

Supreme Court Riddle: Who Voted To Hear The Sports-Betting Case?

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The mystery surrounding the U.S. Supreme Court's decision to hear New Jersey's appeal of a federal sports-betting ban is almost as intriguing as how the court will rule on the case later this year.

Out of 10,000 petitions for certiorari every year, the Supreme Court agrees to hear about 80 appeals, or less than 1 percent, according to the website [FindLaw](#).

For an appeal to overcome these astronomical odds, four justices must vote to hear the case.

The votes are revealed in a private conference of the nine members of the Supreme Court. The least senior justice begins the voting process which continues according to seniority until the most senior justice's vote is recorded. The votes are included in notes taken by the least senior justice who gives them to the clerk of the Supreme Court after the conference.

New Jersey failed to gain four votes when the Supreme Court denied the state's [first sports-betting appeal](#) on June 23, 2014.

But three years and four days later, the Supreme Court announced it would hear New Jersey's [second sports-betting appeal](#) and a ruling is expected before the end of June.

The only justice who did not participate in the 2014 vote is Neil Gorsuch, who succeeded the deceased Antonin Scalia last year. Gorsuch seems to be at the top of the list of justices who might have voted to hear New Jersey's appeal.

"That is a fairly logical assumption, but it is an assumption," said Greg Gemignani, a gaming attorney with Dickinson Wright in Las Vegas.

"Ultimately, I am not confident that I know which justices were in favor of granting cert [certiorari]," Gemignani said.

Kevin Braig, a gaming attorney in Columbus, Ohio, is not as circumspect.

"it is almost certain that Justice Scalia was a vote to decline cert [in 2014] and his replacement, Justice Gorsuch, was a vote to accept cert [in 2017] which got New Jersey to the four votes it needed," said Braig, who works for the firm of Shumaker, Loop & Kendrick.

Gorsuch, who was nominated to the Supreme Court by President Donald Trump, is among the court's conservative justices who tend to be more sympathetic toward states' rights than federal authority.

The other conservatives include Chief Justice John Roberts, and Justices Samuel Alito and Anthony Kennedy.

Justice Clarence Thomas is more of a question mark among the five conservative justices.

Although he tends to go along with his conservative colleagues, Thomas had a long record of voting with [Scalia](#) who was not considered a friend of gambling, especially Indian gaming.

Marc Edelman, a law professor at Baruch College in New York City who writes about gaming issues, said the Supreme Court voted to hear New Jersey's appeal for reasons that go far beyond sports betting.

"At the Supreme Court level, this case has very little to do about gambling policy and a lot to do with the balance of federal and state powers," Edelman said.

Edelman said the executive branch under President Trump has adopted a broad interpretation of federal powers, including the authority to round up and deport illegal immigrants.

Other state issues such as gun laws, medical marijuana and sanctuary cities may have persuaded a mix of more than just four Supreme Court justices to vote to hear New Jersey's sports-betting appeal, according to Gemignani.

"The Supreme Court justices perhaps look at this [New Jersey sports-betting] case as an opportunity ... to assess whether the federal government may truly require state governments to act in a particular manner," Edelman said.

Bob Jarvis, a law professor at Nova Southeastern University in Fort Lauderdale, Florida, agreed with Edelman that the Supreme Court did not vote to hear New Jersey's sports-betting appeal because it is a gambling case.

Instead, the Supreme Court wants to clarify how the federal “commandeering principle” applies to states.

Neither Edelman nor Jarvis would speculate on which four justices voted to hear New Jersey’s sports-betting appeal, but Jarvis said he thinks he knows what the Supreme Court’s ruling will be.

“I expect the court’s decision to be in New Jersey’s favor on the ground that PASPA, as written, violated the commandeering principle,” said Jarvis who wrote an article about the case in Preview, an American Bar Association publication, before the Supreme Court heard [oral arguments](#) on December 4.

PASPA is the [Professional and Amateur Sports Protection Act of 1992](#) which bans sports wagering in all but four states.

“The PASPA matter provides a relatively clean set of facts from which to either make a new doctrine or clarify an existing doctrine regarding the boundaries of state and federal power,” Gemignani said.

“It also may be used to express the differences in federal power over the states and federal power over the citizenry,” he said.

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