

Client Alert

Business Information for
Clients and Friends of
Shumaker, Loop & Kendrick, LLP

December 14, 2017



Handicapping *Christie v. NCAA*: How will the Supreme Court vote on PASPA?

Kevin P. Braig, Partner | kbraig@slk-law.com | 614.628.4433

Introduction

The briefing is complete and the oral argument is over in *Christie v. NCAA*. All that remains is for the Supreme Court to decide the case. How will the Court decide? Will New Jersey blow up the PASPA dam and send regulated sports betting gushing throughout the land? Or will the sports organizations maintain their right to decide how a controlled release of regulated sports betting should occur? Here is my handicapping of how each Justice may vote. But before we look at each Justice individually, there are three meta-aspects of this case that should be considered in handicapping the vote.

1. The mere fact that the Court accepted review of this case is of almost no value in handicapping the vote. It is unusual indeed for a state to launch a “we will not take no for an answer” assault on a federal statute as New Jersey has done here. With several other states potentially poised to launch similar assaults in other circuits, it makes as much sense for the Court to pro-actively take this case to affirm PASPA as it makes for it to take the case to strike down PASPA.

2. Only four current Justices have ever considered whether a federal statute is unconstitutional “commandeering” in violation of the 10th Amendment: Justices Kennedy, Thomas, Ginsburg and Breyer. Only two—Kennedy and Thomas—have ever found commandeering.

3. There are still five Justices on the Court who rejected review of New Jersey’s commandeering argument in *Christie I*. Pursuant to the “Rule of 4,” at least four Justices must vote to review for the Court to accept a case. In *Christie I*, New Jersey could muster at most three votes. Since that vote, Justice Gorsuch has replaced Justice Scalia. In light of these facts, Justice Scalia must have voted not to review in *Christie I* and Justice Gorsuch must have provided the critical fourth vote for review of the current version of the dispute. This gives insight into how to count the votes. First, this indicates it does not necessarily follow that a Justice will find unconstitutional commandeering just because a Justice is conservative. Justice Scalia was a poker-playing, state’s-rights-loving conservative who twice found unconstitutional commandeering. But he did not even see a need to look at New Jersey’s commandeering claim. Second, by simply accounting for the change on the bench from Justice Scalia to Justice Gorsuch, one is left with a well-grounded belief that there are still at least five Justices on the Supreme Court who passively affirmed the Third Circuit’s conclusion that PASPA does not unconstitutionally commandeer New Jersey’s power when they rejected review in *Christie I*.

In this context, here is what to consider as you handicap each Justice:

Chief Justice Roberts

The Chief Justice's vote is pivotal to the outcome of this case. He is not afraid to go his own way, as he demonstrated when he voted to uphold the Patient Protection and Affordable Care Act ("ACA" or "Obamacare") as a constitutional tax in *Nat'l Fed. of Ind. Business v. Sebelius*, 567 U.S. 519 (2012).

According to the transcript, during oral argument, the Chief Justice said he found PASPA to be "odd" in that Congress did not use "normal" preemption language in the statute. However, at least in the emotionless prose of the transcript, he sounded more puzzled by Congress' drafting of the statute than troubled by it. He did sound troubled if "anybody can engage in any kind of gambling they want" and "a 12-year-old can come into a casino." But he may have simply been distancing himself from a future full repeal of sports betting prohibitions that New Jersey has indicated it may pursue if PASPA is upheld.

In his review of *How Judges Think*, Judge Jeffrey Sutton characterized the Chief Justice as a judicial "minimalist" who values pragmatic "rejection of judicial activism in the sense of judicial aggrandizement at the expense of other branches of government." The Chief Justice's natural reluctance to avoid "judicial aggrandizement"—(i.e., increasing the power of the court)—will be enhanced by the fact the subject matter of the case is gambling. Issuing or denying a permit—whether the permit authorizes taking bets, emitting waste byproducts, or undertaking any other activity—is an *executive* power, not a judicial power. Consequently, courts generally are reluctant to issue permission to undertake an activity by issuing a declaratory judgment and are especially reluctant to issue permission when the subject matter of the declaratory judgment involves gambling.

