

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CHRISTOPHER J. CHRISTIE, )  
GOVERNOR OF NEW JERSEY, ET AL., )  
Petitioners, )  
v. ) No. 16-476  
NATIONAL COLLEGIATE ATHLETIC )  
ASSOCIATION, ET AL., )  
Respondents. )  
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NEW JERSEY THOROUGHBRED HORSEMEN'S )  
ASSOCIATION, INC., )  
Petitioner, )  
v. ) No. 16-477  
NATIONAL COLLEGIATE ATHLETIC )  
ASSOCIATION, ET AL., )  
Respondents. )  
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Pages: 1 through 73  
Place: Washington, D.C.  
Date: December 4, 2017

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19    Washington, D.C.

20    Monday, December 4, 2017

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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

1 APPEARANCES:  
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3 behalf of the Petitioners  
4 PAUL D. CLEMENT, Washington, D.C.; on behalf  
5 of the Respondents  
6 JEFFREY B. WALL, Deputy Solicitor General,  
7 Department of Justice, Washington, D.C.;  
8 on behalf of the United States, as  
9 amicus curiae, supporting the Respondents

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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 between --

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 a panoply of provisions regulating airlines  
3 in various different respects, including --

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

8 MR. OLSON: Well, the --

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

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

19 MR. OLSON: I do see the analogy.

20 JUSTICE BREYER: Okay. Good.

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



1 regulating fares, conditions of service, and  
2 that sort of thing.

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

8 This statute is completely different.

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

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

1 burden and expense and accountability all on  
2 the states to do so.

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

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

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

1 the -- the -- the Constitution, statutes, or  
2 treaties shall be the supreme law of the land.  
3 The Court has construed that repeatedly as  
4 saying that --

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

8 MR. OLSON: Yes.

9 JUSTICE KENNEDY: In -- like Southern  
10 Pacific versus Arizona, a state cannot regulate  
11 the length of a -- of a freight train simply  
12 because this is reserved for the Congress. So  
13 that's fairly standard.

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

18 MR. OLSON: Well, first, no, not -- I  
19 think, if I understand your question correctly,  
20 Justice Kennedy, is if Congress had taken  
21 responsibility to decide to do something about  
22 sports wagering by regulating it in some  
23 respect or taking responsibility in some  
24 respects and then it could say that, where a  
25 state is doing something that's inconsistent,

1 then that can be preempted.

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

9 JUSTICE KENNEDY: Can we interpret  
10 that as saying that, if you do regulate, then  
11 it will be preempted?

12 MR. OLSON: If -- it -- it may be  
13 preempted. Congress, as you know, Congress may  
14 adopt a statute that explicitly -- expressly  
15 preempts or, in some cases, impliedly preempts  
16 state laws that are inconsistent or in -- in a  
17 way that obstructs the accomplishment of a  
18 federal objective.

19 JUSTICE BREYER: Okay. And then --  
20 now, I'm seeing this, I think. Is this your  
21 argument? And don't just say yes if it isn't,  
22 please.

23 (Laughter.)

24 JUSTICE BREYER: Forget the Airline  
25 Dereg Act. It was a bad example for this

1 reason.

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

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

17 MR. OLSON: I wish I had said that  
18 myself, Justice Breyer.

19 (Laughter.)

20 MR. OLSON: But you did say it in New  
21 York --

22 JUSTICE BREYER: I'm trying to get  
23 your argument.

24 MR. OLSON: Yes. And -- and my  
25 argument --

1 JUSTICE BREYER: Is that your  
2 argument?

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

12 That's New York v. United States.  
13 It's the Printz case. And that same language  
14 --

15 JUSTICE SOTOMAYOR: May I ask you, is  
16 this a commercial --

17 MR. OLSON: -- appears in earlier  
18 cases.

19 JUSTICE SOTOMAYOR: -- is this --

20 MR. OLSON: It goes back to 1911 in  
21 the Coyle case.

22 JUSTICE SOTOMAYOR: Mr. Olson, is this  
23 a commercial activity by the state? If it's  
24 licensing casinos and horse racing, isn't it  
25 involved in a commercial activity?

1 MR. OLSON: Certainly, it is a  
2 commercial activity when -- when govern -- when  
3 state -- individuals are engaged in betting on  
4 sports, having a sports book --

5 JUSTICE SOTOMAYOR: Why isn't it when  
6 the state is licensing that?

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

8 JUSTICE SOTOMAYOR: It's making money  
9 from the license.

10 MR. OLSON: It doesn't change the  
11 character of the underlying activity. The  
12 Constitution ordains who may regulate that  
13 commercial activity, presuming that it's  
14 interstate commerce. Once that's satisfied --

15 JUSTICE SOTOMAYOR: Well, I have never  
16 understood gambling not to be. You have to  
17 just watch the lines on the highways coming  
18 from all different directions and states going  
19 to gambling casinos.

20 MR. OLSON: Yes, there's no question  
21 --

22 JUSTICE SOTOMAYOR: So if it -- if it  
23 is a commercial activity by the state, haven't  
24 we already said that the federal government can  
25 regulate that activity by the state?

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

2 JUSTICE SOTOMAYOR: So why is it that  
3 telling the states that it can't license,  
4 participate in, authorize, or otherwise involve  
5 itself in gambling a strict prohibition of a  
6 commercial actor?

7 MR. OLSON: It's a -- the question is  
8 interstate commerce, and, yes, just as the  
9 language in the New York case, which I just  
10 quoted, Congress may regulate that field.

11 If it does regulate that field, which  
12 Congress has not chosen to do in this case, it  
13 then can preempt inconsistent state laws. I  
14 would quote --

15 CHIEF JUSTICE ROBERTS: Mr. Olson, you  
16 -- you have not challenged 3702 subsection 2,  
17 have you?

18 MR. OLSON: 370 -- subsection 2 is  
19 simply a counterpart to subsection 1.

20 CHIEF JUSTICE ROBERTS: But you didn't  
21 challenge it?

22 MR. OLSON: We -- we challenged the  
23 entire statute, but we were not sued under that  
24 section. We were sued for violating section --  
25 subsection 1. Subsection 2 is another side of



1 the same coin because subsection 2 says  
2 pursuant to law.

3 The law that's referred to in  
4 subsection 1 we say is something that the  
5 states can do and the -- the Congress, if  
6 Congress chose to prevent it, it would be  
7 unconstitutional. But that subsection --

8 CHIEF JUSTICE ROBERTS: But -- but by  
9 its -- by its terms, though, subsection 2  
10 operates on individuals and not the state.

11 MR. OLSON: Only -- only if  
12 individuals operate pursuant to law, which  
13 means pursuant to the state law, which is  
14 referred to in subsection 1. This is a little  
15 confusing because the way Congress chose to do  
16 it. But the government refers to that as a  
17 belt-and-suspenders thing, and what it is --  
18 and I sort of accept that, because subsection 2  
19 simply seems -- seeks to do indirectly what we  
20 contend subsection 1 can't do directly under --  
21 under the Constitution. And --

22 JUSTICE GINSBURG: One part of  
23 subsection 1, it seems, is -- is not challenged  
24 either, and that's the ban on the state itself  
25 operating gambling casinos.

