

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER J. CHRISTIE,)
GOVERNOR OF NEW JERSEY, ET AL.,)
Petitioners,)
v.) No. 16-476
NATIONAL COLLEGIATE ATHLETIC)
ASSOCIATION, ET AL.,)
Respondents.)

NEW JERSEY THOROUGHBRED HORSEMEN'S)
ASSOCIATION, INC.,)
Petitioner,)
v.) No. 16-477
NATIONAL COLLEGIATE ATHLETIC)
ASSOCIATION, ET AL.,)
Respondents.)

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5 Petitioners,)

6 v.) No. 16-476

7 NATIONAL COLLEGIATE ATHLETIC)

8 ASSOCIATION, ET AL.,)

9 Respondents.)

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13 Petitioner,)

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16 ASSOCIATION, ET AL.,)

17 Respondents.)

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19 Washington, D.C.

20 Monday, December 4, 2017

21

22 The above-entitled matter came on for oral

23 argument before the Supreme Court of the United States

24 at 10:06 a.m.

25

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 16-476, Christie versus NCAA, and the consolidated case, 16-477, the New Jersey Thoroughbred Horsemen's Association versus NCAA.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON
ON BEHALF OF THE PETITIONERS

MR. OLSON: Thank you, Mr. Chief Justice, and may it please the Court:

One of the most important decisions made at the Constitutional Convention in 1787 was replacing the failed confederacy that governed states with a national government that could regulate individuals but not states.

In the words of this Court in the New York case, Congress may regulate interstate commerce directly, but it may not regulate states' regulation of interstate commerce.

JUSTICE GINSBURG: Mr. Olson, isn't that what the government does whenever it preempts state laws? It says you can't regulate.

1 MR. OLSON: When -- when the
2 government preempts state laws, the
3 government -- the federal government has
4 initially taken the position or taken an action
5 to regulate interstate commerce in some
6 respect, and when it does that, this Court has
7 repeatedly held, it may preempt contradictory
8 or inconsistent state laws. But --

9 JUSTICE SOTOMAYOR: So what do you
10 make of FERC?

11 MR. OLSON: Pardon?

12 JUSTICE SOTOMAYOR: What do you make
13 of FERC? FERC, the government gave the state a
14 choice.

15 MR. OLSON: Yes.

16 JUSTICE SOTOMAYOR: Regulate this way
17 or don't regulate at all.

18 MR. OLSON: That's right. It --

19 JUSTICE SOTOMAYOR: And we won't
20 either.

21 MR. OLSON: It gave -- it gave the
22 states a choice in conjunction with the
23 regulation of the area that was being --

24 JUSTICE SOTOMAYOR: No, there were
25 federal standards.

1 MR. OLSON: Yes.

2 JUSTICE SOTOMAYOR: The states were
3 told: Accept them or don't.

4 MR. OLSON: Yes.

5 JUSTICE SOTOMAYOR: But if you don't,
6 you won't regulate, neither will we.

7 MR. OLSON: The --

8 JUSTICE SOTOMAYOR: So --

9 MR. OLSON: As a matter of fact, what
10 the consequence of that is that the -- the
11 states could regulate according to the
12 standards established by the federal government
13 with respect to the regulation of interstate
14 commerce, and if the states chose not to do
15 that, the field was left to the federal
16 government. This is a direct -- PASPA is a
17 direct command to the states without any effort
18 to regulate sports wagering. It's --

19 JUSTICE BREYER: Well, the Airline
20 Deregulation Act is the obvious example.

21 MR. OLSON: Yes, and the Airline
22 Deregulation Act is a very, very good example
23 because in that case, the Congress of the
24 United States took a wide responsibility with
25 respect to airline deregulation. Airline

1 regulation, as a matter of fact, that statute
2 has -- has a panoply of provisions regulating
3 airlines in various different respects,
4 including --

5 JUSTICE BREYER: No, but suppose they
6 hadn't. I mean, they said we don't want the
7 price and routes of airlines de-regulated,
8 period. We don't want to regulate it.

9 MR. OLSON: Well, the --

10 JUSTICE BREYER: That's the federal
11 statute, and it says, now, states, you can't
12 regulate them and we don't regulate their
13 prices. Free market does. Okay?

14 Here, they say -- imagine -- they say
15 we're not going to regulate sports gambling at
16 all. We're not going to forbid it. And we
17 don't want you or we -- you know, we want you
18 to forbid it. I mean, you can -- you see the
19 analogy.

20 MR. OLSON: I do see the analogy.

21 JUSTICE BREYER: Okay. So we --

22 MR. OLSON: And the Morales case to
23 which you're referring has -- discusses in
24 great detail the federal regulatory scheme,
25 which included, as a portion of the federal

1 regulatory scheme, a preemption of the states
2 from regulating fares, conditions of service,
3 and that sort of thing.

4 But -- but, Justice Breyer, that is an
5 area -- it's a quintessential example of the
6 federal government taking responsibility for
7 how airlines flew in this country and deciding
8 in certain areas, yes, it could be preempted.

9 This statute is completely different.

10 JUSTICE KAGAN: Well, what does that
11 mean? What would you be looking for, when you
12 say that the federal government took
13 responsibility? I mean, suppose that the
14 federal government had just said we don't want
15 states to regulate. We don't want to regulate
16 ourselves; we just want -- I think this is what
17 Justice Breyer's question was -- a free market.
18 So is that enough responsibility that the
19 federal government has taken?

20 MR. OLSON: I believe it is not
21 because that is a situation where the -- where
22 the Congress would be saying we're choosing to
23 regulate states. We're telling states that you
24 may not participate in regulating commerce that
25 is taking place in your state. We don't want

1 to take any responsibility. We want to put the
2 burden and expense and accountability all on
3 the states to do so.

4 This is quintessentially what the --
5 the Congress did here.

6 JUSTICE KAGAN: I guess what I'm
7 asking, Mr. Olson, is you're suggesting that
8 the federal government, in order to preempt
9 state activity, has to itself enact some kind
10 of comprehensive regulatory scheme; and the
11 question is, you know, how -- what would we be
12 looking for if that -- if that were our test?
13 When do we know that they've enacted a
14 sufficiently comprehensive regulatory scheme in
15 order to allow preemption of state rules?

16 MR. OLSON: The only thing that I
17 would say in response as a predicate to
18 answering your question is that when you say
19 "sufficiently comprehensive," to the extent
20 that the state -- the federal government,
21 Congress, has taken responsibility to regulate
22 in that field, once it has done so, it can then
23 preempt, under the Supremacy Clause,
24 inconsistent or contradictory state laws. But
25 the Supremacy Clause is where this preemption

1 all comes from. It requires -- it says that
2 the -- the -- the Constitution, statutes, or
3 treaties shall be the supreme law of the land.
4 The Court has construed that repeatedly as
5 saying that --

6 JUSTICE KENNEDY: And -- and it
7 doesn't even have to be inconsistent if the
8 federal government occupies the whole field.

9 MR. OLSON: Yes.

10 JUSTICE KENNEDY: In -- like Southern
11 Pacific versus Arizona --

12 MR. OLSON: That --

13 JUSTICE KENNEDY: -- a state cannot
14 regulate the length of a -- of a freight train
15 simply because this is reserved for the
16 Congress. So that's fairly standard.

17 Could you, in -- in this case, to
18 avoid commandeering concerns, interpret the law
19 as saying that if states do legislate, then
20 they will be preempted?

21 MR. OLSON: Well, first -- no, not --
22 I think, if I understand your question
23 correctly, Justice Kennedy, is if Congress had
24 taken responsibility to decide to do something
25 about sports wagering by regulating it in some

1 respect or taking responsibility in some
2 respects and then it could say that, where a
3 state is doing something that's inconsistent,
4 then that can be preempted.

5 But the title of this statute says it
6 all, to -- the -- an act to prohibit sports
7 gambling under state law, so what Congress was
8 saying there -- and when Congress passed the
9 statute, it had a report from the Congressional
10 Budget Office that specifically said this will
11 have no budgetary impact on the federal
12 government --

13 JUSTICE KENNEDY: Can we interpret
14 that as saying that, if you do regulate, then
15 it will be preempted?

16 MR. OLSON: If -- it -- it may be
17 preempted. Congress, as you know, Congress may
18 adopt a statute that explicitly -- expressly
19 preempts or, in some cases, impliedly preempts
20 state laws that are inconsistent or in -- in a
21 way that --

22 JUSTICE BREYER: Okay. And then --

23 MR. OLSON: -- obstructs the
24 accomplishment of a federal objective.

25 JUSTICE BREYER: Now, I'm seeing this,

1 I think. Is this your argument? And don't
2 just say yes if it isn't, please.

3 (Laughter.)