The *Christie* case resembles a declaratory judgment action of a constitutional dimension. A vote for New Jersey will go against the Chief Justice's minimalist nature and be at the expense of the executive branch and its "private attorneys general," the sports organizations. The Sixth Circuit Court of Appeals, where Judge Sutton sits on the bench, found under the Interstate Horse Racing Act that a horsemen's association's private right to control expanded betting on the sporting events they provide (horse races) via an option to veto off-track betting pre-empted a conflicting Ohio law because the veto is "rationally related to the horseracing industry's

desire to avoid the harmful effects of unrestricted off-track wagering,' making it a legitimate exercise of congressional power." *Horsemen's Benevolent & Protective Association—Ohio Division, Inc. v. DeWine*, 666 F.3d 997 (6th Cir. 2012). Although the Chief Justice could go either way, he is most likely to take a similar view of the sports organizations' option to veto expanded sports betting and refuse to strip them of their federal right to control the expansion of regulated sports betting that is granted in PASPA.

Chief Justice Robert's Vote: PASPA is CONSTITUTIONAL

Justice Gorsuch

As noted above, Justice Gorsuch—the newest member of the bench—probably cast the fourth vote to review. It is suspected that he is keen to rebalance the distribution of power between state governments and the federal government. During oral argument, he cornered the Solicitor General on a "slippery slope" for indicating "maybe the state could have a [monetary] threshold [on bets on sports], and that wouldn't be authorizing" sports betting in violation of PASPA. The Solicitor General's argument that states can authorize "*de minimis* social sports gambling" without violating PASPA has always been a slippery slope because it sounds like the federal government is trying to tell state governments which sports betting laws they can have and which they cannot have. Justice Gorsuch clearly caught the Solicitor General on this slippery slope.

But Justice Gorsuch also asked New Jersey's counsel why New Jersey gave up its statutory argument that a limited repeal of a sports betting law is not an authorization and therefore does not violate PASPA, which would eliminate the need for the Supreme Court to determine if PASPA is constitutional or unconstitutional. It is always an uncomfortable spot for an advocate to be asked why an argument is *not* being advanced. It may have been Justice Gorsuch's way of telling New Jersey, "I'd like to help you. But you have not given me enough to do so." Or, perhaps, he was trying to emphasize to another member of the Court that the case cannot be decided narrowly and that now is the time to confront the constitutional issue and set a new balance of power between the state governments and the federal government. We can only speculate as to why Justice Gorsuch asked New Jersey's counsel why he abandoned the statutory argument. But we can be sure he had a purpose in doing so.

Justice Gorsuch's Vote: PASPA is UNCONSTITUTIONAL

Justice Ginsburg

Justice Ginsburg immediately pounced on New Jersey's counsel from the jump. She rhetorically questioned whether preemption is simply the federal government telling a state government that it may not regulate. She also pointed out that in upholding PASPA the Third Circuit "said each state is free to decide how much of a law enforcement priority it wants to make of sports gambling." In other words, Justice Ginsburg clearly recognized that enforcement of PASPA is *optional*. She was skeptical of the underlying premise of New Jersey's argument, which is PASPA prohibits New Jersey from de-criminalizing intrastate sports betting.

Further, when Justice Ginsburg asked the Solicitor General why he had taken the position that New Jersey "is free to repeal [its] prohibitions [on sports betting] in whole or in part" when he recommended denying review in *Christie I*, the Solicitor General said he did not anticipate New Jersey's "gamesmanship" in the form of a limited repeal that favored only casinos and race tracks. Calling out New Jersey's legislative action as "gamesmanship" is a pretty bold accusation. All judges dislike legal gamesmanship such as forum shopping and artfully drafted pleadings. Justice Ginsburg accepted his characterization of New Jersey's legislative action as "gamesmanship" without rebuking him and, more importantly, no other member of the bench jumped in to challenge his characterization of New Jersey's legislative action as "gamesmanship." Sometimes, what is not said in oral argument is just as important or even more important than what is said. The absence of any push back from any member of the Court on the Solicitor General's reference to "gamesmanship" could be an example of silence speaking loudly.