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

12           So, to the extent that Congress had  
13 initially decided to regulate this area and put  
14 itself into the field of regulating private  
15 persons engaged in activity, it could then  
16 address the states if the states choose to  
17 engage in the same activity.

18           JUSTICE GINSBURG: So, if you took  
19 this statute and you take the prohibition on  
20 private parties and you can have a comparable  
21 prohibition on the state, what do you  
22 accomplish by knocking out the authorized by,  
23 if you have two parts that are not  
24 constitutionally infirm and they achieve almost  
25 the same thing?

1           MR. OLSON: It would be  
2           constitutionally infirm, Your Honor, had --  
3           because the state -- because the Congress  
4           didn't attempt to regulate interstate commerce  
5           directly. And it could then, if it did so,  
6           which it did not do so, quite obviously, it  
7           could then regulate the state as a market  
8           participant to the same degree it was  
9           regulating private citizens as a market  
10          participant. I --

11           CHIEF JUSTICE ROBERTS: But this was  
12          pretty comprehensive. The comprehensive aspect  
13          is a total -- total prohibition.

14           MR. OLSON: Yes, it's --

15           CHIEF JUSTICE ROBERTS: So I don't  
16          know whether it's -- you seem to be saying that  
17          they can't regulate it if the regulation is  
18          going to be a total ban.

19           MR. OLSON: No.

20           CHIEF JUSTICE ROBERTS: But that --  
21          that's -- it's -- that's very comprehensive.

22           MR. OLSON: No. I under -- I agree  
23          with what -- the way you stated it, but that is  
24          not PASPA. If PASPA said we prohibit sports  
25          betting, gambling on sports, then it could

1 address the state as a participant in that same  
2 activity.

3 It did not do so. This statute does  
4 -- attempted to have the states -- and that's  
5 why I quoted the name of the statute -- to  
6 prohibit sports gambling, it didn't stop there.  
7 It said sports gambling under state law.

8 And what it intended to do -- this is  
9 what you talked about in the New York case, New  
10 York versus United States -- is it put the  
11 accountability, the expense, the  
12 responsibility, the burdens on the states and  
13 basically said, as the -- as the Congressional  
14 Budget Office says, it won't have any effect on  
15 the federal budget because the federal  
16 government is doing nothing.

17 JUSTICE KAGAN: Mr. Olson --

18 MR. OLSON: It also said in the Senate  
19 report it won't have any regulatory impact.

20 JUSTICE KAGAN: So suppose I read  
21 these cases as setting up a principle that the  
22 federal government can't conscript state  
23 officials for its own purposes, you know, the  
24 federal government can -- does whatever it  
25 wants, consistent with the Commerce Clause, but

1 it can't conscript state officials in order to  
2 do -- help them -- help the federal government  
3 do it.

4 If that's the way I see these cases,  
5 what's being -- who is being conscripted in  
6 order to do what here?

7 MR. OLSON: What is -- it's both  
8 conscription and the Court uses the word  
9 commandeering and directing the states.

10 JUSTICE KAGAN: Yeah, so --

11 MR. OLSON: All of those terms, all of  
12 those verbs are applied in this. What is being  
13 conscripted here is the legislature of New  
14 Jersey has been told that it may not regulate  
15 an activity that's taking place in New Jersey,  
16 all over New Jersey, it's -- there is illegal  
17 gambling going on.

18 It can't regulate that activity. The  
19 legislature can't --

20 JUSTICE KAGAN: I mean, just the way  
21 you say that, Mr. Olson -- the federal  
22 government is saying to the states you can't do  
23 something -- so that sounds to me the language  
24 of preemption. All the time the federal  
25 government takes some kind of action, passes a

1 law, and then says to the states: you know  
2 what, we've got this; you can't do anything.

3 MR. OLSON: It is so fundamental in  
4 the -- at the Constitutional Convention and as  
5 -- and discussed in most detail in the New York  
6 case, that the difference is that in those  
7 circumstances where Congress has taken the step  
8 of regulating commerce, it can preclude state  
9 efforts that interfere with that or conflict  
10 with that.

11 But when it sets out at the  
12 initiative, at -- at the -- at the first stage  
13 of -- of regulating the legislature, here we  
14 have a situation where a court has ordered,  
15 pursuant to my opponents' briefs, ordered, told  
16 New Jersey, you can't repeal a statute that  
17 you've tried to repeal. You must keep it on  
18 the books.

19 JUSTICE KAGAN: So do you see no  
20 difference between the federal government  
21 saying to a state, look, you can't take some  
22 preferred policy option that you would like to  
23 take, and, on the other hand, the federal  
24 government saying to a state, you must help us  
25 do something?

1           Because I thought that our cases were  
2 all about the second thing. You must help us.  
3 You must be our little assistants when we  
4 promote or try to advance a policy objective.  
5 And I -- I guess what I'm asking you for is how  
6 is New Jersey being put in that position with  
7 respect to this statute?

8           MR. OLSON: New Jersey -- in many  
9 ways. New Jersey is being told it may not  
10 regulate in the way it chooses -- its  
11 legislature chooses to exercise its discretion  
12 with respect to an activity taking place in  
13 that state.

14           It must enforce a law and keep a law  
15 on the books that has attempted to repeal the  
16 -- the executive branch and the legislative  
17 branch of the state of New Jersey have been  
18 conscripted.

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

25           So there's no -- there's not going to

1 be a federal prosecution if the state says we  
2 got -- we have other things to do that are more  
3 important than -- than casino gambling or  
4 sports gambling.

5 MR. OLSON: Yes, Justice Ginsburg, the  
6 court said that. And the court said you may  
7 repeal any portion of your statutes. You may  
8 take any policy that you want to take. The  
9 federal government said you may repeal all or  
10 any part of your sports betting prohibitions.  
11 That's exactly what New Jersey did.

12 But you can imagine, Justice Ginsburg,  
13 having a law that a federal court has ordered  
14 New Jersey to keep on the books, it prevent --  
15 prevents it from repealing that law, which  
16 means it's the same as requiring it to enact  
17 that law and requiring it to maintain that law  
18 on the books.

19 And then the officials of New Jersey,  
20 the law enforcement people in New Jersey, the  
21 governor of New Jersey saying, well, we're not  
22 going to enforce that law on the books after we  
23 took an oath to uphold the laws of New Jersey.

24 That is a strange -- very, very  
25 strange construction of what the preemption



1 clause is and -- and commandeering is all  
2 about, but -- but to go back to the New York --

3 JUSTICE SOTOMAYOR: I'm sorry. Does  
4 the injunction tell the governor that he has to  
5 enforce this law?

6 MR. OLSON: It -- no, it says that the  
7 repeal --

8 JUSTICE SOTOMAYOR: Well --

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

10 JUSTICE SOTOMAYOR: If -- if a act is  
11 unconstitutional, those laws basically go by  
12 the wayside no matter what. But my question to  
13 you is I don't -- I read the injunction. I  
14 don't see it anywhere telling the governor he  
15 has to enforce these prohibitions.

