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Supreme Court to Decide Future of Sports Betting: Implications for Tribal Casinos

By Christopher Babbitt, Jonathan Bressler and Claire Chung

The Supreme Court's forthcoming decision in *Christie v. National Collegiate Athletic Association* (Nos. 16-476, 16-477) will have profound implications for sports betting in the United States and will potentially open the door to such betting in tribal casinos across the country. The case presents New Jersey's challenge to the constitutionality of the Professional and Amateur Sports Protection Act ("PASPA"), a federal law enacted in 1992 to prohibit states and tribes from sponsoring or authorizing any form of sports wagering, while grandfathering the handful of states that allowed such gaming at the time of PASPA's enactment. Several news outlets and legal commentators have noted that the Court appeared skeptical of PASPA's constitutionality at the December 4, 2017, oral argument, and many states have taken steps in anticipation that the Court will hold PASPA unconstitutional.[1] Since the oral argument, online betting markets on the decision have given New Jersey more than an 80 percent chance of prevailing.[2] This alert analyzes the implications for tribal casinos if the Court strikes down PASPA.

At the outset, it is important to note that the Court's ruling would simply restore to states and tribes the authority that PASPA had taken away from them, but would not actually authorize sports betting anywhere in the country. Any tribal sports-betting operation would be governed by the Indian Gaming Regulatory Act ("IGRA"), the 1988 federal law that governs tribal gaming. As discussed below, however, there are a number of important issues that remain unsettled under IGRA—and a renewed interest in sports betting could engender litigation to resolve them.

Generally speaking, IGRA allows a tribe to conduct commercial gaming operations if "such gaming" is permitted in its home state and the tribe meets other federal requirements that vary based on whether the gaming constitutes class II or class III gaming under IGRA.[3] But when a

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[1] *See* Adam Edelman, *Cash-hungry states betting Supreme Court will legalize sports gambling*, NBC News, Feb. 12, 2018, *available at* https://www.nbcnews.com/politics/politics-news/cash-hungry-states-betting-supreme-court-will-legalize-sports-gambling-n846676; Robert Barnes, *N.J. argues that it can legalize sports betting, and Supreme Court seems to agree*, Washington Post, Dec. 4, 2017, *available at* https://www.washingtonpost.com/politics/courts_law/nj-argues-that-it-can-legalize-sports-betting-and-supreme-court-seems-to-agree/2017/12/04/25410ae6-d92c-11e7-a841-2066faf731ef_story.html?utm_term=.022c7baa579e; Amy Howe, *Argument analysis: Justices seem to side with state on sports betting*, Scotusblog, Dec. 4, 2017, *available at* http://www.scotusblog.com/2017/12/argument-analysis-justices-seem-side-state-sports-betting.

[2] *See* Ryan Rodenberg, *How to Speculate—With Real Money—on the Supreme Court Sports Betting Case*, Sportshandle.com, Feb. 7, 2018, *available at* https://sportshandle.com/supreme-court-sports-betting-speculate-real-money.

[3] 25 U.S.C. §§ 2710(b)(1)(A), (d)(1)(B).

state permits only certain kinds of gaming, courts have not uniformly agreed on how broadly a tribe may engage in other, related gaming. Although IGRA clearly authorizes the tribe to engage in the same forms of the same games permitted under state law, it is less clear whether the tribe may also conduct other forms of the same games or even other kinds of games within the same IGRA class.

Accordingly, a threshold question is whether particular forms of sports betting would qualify as class II or class III gaming under IGRA. While most traditional sports betting would likely be treated as class III gaming, other forms could potentially be considered class II, and the classification of gaming is still a developing area of law. If the state does not permit any gaming of that class, tribes will not be permitted to conduct it. If the state permits only limited kinds of gaming within that class, then tribes will clearly be permitted to conduct at least the specific forms of gaming (including sports gaming) that their home states authorize. In addition, tribes have arguments that they should be entitled to conduct any form of sports betting in states that allow other forms of class III gaming—though this too is still a developing area of law and likely to be the subject of future litigation, particularly if states attempt to limit the forms of sports betting they authorize.