4 JUSTICE BREYER: Forget the Airline
5 Dereg Act. It was a bad example for this
6 reason.

7 Now, I think what you actually say is
8 the federal government makes a determination of
9 what interstate commerce will be like in
10 respect to this particular item. It can do
11 that, we -- including a determination, it
12 shouldn't be -- that's a determination, okay?

13 Once it makes that determination, it
14 can forbid state laws inconsistent with that
15 determination. That's called preemption. But
16 what it can't do is say that our determination
17 is that the states roughly can do it as they
18 want, but they can't do it that way; for to do
19 that is to tell the state how to legislate, in
20 which case it is the state and not the person
21 who becomes the subject of a federal law.

22 MR. OLSON: I wish I'd said that
23 myself, Justice Breyer.

24 (Laughter.)

25 MR. OLSON: But you did say it in New

1 York --

2 JUSTICE BREYER: Yeah, I'm trying to
3 get your argument.

4 MR. OLSON: Yes. And -- and my
5 argument --

6 JUSTICE BREYER: Is that your
7 argument?

8 MR. OLSON: That is my argument. And
9 the Court said it almost the same way in New
10 York versus United States. Congress could
11 preempt state radioactive waste regulation, but
12 the Tenth Amendment limits the power of
13 Congress to regulate in the way it has chosen,
14 in that case, to -- instead of directly
15 regulating, Congress has impermissibly directed
16 the states to regulate.

17 That's New York versus United States.
18 It's the Printz case. And that same language
19 --

20 JUSTICE SOTOMAYOR: May I ask you, is
21 this a commercial --

22 MR. OLSON: -- appears in earlier
23 cases.

24 JUSTICE SOTOMAYOR: -- is this --

25 MR. OLSON: It goes back to 1911 in

1 the Coyle case.

2 JUSTICE BREYER: I got it. Got it.

3 JUSTICE SOTOMAYOR: Mr. Olson, is this
4 a commercial activity by the state? If it's
5 licensing casinos and horse racing, isn't it
6 involved in a commercial activity?

7 MR. OLSON: Certainly, it is a
8 commercial activity when -- when govern -- when
9 state -- individuals are engaged in betting on
10 sports, having a sports book --

11 JUSTICE SOTOMAYOR: Why isn't it when
12 the state is licensing that?

13 MR. OLSON: It -- it doesn't change --

14 JUSTICE SOTOMAYOR: It's making money
15 from the license.

16 MR. OLSON: It doesn't change the
17 character of the underlying activity. The
18 Constitution ordains who may regulate that
19 commercial activity, presuming that it's
20 interstate commerce. Once that's satisfied --

21 JUSTICE SOTOMAYOR: Well, I have never
22 understood gambling not to be. You have to
23 just watch the lines on the highways coming
24 from all different directions and states going
25 to gambling casinos.

1 MR. OLSON: Yes, there's no question

2 --

3 JUSTICE SOTOMAYOR: So if it -- if it
4 is a commercial activity by the state, haven't
5 we already said that the federal government can
6 regulate that activity by the state?

7 MR. OLSON: Yes. In fact, it --

8 JUSTICE SOTOMAYOR: So why is it that
9 telling the states that it can't license,
10 participate in, authorize, or otherwise involve
11 itself in gambling a strict prohibition of a
12 commercial actor?

13 MR. OLSON: It's a -- it's -- the
14 question is interstate commerce, and, yes, just
15 as the language in the New York case, which I
16 just quoted, Congress may regulate that field.

17 If it does regulate that field, which
18 Congress has not chosen to do in this case, it
19 then can preempt inconsistent state laws. I
20 would quote --

21 CHIEF JUSTICE ROBERTS: Mr. Olson, you
22 -- you have not challenged 3702 subsection (2),
23 have you?

24 MR. OLSON: 370 -- subsection (2) is
25 simply a counterpart to subsection (1).

1 CHIEF JUSTICE ROBERTS: But you didn't
2 challenge it?

3 MR. OLSON: We -- we challenged the
4 entire statute, but we were not sued under that
5 section. We were sued for violating section --
6 subsection (1). Subsection (2) is another side
7 of the same coin because subsection (2) says
8 pursuant to law.

9 The law that's referred to in
10 subsection (1), we say, is something that the
11 states can do and the -- the Congress, if
12 Congress chose to prevent it, it would be
13 unconstitutional. But that subsection --

14 CHIEF JUSTICE ROBERTS: But -- but by
15 its -- by its terms, though, subsection (2)
16 operates on the individuals and not the state.

17 MR. OLSON: Only -- only if
18 individuals operate pursuant to law, which
19 means pursuant to the state law, which is
20 referred to in subsection (1). This is a
21 little confusing because the way Congress chose
22 to do it. But the government refers to that as
23 a belt-and-suspenders thing, and what it is --
24 and I sort of accept that, because subsection
25 (2) simply seems -- seeks to do indirectly what

1 we contend subsection (1) can't do directly
2 under -- under the Constitution. And --

3 JUSTICE GINSBURG: One part of
4 subsection (1), it seems, is -- is not
5 challenged either, and that's the ban on the
6 state itself operating gambling casinos.

7 MR. OLSON: This -- this would be
8 something similar, Justice Ginsburg, to the
9 Reno versus Condon case or the South Dakota --
10 I mean, South Carolina versus Baker case, where
11 the federal government chose to enact a law of
12 general application to -- that applied to
13 private parties engaged in interstate commerce
14 on -- and applied the same law to the states
15 when the states were engaged as a market
16 participant in the same -- to the same degree
17 as interstate commerce -- in -- in interstate
18 commerce.

19 So, to the extent that Congress had
20 initially decided to regulate this area and put
21 itself into the field of regulating private
22 persons engaged in activity, it could then
23 address the states if the states choose to
24 engage in the same activity.

25 JUSTICE GINSBURG: So, if you took

1 this statute and you take the prohibition on
2 private parties and you can have a comparable
3 prohibition on the state, what do you
4 accomplish by knocking out the "authorized by,"
5 if you have two parts that are not
6 constitutionally infirm and they achieve almost
7 the same thing?

8 MR. OLSON: It would be
9 constitutionally infirm, Your Honor, had --
10 because the state -- because the Congress
11 didn't attempt to regulate interstate commerce
12 directly. And it could then, if it did so,
13 which it did not do so, quite obviously, it
14 could then regulate the state as a market
15 participant to the same degree it was
16 regulating private citizens as a market
17 participant. I could go --

18 CHIEF JUSTICE ROBERTS: Well, this is
19 pretty comprehensive. The comprehensive aspect
20 is a total -- total prohibition.

21 MR. OLSON: Yes, it's --

22 CHIEF JUSTICE ROBERTS: And so I don't
23 know whether it's -- you seem to be saying that
24 they can't regulate it if the regulation is
25 going to be a total ban.

1 MR. OLSON: No.

2 CHIEF JUSTICE ROBERTS: But that --
3 that's -- it's -- that's very comprehensive.

4 MR. OLSON: No. I under -- I agree
5 with what -- the way you stated it, but that is
6 not PASPA. If PASPA said we prohibit sports
7 betting, gambling on sports, then it could
8 address the state as a participant in that same
9 activity.

10 It did not do so. This statute does
11 -- attempted to have the states -- and that's
12 why I quoted the name of the statute -- to
13 prohibit sports gambling, it didn't stop there.
14 It said sports gambling under state law.

15 And what it intended to do -- this is
16 what you talked about in the New York case, New
17 York versus United States, is it put the
18 accountability, the expense, the
19 responsibility, the burdens on the states and
20 basically said, as the -- as the Congressional
21 Budget Office says, it won't have any effect on
22 the federal budget because the federal
23 government is doing nothing.

24 JUSTICE KAGAN: Mr. Olson --

25 MR. OLSON: It also said in the Senate

1 report it won't have any regulatory impact.

2 JUSTICE KAGAN: So suppose I read
3 these cases as setting up a principle that the
4 federal government can't conscript state
5 officials for its own purposes, you know, the
6 federal government can -- does whatever it
7 wants, consistent with the Commerce Clause, but
8 it can't conscript state officials in order to
9 do -- help them -- help the federal government
10 do it.

11 If that's the way I see these cases,
12 what's being -- who is being conscripted in
13 order to do what here?

14 MR. OLSON: What is -- it's both
15 conscription and the Court uses the word
16 commandeering and directing the states.

17 JUSTICE KAGAN: Yeah, so --

18 MR. OLSON: All of those terms, all of
19 those verbs are applied in this. What is being
20 conscripted here is the legislature of New
21 Jersey has been told that it may not regulate
22 an activity that's taking place in New Jersey,
23 all over New Jersey, it's -- there's illegal
24 gambling going on.