16 MR. OLSON: No, it doesn't. What the  
17 -- what -- the governor's responsibility to  
18 enforce the law --

19 JUSTICE SOTOMAYOR: Mr. Olson, if  
20 every governor enforced every law on the book,  
21 the state would be more than bankrupt. It  
22 would have no way of surviving.

23 MR. OLSON: I understand that.

24 JUSTICE SOTOMAYOR: There are  
25 countless laws, and even laws that are in

1 force, that are not enforced totally.

2 MR. OLSON: I understand --

3 JUSTICE SOTOMAYOR: States make  
4 choices all the time.

5 MR. OLSON: Yes. And -- and -- but  
6 the states make though choices then. Here we  
7 have --

8 JUSTICE SOTOMAYOR: There is nothing  
9 here telling this state that it has to enforce  
10 this law.

11 MR. OLSON: If there is an order from  
12 a federal court saying that the legislature,  
13 having repealed a statute, must un-repeal it,  
14 put it back on the books. And what you're  
15 saying is that the governor doesn't have to  
16 enforce that law. It's a law on the books of  
17 New Jersey. The governor and executive branch  
18 of New Jersey officials have taken an oath to  
19 uphold the laws of the state of New Jersey, and  
20 here is a federal court that comes along and  
21 basically says we're going to order the statute  
22 to be back on the books, but just forget about  
23 it.

24 This is a very, very strange  
25 situation --

1 JUSTICE SOTOMAYOR: What's the  
2 difference between that and this law is  
3 unconstitutional? This law is preempted or  
4 just a simple ruling by the court, this law is  
5 preempted? Period, end of story.

6 MR. OLSON: This was a repeal.

7 JUSTICE SOTOMAYOR: If -- if -- if, as  
8 I said, the court had simply said this is  
9 preempted.

10 MR. OLSON: And what this -- what the  
11 "this" is in your question is a repeal of a  
12 prohibition of sports betting, which means the  
13 repeal that the legislature carefully did in  
14 response to the Third Circuit's decision and  
15 the government and the leagues both saying you  
16 may repeal any law you wish --

17 JUSTICE SOTOMAYOR: I have three ways  
18 of looking at this case or of the issues here.  
19 The first way is to say that this is a repeal,  
20 which it seems you're arguing, and you're  
21 saying to us does or does not this statute  
22 permit a repeal?

23 And if I say it permits repeals of all  
24 kinds, partial or complete -- partial or not  
25 partial, we avoid the constitutional question

1 because then you could do whatever kind of  
2 appeal you want.

3 The second way to look at this is that  
4 the statute does not prevent repeals at all.  
5 That's what you're arguing right now. That  
6 would make this statute unconstitutional.

7 And the third approach is basically  
8 what the government is arguing here, which is  
9 it prevents -- it permits complete repeals but  
10 not partial repeals because partial repeals of  
11 the nature taken here are actually  
12 authorizations that are prohibited by the law.

13 So those are the three approaches. Am  
14 I missing something in what the -- those  
15 approaches are?

16 MR. OLSON: Yes, because the effect of  
17 the statute is to prohibit New Jersey -- the  
18 statute was intended to ban sports --

19 JUSTICE GINSBURG: That's the second  
20 --

21 MR. OLSON: -- betting.

22 JUSTICE SOTOMAYOR: -- that's the  
23 second. Or is this a fourth way of looking at  
24 it?

25 MR. OLSON: No, this is -- this is one

1 way, and I submit the only way, of looking at  
2 the statute. From its title, to its  
3 legislative history, to its exact language, it  
4 was intended to prohibit sports betting under  
5 state law. Now --

6 JUSTICE SOTOMAYOR: That's my second  
7 way. That's my second way.

8 MR. OLSON: -- sports betting is  
9 taking place under state law. All over the  
10 United States in every state, except Nevada,  
11 it's -- with these other limited exceptions, is  
12 illegal.

13 What -- what New Jersey has decided,  
14 not just that we want to repeal, because if you  
15 repeal --

16 JUSTICE GORSUCH: Mr. --

17 MR. OLSON: -- all the --

18 JUSTICE GORSUCH: -- Mr. Olson, you --  
19 you did make the argument below that there was  
20 no authorization because the statute didn't  
21 regulate how sports betting would take place.  
22 You've abandoned that argument on statutory  
23 interpretation ground.

24 MR. OLSON: We did --

25 JUSTICE GORSUCH: I was curious, why?

1 MR. OLSON: The only -- we're  
2 responding to a -- arguments by our opponents  
3 and a Third Circuit decision that says --

4 JUSTICE GORSUCH: But -- but -- but,  
5 we normally -- we normally interpret statutes  
6 in ways to avoid constitutional difficulties,  
7 not in ways to create --

8 MR. OLSON: Yes. And the only way to  
9 avoid that has been suggested here is that  
10 there may be some appeals -- and the Third  
11 Circuit used the language "too much" -- "too  
12 much authorization," which is very much like  
13 the language in the Printz case, "too much  
14 policy-making," and the Court said in that case  
15 that's not a line that's permissive with  
16 respect to regulating what the states are  
17 doing.

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

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

22 MR. OLSON: We would take the win  
23 except, Your Honor, the consequence of that is  
24 that we would have a statute intending to  
25 prohibit the spread of sports betting, and our

1 opponents say, well, in order to make that  
2 statute constitutional -- because they  
3 recognize the commandeering problem right from  
4 the beginning. In order to make that  
5 constitutional, you will -- we can allow you to  
6 eliminate all prohibitions of sports betting.

7 So an -- an effort by Congress to stop  
8 the spread of sports betting would lead to an  
9 interpretation, in order to hold it  
10 constitutional, where all limits on sports  
11 betting were removed.

12 If the Court permits I would like to  
13 remove -- reserve the remainder of my time.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 Mr. Olson.

16 Mr. Clement.

17 ORAL ARGUMENT OF PAUL D. CLEMENT

18 ON BEHALF OF THE RESPONDENTS

19 MR. CLEMENT: Mr. Chief Justice, and  
20 may it please the Court:

21 PASPA does three basic things. First,  
22 it tells the states that they may not  
23 themselves operate or advertise sports gambling  
24 schemes such as a sports-based lottery or a  
25 sports book.

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

4           And, thirdly, it tells states that  
5   they may not authorize or license third parties  
6   to conduct those sports gambling schemes that  
7   would violate federal law.

8           JUSTICE KENNEDY: But it does so by  
9   this mechanism. It leaves in place a state law  
10  that the state does not want, so the citizens  
11  of the State of New Jersey are bound to obey a  
12  law that the state doesn't want but that the  
13  federal government compels the state to have.  
14  That seems commandeering.

15          MR. CLEMENT: No, Justice Kennedy, we  
16  don't think PASPA operates in that way. We  
17  think that, if New Jersey wants to say we're  
18  going to lift all our prohibitions, we think,  
19  at least as to that law, it would not be  
20  preempted by PASPA as written.

