of the appellant's argument that PASPA unconstitutionally commandeers the states.<sup>5</sup>

### Justice Ruth Bader Ginsburg:

Mr. Olsen argued that "Congress may regulate interstate commerce directly, but it may not regulate states' regulation of interstate commerce". In response, Justice Ginsburg asked: "[I]sn't that what the government does whenever it preempts state laws? It says you can't regulate?" Justice Ginsburg also noted that only that part of the law referring to state licensing and authorization was being challenged. The prohibition on the operation of sports betting by states and private parties was not. Justice Ginsburg stated: "So, if you took this statute and you take the prohibition on private parties and you can have a comparable prohibition on the state, what do you accomplish by knocking out the authorized by, if you have two parts that are not constitutionally infirm and they achieve almost the same thing?" Olsen argued that PASPA would still be unconstitutional, because Congress didn't attempt to regulate interstate commerce directly. Had Congress

done so, he argued, it could then regulate the states as market participants to the same degree as it was regulating private citizens in that capacity.

Justice Ginsburg made clear that she viewed dimly the United States' change of position in the case. She said the following to Jeffrey Wall, Deputy Solicitor General, who appeared in the case for the United States, as amicus curiae: "Mr. Wall, the last time around, the government did say, in recommending that we deny cert, that PASPA does not require New Jersey to retain prohibitions it adopted. Pre-PASPA, it is free to repeal those prohibitions in whole or in part. That's what the government represented to this Court. [W]as that statement inaccurate?" Mr. Wall responded: "I think we did not take into account the gamesmanship in which New Jersey was going to engage."

### Justice Elena Kagan:

Justice Kagan asked: "Mr. Olson ... you're suggesting that the federal government, in order to preempt state activity, has to itself enact some kind of comprehensive regulatory scheme; and the question is, ... what would we be looking for ... if that were our test? When do we know that they've enacted a sufficiently comprehensive regulatory scheme in order to allow preemption of state rules?" Olsen responded that Congress must take responsibility to regulate in that field, and that once it has done so, then it can preempt inconsistent or contradictory state laws under the Constitution's Supremacy Clause.

Justice Kagan said to Mr. Olson: "So suppose I read [our past rulings] as setting up a principle that the federal government can't conscript state officials for its own purposes, you know, the federal government ... does whatever it wants, consistent with the Commerce Clause, but it can't conscript state officials in order to ... help the federal government do it. If that's the way I see these cases, ... who is being conscripted in order to do what here?" Olsen replied: "What is being conscripted here is the legislature of New Jersey [which] has been told that it may not regulate an activity that's taking place in New Jersey, all over New Jersey, it's - there is illegal gambling going on. It can't regulate that activity."

Justice Kagan remained skeptical. She responded: "I mean, just the way you say that, Mr. Olson - the federal government is

saying to the states you can't do something - so that sounds to me [like] the language of preemption. All the time the federal government takes some kind of action, passes a law, and then says to the states: you know what, we've got this; you can't do anything." Mr. Olson countered: "[T]he difference is that in those circumstances where Congress has taken the step of regulating commerce, it can preclude state efforts that interfere with that or conflict with that. But...here we have a situation where a court has...told New Jersey, you

**... based on the Justices' questions asked during oral argument, it seems that five of the nine justices favor New Jersey's argument that PASPA unconstitutionally 'commandeers' states to maintain state-law prohibitions on sports betting or that New Jersey's 'partial repeal' law does not violate PASPA. The Supreme Court's decision is expected by the end of June 2018 and has the potential to change the gaming landscape in the United States**

can't repeal a statute that you've tried to repeal. You must keep it on the books." Justice Kagan remained unconvinced. She said: "So do you see no difference between the federal government saying to a state, look, you can't take some preferred policy option that you would like to take, and, on the other hand, the federal government saying to a state, you must help us do something? Because I thought that our cases were all about the second thing. You must help us. ... I guess what I'm asking you for is how is New Jersey being put in that position with respect to this statute?" Mr. Olson responded that "New Jersey is being told it may not regulate in the way it chooses - its legislature chooses to exercise its discretion with respect to an activity taking place in that state. It must enforce a law and keep a law on the books. ... [T]he executive branch and the legislative branch of the state of New Jersey have been conscripted."