25 It can't regulate that activity. The

1 legislature can't --

2 JUSTICE KAGAN: I mean, just the way
3 you say that, Mr. Olson -- the federal
4 government is saying to the states you can't do
5 something -- so that sounds to me the language
6 of preemption. All the time the federal
7 government takes some kind of action, passes a
8 law, and then says to the states: you know
9 what, we've got this; you can't do anything.

10 MR. OLSON: It is so fundamental in
11 the -- at the Constitutional Convention and as
12 -- and discussed in most detail in the New York
13 case, that the difference is that in those
14 circumstances where Congress has taken the step
15 of regulating commerce, it can preclude state
16 efforts that interfere with that or conflict
17 with that.

18 But when it sets out at the
19 initiative, at -- at the -- at the first stage
20 of -- of regulating the legislature, here we
21 have a situation where a court has ordered,
22 pursuant to my opponents' briefs, ordered, told
23 New Jersey, you can't repeal a statute that
24 you've tried to repeal. You have -- must keep
25 it on the books.

1 JUSTICE KAGAN: So do you see no
2 difference between the federal government
3 saying to a state, look, you can't take some
4 preferred policy option that you would like to
5 take, and, on the other hand, the federal
6 government saying to a state, you must help us
7 do something?

8 Because I thought that our cases were
9 all about the second thing. You must help us.
10 You must be our little assistants when we
11 promote or try to advance a policy objective.
12 And I -- I guess what I'm asking you for is how
13 is New Jersey being put in that position with
14 respect to this statute?

15 MR. OLSON: New Jersey -- in many
16 ways. New Jersey is being told it may not
17 regulate in the way it chooses -- its
18 legislature chooses to exercise its discretion
19 with respect to an activity taking place in
20 that state.

21 It must enforce a law and keep a law
22 on the books that has attempted to repeal the
23 -- the executive branch and the legislative
24 branch of the State of New Jersey have been
25 conscripted --

1 JUSTICE GINSBURG: Mr. Olson, may I --
2 may I just ask you to qualify that can't --
3 "must enforce?" Because the Third Circuit, the
4 first time around, said each state is free to
5 decide how much of a law enforcement priority
6 it wants to make of sports gambling.

7 So there's no -- there's not going to
8 be a federal prosecution if the state says we
9 got -- we have other things to do that are more
10 important than -- than casino gambling or
11 sports gambling.

12 MR. OLSON: Yes, Justice Ginsburg, the
13 court said that. And the court said you may
14 repeal any portion of your statutes. You may
15 take any policy that you want to take. The
16 federal government said you may repeal all or
17 any part of your sports betting prohibitions.
18 That's exactly what New Jersey did.

19 But you can imagine, Justice Ginsburg,
20 having a law that a federal court has ordered
21 New Jersey to keep on the books, it prevent --
22 prevents it from repealing that law, which
23 means it's the same as requiring it to enact
24 that law and requiring it to maintain that law
25 on the books.

1 And then the officials of New Jersey,
2 the law enforcement people in New Jersey, the
3 governor of New Jersey saying, well, we're not
4 going to enforce that law on the books after we
5 took an oath to uphold the laws of New Jersey.

6 That is a strange -- very, very
7 strange construction of what the preemption
8 clause is and -- and commandeering is all
9 about, but -- but to go back to the New York --

10 JUSTICE SOTOMAYOR: I'm sorry. Does
11 the injunction tell the governor that he has to
12 enforce this law?

13 MR. OLSON: It -- no, it says that the
14 repeal --

15 JUSTICE SOTOMAYOR: Well --

16 MR. OLSON: -- must be reversed --

17 JUSTICE SOTOMAYOR: If -- if a act is
18 unconstitutional, those laws basically go by
19 the wayside no matter what. But my question to
20 you is I don't -- I read the injunction. I
21 don't see it anywhere telling the governor he
22 has to enforce these prohibitions.

23 MR. OLSON: No, it doesn't. What the
24 -- what -- the governor's responsibility to
25 enforce the law --

1 JUSTICE SOTOMAYOR: Mr. Olson, if
2 every governor enforced every law on the book,
3 the state would be more than bankrupt. It
4 would have no way of surviving.

5 MR. OLSON: I understand that.

6 JUSTICE SOTOMAYOR: There are
7 countless laws, and even laws that are in
8 force, that are not enforced totally.

9 MR. OLSON: I understand --

10 JUSTICE SOTOMAYOR: States make
11 choices all the time.

12 MR. OLSON: Yes. And -- and -- but
13 the states make those choices then. Here we
14 have --

15 JUSTICE SOTOMAYOR: There is nothing
16 here telling this state that it has to enforce
17 this law.

18 MR. OLSON: If -- if there's an order
19 from a federal court saying that the
20 legislature, having repealed a statute, must
21 un-repeal it, put it back on the books. And
22 what you're saying is that the governor doesn't
23 have to enforce that law. It's a law on the
24 books of New Jersey. The governor and
25 executive branch of New Jersey officials have

1 taken an oath to uphold the laws of the State
2 of New Jersey, and here's a federal court that
3 comes along and basically says we're going to
4 order this statute to be back on the books, but
5 just forget about it.

6 This is a very, very strange
7 situation --

8 JUSTICE SOTOMAYOR: What's the
9 difference between that and this law is
10 unconstitutional? This law is preempted or
11 just a simple ruling by the court, this law is
12 preempted? Period, end of story.

13 MR. OLSON: This was a repeal.

14 JUSTICE SOTOMAYOR: If -- if -- if, as
15 I said, the court had simply said this is
16 preempted.

17 MR. OLSON: And what this -- what the
18 "this" is in your question is a repeal of a
19 prohibition of sports betting, which means the
20 repeal that the legislature carefully did in
21 response to the Third Circuit's decision and
22 the government and the leagues both saying you
23 may repeal any law you wish --

24 JUSTICE SOTOMAYOR: I have three ways
25 of looking at this case or of the issues here.

1 The first way is to say that this is a repeal,
2 which it seems you're arguing, and you're
3 saying to us does or does not this statute
4 permit a repeal?

5 And if I say it permits repeals of all
6 kinds, partial or complete -- partial or not
7 partial, we avoid the constitutional question
8 because then you could do whatever kind of
9 repeal you want.

10 The second way to look at this is that
11 the statute does not prevent repeals at all.
12 That's what you're arguing right now. That
13 would make this statute unconstitutional.

14 And the third approach is basically
15 what the government is arguing here, which is
16 it prevents -- it permits complete repeals but
17 not partial repeals because partial repeals of
18 the nature taken here are actually
19 authorizations that are prohibited by the law.

20 So those are the three approaches. Am
21 I missing something in what the -- those
22 approaches are?

23 MR. OLSON: Yes, because the effect of
24 the statute is to prohibit New Jersey -- the
25 statute was intended to ban sports --

1 JUSTICE SOTOMAYOR: That's the second

2 --

3 MR. OLSON: -- betting.

4 JUSTICE SOTOMAYOR: -- that's the
5 second. Or is this a fourth way of looking at
6 it?

7 MR. OLSON: No, this is -- this is a
8 one way, and I submit the only way, of looking
9 at the statute. From its title, to its
10 legislative history, to its exact language, it
11 was intended to prohibit sports betting under
12 state law. Now --

13 JUSTICE SOTOMAYOR: That's my second
14 way.

15 MR. OLSON: -- sports betting is --

16 JUSTICE SOTOMAYOR: That's my second
17 way.

18 MR. OLSON: -- taking place under
19 state law. All over the United States in every
20 state, except Nevada, it's -- with these other
21 limited exceptions, is illegal.

22 What -- what New Jersey has decided,
23 not just that we want to repeal, because if you
24 repeal --

25 JUSTICE GORSUCH: Mr. --

1 MR. OLSON: -- all the --

2 JUSTICE GORSUCH: -- Mr. Olson, you --
3 you did make the argument below that there was
4 no authorization because the statute didn't
5 regulate how sports betting would take place.
6 You've abandoned that argument on a statutory
7 interpretation ground.

8 MR. OLSON: Well, we didn't --

9 JUSTICE GORSUCH: And I'm curious,
10 why?

11 MR. OLSON: We only were responding to
12 a -- arguments by our opponents and a Third
13 Circuit decision that says --

14 JUSTICE GORSUCH: But -- but -- but,
15 we normally -- we normally interpret statutes
16 in ways to avoid constitutional difficulties,
17 not in ways to create them.

18 MR. OLSON: Yes. And the only way to
19 avoid that has been suggested here is that
20 there may be some appeals -- and the Third
21 Circuit used the language "too much" -- "too
22 much authorization," which is very much like
23 the language in the Printz case, "too much
24 policy-making," and the Court said in that
25 case, that's not a line that's permissive with

1 respect to regulating what the states are
2 doing.