21          I think it's a separate question,  
22  especially in New Jersey, whether the private  
23  conduct that would take place pursuant to that  
24  repeal, especially at casinos and racetracks,  
25  would be prohibited by 3702(2).



1 JUSTICE KENNEDY: But the partial  
2 repeal is forbidden, correct?

3 MR. CLEMENT: This partial repeal is  
4 forbidden.

5 JUSTICE KENNEDY: Correct.

6 CHIEF JUSTICE ROBERTS: Mr. --

7 MR. CLEMENT: This partial repeal, but  
8 think about how strange --

9 JUSTICE KAGAN: What -- what partial  
10 -- what partial repeals are not forbidden?  
11 What could the state do?

12 MR. CLEMENT: Well, first of all, I  
13 think it's important to recognize that what  
14 PASPA regulates, and it does regulate it quite  
15 comprehensively, is the operation of sports  
16 gambling schemes. It doesn't actually regulate  
17 sports gambling in the generic sense, and it  
18 says nothing about individuals engaging in  
19 sports gambling.

20 So, if New Jersey wants to say, look,  
21 all our prohibitions which right now are both  
22 on the supply side and the demand side, all of  
23 its prohibitions on the demand side, it can  
24 partially repeal. It --

25 CHIEF JUSTICE ROBERTS: Could a state

1 enact a law -- the federal government enact a  
2 law saying no state shall pass an income tax  
3 greater than 6 percent?

4 MR. CLEMENT: I -- I think it might be  
5 able to do that because -- put it this way, I  
6 mean, I don't know why in principle that would  
7 be so different from the statute at issue in  
8 Baker, which says no state shall issue a bearer  
9 bond and --

10 CHIEF JUSTICE ROBERTS: No state shall  
11 issue?

12 MR. CLEMENT: A bearer bond. So I  
13 think it's the same. But I think, to the  
14 extent there would be anything odd about it,  
15 and it's what Mr. Olson suggests is odd about  
16 PASPA, is this idea that there's just a  
17 preemption provision.

18 And even he seems to concede that, if  
19 Congress regulated the field, that there would  
20 be no problem with the preemption provisions --

21 CHIEF JUSTICE ROBERTS: Well, it seems  
22 to me that there would be something a little  
23 more odd about it, which is it goes to the  
24 fundamental powers and prerogatives of a state  
25 to sort of function their own -- own

1 government, if you say you can go so far as to  
2 regulate what level of income tax they can  
3 charge.

4 MR. CLEMENT: Well, you're right, Mr.  
5 Chief Justice. I thought your -- maybe I  
6 should amend my remarks to say I don't think  
7 that there would be a commandeering problem  
8 with that statute.

9 Now, there might be some other  
10 federalism problem, you know, I think if -- if  
11 the -- if the Court -- if Congress tells the  
12 state to move its state capital, I'm not sure  
13 it's a commandeering problem. I just think  
14 that it's, you know, I mean, not to use a word  
15 maybe I'm not supposed to, but maybe --

16 CHIEF JUSTICE ROBERTS: Well --

17 MR. CLEMENT: -- it's a National  
18 League of Cities problem, but I don't think  
19 it's a commandeering problem.

20 CHIEF JUSTICE ROBERTS: Well, you  
21 could imagine a situation where it's the same  
22 kind of commandeering. The federal government  
23 wants to reduce expenditures on public employee  
24 pensions, so it tells the states there's a  
25 state law, you cannot spend more than

1 20 percent of your budget on -- on state  
2 employee pensions. They're commandeering the  
3 state to achieve that result.

4 Can they do that?

5 MR. CLEMENT: Again, I don't think  
6 that's a commandeering problem. I do think  
7 it's probably a national states/League of  
8 Cities problem. And, you know, if the Court  
9 wants to say that there are certain things that  
10 get too far into the court -- the state's  
11 kitchen, you know, that's one thing.

12 But I do think --

13 JUSTICE KENNEDY: But the Chief's --  
14 the Chief's hypothetical indicates that this  
15 blurs political accountability. The citizen  
16 doesn't know is this coming from the federal  
17 government, is this coming from the state  
18 government. That's precisely what federalism  
19 is designed to prevent.

20 MR. CLEMENT: And precisely in New  
21 York, this Court said there's not an  
22 accountability problem with preemptive  
23 legislation.

24 JUSTICE BREYER: If it's for --

25 MR. CLEMENT: And I do think it's

1 worth -- I -- I'm -- just to finish the point,  
2 I mean, I do think it's worth recognizing that  
3 you have three pieces, three legs of the stool,  
4 if you will. One says to states, you can't do  
5 this. That, the other side, doesn't have an  
6 objection to.

7           The other one says, private parties,  
8 you cannot do this pursuant to state law.  
9 That, because it's regulation of private  
10 parties --

11           JUSTICE KENNEDY: Are there other  
12 statutes that rely on -- on prohibition of  
13 state action without an accompanying federal  
14 policy?

15           MR. CLEMENT: Justice Kennedy, I don't  
16 know that there are. I actually think maybe  
17 there are. It's just that the federal policy  
18 that they enforce is implicit. So there's a  
19 provision that says that you can't have  
20 discriminatory taxes against railroads. That's  
21 all the provision says.

22           I assume, in interpreting that, you'd  
23 think, well, Congress has said they -- they  
24 don't want to have that kind of discrimination  
25 in interstate commerce. But here, you don't

1 have to look where the federal policy is. They  
2 say, we don't want sports gambling schemes. We  
3 don't want the states to do it. We don't want  
4 the private parties to do it.

5 JUSTICE BREYER: It's a certain  
6 kind --

7 CHIEF JUSTICE ROBERTS: Isn't it  
8 enough just to say -- isn't it enough just to  
9 say it's illegal for entities, people or  
10 otherwise, to engage in gambling on sports  
11 events? That would be the federal government  
12 regulating this area. And then it has what is  
13 the normal preemption clause, which it says --  
14 where it says not with any -- notwithstanding  
15 any state law to the contrary.

16 MR. CLEMENT: And -- and, Mr. Chief  
17 Justice, I think, at the end of the day, that's  
18 what PASPA does. I think it was worded in a  
19 particular way for a particular reason, which  
20 is the one set of federal statutes you should  
21 look at in interpreting PASPA are the  
22 preexisting provisions in Title 18 that already  
23 told private parties that, if they engaged in a  
24 sports gambling scheme or a gambling business  
25 in violation of state law, that was already a

1 federal felony, 1084, Title 18, 1301 through  
2 1304 of Title 18, as to lotteries and probably  
3 most clearly 18 U.S. --

4 CHIEF JUSTICE ROBERTS: But, that's a  
5 very odd way -- that's a very -- and this is,  
6 of course, subsection 2. It's a very odd way  
7 to phrase something. It's illegal if it's  
8 pursuant to state law.

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

10 CHIEF JUSTICE ROBERTS: In other  
11 words, if the state law says you can do it,  
12 that's the only situation in which it's  
13 illegal. If the state law doesn't say anything  
14 about it, well, feel free, you can do it.