In states where IGRA permits tribes to conduct sports gaming, tribes will also have to satisfy other federal requirements for class II or class III gaming. The difference is important: IGRA subjects class II gaming only to federal oversight, not state regulation, but generally permits class III gaming only pursuant to gaming compacts negotiated between tribes and their home states. Although states vary in how they negotiate and execute gaming compacts with tribes, all states are subject to IGRA's requirement that they conduct such negotiations "in good faith"—a mandate that tribes have successfully enforced against some recalcitrant states in federal court to obtain alternative terms issued by the Secretary of the Interior that permit class III gaming operations.

Finally, states and tribes that have negotiated provisions in existing compacts granting tribes exclusive gaming rights in defined areas will need to ensure that newly authorized sports wagering does not run afoul of those exclusivity provisions.

I. Professional and Amateur Sports Protection Act in *Christie*

The key provision of PASPA before the Supreme Court is 28 U.S.C. § 3702, which provides:

> It shall be unlawful for—
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> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
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> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,
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> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based … on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.[4]

[4] 28 U.S.C. § 3702.

PASPA defines "governmental entity" to include states and their political subdivisions, as well as Indian tribes.[5]

In *Christie*, New Jersey has primarily challenged Section 3702(1), but has argued that Section 3702(2) is also unconstitutional because, in prohibiting individuals from sponsoring or operating sports wagering "pursuant to" state law, it is textually tethered to Section 3702(1).[6] Defenders of PASPA—including the major sports leagues and the United States—have argued that, even if Section 3702(1) is held unconstitutional, Section 3702(2) should survive, which could effectively prohibit sports betting outside of the three grandfathered states.[7]

It remains to be seen how the Supreme Court will approach Section 3702(2) if it invalidates Section 3702(1). If Section 3702(2) survives, it may have the same effect as PASPA does now by prohibiting individuals from operating sports wagering "pursuant to" any law a state might pass if Section 3702(1) were invalidated. However, it is certainly possible that if the Court finds any portion of Section 3702 unconstitutional, it will invalidate both Sections 3702(1) and (2), thereby allowing states to authorize sports betting and individuals to participate. The remainder of this alert proceeds on the assumption that the Court invalidates the entirety of Section 3702.

II. Considerations Under the Indian Gaming Regulatory Act

A ruling that invalidates Section 3702 would open the door for states to authorize sports wagering. For tribes, however, lifting of the federal ban on sports wagering would be only the first step. Tribes would still need to meet the requirements of IGRA to conduct sports wagering on Indian lands.

A. Class II or Class III Gaming Classification

IGRA imposes different requirements for gaming that vary based on the three classes of gaming that IGRA defines.[8] Class I gaming includes social games for minimal prizes.[9] Class II gaming encompasses bingo-like games, including pull-tabs and non-banking card games, in which players bet against and settle with each other, rather than betting against and settling with the house.[10] IGRA deems "all forms of gaming that are not class I gaming or class II gaming" to be class III gaming.[11]

Traditional sports wagering would likely qualify as class III gaming insofar as it is not a social game for minimal prizes, a bingo-like game, or an unbanked card game. Indeed, the National Indian Gaming Commission ("NIGC") has expressly defined class III gaming to include "[a]ny sports betting and parimutuel wagering."[12] The NIGC's Office of General Counsel has also advised gaming operators that "sports betting … is a Class III form of gaming."[13]

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[5] *Id.* § 3701(2) (citing 25 U.S.C. § 2703(5)).

[6] Pet. Br. at 20, 55-56.

[7] Resp. Br. at 21, 53-59; U.S. Amicus Curiae Br. at 31-33.

[8] *See* 25 U.S.C. §§ 2703, 2710.

[9] *Id.* § 2703(6).

[10] *Id.* § 2703(7).