3 What we're saying, to the extent that
4 our opponents are making an argument that --

5 JUSTICE GORSUCH: But you -- you'd
6 take a win on statutory grounds, wouldn't you?

7 MR. OLSON: We would take the win
8 except, Your Honor, the consequence of that is
9 that we would have a statute intending to
10 prohibit the spread of sports betting. And our
11 opponents say, well, in order to make that
12 statute constitutional -- because they
13 recognize the commandeering problem right from
14 the beginning. In order to make that
15 constitutional, you will -- we can allow you to
16 eliminate all prohibitions of sports betting.

17 So -- and as -- an effort by Congress
18 to stop the spread of sports betting would lead
19 to an interpretation, in order to hold it
20 constitutional, where all limits on sports
21 betting were removed.

22 If the Court permits, I would like to
23 remove -- reserve the remainder of my time.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Olson.

1 Mr. Clement.

2 ORAL ARGUMENT OF PAUL D. CLEMENT

3 ON BEHALF OF THE RESPONDENTS

4 MR. CLEMENT: Mr. Chief Justice, and
5 may it please the Court:

6 PASPA does three basic things:

7 First, it tells the states that they
8 may not themselves operate or advertise sports
9 gambling schemes, such as a sports-based
10 lottery or a sports book.

11 Second, it tells private parties, in
12 3702(2), that they may not operate or advertise
13 a sports gambling scheme pursuant to state law.

14 And, thirdly, it tells states that
15 they may not authorize or license third parties
16 to conduct those sports gambling schemes that
17 would violate federal law.

18 CHIEF JUSTICE ROBERTS: Mr. Clement --

19 JUSTICE KENNEDY: But it does so by
20 this mechanism. It leaves in place a state law
21 that the state does not want, so the citizens
22 of the State of New Jersey are bound to obey a
23 law that the state doesn't want but that the
24 federal government compels the state to have.
25 That seems commandeering.

1 MR. CLEMENT: No, Justice Kennedy, we
2 don't think PASPA operates in that way. We
3 think that, if New Jersey wants to say we're
4 going to lift all our prohibitions, we think,
5 at least as to that law, it would not be
6 preempted by PASPA as written.

7 I think it's a separate question,
8 especially in New Jersey, whether the private
9 conduct that would take place pursuant to that
10 repeal, especially at casinos and racetracks,
11 would be prohibited by 3702(2).

12 JUSTICE KENNEDY: But the -- the
13 partial repeal is forbidden, correct?

14 MR. CLEMENT: This partial repeal is
15 forbidden.

16 JUSTICE KENNEDY: Correct.

17 CHIEF JUSTICE ROBERTS: Mr. --

18 MR. CLEMENT: This partial repeal, but
19 think about how strange --

20 JUSTICE KAGAN: What -- what partial
21 -- what partial repeals are not forbidden?
22 What could the state do?

23 MR. CLEMENT: Well, first of all, I
24 think it's important to recognize that what
25 PASPA regulates -- and it does regulate it

1 quite comprehensively -- is the operation of
2 sports gambling schemes. It doesn't actually
3 regulate sports gambling in the generic sense,
4 and it says nothing about individuals engaging
5 in sports gambling.

6 So, if New Jersey wants to say, look,
7 all our prohibitions which right now are both
8 on the supply side and the demand side, all of
9 its prohibitions on the demand side, it can
10 partially repeal. It could --

11 CHIEF JUSTICE ROBERTS: Could a state
12 enact a law -- I mean, the federal government
13 enact a law saying no state shall pass an
14 income tax greater than 6 percent?

15 MR. CLEMENT: I -- I think it might be
16 able to do that because I -- I -- put it this
17 way, I mean, I don't know why in principle that
18 would be so different from the statute at issue
19 in Baker, which says no state shall issue a
20 bearer bond. And --

21 CHIEF JUSTICE ROBERTS: No state shall
22 issue?

23 MR. CLEMENT: A bearer bond. So I
24 think it's the same. But I think, to the
25 extent there would be anything odd about it,

1 and it's what Mr. Olson suggests is odd about
2 PASPA, is this idea that there's just a
3 preemption provision.

4 And even he seems to concede that, if
5 Congress regulated the field, that there would
6 be no problem with the preemption provisions --

7 CHIEF JUSTICE ROBERTS: Well, it seems
8 to me that there would be something a little
9 more odd about it, which is it goes to the
10 fundamental powers and prerogatives of a state
11 to sort of function their own -- own
12 government, if you say you can go so far as to
13 regulate what level of income tax they can
14 charge.

15 MR. CLEMENT: Well, you're right, Mr.
16 Chief Justice. I thought your -- and maybe I
17 should amend my remarks to say I don't think
18 there would be a commandeering problem with
19 that statute.

20 Now, there might be some other
21 federalism problem. You know, I think if -- if
22 the -- if the Court -- if -- if Congress tells
23 the state to move its state capital, I'm not
24 sure it's a commandeering problem. I just
25 think that it's, you know -- I mean, not to use

1 a word maybe I'm not supposed to, but maybe --

2 CHIEF JUSTICE ROBERTS: Well --

3 MR. CLEMENT: -- it's a National
4 League of Cities problem. But I don't think
5 it's a commandeering problem.

6 CHIEF JUSTICE ROBERTS: Well, you
7 could imagine a situation where it's the same
8 kind of commandeering. The federal government
9 wants to reduce expenditures on public employee
10 pensions, so it tells the states there's a
11 state law, you cannot spend more than
12 20 percent of your budget on -- on state
13 employee pensions. They're commandeering the
14 state to achieve that result.

15 Can they do that?

16 MR. CLEMENT: Again, I don't think
17 that's a commandeering problem. I do think
18 it's probably a national states/League of
19 Cities problem. And, you know, if the Court
20 wants to say that there are certain things that
21 get too far into the court -- the state's
22 kitchen, you know, that's one thing.

23 But I do think --

24 JUSTICE KENNEDY: The Chief's -- the
25 Chief's hypothetical indicates that this blurs

1 political accountability. The citizen doesn't
2 know is this coming from the federal
3 government, is this coming from the state
4 government? That's precisely what federalism
5 is designed to prevent.

6 MR. CLEMENT: And precisely in New
7 York, this Court said there's not an
8 accountability problem with preemptive
9 legislation.

10 JUSTICE BREYER: If it's for --

11 MR. CLEMENT: And I do think it's
12 worth -- I -- I'm -- just to finish the point,
13 I mean, I do think it's worth recognizing that
14 you have three pieces, three legs of the stool,
15 if you will. One says to states, you can't do
16 this. That, the other side, doesn't have an
17 objection to.

18 The other one says, private parties,
19 you cannot do this pursuant to state law.
20 That, because it's regulation of private
21 parties --

22 JUSTICE KENNEDY: Are there other
23 statutes that rely on -- on prohibition of
24 state action without an accompanying federal
25 policy?

1 MR. CLEMENT: Justice Kennedy, I don't
2 know that there are. I actually think maybe
3 there are. It's just that the federal policy
4 that they enforce is implicit. So there's a
5 provision that says that you can't have
6 discriminatory taxes against railroads. That's
7 all the provision says.

8 I assume, in interpreting that, you'd
9 think, well, Congress has said they -- they
10 don't want to have that kind of discrimination
11 in interstate commerce. But here, you don't
12 have to look where the federal policy is. They
13 say, we don't want sports gambling schemes. We
14 don't want the states to do it. We don't want
15 the private parties to do it. And --

16 CHIEF JUSTICE ROBERTS: Isn't it
17 enough just to say --

18 JUSTICE BREYER: It's a certain
19 kind --

20 CHIEF JUSTICE ROBERTS: Isn't it
21 enough just to say it's illegal for entities,
22 people or otherwise, to engage in gambling on
23 sports events? That would be the federal
24 government regulating this area. And then it
25 has what is the normal preemption clause, with

1 it says -- where it says not with any --
2 notwithstanding any state law to the contrary.

3 MR. CLEMENT: And -- and, Mr. Chief
4 Justice, I think, at the end of the day, that's
5 what PASPA does. I think it was worded in a
6 particular way for a particular reason, which
7 is the one set of federal statutes you should
8 look at in interpreting PASPA are the
9 preexisting provisions in Title 18 that already
10 told private parties that, if they engaged in a
11 sports gambling scheme or a gambling business
12 in violation of state law, that was already a
13 federal felony, 1084, Title 18, 1301 through
14 1304 of Title 18, as to lotteries and probably
15 most clearly 18 U.S. --

16 CHIEF JUSTICE ROBERTS: But, that's a
17 very odd way -- that's a very -- and this is,
18 of course, subsection (2). It's a very odd way
19 to phrase something. It's illegal if it's
20 pursuant to state law.