15 MR. CLEMENT: But, Mr. Chief Justice,  
16 that's why I think the oddity goes away  
17 entirely if you understand that, before  
18 Congress passed PASPA, it was already unlawful  
19 as a matter of federal criminal law for a  
20 private party to operate a sports gambling  
21 scheme in violation of state law, so, in a  
22 sense --

23 JUSTICE BREYER: In violation of state  
24 law. That's --

25 MR. CLEMENT: In violation of state

1 law.

2 JUSTICE BREYER: No, go back for a  
3 second. One of the purposes, which is not the  
4 one Justice Kagan mentioned, but it's the best  
5 one as this case is concerned that I could  
6 find, is the notion that federal statutes  
7 should address themselves to individuals and  
8 not to states. All right?

9 Now, that can't be 100 percent true  
10 because we have all preemption, but you can  
11 still look at it as basically true with  
12 preemption being a commerce cause based, for  
13 example, exception. Then ask, what have we  
14 here?

15 Well, is there NTSA, you know,  
16 Transportation Safety Act, OSHA -- no, nothing  
17 like that. There is no federal regulation of  
18 that kind. Is there Deregulation Act, which  
19 says that it is the federal policy that there  
20 will be free enterprise in fares? No, because  
21 all the things you mentioned have the word  
22 "state law" in it.

23 So all we have here are a group, if  
24 you like, of provisions, all of which are  
25 addressing themselves to what kind of law a



1 state may have without a clear federal policy  
2 that distinguishes between what they want  
3 states to do and what the federal government is  
4 doing.

5           Given those circumstances, it falls on  
6 the subject matter of this law is the state.  
7 That's what this is about, telling states what  
8 to do, and therefore, it falls within  
9 commandeering. A little long, but that's how I  
10 was reading New York, the notion of not  
11 addressing itself to the states, and it's long  
12 so that you can answer the whole thing.

13           MR. CLEMENT: Well, I'll try to answer  
14 the whole thing, but I'll start with the  
15 proposition that we know there's absolutely  
16 nothing wrong with congressional legislation  
17 that operates on states as market actors. And  
18 that's what the first four prohibitions in  
19 3702(1) plainly do. They tell -- tell the  
20 states, you can't operate, advertise, sponsor,  
21 or promote sports gambling schemes.

22           So that's okay. It also tells private  
23 parties that you can't do those four things  
24 pursuant to state law. And keep in mind, those  
25 private parties can't do it as a matter of

1 federal law in violation of state law because  
2 it's a federal criminal prohibition.

3 So all that leaves, then, is the  
4 provisions that they've challenged, the license  
5 or authorize. And all those are, in the  
6 context of this statute, is an express  
7 preemption provision, which, of course, it's  
8 addressed to the states and local governments  
9 because states and local governments are the  
10 ones that can pass laws that might be  
11 preempted.

12 But I don't think it creates any  
13 problem. Think about it -- I think it's very  
14 analogous to Baker. In Baker, Congress told  
15 the states they couldn't have bearer bonds.  
16 They also told private parties, you can't have  
17 bearer bonds.

18 JUSTICE KENNEDY: But -- but you --  
19 you begin by saying that this is market  
20 participant as to the first three, but it's not  
21 as to the fourth.

22 MR. CLEMENT: Well, it's -- I -- I  
23 don't mean to be pedantic. It's market  
24 participant as to the first four, not to the --  
25 not to the fifth and the sixth, which are

1 licensed and authorized.

2 But -- but my point is you're already  
3 telling the states that they can't do  
4 something, just like Congress did in Baker.  
5 You can't issue bearer bonds.

6 3702(2), especially right against the  
7 backdrop of statutes like 18 U.S.C. 1955, tells  
8 private parties, you can't issue bearer bonds,  
9 you can't operate sports gambling schemes.

10 So the only thing in the middle is a  
11 provision that says, states, you can't  
12 authorize or license private parties to engage  
13 in conduct that violates federal law. If that  
14 provision weren't in the statute, I think the  
15 same laws would be impliedly preempted under  
16 those that apply in applied preemption and if  
17 Congress says expressly those laws, states,  
18 don't do that, don't authorize and don't  
19 license private parties to engage in conduct  
20 that would violate federal law. That's classic  
21 preemption.

22 CHIEF JUSTICE ROBERTS: Well, you seem  
23 -- you said subsection 2 is the other side of  
24 the coin of subsection 1. And it seems to me  
25 that if that's the case, that subsection 2

1 cannot be severable from subsection 1.

2 MR. CLEMENT: Well, I don't know if I  
3 used the phrase "other side of the coin," Your  
4 Honor, but I do think that it is not just  
5 severable; I think it operates independently,  
6 and it operates without even a constitutional  
7 issue.

8 CHIEF JUSTICE ROBERTS: To do the same  
9 thing, right? Because it says that it is  
10 illegal for individuals to follow state law or  
11 to engage in activity protected, authorized  
12 under state law, which seems to me to be the  
13 same thing as saying states shall not authorize  
14 individuals to do that.

15 MR. CLEMENT: Well, Your Honor, a  
16 couple of points. One is I do think there's  
17 some difference in text between 3702(2) and  
18 3702(1), and I think there's an argument that  
19 the parties haven't had to brief here because  
20 this really hasn't been a 3702 case, but I  
21 think there's a good argument that 3702(2) is  
22 actually broader, and "pursuant to law" is  
23 broader than "licensed or authorized by law."

24 So just put that to one side, though.  
25 What I would say is, particularly when you read

1 3702(2) against the backdrop of the preexisting  
2 federal statutes in Title 18 that made  
3 operating a sports gambling scheme, in  
4 violation of state law, a federal criminal  
5 prohibition, then it's a comprehensive scheme.  
6 It basically says, private parties, there's  
7 something that is essentially a cancer on  
8 interstate commerce that we don't want to take  
9 place. And that is --

10 JUSTICE GORSUCH: But, Mr. Clement,  
11 how do we know that Congress would have passed  
12 (2) without (1)? (1) makes the regulation free  
13 because it says, states, you have to do this.  
14 And it doesn't cause any budget impact on the  
15 federal government.

16 (2), under your interpretation, is a  
17 direct regulation by the government and,  
18 therefore, might cost money. And you could see  
19 a legislature saying: Well, you know, (1)  
20 makes sense, and I'm only going to vote for (2)  
21 because of (1) --

22 MR. CLEMENT: So --

23 JUSTICE GORSUCH: -- because it's  
24 free. It comes for free.

25 MR. CLEMENT: So -- so, Justice

1 Gorsuch, I'd like to make two points in  
2 response to that. One is, on this idea that  
3 the CBO scored it as being zero and so it's  
4 free, we actually looked at other preemption  
5 provisions and other federal criminal  
6 provisions, and CBO tends to score them the  
7 same way. They basically say --

8 JUSTICE GORSUCH: That's neither here  
9 nor there --

10 MR. CLEMENT: Okay. But then --

11 JUSTICE GORSUCH: -- for purposes of  
12 my -- my question. My question is, if we're  
13 asking the severability question the Chief  
14 Justice posed to you, one of the questions we  
15 have is what Congress would have done in a  
16 different world? Now, that's a very hard  
17 question to answer, but that's the question  
18 we were posed.

