

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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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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