[11] *Id.* § 2703(8).

[12] 25 C.F.R. § 502.4(c).

[13] Kevin K. Washburn, General Counsel, NIGC, to Joseph M. Speck, Nic-A-Bob Productions, NIGC Game Classification on WIN Sports Betting Game, p. 2 (Mar. 13, 2001), *available at* https://www.nigc.gov/images /uploads/game-opinions/WIN%20Sports%20Betting%20Game-Class%20III.pdf.

Whether *all* forms of sports wagering would be considered class III gaming, however, has not been conclusively resolved. Montana, for example, currently authorizes sports pools and sports tab games, which are non-banked games in which players bet against and settle with each other, not a traditional sportsbook.[14] Such games might ultimately be deemed class III gaming because the NIGC's regulation does not expressly exempt any form of "sports betting" from its definition of class III gaming and deems parimutuel wagering class III gaming even though players bet among themselves,[15] and the NIGC's Office of General Counsel has concluded that at least one form of sports betting in which "players compete against other players" constitutes class III gaming.[16] But the NIGC's position has not been litigated, and the law on sports wagering is still developing.

B. State Authorization

IGRA permits tribes to engage in class II or class III gaming operations if "such gaming" is permitted in their home states, but IGRA does not define the scope of "such gaming."[17] As Kevin Washburn, former General Counsel of the NIGC and Assistant Secretary of the Interior for Indian Affairs, has explained, "[t]his language is the subject of great disagreement."[18] On one hand, it clearly permits tribes to conduct any form of gaming that their states permit. On the other hand, it clearly does not permit tribes to conduct any gaming within a class of gaming if their states do not permit any gaming within that class. Between those two poles, federal courts have followed two different approaches.

Under the "game-specific" approach, IGRA authorizes tribes to conduct only the specific "form" of a game allowed under state law.[19] For example, even if traditional keno is authorized under state law, tribes would not be authorized to conduct video keno.[20] The Eighth and Ninth Circuits follow this approach for class III gaming,[21] and the NIGC has applied this approach to sports betting, explaining that "specific forms of gaming, including sports betting," must be authorized under state law.[22] But there is still the question of how narrowly to define a specific "form" of gaming. As Washburn put it: "[W]hat if the state bans seven-card poker but allows five-card poker, or bans single-deck blackjack, but allows blackjack that is dealt out of a six-deck shoe?"[23] Courts will undoubtedly be required to resolve variations on that question in the future.

Under the "categorical" approach, by contrast, courts have found that IGRA authorizes tribes to conduct all forms of gaming within an IGRA class when any form of gaming within the same

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[14] *See* Mont. Code § 23-5-503; *see also* Montana Department of Justice, Gambling Control Division, *Gambling Laws*, *available at* https://dojmt.gov/gaming/gambling-laws-administrative-rules.

[15] 25 C.F.R. § 502.4(c).

[16] Washburn to Speck, *supra*, p. 2.

[17] *Id.* §§ 2710(b)(1)(A), (d)(1)(B).

[18] Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 Wyo. L. Rev. 427, 442 (2001).

[19] *See N. Arapaho Tribe v. State of Wyoming*, 389 F.3d 1308, 1311 (10th Cir. 2004) ("The … "game-specific" approach requires courts to review whether state law permits the specific game at issue.").

[20] *See Cheyenne River Sioux Tribe v. State of S.D.*, 3 F.3d 273, 279 (8th Cir. 1993).

[21] *See Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1994) (IGRA authorizes tribes "to operate games that others can operate" but not "another, albeit similar form of gaming"), *amended*, 99 F.3d 321 (9th Cir. 1996); *Cheyenne River Sioux Tribe*, 3 F.3d at 279 (IGRA does not authorize tribes to conduct "forms of gaming [their home state] does not presently permit").

[22] Washburn to Speck, *supra*, p. 2; *see also id.* ("If sports betting is unlawful in a state, it is unlawful for tribes in that state to engage in it.").