19 And how do we know Congress would have  
20 passed (2) without (1), given that (2) in this  
21 world, if it's -- if (1) is fine, (2) comes for  
22 free?

23 MR. CLEMENT: So, Justice Gorsuch, if  
24 I could, I'd like to refine the question in  
25 this way, and you tell me if it's unfair, but I

1 think really the critical question is would  
2 Congress have wanted to have the first four  
3 prohibitions in (1) and the prohibitions in (2)  
4 if it couldn't have the "licensed or authorized  
5 by law" provision?

6 I think that's the relevant question  
7 because their constitutional argument only goes  
8 to "licensed or authorized by law." And I  
9 think, although all these counterfactual  
10 questions are difficult, I think this may be  
11 the easiest one that you'll ever have because I  
12 think the statute operates almost the same way.

13 The net effect of a statute that said  
14 that states can't sponsor, operate, advertise,  
15 promote sports gambling schemes and neither can  
16 private parties pursuant to state law, and, by  
17 the way, they can't do it in violation of state  
18 law because of other provisions, that world,  
19 what it would mean is we should have gone for  
20 the injunction against the private parties,  
21 which, by the way, we did in the district court  
22 and that issue, I think, is still there in  
23 front of the district court. When we first  
24 filed our TRO, we went against the state and we  
25 went against the private parties. We got a TR

1 O against both, and then there was an unclear  
2 hands argument that arose only with the private  
3 parties, so the district court enjoined only  
4 the -- the states.

5 But the net effect of these two  
6 statutes without "authorized or licensed" is  
7 the same as a statute that sort of left that to  
8 implied preemption. It's essentially the same  
9 statute. So I think in a counterfactual world,  
10 would Congress want a statute that still told  
11 the states that you can't operate or advertise  
12 sports gambling schemes and told private  
13 parties that you can't operate sports gambling  
14 schemes pursuant to state law and, oh, by the  
15 way, you can't do it in violation of state law  
16 anyway because that violates a whole bunch of  
17 criminal prohibitions, obviously they want  
18 that.

19 You know, this express preemption  
20 provision, it's -- it's like neat --

21 JUSTICE BREYER: One -- one --

22 MR. CLEMENT: -- tidy law-making, but  
23 it's not vital.

24 JUSTICE BREYER: Give me a one  
25 sentence answer. In the Airline Deregulation



1 Act, the Congress wanted a world, i.e., the  
2 United States, where market forces set prices.  
3 In all the acts you're talking about put  
4 together, Congress wanted the United States,  
5 fill in the blank.

6 MR. CLEMENT: The -- the Congress  
7 wanted there to be, putting aside the  
8 grandfather clause, no state-sponsored or  
9 -operated gambling taking place by either  
10 individuals or by the state.

11 JUSTICE BREYER: Right. Now, you had  
12 to use the word "state-sponsored" to date that  
13 and as soon as you had to describe it, you had  
14 to use the word "state-sponsored" there.  
15 "State-sponsored" means legislation, and,  
16 therefore, there is no interstate policy other  
17 than the interstate policy of telling the  
18 states what to do.

19 MR. CLEMENT: Can I amend my answer?

20 JUSTICE BREYER: Yes.

21 (Laughter.)

22 MR. CLEMENT: Congress -- Congress in  
23 all of these statutes did not want there to be  
24 sports gambling schemes operating in interstate  
25 commerce.

1 JUSTICE ALITO: Well, Congress could

2 --

3 MR. CLEMENT: They were indifferent --

4 JUSTICE ALITO: Congress could have  
5 prohibited sports gambling itself. So what  
6 federal policy is served by this statute that  
7 would not have been served by the former?

8 MR. CLEMENT: Two things, Justice  
9 Alito. First is Congress could have prohibited  
10 all sports gambling, but that would have  
11 required it to regulate individuals as sports  
12 gamblers as opposed to entities, businesses  
13 that were providing sports gambling schemes.

14 JUSTICE ALITO: All right. So I amend  
15 the question. Congress could have prohibited  
16 gambling enterprises itself. No question it  
17 could have done that, assuming it's within the  
18 Commerce Clause. What policy does this statute  
19 serve that that would not?

20 MR. CLEMENT: Ironically enough,  
21 Justice Alito, it actually furthers federalism  
22 values by saying, instead of having a  
23 one-size-fits-all policy which says as a matter  
24 of federal law everybody who operates a sports  
25 gambling scheme is going to face two years in

1 the federal penitentiary and a fine of \$10,000,  
2 this statute basically says, look, 46 states  
3 right now are more or less doing what we want,  
4 but they're doing it in 46 different ways. In  
5 some cases, it's --

6 JUSTICE GORSUCH: Where does it serve  
7 the interest of making it cheap by allowing  
8 Congress not to have to expend any funds to  
9 enforce its laws?

10 MR. CLEMENT: With all due respect, I  
11 don't think trying to do this on the cheap was  
12 their principal concern. As I said, as a  
13 general matter, when Congress passes a new  
14 federal statute, criminal statute, it doesn't  
15 really have like a big budgetary impact because  
16 you don't, like, have to make like a new AUSA  
17 to enforce that statute. You just let  
18 everybody enforce it, and the enforcement  
19 priorities that Justice Sotomayor alluded to  
20 work on the federal level as well.

21 And if you preempt state law, that  
22 tends to not have a budgetary impact either.  
23 But what's distinct about this is it basically  
24 says, look, 46 states, if you want to regulate  
25 this in 46 different ways, have at it. If you

1 want to repeal those laws, I mean, you can do  
2 it. I mean, that repeal itself won't violate  
3 3702(1). The sports gambling that takes place  
4 pursuant to it might violate 3702(2).

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

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

16 MR. CLEMENT: I would draw the line  
17 that this Court drew in *New York and Printz*  
18 because it was writing its opinions against the  
19 backdrop of all sorts of preemption statutes  
20 that various parties were saying were relevant  
21 and the Court was distinguishing. I would say  
22 that, unless the Congress basically tells the  
23 states that they must regulate -- that they  
24 must basically pass federally prescribed  
25 legislation or enforce a federally -- a federal

1 policy as in Printz --

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

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

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

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

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

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

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

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

15          CHIEF JUSTICE ROBERTS: Certainly.

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

23          And we now have this prospect that  
24          maybe some states are going to authorize this,  
25          and we're going to complete our federal policy

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

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

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Mr. Wall.

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

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

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

23 As to the first, I'd encourage the  
24 Court to look at page 383 of the JA. The  
25 injunction in this case does not remotely

1 require the state to keep a law on its books.