21 MR. CLEMENT: But, Mr. Chief --

22 CHIEF JUSTICE ROBERTS: In other
23 words, if the state law says you can do it,
24 that's the only situation in which it's
25 illegal. If the state law doesn't say anything

1 about it, well, feel free, you can do it.

2 MR. CLEMENT: But, Mr. Chief Justice,
3 that's why I think the oddity goes away
4 entirely if you understand that before Congress
5 passed PASPA, it was already unlawful as a
6 matter of federal criminal law for a private
7 party to operate a sports gambling scheme in
8 violation of state law, so, in a sense --

9 JUSTICE BREYER: In violation of state
10 law. That's --

11 MR. CLEMENT: In violation of state
12 law.

13 JUSTICE BREYER: No, go back for a
14 second. One of the purposes -- which is not
15 the one Justice Kagan mentioned, but it's the
16 best one as this case is concerned that I could
17 find -- is the notion that federal statutes
18 should address themselves to individuals and
19 not to states. All right?

20 Now, that can't be 100-percent true
21 because we have all preemption, but you can
22 still look at it as basically true with
23 preemption being a commerce cause based, for
24 example, exception. Then ask, what have we
25 here?

1 Well, is there NHTSA, you know,
2 Transportation Safety Act, OSHA -- no, nothing
3 like that. There is no federal regulation of
4 that kind.

5 Is there Deregulation Act, which says
6 that it is the federal policy that there will
7 be free enterprise in fares? No, because all
8 the things you mentioned have the word "state
9 law" in it.

10 So all we have here are a group, if
11 you like, of provisions, all of which are
12 addressing themselves to what kind of law a
13 state may have, without a clear federal policy
14 that distinguishes between what they want
15 states to do and what the federal government is
16 doing.

17 Given those circumstances, it falls on
18 the subject matter of this law is the state.
19 That's what this is about, telling states what
20 to do, and therefore, it falls within
21 commandeering.

22 A little long, but that's how I was
23 reading New York, the notion of not addressing
24 itself to the states. And it's long so that
25 you can answer the whole thing.

1 MR. CLEMENT: Well, I'll try to answer
2 the whole thing, but I'll start with the
3 proposition that we know there's absolutely
4 nothing wrong with congressional legislation
5 that operates on states as market actors.

6 And that's what the first four
7 prohibitions in 3702(1) plainly do. They tell
8 -- tell the states, you can't operate,
9 advertise, sponsor, or promote sports gambling
10 schemes. So that's okay. It also tells
11 private parties that you can't do those four
12 things pursuant to state law. And keep in
13 mind, those private parties can't do it as a
14 matter of federal law in violation of state law
15 because it's a federal criminal prohibition.

16 So all that leaves, then, is the
17 provisions that they've challenged, the license
18 or authorize. And all those are, in the
19 context of this statute, is an express
20 preemption provision; which, of course it's
21 addressed to the states and local governments,
22 because states and local governments are the
23 ones that can pass laws that might be
24 preempted.

25 But I don't think it creates any

1 problem. Think about it -- I think it's very
2 analogous to Baker. In Baker, Congress told
3 the states they couldn't have bearer bonds.
4 They also told private parties, you can't have
5 bearer bonds.

6 JUSTICE KENNEDY: But -- but you --
7 you begin by saying that this is market
8 participant as to the first three, but it's not
9 as to the fourth.

10 MR. CLEMENT: Well, it's -- I -- I
11 don't mean to be pedantic. It's market
12 participant as to the first four, not to the --
13 not to the fifth and the sixth, which are
14 licensed and authorized.

15 But -- but my point is you're already
16 telling the states that they can't do
17 something, just like Congress did in Baker.
18 You can't issue bearer bonds.

19 3702(2), especially right against the
20 backdrop of statutes like 18 U.S.C. 1955, tells
21 private parties, you can't issue bearer bonds,
22 you can't operate sports gambling schemes.

23 So the only thing in the middle is a
24 provision that says, states, you can't
25 authorize or license private parties to engage

1 in conduct that violates federal law. If that
2 provision weren't in the statute, I think the
3 same laws would be impliedly preempted under
4 those that apply in implied preemption. And if
5 Congress says expressly, those laws -- states,
6 don't do that, don't authorize and don't
7 license private parties to engage in conduct
8 that would violate federal law. That's classic
9 preemption.

10 CHIEF JUSTICE ROBERTS: Well, you seem
11 -- you said subsection (2) is the other side of
12 the coin of subsection (1). And it seems to me
13 that if that's the case, that subsection (2)
14 cannot be severable from subsection (1).

15 MR. CLEMENT: Well, I don't know if I
16 used the phrase "other side of the coin," Your
17 Honor, but I do think that it is not just
18 severable; I think it operates independently,
19 and it operates without even a constitutional
20 issue.

21 CHIEF JUSTICE ROBERTS: To do the same
22 thing, right? Because it says that it is
23 illegal for individuals to follow state law --

24 MR. CLEMENT: Well --

25 CHIEF JUSTICE ROBERTS: -- or to engage

1 in activity protected, authorized under state
2 law; which seems to me to be the same thing as
3 saying states shall not authorize individuals
4 to do that.

5 MR. CLEMENT: Well, Your Honor, a
6 couple of points. One is I do think there's
7 some difference in text between 3702(2) and
8 3702(1); and I think there's an argument that
9 the parties haven't had to brief here because
10 this really hasn't been a 3702 case. But I
11 think there's a good argument that 3702(2) is
12 actually broader, and "pursuant to law" is
13 broader than "licensed or authorized by law."

14 So just put that to one side, though.
15 What I would say is, particularly when you read
16 3702(2) against the backdrop of the preexisting
17 federal statutes in Title 18 that made
18 operating a sports gambling scheme, in
19 violation of state law, a federal criminal
20 prohibition, then it's a comprehensive scheme.
21 It basically says, private parties, there's
22 something that is an -- a -- essentially a
23 cancer on interstate commerce that we don't
24 want to take place. And that is --

25 JUSTICE GORSUCH: But, Mr. Clement,

1 how do we know that Congress would have passed
2 (2) without (1)?

3 (1) makes the regulation free because
4 it says, states, you have to do this. And it
5 doesn't cause any budget impact on the federal
6 government.

7 (2), under your interpretation, is a
8 direct regulation by the government, and
9 therefore might cost money. And you could see
10 a legislature saying: Well, you know, (1)
11 makes sense, and I'm only going to vote for (2)
12 because of (1) --

13 MR. CLEMENT: So --

14 JUSTICE GORSUCH: -- because it's
15 free. It comes for free.

16 MR. CLEMENT: So -- so, Justice
17 Gorsuch, I'd like to make two points in
18 response to that. One is, on this idea that
19 the CBO scored it as being zero and so it's
20 free. We actually looked at other preemption
21 provisions and other federal criminal
22 provisions, and CBO tends to score them the
23 same way. They basically say --

24 JUSTICE GORSUCH: That's neither here
25 nor there --

1 MR. CLEMENT: Okay. But then --

2 JUSTICE GORSUCH: -- for purposes of
3 my -- my question. My question is, if we're
4 asking the severability question the Chief
5 Justice posed to you, one of the questions we
6 have is what Congress would have done in -- in
7 a different world? Now, that's a very hard
8 question to answer, but that's the question
9 we were posed.

10 And how do we know Congress would have
11 passed (2) without (1), given that (2) in this
12 world, if it's -- if (1) is fine, (2) comes for
13 free?

14 MR. CLEMENT: So, Justice Gorsuch, if
15 I could, I'd like to refine the question -- the
16 -- in this way -- and you tell me if it's
17 unfair -- but I think really the critical
18 question is: Would Congress have wanted to
19 have the first four prohibitions in (1) and the
20 prohibitions in (2), if it couldn't have the
21 "licensed or authorized by law" provision?

22 I think that's the relevant question,
23 because their constitutional argument only goes
24 to "licensed or authorized by law." And I
25 think, although all these counterfactual

1 questions are difficult, I think this may be
2 the easiest one that you'll ever have, because
3 I think the statute operates almost the same
4 way.

5 The net effect of a statute that said
6 that states can't sponsor, operate, advertise,
7 promote sports gambling schemes and neither can
8 private parties pursuant to state law; and, by
9 the way, they can't do it in violation of state
10 law because of other provisions -- that world,
11 what it would mean is we should have gone for
12 the injunction against the private parties.

13 Which, by the way, we did in the
14 district court. And that issue, I think, is
15 still there in front of the district court.
16 When we first filed our TRO, we went against
17 the state and we went against the private
18 parties. We got a TRO against both, and then
19 there was an unclean hands argument that arose
20 only with the private parties, so the district
21 court enjoined only the -- the states.