**Leaning in favor of New Jersey?** Five Justices - Chief Justice Roberts, and Justices Breyer, Kennedy, Alito and Gorsuch - appeared to be in favor of overturning PASPA or finding New Jersey's 2014

law partially repealing its sports betting prohibitions as not in violation of PASPA:

### Justice Stephen G. Breyer:

Justice Breyer restated the appellant's argument and seemed to agree with it. To Mr. Olson, he said:

Now, I think what you actually say is the federal government makes a determination of what interstate commerce will be like in respect to this particular item. It can do that. ... Once it makes that determination, it can forbid state laws inconsistent with that

determination. That's called preemption. But what it can't do is say that our determination is that the states roughly can do it as they want, but they can't do it that way; for to do that is to tell the state how to legislate, in which case, it is the state and not the person who becomes the subject of a federal law.

Justice Breyer also said the following to Mr. Clement:

One of the purposes...is the notion that federal statutes should address themselves to individuals and not to states. All right? Now, that can't be 100 percent true because we have all preemption, but you can still look at it as basically true with preemption being a commerce cause based, for example, exception. Then ask, what have we here? ... So all we have here are a group, if you like, of provisions, all of which are addressing themselves to what kind of law a state may have without a clear federal policy that distinguishes between what they want states to do and what the federal government is doing. Given those circumstances, ... the subject matter of this law is the state. That's what this is about, telling states what to do, and therefore, it falls within commandeering."



## Chief Justice John G. Roberts, Jr.:

Chief Justice Roberts also seemed to sympathize with the appellants. Mr. Clement said: “[O]ne set of federal statutes you should look at in interpreting PASPA are the preexisting provisions in Title 18 that already told private parties that, if they engaged in a sports gambling scheme or a gambling business in violation of state law, that was already a federal felony,” citing the Wire Act at 18 U.S.C. 1084, the anti-lottery laws at 18 U.S.C. 1301 – 1304 and the Illegal Gambling Business Act at 18 U.S.C. 1955. The Chief Justice responded: “But, that’s a very odd way...to phrase something. It’s illegal if it’s pursuant to state law. ... In other words, if the state law says you can do it, that’s the only situation in which it’s illegal. If the state law doesn’t say anything about it, well, feel free, you can do it.”

Later the Chief Justice had the following exchange with Mr. Wall:

Chief Justice Roberts: [W]hat if the repeal is across the board, no exceptions?

Mr. Wall: If New Jersey just repeals its prohibitions, we have said we don’t have a problem with that.

Chief Justice Roberts: Well, is that serious? You have no problem if there’s no prohibition at all and anybody can engage in any kind of gambling they want, a

12-year-old can come into the casino and – you’re not serious about that.

Mr. Wall: I’m very serious about it, Mr. Chief Justice. The problem that Congress was confronting was state sponsored and sanctioned sports gambling schemes. It didn’t care if I bet with my buddy on the Redskins game or we had an office pool. It wasn’t going after all sports gambling. Chief Justice Roberts: [B]ut when you put the state in a position that that’s the only thing they can do, that’s not a real choice.

## Justice Anthony M. Kennedy:

Justice Kennedy suggested that PASPA was unconstitutional in his colloquy with Mr. Clement. He said: “[PASPA] leaves in place a state law that the state does not want, so the citizens of the State of New Jersey are bound to obey a law that the state doesn’t want but that the federal government compels the state to have. That seems commandeering.” Mr. Clement argued that PASPA doesn’t operate that way and instead allows New Jersey to repeal all its prohibitions on sports gambling, but that the partial repeal at issue was forbidden.