[23] Washburn, *Recurring Problems in Indian Gaming*, 1 Wyo. L. Rev. at 442.

IGRA class is allowed under state law.[24] For example, if any class III gaming, such as parimutuel wagering, is allowed under state law, tribes would be authorized to conduct any other class III games too, including blackjack, roulette, and slot machines[25]—and potentially all forms of sports gaming. The Eighth and Ninth Circuits appear to follow this approach for class II gaming.[26] Moreover, at least one district court has endorsed this approach for class III gaming,[27] and several courts have stated that the Second Circuit has also endorsed this approach for class III gaming,[28] though it is not clear whether the Second Circuit's decision should be read so broadly.[29] At a minimum, at least two circuits have left open the possibility of applying the categorical approach in the class III context,[30] making this issue a likely subject of future litigation, particularly if PASPA is struck down.

Currently, three states allow sports wagering under PASPA's grandfathering exemption from the federal prohibition on state-authorized sports wagering.[31] Nevada allows full-fledged sports wagering at traditional sportsbooks[32]; Delaware allows parlay wagering (multi-gaming betting) on professional football[33]; and Montana allows sports pool or sports tab games.[34] Anticipating the lifting of the federal ban, three other states—Connecticut, Mississippi, and Pennsylvania—have passed legislation that would authorize or could lead to authorizing sports wagering should PASPA be invalidated.[35] Additionally, at least fifteen states—California, Illinois, Indiana, Iowa,

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[24] *See N. Arapaho Tribe*, 389 F.3d at 1311 ("The … 'categorical' approach requires courts to first review the general scope of gaming permitted by the state. If the state permits any form of Class III gaming, the tribe must negotiate to offer all forms of Class III gaming …." (citation omitted)); *see also In re Indian Gaming Related Cases*, 331 F.3d 1094, 1098 (9th Cir. 2003) (noting approach in which state could not limit "the subset of class III games that [tribes] sought to conduct" if "the State permitted other types of class III games"); Washburn, *Recurring Problems in Indian Gaming*, 1 Wyo. L. Rev. at 442 (IGRA "can plainly be interpreted to indicate that if a state allows any Class III gaming activities, IGRA requires states to negotiate with tribes generally about Class III games and does not necessarily limit the negotiations to the particular Class III games that are offered under state law.").

[25] *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wis.*, 770 F. Supp. 480, 484-488 (W.D. Wis. 1991), *appeal dismissed on other grounds*, 957 F.2d 515 (7th Cir. 1992).

[26] *See Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 539 (9th Cir. 1994) ("[I]nsofar as the State's argument is directed at Class II-type gaming, … the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees."); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 368 (8th Cir. 1990); *see also Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1082-1083 (7th Cir. 2015) (discussing *Sycuan* and *Sisseton-Wahpeton*); *Rumsey Indian Rancheria*, 64 F.3d at 1258 n.5 (discussing *Sycuan*).

[27] *See Lac du Flambeau Band*, 770 F. Supp. at 484-488.

[28] *See Ho-Chunk Nation*, 784 F.3d at 1083; *N. Arapaho Tribe*, 389 F.3d at 1311; *In re Indian Gaming Related Cases*, 331 F.3d at 1098.

[29] *See Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1032 (2d Cir. 1990) (holding that state must negotiate because "games of chance are currently permitted in the State"); *see also Rumsey Indian Rancheria*, 64 F.3d at 1259 n.6 (explaining that Second Circuit decision held only that "because Connecticut permitted the games of chance to be operated by some persons in the state, the state had to negotiate over those games").

[30] *See Ho-Chunk Nation*, 784 F.3d at 1082-1083; *N. Arapaho Tribe*, 389 F.3d at 1311.

[31] *See* 28 U.S.C. §§ 3704(a)(1), (2). Oregon used to allow limited sports wagering pursuant to PASPA's exemption, but has prohibited it since 2007.