22 But the net effect of these two
23 statutes without "authorized or licensed," is
24 the same as a statute that sort of left that to
25 implied preemption. It's essentially the same

1 statute.

2 So, I think in a counterfactual world,
3 would Congress want a statute that still told
4 the states that you can't operate or advertise
5 sports gambling schemes and told private
6 parties that you can't operate sports gambling
7 schemes pursuant to state law and, oh, by the
8 way, you can't do it in violation of state law
9 anyway because that violates a whole bunch of
10 criminal prohibitions, obviously they'd want
11 that.

12 You know, this express preemption
13 provision, it's -- it's like neat --

14 JUSTICE BREYER: One -- one --

15 MR. CLEMENT: -- tidy law-making, but
16 it's not vital.

17 JUSTICE BREYER: Give me a
18 one-sentence answer.

19 In the Airline Deregulation Act, the
20 Congress wanted a world, i.e., the United
21 States, where market forces set prices. In all
22 the acts you're talking about put together,
23 Congress wanted the United States -- fill in
24 the blank.

25 MR. CLEMENT: The -- the Congress

1 wanted there to be, putting aside the
2 grandfather clause, no state-sponsored or
3 -operated gambling taking place by either
4 individuals or by the state.

5 JUSTICE BREYER: Right. Now, you had
6 to use the word "state-sponsored" to date that,
7 and as soon as you had to describe it, you had
8 to use the word "state-sponsored" there.
9 "State-sponsored" means legislation, and
10 therefore, there is no interstate policy other
11 than the interstate policy of telling the
12 states what to do.

13 MR. CLEMENT: Can I amend my answer?

14 JUSTICE BREYER: Yes.

15 (Laughter.)

16 MR. CLEMENT: Congress -- Congress, in
17 all of these statutes, did not want there to be
18 sports gambling schemes operating in interstate
19 commerce.

20 JUSTICE ALITO: Well, Congress could
21 --

22 MR. CLEMENT: They were indifferent --

23 JUSTICE ALITO: Congress could have
24 prohibited sports gambling itself. So what
25 federal policy is served by this statute that

1 would not have been served by the former?

2 MR. CLEMENT: Two things, Justice
3 Alito.

4 First is: Congress could have
5 prohibited all sports gambling; but that would
6 have required it to regulate individuals as
7 sports gamblers as opposed to entities,
8 businesses that were providing sports gambling
9 schemes --

10 JUSTICE ALITO: All right. So I amend
11 the question:

12 Congress could have prohibited
13 gambling enterprises itself. No question it
14 could have done that, assuming it's within the
15 Commerce Clause. What policy does this statute
16 serve that that would not?

17 MR. CLEMENT: Ironically enough,
18 Justice Alito, it actually furthers federalism
19 values by saying: instead of having a
20 one-size-fits-all policy, which says as a
21 matter of federal law, everybody who operates a
22 sports gambling scheme is going to face two
23 years in the federal penitentiary and a fine of
24 \$10,000; this statute basically says, look, 46
25 states right now are more or less doing what we

1 want, but they're doing it in 46 different
2 ways. In some cases, it's --

3 JUSTICE GORSUCH: Or -- or does it
4 serve the interest of making it cheap by
5 allowing Congress not to have to expend any
6 funds to enforce its laws?

7 MR. CLEMENT: With all due respect, I
8 don't think trying to do this on the cheap was
9 their principal concern.

10 As I said, as a general matter, when
11 Congress passes a new federal statute, criminal
12 statute, it's -- doesn't really have like, a
13 big budgetary impact; because you don't, like,
14 have to make like a new AUSA to enforce that
15 statute. You just let everybody enforce it,
16 and the enforcement priorities that Justice
17 Sotomayor alluded to work on the federal level
18 as well.

19 And if you preempt state law, that
20 tends to not have a budgetary impact either.
21 But what's distinct about this is it basically
22 says, look, 46 states, if you want to regulate
23 this in 46 different ways, have at it. If you
24 want to repeal those laws, I mean, you can do
25 it. I mean, that repeal itself won't violate

1 3702(1). The sports gambling that takes place
2 pursuant to it might violate 3702(2).

3 I actually think that rather than have
4 a one-size-fits-all federal felony where
5 everybody's going to get the same exact
6 sentence, having a system where, you know, one
7 state makes it a misdemeanor, another state
8 makes it a felony, another state goes at it
9 with all their enforcement regulations --
10 policies because they think it's really
11 important --

12 JUSTICE KAGAN: Mr. Clement, what --
13 what's the line you would draw as between
14 preemption and commandeering?

15 MR. CLEMENT: I would draw the line
16 that this Court drew in New York and Printz,
17 because it was writing its opinions against the
18 backdrop of all sorts of preemption statutes
19 that various parties were saying were relevant
20 and the Court was distinguishing.

21 I would say that, unless the Congress
22 basically tells the states that they must
23 regulate -- that they may, basically, pass
24 federally-prescribed legislation, or enforce a
25 federally -- a federal policy as in Printz --

1 JUSTICE KAGAN: So what's the
2 difference between saying you must pass a
3 certain piece of legislation and saying you
4 must maintain a piece of legislation on the
5 books?

6 MR. CLEMENT: I -- I don't think that
7 there is a distinction necessarily between
8 those two, but I don't think that's what PASPA
9 does. PASPA doesn't say thou must maintain
10 your existing prohibitions on the books. If
11 you think about it --

12 JUSTICE KAGAN: How is it different
13 from that?

14 MR. CLEMENT: It -- it's different
15 about that because it basically tells the
16 states, look, you want to repeal that
17 prohibition, you can do that. Your act of
18 repealing the law will not violate PASPA.
19 Okay?

20 I mean, you know, and think about it
21 in analogy to Baker. If a state had a
22 preexisting prohibition on issuing bearer bonds
23 in Baker and it repealed that pre-existing
24 prohibition, nothing would happen.

25 If, on the other hand, the state

1 itself started issuing bearer bonds because
2 there's no longer a prohibition or private
3 parties started issuing bearer bonds because
4 there was no longer a prohibition, that action
5 by the state or by the private party would
6 violate the federal statute. That's the way
7 PASPA works.

8 JUSTICE ALITO: Could Congress just go
9 through federal -- the -- the statutes of the
10 states and pick out a long list of statutes
11 that can't be repealed except in full?

12 MR. CLEMENT: May I answer the
13 question?

14 CHIEF JUSTICE ROBERTS: Certainly.

15 MR. CLEMENT: No, I don't think it
16 could do that, Justice Alito. But, again, I
17 think what Congress did here is it said: Look,
18 we already say as a matter of federal law in a
19 variety of provisions that people who engage in
20 gambling businesses in violation of state law
21 violate federal law.

22 And we now have this prospect that
23 maybe some states are going to authorize this,
24 and we're going to complete our federal policy
25 by saying, look, if you're a private party and

1 you're operating a sports gambling scheme, we
2 don't care if you do it in violation of federal
3 law, that's criminal, or pursuant to state law,
4 that's civilly prohibited by PASPA.

5 I don't think that's a constitutional
6 problem.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Wall.

10 ORAL ARGUMENT OF JEFFREY B. WALL ON
11 BEHALF OF THE UNITED STATES, AS AMICUS
12 CURIAE, SUPPORTING THE RESPONDENTS

13 MR. WALL: Mr. Chief Justice, and may
14 it please the Court:

15 I think Mr. Olson has boiled down the
16 state's case to what I take to be his two basic
17 arguments. This is a commandeering problem, he
18 says, because New Jersey is forced to keep a
19 law on its books and there's no accompanying
20 comprehensive federal regime. Both of those
21 arguments are incorrect.

22 As to the first, I'd encourage the
23 Court to look at page 383 of the JA. The
24 injunction in this case does not remotely
25 require the state to keep a law on its books.

1 It says the state cannot give
2 operation or effect to its preempted law. That
3 is exactly, almost word-for-word, what Justice
4 Scalia said in *Printz*, the Supremacy Clause
5 requires. If the state passes a law that is
6 preempted by federal law, the state can be
7 required -- and state officials can be
8 required -- not to give effect to that
9 preempted law. That is not conscription in any
10 meaning of the -- of the word.

11 And as to the second, I think this
12 comprehensive federal regime is -- is a made-up
13 principle for the reasons Mr. Clement gives. A
14 federal statute often says states may not
15 regulate interstate commerce in a particular
16 way because the federal policy is just that the
17 states are to take their hands off of that
18 particular part of interstate commerce.

19 But even if the Court thinks it's a
20 principle, it doesn't need to reach it here
21 because there is actually a federal regime
22 beyond PASPA itself.