Justice Ginsburg's Vote: PASPA is CONSTITUTIONAL

Justice Kagan

Justice Kagan remarked that PASPA "sounds to me like the language of [permissible] preemption." She pointed out that Congress has the power to direct that a market remain completely unregulated, such as when price is allowed to serve as the sole regulator of a market. She also raised a difference

between when the federal government tells a state it "can't take some preferred policy option" and, on other hand, telling a state "you must help us" carry out federal policy. "I thought our cases were about the second thing," Justice Kagan said. "You must help us. You must be our little assistants when we promote or try to advance a policy objective." In the transcript, she did not sound like she thought New Jersey was being deputized as a "little assistant" under PASPA.

Justice Kagan's Vote: PASPA is CONSTITUTIONAL

Justice Sotomayor

Justice Sotomayor drew significant admissions from New Jersey's counsel. She asked counsel if betting on sports is commercial activity and, after extracting his admission that it is, observed that the "federal government can regulate commercial activity by the states." She also asked counsel if the lower court's injunction tells the Governor that he must enforce PASPA. After counsel admitted the injunction does not do so, she observed "[t]here is nothing here telling this state it has to enforce this law." Like Justice Ginsburg's questioning, Justice Sotomayor's questioning drove directly at the *optional* character of enforcement of PASPA. Perhaps tellingly, no other member of the bench jumped in to challenge her conclusion. The silence of the Court in response to Justice Sotomayor's strong and clear statement that New Jersey has no *obligation* under PASPA to enforce any sports betting law may speak more loudly than anything any other Justice actually said during the oral argument.

Justice Sotomayor's Vote: PASPA is CONSTITUTIONAL

Justice Kennedy

Justice Kennedy has twice voted to strike down a federal statute as unconstitutional commandeering. At oral argument, he stated PASPA "leaves in place a state law that the state does not want, so the citizens of the State of New Jersey are bound to obey a law that the state doesn't want but that the federal government compels the state to have. That seems commandeering." However, in *King v. Burwell*, Justice Kennedy raised 10th Amendment issues in oral argument and then joined a majority opinion that did not mention the 10th Amendment in upholding the federal statute.

Justice Kennedy's Vote: PASPA is UNCONSTITUTIONAL

Justice Alito

Justice Alito spoke just once during the *Christie* oral argument to point out Congress could have prohibited sports betting itself.

Justice Alito's Vote: PASPA is UNCONSTITUTIONAL

Justice Thomas

Justice Thomas is a wild card and tricky to handicap because he rarely speaks during oral arguments and did not do so during the *Christie* oral argument. Justice Thomas has twice voted to strike down a federal statute as unconstitutional commandeering, once without writing (*New York v. United States*) and once with an accompanying concurrence (*Printz v. United States*). In the latter case, Justice Thomas found the provision of the Brady Act requiring local law enforcement to carry out federal gun control policy violated the Commerce Clause itself in addition to the 10th Amendment. Justice Thomas wrote that, notwithstanding clear precedent to the contrary, he does not believe Congress has the power under the Commerce Clause to regulate purely intrastate transactions of any kind. If he sides with New Jersey, he likely will write a companion opinion again expressing this view.

But it is not a foregone conclusion that he will side with New Jersey. Justice Thomas exhibits strong libertarian tendencies and his concurrence in *Printz* was shaped by his libertarian view that the Second Amendment provides citizens an absolute personal right to bear arms. Economically, the cornerstone of libertarian belief is resources may not be transferred without consent. Under PASPA, the entities that hold the right to grant or withhold consent to expanded sports betting are private interest—the sports organizations—not a governmental interests.

Thus, it is quite possible Justice Thomas will view the sports organizations' option to withhold their consent to sports betting beyond Nevada as a libertarian right and the most important right to be protected by the Court. That position seems even more likely given that PASPA gave New Jersey a 1-year opportunity to authorize sports betting and New

Jersey failed to do so, which increases the probability that he will interpret New Jersey's legislative action as inappropriate governmental "gamesmanship" that seeks to transfer the wealth arising from sports betting without first obtaining the consent of the sports organizations. Further, Justice Thomas has a long record of voting with former Justice Scalia, which means he may have voted not to review in *Christie I* and may have again voted not to review this version of the dispute. If Justice Thomas remains true to his libertarian roots, he is likely to view PASPA as a straightforward grant of a right to prevent the transfer of resources without consent. Justice Thomas probably would like such a grant quite a bit.