Justice Kennedy also stated that PASPA “blurs political accountability. The citizen doesn’t know it is [the sports betting

prohibition] coming from the federal government, is this coming from the state government[?] That’s precisely what federalism is designed to prevent.”

## Justice Samuel A. Alito, Jr.:

Justice Alito also seemed skeptical of the respondent leagues’ arguments. Justice Alito said: “Congress could have prohibited sports gambling itself. So what federal policy is served by [PASPA, which prohibits state authorization of sports betting] that would not have been served by [a federal ban on sports gambling]? Mr. Clement responded: “Two things, Justice Alito. First is Congress could have prohibited all sports gambling, but that would have required it to regulate individuals as sports gamblers as opposed to entities, businesses that were providing sports gambling schemes.” Justice Alito seemed unsatisfied. He responded: “All right. So I amend the question. Congress could have prohibited gambling enterprises itself. No question it could have done that, assuming it’s within the Commerce Clause. What policy does this statute serve that that would not?” Mr. Clement responded that, as a result of PASPA’s direction on states, the states were free to have different punishment schemes for violations of sports betting bans imposed under state law.

## Justice Neil M. Gorsuch:

Justice Gorsuch seemed to lean toward upholding PASPA as constitutional and finding New Jersey’s “partial repeal” law compliant with it. He asked Mr. Olson: “[W]e normally interpret statutes in ways to avoid constitutional difficulties ... [Y]ou’d take a win on statutory grounds, wouldn’t you?” Mr. Olson responded: “We would take the win except, Your Honor, the consequence of that is that we would have a statute intending to prohibit the spread of sports betting, and our opponents say, well, in order to make that statute constitutional... we can allow you to eliminate all prohibitions of sports betting. So... an effort by Congress to



stop the spread of sports betting would lead to an interpretation, in order to hold it constitutional, where all limits on sports betting were removed.”

Justice Gorsuch also wondered to what extent sports betting prohibitions could be repealed without the respondents claiming that a partial repeal would constitute “authorization” under PASPA. He asked Mr. Clement: “But where is the line? The Third Circuit said *de minimis* private gambling isn’t covered. [Y]ou indicate maybe the state could have a certain dollar threshold, and that wouldn’t be authorizing. ... I’m really not clear why that wouldn’t be authorizing if you specify a threshold dollar amount in state law. ... [W]hat if they said you can do it at the Elks Club, is that authorizing? [W]here does the government draw the line?” Mr. Wall responded that whenever the state “is channeling sports gambling to ... state preferred providers, that’s an authorization.” Justice Gorsuch countered: “But [we] have no record about that, as Justice Sotomayor points out. And the Respondent took the position that authorizing means any repeal of any degree of any kind. Why shouldn’t the Respondent have to live with that invited error, perhaps, now in this case?”

**Justice Sonia Sotomayor’s position is less clear:** Justice Sonia Sotomayor’s position is less apparent than the positions of the other justices, because she was critical of both the appellant’s and the respondents’ arguments. After Mr. Olsen admitted that gambling is a commercial activity, Justice Sotomayor asked: “So...if it is a commercial activity by the state, haven’t we already said that the federal government can regulate that activity by the state? ... So why is it that telling the states [sic] that it can’t license, participate in, authorize, or otherwise involve itself in gambling a strict prohibition of a commercial actor?” Mr. Olsen responded that if Congress had regulated sports betting rather than prohibit states from allowing it, Congress could have preempted inconsistent state laws.

However, Justice Sotomayor also seemed skeptical of Mr. Wall’s argument on behalf of the United States. Justice Sotomayor asked: “[W]hy is a partial repeal unconstititutional – or in violation of the preemption clause? Because if the law didn’t exist, the fact that they’ve carved out a certain section of the – of the population for whom the law will stay in existence, that’s not actually authorizing. That’s just

merely repealing.” Mr. Wall responded: “[W]hen the state says, we’re going to repeal our law in such a way that nobody in the state can run a sports lottery or sports book, except for the 12 state licensed casinos and racetracks that already conduct authorized gambling operations.” Justice Sotomayor countered: “[Y]ou might be right if the licenses that those two [sic – probably 12 was intended] facilities hold really are... general and say, you’re authorized to do any gambling permitted by law. Then you might have an argument. But if all they do is repeal, what does it matter?”