23 Federal law criminalizes the operation
24 of a gambling scheme that's in violation of
25 state law; so when states in the early '90s

1 started looking at authorizing these things,
2 Congress handled the other half of the circle
3 and said, all right, look, we're not going to
4 make it criminal, but we will give an
5 injunctive action to the attorney general and
6 the Leagues so that if states start authorizing
7 sports gambling schemes -- which we know states
8 can't do and we know individuals can't do, and
9 they've never argued there's any constitutional
10 problem with those two legs of the stool --
11 then if states start doing that, we'll give a
12 civil injunctive action, and that's far less
13 invasive of state sovereignty.

14 And I think -- look, that this -- I
15 mean, as Mr. Clement says, it's Baker all over
16 again. The states can't do it, and the
17 individuals can't do it.

18 JUSTICE SOTOMAYOR: Mr. Wall --

19 MR. WALL: They've never argued
20 there's any --

21 JUSTICE SOTOMAYOR: Can you go back to
22 the basic question, and it was raised, I think,
23 by the dissent, Judge Fuentes, who said you
24 start this discussion from the fact that a law
25 exists, if it's a partial or full repeal, the

1 law doesn't exist. Period, end of story. And
2 that's the baseline.

3 So why is a partial repeal
4 unconstitutional -- or in violation of the
5 preemption clause? Because if the law didn't
6 exist, the fact that they've carved out a
7 certain section of the -- of the population for
8 whom the law will stay in existence, that's not
9 actually authorizing. That's just merely
10 repealing.

11 MR. WALL: So I think that would be
12 right for a lot of the things that the state
13 would do; but when the state says, we're going
14 to repeal our law in such a way that nobody in
15 the state can run a sports lottery or sports
16 book, except for the 12 state licensed casinos
17 and racetracks that already conduct authorized
18 gambling operations --

19 JUSTICE SOTOMAYOR: Well, but that's
20 the issue that the court below avoided. I
21 haven't looked at the licensing laws below --
22 in -- in New Jersey because they weren't
23 provided to us, and it was further afield than
24 the question presented, but the court below
25 said that it was not -- passing on that

1 question because it found a different answer.

2 But you might be right if the licenses
3 that those two facilities hold really are --
4 are general and say, you're authorized to do
5 any gambling permitted by law. Then you might
6 have an argument. But if all they do is
7 repeal, what does it matter?

8 MR. WALL: So I think it's even
9 simpler than that, Justice Sotomayor, and it
10 gets to something Justice Gorsuch said earlier.

11 They want to interpret the statute as
12 barring all repeals so that they can create a
13 constitutional problem with two words of the
14 statute or law and leverage that to try to take
15 down the entire thing.

16 And our point's pretty simple. If the
17 Court sticks to what it says in Gunther and
18 says an authorization is affirmative enabling
19 conduct, then that's this repeal because it
20 channels to particular state license providers,
21 but it's not going to be most things that New
22 Jersey does. And read that way --

23 JUSTICE GORSUCH: But where's the
24 line?

25 MR. WALL: -- there's no --

1 JUSTICE GORSUCH: The Third Circuit
2 said de minimis private gambling isn't covered.
3 On page 30 of your brief, you indicate maybe
4 the state could have a certain dollar
5 threshold, and that wouldn't be authorizing.

6 I -- I'm really not clear why that
7 wouldn't be authorizing if you specify a
8 threshold dollar amount in state law. You
9 know, what -- what if they said you can do it
10 at the Elks Club, is that authorizing? Where
11 -- where does the government draw the line?

12 MR. WALL: I think the only thing the
13 Court needs to say here, Justice Gorsuch, is:
14 in the context of PASPA, if you -- or whatever
15 -- however the state get -- gets there,
16 legislating up, legislating down, amendment,
17 repeal, enact, it doesn't matter -- if what
18 it's doing is channeling sports gambling to
19 particular preferred -- state-preferred
20 providers, that's an authorization.

21 JUSTICE GORSUCH: But we have no
22 record about that, as Justice Sotomayor points
23 out. And the Respondent took the position that
24 authorizing means any repeal of any degree of
25 any kind. Why shouldn't the Respondent have to

1 live with that invited error, perhaps, now in
2 this case?

3 MR. WALL: Justice Gorsuch, I don't
4 think it's a record question.

5 I think it's, look, in the 2012 law,
6 they affirmatively said, we're going to let
7 only the casinos and racetracks do it. That
8 was a problem. They didn't dispute that it
9 violated PASPA.

10 Then they came back and said, well,
11 we'll repeal our prohibition, but just for the
12 same casinos and racetracks. And our only
13 point is --

14 JUSTICE SOTOMAYOR: I'm sorry, but the
15 earlier version actually explicitly licensed --
16 it explicitly licensed and set up a complete
17 operation requirements and other things.

18 That -- I don't think they would have
19 had a snowball's chance to say that that wasn't
20 licensing or -- or effectively operating.

21 But here, what they're saying is there
22 were no laws -- there's a law prohibiting all
23 gambling, we're now going to repeal part of it
24 and say some gambling is okay. So --

25 MR. WALL: Justice Sotomayor, unless

1 what the Court wants to say is no repeal can be
2 an authorization, even if New Jersey took away
3 its prohibition only at the Borgata -- which
4 would provide a roadmap, I think, for flouting
5 the Supremacy Clause; because then you could
6 just enact a prohibition and peel it back
7 wherever you wanted.

8 Unless the Court is prepared to say
9 that a repeal can never be an authorization,
10 which I think would elevate form over
11 substance, this particular repeal is -- and --
12 and I think all the Court needs to say is, for
13 PASPA purposes, if you're channeling to
14 particular entities, here, 12 state-licensed
15 casinos and racetracks, that's an
16 authorization.

17 And read in that way, there's no
18 constitutional problem; because it requires
19 affirmative conduct by the state to enable --
20 it's no longer a conscription, we're not
21 telling them they have to maintain anything,
22 the state, it can sit there and do nothing, and
23 it's perfectly compliant. The one thing --

24 CHIEF JUSTICE ROBERTS: But what if
25 the repeal -- what if the repeal is across the

1 board, no exceptions?

2 MR. WALL: If New Jersey just repeals
3 its prohibitions, we have said we don't have a
4 problem with that.

5 CHIEF JUSTICE ROBERTS: Well, is that
6 serious? You have no problem if there's no
7 prohibition at all and anybody can engage in
8 any kind of gambling they want, a 12-year-old
9 can come into the casino and --

10 MR. WALL: I -- I --

11 CHIEF JUSTICE ROBERTS: -- you're not
12 serious about that.

13 MR. WALL: I -- I'm very serious about
14 it, Mr. Chief Justice. The problem that
15 Congress was confronting was state-sponsored
16 and sanctioned sports gambling schemes. It
17 didn't care if I bet with my buddy on the
18 Redskins game or we had an office pool. It
19 wasn't going after all sports gambling.

20 CHIEF JUSTICE ROBERTS: Well, but when
21 you put the state in a position that that's the
22 only thing they can do, that's not a real
23 choice.

24 MR. WALL: Oh, it's not the only thing
25 they can do. They can strengthen, or they can

1 repeal in whole, or they can repeal in part in
2 various ways.

3 The one thing they can't do is
4 affirmatively engage in the one kind of conduct
5 that Congress took off the table as a policy
6 matter, and that's the definition of
7 preemption. Now, I'll grant --

8 JUSTICE GINSBURG: But the government
9 --

10 MR. WALL: -- that Congress may have
11 assumed Mr. --

12 JUSTICE GINSBURG: -- but the
13 government -- Mr. Wall, the last time around,
14 the government did say, in recommending that we
15 deny cert, that PASPA does not require New
16 Jersey to retain prohibitions it adopted
17 pre-PASPA. It is free to repeal those
18 prohibitions in whole or in part. That's what
19 the government represented to this Court.

20 Was that -- was that statement
21 inaccurate?

22 MR. WALL: No. I think we did not
23 take into account the gamesmanship in which New
24 Jersey was going to engage.

25 We said the same thing we're saying

1 here today, that they've got a lot of options
2 on the table. The one thing they can't do is
3 the one thing that Congress preempted.

4 And so we said they can engage in lots
5 of partial repeals, but we didn't have in mind
6 that New Jersey would come back and do the 2012
7 law, but style it as a partial repeal.

8 And, yes, I wish we had dropped a
9 footnote and said, if New Jersey tries to
10 accomplish the same thing, but just styles it
11 as something different, that will equally be an
12 authorization for PASPA purposes.

13 And just to return to your question,
14 Mr. Chief Justice, I will completely grant that
15 Congress assumed that states were not going to
16 start authorizing this if they couldn't profit
17 from it. And that assumption was true for a
18 long time.