[32] *See, e.g.*, Nev. Rev. Stat. § 463.800; *see also id.* § 463.0193.

[33] *See, e.g.*, 29 Del. Code § 4825; *see also id.* §§ 4803(w), (x). In 2009, the U.S. Court of Appeals for the Third Circuit held that PASPA preempted Delaware law to the extent it allowed sports wagering beyond parlay betting on professional football, because that is the type of gaming that Delaware permitted at the time of PASPA's enactment. *See OFC Comm Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009). If PASPA is invalidated, however, Delaware would be free to allow other forms of sports wagering in the state.

[34] *See, e.g.*, Mont. Code §§ 23-5-502, 23-5-503.

[35] *See* Conn. Pub. Act 17-209, *available at* https://www.cga.ct.gov/2017/ACT/pa/2017PA-00209-R00HB-06948-PA.htm; Miss. HB 967, *available at* http://billstatus.ls.state.ms.us/2017/pdf/history/HB/HB0967.xml; Pa. 2017 Pub. L. 419, *available at* http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2017&sessInd=0&act=42.

Kansas, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New York, Oklahoma, Rhode Island, South Carolina, and West Virginia—are considering legislation that would allow or could lead to allowing sports wagering upon PASPA's invalidation.[36]

In states that have legalized or will legalize sports betting, tribes would be able to conduct at least the forms of sports wagering authorized by state law, if tribes can satisfy IGRA's other requirements. But whether they would be able to conduct other forms of sports betting may depend on whether courts in their jurisdiction follow the "game-specific" or "categorical" approach described above.

C. Compacting Considerations

Tribes that seek to conduct class III sports betting operations would also be subject to IGRA's compacting requirement and therefore could be required to seek new compacts or to amend existing compacts with their home states before commencing such gaming (unless the terms of their existing arrangements are broad enough to permit it).[37]

IGRA requires states to negotiate compacts in good faith. If a state that permits the form of class III sports gaming that a tribe seeks to conduct refuses to negotiate with the tribe in good faith over sports betting, IGRA permits the tribe to bring a remedial action against the state in federal court.[38] In certain circumstances, IGRA's remedial process allows the Secretary of the Interior to prescribe alternative procedures, known as Secretarial Procedures, regulating class III gaming conducted by a tribe in the absence of a tribal-state compact.[39] The Supreme Court, however, has held that states retain their sovereign immunity from a remedial suit under IGRA.[40] Although some states, most notably California, have waived their sovereign immunity from such suits, many states have not.[41] The Secretary of the Interior has issued regulations

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[36] *See, e.g.*, (1) Cal. ACA 18, *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180ACA18; (2) Ill. HB 4214, *available at* http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=91&GA=100&DocTypeId=HB&DocNum=4214&GAID=14&LegID=108568&SpecSess=&Session=, HB 5186*, available at* http://www.ilga.gov/legislation/BillStatus.asp?DocNum=5186&GAID=14&DocTypeID=HB&LegId=110813&SessionID=91&GA=100; (3) Ind. SB 405, *available at* https://iga.in.gov/legislative/2018/bills/senate/405#document-c0536cb0, HB 1325, *available at* http://iga.in.gov/legislative/2018/bills/house/1325/#document-497473f8; (4) Iowa HSB 592, *available at* https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HSB592; (5) Kan. HB 2533, *available at* http://www.kslegislature.org/li/b2017_18/measures/documents/hb2533_00_0000.pdf; (6) Ky. SB 22, *available at* http://www.lrc.ky.gov/RECORD/18RS/SB22.htm; (7) Md. SB 836, *available at* http://mgaleg.maryland.gov/2018RS/bills/sb/sb0836f.pdf; (8) Mass. S 2273, *available at* https://malegislature.gov/Bills/190/SD2480; (9) Mich. H 4060, *available at* http://www.legislature.mi.gov/documents/2017-2018/billintroduced/House/pdf/2017-HIB-4060.pdf, H 4261, *available at* http://www.legislature.mi.gov/documents/2017-2018/billintroduced/House/pdf/2017-HIB-4261.pdf, H 4926, *available at* http://www.legislature.mi.gov/documents/2017-2018/billintroduced/House/pdf/2017-HIB-4926.pdf; (10) Mo. HB 2320, *available at* https://www.house.mo.gov/billtracking/bills181/hlrbillspdf/6198H.02I.pdf; (11) N.Y. S 1282, *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=S01282&term=2017&Summary=Y&Actions=Y&Text=Y&Votes=Y; (12) Okla. HB 3375, *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20INT/hB/HB3375%20INT.PDF, SB 1195, *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2017-18%20INT/SB/SB1195%20INT.PDF; (13) R.I. S 2045, *available at* http://webserver.rilin.state.ri.us/BillText/BillText18/SenateText18/S2045.pdf; (14) S.C. HJR 3102, *available at* http://www.scstatehouse.gov/billsearch.php?billnumbers=3102&session=122&summary=B, SJR 309, *available at* http://www.scstatehouse.gov/billsearch.php?billnumbers=309&session=122&summary=B; (15) W. Va. H 2751, *available at* http://www.wvlegislature.gov/Bill_Text_HTML/2017_SESSIONS/RS/bills/hb2751%20intr.pdf, S 106, *available at* http://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=SB106%20INTR.htm&yr=2018&sesstype=RS&i=106.