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

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

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

24           Federal law criminalizes the operation  
25 of a gambling scheme that's in violation of



1 state law, so when states in the early '90s  
2 started looking at authorizing these things,  
3 Congress handled the other half of the circle  
4 and said, all right, look, we're not going to  
5 make it criminal, but we will give an  
6 injunctive action to the attorney general and  
7 the Leagues so that if states start authorizing  
8 sports gambling schemes, which we know states  
9 can't do and we know individuals can't do, and  
10 they've never argued there's any constitutional  
11 problem with those two legs of the stool, then  
12 if states start doing that, we'll give a civil  
13 injunctive action, and that's far less invasive  
14 of state sovereignty.

15 And I think -- look, that this -- I  
16 mean, as Mr. Clement says, it's Baker all over  
17 again. The states can't do it, and the  
18 individuals can't do it. They've never argued  
19 there's any --

20 JUSTICE SOTOMAYOR: Mr. Wall, can you  
21 go back to the basic question, and it was  
22 raised, I think, by the dissent, Judge Fuentes,  
23 who said you start this discussion from the  
24 fact that the law exists, if it's a partial or  
25 full repeal, the law doesn't exist, period, end

1 of story.

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

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

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

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

7           MR. WALL: So I think it's even  
8           simpler than that, Justice Sotomayor, and it  
9           gets to something Justice Gorsuch said earlier.  
10          They want to interpret the statute as barring  
11          all repeals so that they can create a  
12          constitutional problem with two words of the  
13          statute or law and leverage that to try to take  
14          down the entire thing.

15          And our point is pretty simple. If  
16          the Court sticks to what it says in Gunther and  
17          says an authorization is affirmative enabling  
18          conduct, then that's this repeal because it  
19          channels to particular state license providers,  
20          but it's not going to be most things that New  
21          Jersey does, and read that way, there's no --

22          JUSTICE GORSUCH: But where is the  
23          line? The Third Circuit said de minimis  
24          private gambling isn't covered. On page 30 of  
25          your brief, you indicate maybe the state could

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

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

18 JUSTICE GORSUCH: But have no record  
19 about that, as Justice Sotomayor points out.  
20 And the Respondent took the position that  
21 authorizing means any repeal of any degree of  
22 any kind. Why shouldn't the Respondent have to  
23 live with that invited error, perhaps, now in  
24 this case?

25 MR. WALL: Justice Gorsuch, I don't

1 think it's a record question.

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

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

11 JUSTICE SOTOMAYOR: I'm sorry, but the  
12 earlier version actually explicitly licensed --  
13 it explicitly licensed and set up a complete  
14 operation requirements and other things.  
15 That -- I don't think they would have had a  
16 snowball's chance to say that that wasn't  
17 licensing or -- or effectively operating.

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

22 MR. WALL: Justice Sotomayor, unless  
23 what the Court wants to say is no repeal can be  
24 an authorization, even if New Jersey took away  
25 its prohibition only at the Borgata, which

1 would provide a roadmap, I think, for flouting  
2 the Supremacy Clause, because then you could  
3 just enact a prohibition and peel it back  
4 wherever you wanted.

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

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

21 CHIEF JUSTICE ROBERTS: What if the  
22 repeal -- what if the repeal is across the  
23 board, no exceptions?

24 MR. WALL: If New Jersey just repeals  
25 its prohibitions, we have said we don't have a

1 problem with that.

2 CHIEF JUSTICE ROBERTS: Well, is that  
3 serious? You have no problem if there's no  
4 prohibition at all and anybody can engage in  
5 any kind of gambling they want, a 12-year-old  
6 can come into the casino and -- you're not  
7 serious about that.

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

15 CHIEF JUSTICE ROBERTS: Well, but when  
16 you put the state in a position that that's the  
17 only thing they can do, that's not a real  
18 choice.

19 MR. WALL: Oh, it's not the only thing  
20 they can do. They can strengthen or they can  
21 repeal in whole or they can repeal in part in  
22 various ways. The one thing they can't do is  
23 affirmatively engage in the one kind of conduct  
24 that Congress took off the table as a policy  
25 matter, and that's the definition of

1     preemption. Now, I'll grant that Congress may  
2     have assumed --

3             JUSTICE GINSBURG: But the government  
4     -- but the government -- Mr. Wall, the last  
5     time around, the government did say, in  
6     recommending that we deny cert, that PASPA does  
7     not require New Jersey to retain prohibitions  
8     it adopted. Pre-PASPA, it is free to repeal  
9     those prohibitions in whole or in part. That's  
10    what the government represented to this Court.

11            Was that -- was that statement  
12    inaccurate?

13            MR. WALL: No. I think we did not  
14    take into account the gamesmanship in which New  
15    Jersey was going to engage. We said the same  
16    thing we're saying here today, that they've got  
17    a lot of options on the table.

18            The one thing they can't do is the one  
19    thing that Congress preempted. And so we said  
20    they can engage in lots of partial repeals, but  
21    we didn't have in mind that New Jersey would  
22    come back and do the 2012 law, but style it as  
23    a partial repeal. And, yes, I wish we had  
24    dropped a footnote and said, if New Jersey  
25    tries to accomplish the same thing, but just



1 styles it as something different, that will  
2 equally be an authorization for PASPA purposes.

3 And just to return to your question,  
4 Mr. Chief Justice, I will completely grant that  
5 Congress assumed that states were not going to  
6 start authorizing this if they couldn't profit  
7 from it. And that assumption was true for a  
8 long time.

9 And if states start lifting their  
10 prohibitions in whole, I think Congress may  
11 well want to revisit that. But PASPA doesn't  
12 have anything to say about it. And what the --  
13 what New Jersey is doing is giving an unnatural  
14 interpretation of federal statute to create a  
15 small problem with two words and then try to  
16 leverage that small sickness to take down the  
17 entire patient.

18 And that's just not the way statutory  
19 interpretation and severability normally work,  
20 but they have to do that because it's the only  
21 way that can get them where they want to go,  
22 which is to take down the private party  
23 prohibition in 3702(2), which they've never  
24 argued is even -- even potentially  
25 accommodating language.

1           JUSTICE BREYER:  You're saying this is  
2   authorization, not a repeal, because it's  
3   limited to the casinos, which probably have all  
4   kinds of other rules and regulations, 9 a.m.  
5   opening and dah, dah, dah, dah, dah, and under  
6   those circumstances, it amounts to an  
7   authorization, not a simple repeal, is that the  
8   argument?

9           MR. WALL:  Exactly.

10          JUSTICE BREYER:  Okay.

11          MR. WALL:  If you're trying to figure  
12   out what constitutes an authorization to  
13   operate a sports gambling scheme, any law that  
14   says everybody can't do it, except for you two  
15   or three, that's an authorization.

16                 And it doesn't matter whether the  
17   state gets there by legislating up or down.  It  
18   puts substance over form.

19          JUSTICE BREYER:  All right.  And then  
20   -- they're then -- once you say that, I think  
21   their argument is, but, you see, there is no  
22   federal policy which says states can't -- well,  
23   there is no federal policy against authorizing  
24   sports gambling but for a federal policy that  
25   says a state can't authorize sports gambling,

1 and that is to commandeer.

2 Have I got that right?

3 MR. WALL: I think that is their  
4 argument, but I think it doesn't make sense for  
5 the simple reason Mr. Clement gave. Baker  
6 would not have been different if, in addition  
7 to having a prohibition on states and  
8 individuals, it had said states are preempted  
9 if they try to authorize private conduct that's  
10 separately barred by the Act.