## Conclusion:

In summary, based on the Justices’ questions asked during oral argument, it seems that five of the nine justices favor New Jersey’s argument that PASPA unconstitutionally “commandeers” states to maintain state-law prohibitions on sports betting or that New Jersey’s “partial repeal” law does not violate PASPA. The Supreme Court’s decision is expected by the end of June 2018 and has the potential to change the gaming landscape in the United States. A decision favoring New Jersey could (1) remove the federal prohibition on state-authorized sports betting (if PASPA were struck down entirely) or (2) provide a road-map for other states to follow in order to permit sports betting (if New Jersey’s “partial repeal” law were held compliant with PASPA). In either event, online interstate wagering would still be prohibited under the federal Wire Act. A holding in favor of New Jersey would permit states to decide for themselves whether to allow sports betting within their borders. ■

<sup>1</sup>Christie v. NCAA, et al., 832 F.3d 389, 396-397 (3rd Cir. 2016), cert. granted, 2017 U.S. LEXIS 4279 (2017) and consolidated with *New Jersey Thoroughbred Horsemen’s Association, Inc. v. NCAA, et al.*, U.S. Sup. Ct. Nos. 16-476 and 16-477. Respondents are the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League and Major League Baseball.

<sup>2</sup>N.J. 2014 P.L. c. 62, §. 28 U.S.C. §§ 3701 – 3704.

<sup>4</sup>*New York v. United States*, 505 U.S. 144, 166 (1992).

<sup>5</sup>All quotes are from the transcript of the oral argument before the U.S. Supreme Court, available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcript/2017](https://www.supremecourt.gov/oral_arguments/argument_transcript/2017) (last accessed December 28, 2017). Justice Clarence Thomas did not ask any questions during the oral argument and therefore this article does not speculate on his view of the case.

*Richard Bateson continued from page 18*

At the moment, we have EuroMillions with its huge, rolling jackpots and Lotto which has multi-million-pound jackpots, and then also a game called Thunderball with a top prize of £500,000. However, we don’t currently have any games for people who dream of lifelong financial security, rather than just big jackpots overnight. We don’t yet have any details about the prizes, cost of play or anything like that – as we’re still looking at all the potential options and aren’t looking to introduce such a game until 2019 – but think an annuity game will fit well in our portfolio.

In terms of Lotto, we made some changes to the matrix and prizes back in 2015 that were intended to meet player demand for bigger, rolling jackpots. But the game hasn’t performed as expected – primarily because a long series of rollovers has made some players feel like the jackpot is now too difficult to win.

So, we’ve listened to what people (players, non-players, retailers) are telling us they want from Lotto – decent jackpots that can be won regularly but without further major disruption to the game – and we’re planning to make improvements to the game this year. We’re currently testing a number of possible game options, but think we can give people a better game without the upheaval caused by changing the matrix again. That’s good news because it means we can improve the game for them more quickly. So, watch this space.

**It sounds like you and the Camelot team have a lot to do in 2018 and beyond – do you have any final words of wisdom to share?**

**R. Bateson:** I’ve said it already, but I think one of the main things I have been reminded of since returning to the UK business last summer is what a fantastic bunch of people we have working for us. I think it’s really important that all lottery operators remember that it’s the people who make up your organisation that really make your business – and bring your brand to life.

Our next focus will be on transforming our commercial capability – and, again, it comes back to people. You need to have the right people, following the right processes and then the right support functions to execute your plans.

Yes, we have a big job ahead of us, but we’re all up to the challenge. ■