19 And if states start lifting their
20 prohibitions in whole, I think Congress may
21 well want to revisit that. But PASPA doesn't
22 have anything to say about it. And what the --
23 what New Jersey is doing is giving an unnatural
24 interpretation of federal statute to create a
25 small problem with two words and then try to

1 leverage that small sickness to take down the
2 entire patient.

3 And that's just not the way statutory
4 interpretation and severability normally work,
5 but they have to do that because it's the only
6 way that can get them where they want to go,
7 which is to take down the private party
8 prohibition in 3702(2), which they've never
9 argued is even -- even potentially
10 accommodating language.

11 JUSTICE BREYER: You're saying this is
12 authorization, not a repeal, because it's
13 limited to the casinos, which probably have all
14 kinds of other rules and regulations, 9:00 a.m.
15 opening and dah, dah, dah, dah, dah. And under
16 those circumstances, it amounts to an
17 authorization, not a simple repeal, is that the
18 argument?

19 MR. WALL: Exactly.

20 JUSTICE BREYER: Okay.

21 MR. WALL: If you're trying to figure
22 out what constitutes an authorization to
23 operate a sports gambling scheme, any law that
24 says everybody can't do it, except for you two
25 or three, that's an authorization.

1 And it doesn't matter whether the
2 state gets there by legislating up or down,
3 because it's substance over form.

4 JUSTICE BREYER: All right. And then
5 -- they're then -- once you say that, I think
6 their argument is: but, you see, there is no
7 federal policy which says states can't -- well,
8 there is no federal policy against authorizing
9 sports gambling but for a federal policy that
10 says a state can't authorize sports gambling,
11 and that is to commandeer.

12 Have I got that right?

13 MR. WALL: I think that is their
14 argument, but I think it doesn't make sense for
15 the simple reason Mr. Clement gave.

16 Baker would not have been different
17 if, in addition to having a prohibition on
18 states and individuals, it had said states are
19 preempted if they try to authorize private
20 conduct that's separately barred by the Act.

21 If this Court finds that to be a
22 latent commandeering violation, the government
23 would respectfully submit it's going to spend
24 an awfully long time figuring out how to unblur
25 the clear line between preemption and

1 commandeering.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Five minutes, Mr. Olson.

5 REBUTTAL ARGUMENT OF THEODORE B. OLSON ON
6 BEHALF OF THE PETITIONERS

7 MR. OLSON: Thank you, Your Honor.
8 May it please the Court:

9 JUSTICE BREYER: If I've got your
10 argument right just now, just say yes.
11 Otherwise forget it.

12 MR. OLSON: You had it right before.
13 (Laughter.)

14 JUSTICE BREYER: No, but I had it
15 right just now?

16 Okay, you weren't -- forget it.
17 Forget it. Forget it. Go ahead.

18 JUSTICE SOTOMAYOR: Mr. Olson, I do
19 have a question following up on what the Chief
20 asked earlier. The Respondent says the New
21 Jersey legislature is doing exactly what he
22 thinks they shouldn't do or wouldn't do, which
23 is that they are considering legislation that
24 would fully repeal the sports betting
25 prohibitions.

1 I understand it's being considered by
2 both houses. Where does that consideration
3 stand right now?

4 MR. OLSON: Well, I don't know where
5 it stands. And I think it's utterly
6 irrelevant. The -- the -- what the --

7 JUSTICE SOTOMAYOR: No, but you argued
8 to us that no state legislature would do that.
9 But here we have --

10 MR. OLSON: I --

11 JUSTICE SOTOMAYOR: -- two have -- two
12 bills introduced that would do just that.

13 MR. OLSON: Well, they have not --
14 they're not laws yet. And what I said was,
15 Congress could not possibly have intended in a
16 bill to prohibit this expansion of sports
17 betting, to have it construed in a way that
18 would remove --

19 JUSTICE SOTOMAYOR: Why?

20 MR. OLSON: -- all limitations.

21 JUSTICE SOTOMAYOR: Let -- let me ask
22 you, what's so crazy about Congress perceiving
23 that states would never want 12-year-olds to go
24 into gambling houses and that the states would
25 find some way of prohibiting that or living

1 with rules of some sort of creating laws,
2 regulations, conduct that would prohibit that
3 sort of thing?

4 MR. OLSON: What Congress can do is
5 enact a statute that places restrictions on
6 sports betting and -- and have a
7 finely-reticulated statute. It can adopt the
8 -- the provision that it permitted Nevada to
9 have, which is careful regulation of something
10 that's taking place.

11 What we have now is activity that is
12 billions of dollars that is taking place
13 throughout the United States. It is all
14 unlawful. What New Jersey decided to do is --

15 JUSTICE SOTOMAYOR: That's your
16 selective -- your selective prosecution theory,
17 that they're permitting fantasy teams?

18 MR. OLSON: No, no, no, I'm not
19 talking about fantasy at all. I'm talking
20 about betting on sports games, and that --

21 JUSTICE SOTOMAYOR: There are four
22 states that are -- are permitted to continue?

23 MR. OLSON: Nevada -- Nevada has
24 sports betting, and it has it regulated. It --
25 it prohibits criminals from going into the

1 business. It has open books and so forth.

2 Those other three states were small
3 slivers of lotteries.

4 What I'm saying is -- and all of the
5 evidence supports this -- that betting on
6 sports is taking place all over the United
7 States. Five percent of it is legal in Nevada.
8 The rest of it is illegal.

9 New Jersey decided we are going to
10 look at --

11 JUSTICE SOTOMAYOR: So why don't we --
12 why don't we legalize -- this is a
13 hypothetical -- marijuana because all of -- and
14 all drugs, because there's a rampant market out
15 there for those drugs, but we've made a policy
16 choice that we don't want the state involved in
17 promoting that type of enterprise.

18 MR. OLSON: And the federal --

19 JUSTICE SOTOMAYOR: Why is this any
20 different?

21 MR. OLSON: The Congress of the United
22 States enacted laws with respect to marijuana
23 and with respect to other substances. And
24 that's -- that's in play right now because
25 various states have done various different

1 things.

2 But we have no question here that what
3 Congress intended to do was pass a law -- would
4 look at the statute, as I said before, the --
5 the statute says it's an act to prohibit sports
6 gambling under state law, not under federal
7 law.

8 The preemption process starts with the
9 idea that there must be a federal
10 constitutional provision in a statute or in a
11 treaty or in the Constitution, and then the
12 federal government may take steps to prevent
13 states from interfering with the accomplishment
14 of that.

15 My opponent, Mr. Clement, talked about
16 the -- the -- the South Carolina versus Baker
17 case. South Carolina versus Baker specifically
18 said the exact same thing that New York versus
19 United States says, and the Printz case says:
20 Section 310, regulated states activities is --
21 does not seek to control or influence the
22 manner in which states regulate private
23 parties.

24 And the same thing is true in the --
25 in the Reno case. My opponent talked about

1 statutes of general application. In the last
2 sentence of that case, this Court specifically
3 reserved the question whether Congress could
4 single out states with respect to activities
5 and didn't decide whether it could do so in the
6 -- outside the context of a statute or general
7 application.

8 When the -- when this suit was first
9 filed by the Leagues, their complaint
10 specifically said PASPA imposes a broad ban on
11 sports betting, subject only to the narrow
12 exceptions that apply here.

13 CHIEF JUSTICE ROBERTS: You have an
14 extra couple minutes, Mr. Olson.

15 MR. OLSON: Thank -- thank you, Mr.
16 Chief Justice.

17 This is -- as the federal government
18 said on page 15 of the federal government's
19 brief -- we are saying that state laws that
20 attempt to change what New Jersey has done are
21 nullified by PASPA.

22 Anyone familiar, as this Court is,
23 with the history of the Constitutional
24 Convention knows that there was specifically on
25 the agenda an opportunity for Congress to

1 nullify state laws. That was defeated.

2 The whole debate with respect to
3 federalism had to do with whether Congress was
4 going to be permitted to regulate interstate
5 com -- regulate states, or would it be required
6 to regulate commerce first, and as an adjunct
7 to that, constrain what states could do.

8 And that's exactly what this statute
9 did. The federal government, the Congress
10 wanted a prohibition under state law because it
11 would have no responsibility, no
12 accountability, and -- and our opponent's brief
13 says, if you're complaining about
14 accountability, call your Senator.

15 That's exactly what the United States
16 talked about, what the Court -- this Court
17 talked about in New York versus United States.

18 The accountability is very important.
19 The structure is important to the liberty of
20 citizens. And this statute violates that
21 ordained structure.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 11:09 a.m., the case in
25 the above-entitled matter was submitted.)

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