11 If this Court finds that to be a  
12 latent commandeering violation, the government  
13 would respectfully submit it's going to spend  
14 an awfully long time figuring out how to unblur  
15 the clear line between preemption and  
16 commandeering.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Five minutes, Mr. Olson.

20 REBUTTAL ARGUMENT OF THEODORE B. OLSON ON  
21 BEHALF OF THE PETITIONERS

22 MR. OLSON: Thank you, Your Honor.  
23 May it please the Court.

24 JUSTICE BREYER: If I've got your  
25 argument right just now, just say yes.

1 Otherwise forget it.

2 MR. OLSON: You had it right before.

3 (Laughter.)

4 JUSTICE BREYER: But I had it right  
5 just now? Okay, you weren't -- forget it.  
6 Forget it. Forget it. Go ahead.

7 JUSTICE SOTOMAYOR: Mr. Olson, I do  
8 have a question following up on what the Chief  
9 asked earlier. The Respondent says the New  
10 Jersey legislature is doing exactly what he  
11 thinks they shouldn't do or wouldn't do, which  
12 is that they are considering legislation that  
13 would fully repeal the sports betting  
14 prohibitions.

15 I understand it's being considered by  
16 both houses. Where does that consideration  
17 stand right now?

18 MR. OLSON: Well, I don't know where  
19 it stands. And I think it's utterly  
20 irrelevant. The -- the -- what the --

21 JUSTICE SOTOMAYOR: No, but you argued  
22 to us that no state legislature would do that.  
23 But here we have --

24 MR. OLSON: I --

25 JUSTICE SOTOMAYOR: -- two bills

1 introduced that would do just that.

2 MR. OLSON: Well, they have not --  
3 they're not laws yet. And what I said was  
4 Congress could not possibly have intended in a  
5 bill to prohibit this expansion of sports  
6 betting, to have it construed in a way that  
7 would remove --

8 JUSTICE SOTOMAYOR: Why?

9 MR. OLSON: -- all limitations.

10 JUSTICE SOTOMAYOR: Let me ask you,  
11 what's so crazy about Congress perceiving that  
12 states would never want 12-year-olds to go into  
13 gambling houses and that the states would find  
14 some way of prohibiting that or living with  
15 rules of some sort of creating laws,  
16 regulations, conduct that would prohibit that  
17 sort of thing?

18 MR. OLSON: What Congress can do is  
19 enact a statute that places restrictions on  
20 sports betting and -- and have a finely  
21 reticulated statute. It can adopt the -- the  
22 provision that it permitted Nevada to have,  
23 which is careful regulation of something that's  
24 taking place.

25 What we have now is activity that is

1 billions of dollars that is taking place  
2 throughout the United States. It is all  
3 unlawful. What New Jersey decided to do is --

4 JUSTICE SOTOMAYOR: That's your  
5 selective -- your selective prosecution theory,  
6 that they're permitting fantasy teams?

7 MR. OLSON: No, no, no, I'm not  
8 talking about fantasy at all. I'm talking  
9 about betting on sports games and --

10 JUSTICE SOTOMAYOR: There are four  
11 states that are -- are permitted to continue?

12 MR. OLSON: Nevada -- Nevada has  
13 sports betting and it has it regulated. It  
14 prohibits criminals from going into the  
15 business. It has open books and so forth.  
16 Those other three states were small slivers of  
17 lotteries.

18 What I'm saying is, and all of the  
19 evidence supports this, that betting on sports  
20 is taking place all over the United States.  
21 Five percent of it is legal in Nevada. The  
22 rest of it is illegal.

23 New Jersey decided we are going to  
24 look at it.

25 JUSTICE SOTOMAYOR: So why don't we --

1     why don't we legalize -- this is a  
2     hypothetical -- marijuana because all -- and  
3     all drugs, because there's a rampant market out  
4     there for those drugs, but we've made a policy  
5     choice that we don't want the state involved in  
6     promoting that type of enterprise.

7                 MR. OLSON:  And the federal --

8                 JUSTICE SOTOMAYOR:  Why is this any  
9     different?

10                MR. OLSON:  The Congress of the United  
11     States enacted laws with respect to marijuana  
12     and with respect to other substances.  And  
13     that's -- that's in play right now because  
14     various states have done various different  
15     things.

16                But we have no question here that what  
17     Congress intended to do was pass a law, would  
18     look at the statute, as I said before, the --  
19     the statute says it's an act to prohibit sports  
20     gambling under state law, not under federal  
21     law.

22                The preemption process starts with the  
23     idea that there must be a federal  
24     constitutional provision in a statute or in a  
25     treaty or in the Constitution, and then the

1 federal government may take steps to prevent  
2 states from interfering with the accomplishment  
3 of that.

4 My opponent, Mr. Clement, talked about  
5 the -- the -- the South Carolina versus Baker  
6 case. South Carolina versus Baker specifically  
7 said the exact same thing that New York versus  
8 United States says, and the Printz case says  
9 Section 310, regulated states activities, does  
10 not seek to control or influence the manner in  
11 which states regulate private parties.

12 And the same thing is true in the --  
13 in the Reno case. My opponent talked about  
14 statutes of general application. In the last  
15 sentence of that case, this Court specifically  
16 reserved the question whether Congress could  
17 single out states with respect to activities  
18 and didn't decide whether it could do so in --  
19 outside the context of a statute or general  
20 application.

21 When the -- when this suit was first  
22 filed by the Leagues, their complaint  
23 specifically said PASPA imposes a broad ban on  
24 sports betting, subject only to the narrow  
25 exceptions that apply here.



1 CHIEF JUSTICE ROBERTS: You have an  
2 extra couple minutes, Mr. Olson.

3 MR. OLSON: Thank you, Mr. Chief  
4 Justice.

5 This is, as the federal government  
6 said on page 15 of the federal government's  
7 brief, we are saying that state laws that  
8 attempt to change what New Jersey has done are  
9 nullified by PASPA.

10 Anyone familiar, as this Court is,  
11 with the history of the Constitutional  
12 Convention knows that there was specifically on  
13 the agenda an opportunity for Congress to  
14 nullify state laws. That was defeated.

15 The whole debate with respect to  
16 federalism had to do with whether Congress was  
17 going to be permitted to regulate interstate  
18 com -- regulate states or will it be required  
19 to regulate commerce first and, as an adjunct  
20 to that, constrain what states could do.

21 And that's exactly what this statute  
22 did, the federal government, that Congress  
23 wanted a prohibition under state law because it  
24 would have no responsibility, no  
25 accountability, and -- and our opponent's brief

1 says, if you're complaining about  
2 accountability, call your Senator.

3 That's exactly what the United States  
4 talked about, what the Court -- this Court  
5 talked about in New York versus United States.

6 The accountability is very important.  
7 The structure is important to the liberty of  
8 citizens. And this statute violates that  
9 ordained structure.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel. The case is submitted.

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

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