Justice Thomas' Vote: PASPA is CONSTITUTIONAL

Justice Breyer

Justice Breyer is the "oral argument opposite" of Justice Thomas and is renowned for talking the most during arguments. He did so again when this case was argued.

Justice Breyer also was on the opposite side from Justice Thomas in *Printz v. United States*. In that case, Justice Breyer would have upheld Congress "federalizing" local law enforcement to carry out its gun control policy against an anti-commandeering challenge. To move from a position that would allow Congress to federalize the local sheriff to a position where Congress cannot grant an option to exclude sports betting beyond Nevada would be a major move indeed.

Justice Breyer is so verbose that some SCOTUS followers refer to his compound question/statements as a "Breyer Page" because it takes a page or more in the transcript to contain his full expression. In this transcript, Justice Breyer filled a little over a "Breyer Page" in which he seemed to be searching for a regulatory scheme in PASPA. He concluded by stating, "Given those circumstances, it falls on the subject matter of this law is the state. That's what this is about, telling states what to do, and therefore, it falls within commandeering." He then acknowledged that his remarks were "long" and invited counsel for the sports organization to "answer the whole thing." Most reports analyzing this part of the oral argument have concluded that Justice Breyer was indicating PASPA imposes unconstitutional commandeering. But that might not be the case. It might just be Justice Breyer being Justice

Breyer. Moreover, before launching into the “Breyer Page,” he observed the prohibition on federal statutes addressing themselves to states “can’t be 100 percent true.” It is possible that Justice Breyer ultimately will decide PASPA violates the 10th Amendment, but given his past vote in *Printz*, it seems more likely that in the end he will accept the sports organizations’ argument that the “regulatory scheme” is embodied in a cluster of federal statutes—PASPA, Wire Act, Illegal Gambling Business Act, etc.—or conclude that the regulatory scheme is a simple option to veto granted to the sports organizations as private attorneys general.

Finally, there is still an additional path Justice Breyer might take that was not part of the oral argument at all. As demonstrated by his dissent in *Printz*, Justice Breyer sometimes takes a comparative law approach and draws on international law to decide cases. In *Printz*, he looked to the law of Switzerland, Germany and the European Union to support upholding federalizing local law enforcement. If Justice Breyer goes down this path, he may look Down Under. In Australia, the sports betting regulatory scheme gives Australian sports organizations the equivalent of a “line-item veto.” Occasionally, an Australian sports organization will use this power to block a specific wager because it finds the structure of the wager presents too much risk to the integrity of the underlying sporting event. For example, in 2017, the Australian Football League (“AFL”) used its line-item veto to prevent operators from taking weekly bets on voting for the Brownlow Medal, the highest honor in the AFL. If Justice Breyer again looks to international law, it is not hard to see him joining to uphold PASPA and adding a concurrence citing the Australian regulatory scheme.

Justice Breyer’s Vote: PASPA is CONSTITUTIONAL

Conclusion

The bottom line is that it appears there are three solid Supreme Court votes to uphold PASPA and three solid Supreme Court votes to strike PASPA down as unconstitutional commandeering. The outcome will be decided by Chief Justice Roberts and Justices Thomas and Breyer, with the Chief Justice playing the pivotal role. If the Chief Justice decides PASPA is odd, but not too odd, and votes to uphold the law, he likely will free Justice Thomas to follow his libertarian tendencies and join in upholding PASPA. But if the Chief Justice decides PASPA is too odd to be constitutional, Justice Thomas likely will subordinate his libertarian tendencies to his disdain for the federal government regulating purely intrastate transactions and join a majority that will strike down PASPA. Justice Breyer could fit into the mix on either side and his vote ultimately may be surplusage no matter how the case is decided.

How do you think they will vote? [TAKE OUR SURVEY HERE](#). If you have feedback, or would like more information on this case, contact Kevin Braig at kbraig@slk-law.com or 614.628.4433.