[37] 25 U.S.C. § 2710(d)(1), (7), (8). For tribes gaming under terms imposed by the Secretary of the Interior, they would look to the terms of the Secretarial Procedures rather than an existing compact.

[38] *Id.* § 2710(d)(7)(A), (B)(i).

[39] *Id.* § 2710(d)(7)(B)(vii).

[40] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[41] *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1026 & n.8 (9th Cir. 2010).

instituting an alternative process for Secretarial Procedures when a state asserts its sovereign immunity,[42] but the only two circuits to address the validity of those regulations have held them invalid.[43] Thus, tribes in states that do not waive their sovereign immunity under IGRA would likely need to enter into a tribal-state compact or amend an existing compact to conduct class III sports wagering.

III. Exclusivity Provisions

Efforts to authorize sports betting after the Court's decision in *Christie* could violate states' existing contractual commitments to tribes. Some tribal-state gaming compacts include exclusivity provisions, whereby a state promises gaming exclusivity within a geographic territory to a tribe in exchange for a certain percentage of the tribe's gaming revenue. If a state passes a law authorizing sports wagering, including by commercial entities, sports wagering by another entity within a tribe's exclusive territory could violate such an exclusivity provision. Whether a violation has occurred and any remedy the tribe may be able to seek would likely depend on the language of the exclusivity provision and terms of the compact.

IV. Conclusion

A decision by the Supreme Court striking down PASPA would be momentous—opening the door for sports betting by tribes around the country—but it is likely to spawn significant litigation among tribes, states, commercial gaming entities, and the federal government to resolve the new issues that will surely arise in its wake.

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[42] 25 C.F.R. Part 291.

[43] *See New Mexico v. Dep't of Interior*, 854 F.3d 1207 (10th Cir. 2017); *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007).

For more information on this or other matters, contact:

Christopher E. Babbitt +1 202 663 6681 christopher.babbitt@wilmerhale.com

Michael Connor +1 202 663 6063 michael.connor@wilmerhale.com

Kelly P. Dunbar +1 202 663 6262 kelly.dunbar@wilmerhale.com

Ken Salazar +1 720 274 3131 ken.salazar@wilmerhale.com

Danielle Spinelli +1 202 663 6901 danielle.spinelli@wilmerhale.com

Thomas L. Strickland +1 202 663 6925 thomas.strickland@wilmerhale.com

Daniel S. Volchok +1 202 663 6103 daniel.volchok@wilmerhale.com

Seth P. Waxman +1 202 663 6800 seth.waxman@wilmerhale.com

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