



PASPA unconstitutional; states free to legalize sports betting: top points about the landmark Supreme Court decision

Media, Sport and Entertainment Alert

22 MAY 2018

By: Timothy J. Lowry | David R. Pahl

The Supreme Court of the United States has overturned the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 et seq. (PASPA), in its entirety.

As we reported last week, the majority decision, delivered by Justice Samuel Alito in *Murphy v. Nat'l Collegiate Athletic Assn.*, 584 U.S. ___ (2018), concluded PASPA is "not consistent with the Constitution," as Congress is not authorized to direct a state's regulation of its citizens. *Id.* at p. 31.

This decision paves the way for each of the states and territories to legalize, tax, regulate and even participate themselves in the multibillion-dollar sports gambling industry.

In this alert, we take a look at the top points for business about this game-changing decision.

What PASPA did, and New Jersey's response

In 1992, Congress enacted PASPA in response to concerns over state-sponsored sports gambling. PASPA made it illegal for any governmental entity or private person to "sponsor, operate, advertise, or promote" a wagering scheme directly or

indirectly based on a competitive game in "which professional or amateur athletes participate." 28 U.S.C. § 3702.

PASPA effectively outlawed the expansion of sports betting nationwide, with the exception of four states where a sports betting scheme had already been established at the time of PASPA's enactment (Delaware, Montana, Nevada, and Oregon). Section 3704 grandfathered in the sports gambling schemes in those jurisdictions and provided a one-year deadline by which a state that had operated licensed casino gaming for the previous ten-year period (*i.e.*, New Jersey) could pass laws permitting sports wagering. However, New Jersey, with a then-healthy, competition-free casino industry that didn't need a boost from sports gambling, did not exercise that opportunity within the allotted window.¹

Time passed, and New Jersey's casino industry began to confront competition from tribal and other casinos in the eastern states. Concluding that Atlantic City now could use the economic lift sports gambling would bring, New Jersey took up the gauntlet and pushed back on PASPA's ban on authorizing or licensing sports betting offerings – beginning a long journey that ended with the Court's issuance of the *Murphy* decision.

First, the New Jersey legislature authorized a ballot question which led to voters approving an amendment to the New Jersey Constitution in 2011 to allow for sports gambling. Utilizing the power granted to it by the constitutional amendment, the New Jersey legislature then passed legislation in 2012 (the Sports Wagering Act) and promulgated regulations establishing a regulated sports gambling structure.

The NCAA (along with the NFL, MLB, NBA and the NHL) then sued the state. In *Nat'l Collegiate Athletic Assn. v. Christie*, 926 F.Supp.2d 551 (D.N.J. 2013) (*Christie I*), the NCAA argued that New Jersey's law was a violation of PASPA, a point with which New Jersey did not take issue; instead, the state focused on the argument that PASPA was unconstitutional.

The United States District Court for the District of New Jersey did not agree and struck down New Jersey's legislation, a decision affirmed by the Third Circuit Court of Appeals, which found PASPA to be "a reasonable expression of Congress' powers, and...therefore constitutional." *Christie I* at 554. Among other findings, the Third Circuit held that PASPA did not violate the Tenth Amendment because the statute does not compel or command a state to "engage in affirmative activity." *Id.* at 570. The opinion also contained some tantalizing dicta to the effect that New Jersey could not be prevented from repealing its prohibitions, including potentially only a partial repeal. (However, no further guidance was given.) Review was denied at that time by the Supreme Court.

These decisions did not stop New Jersey from continuing to push the boundaries in its effort to legalize sports gambling. Picking up on the dicta from *Christie I*, New Jersey's Attorney General issued a directive allowing for a partial repeal of the sports gambling prohibition. Then-Governor Chris Christie also signed a purported partial repeal of New Jersey's prohibition on sports gambling in 2014, which provided that sports gambling would remain illegal except in a facility which is otherwise regulated by the New Jersey Casino Control Commission. Thus, New Jersey's chosen path was to anoint only its regulated casinos with the authority to engage in sports gambling.

Rematch

The NCAA and other sports organizations sued New Jersey again, in what became known as *Christie II* (*Nat'l Collegiate Athletic Assn. v. Christie*, 61 F.Supp.3d 488 (D.N.J. 2015)). In this rematch, New Jersey argued that the partial repeal was in accordance with federal law and the decision in *Christie I*. The District Court rejected New Jersey's argument, ruling that the state had violated PASPA, a holding which the Third Circuit again affirmed. The Supreme Court subsequently granted New Jersey's petition for a writ of certiorari despite the Solicitor General recommending against it – an act rarely taken by the Supreme Court. This month, the Court went on to overturn PASPA in its entirety by a 6-3 majority

In the decision issued on May 14, the Court examined cases that form the backbone of its jurisprudence on the anti-commandeering doctrine, including *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). In *New York*, the Court had struck down legislation that would require states to deal with radioactive waste in accordance with federal direction. A similar outcome resulted from the *Printz* decision, where the Court found a law imposing federal requirements in connection with the performance of background checks by state and local law enforcement unconstitutional. In *Murphy*, the majority followed this line of cases and held that PASPA impermissibly and "unequivocally dictates what a state legislature may and may not do." *Murphy*, at 18 (noting that "a more direct affront to state sovereignty is not easy to imagine"). The respondents' contention that PASPA did not violate the anti-commandeering rule because PASPA did not require an "affirmative" action – but only prevented a state from enacting new legislation – was characterized by the court as "empty." *Id.* at 19.

The Court also rejected the respondents' position that PASPA is an example of the proper application of federal preemption doctrine, which is rooted in the Constitution's Supremacy Clause (Art. VI, Clause 2). Noting that the Supremacy Clause "is not an independent grant of legislative power to Congress," the Court explains that PASPA cannot preempt state law because first, PASPA does not "represent the exercise of a power conferred on Congress by the Constitution," and second, the prohibition of a state's authorization of a sports gambling scheme does not regulate the conduct of private actors (holding that "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States"). *Id.* at 23-24.

Of at least equal significance is the Court's determination to strike down the entirety of PASPA, and not only the portion of the statute that prohibited a state from "authorizing" or "licensing" sports gambling. Citing what they perceived to be Congressional intent, the majority also struck down the remaining provisions of PASPA that, inter alia, prohibited private parties from engaging in sports gambling authorized by state law. In other words, as Justice Stephen G. Breyer noted in dissent, PASPA had provided that "just in case a State finds a way to" authorize sports betting, private parties would be prohibited by federal law from engaging in sports gambling. The majority, however, found that these provisions were not severable, and invalidated the entirety of the statute. Had it concluded the opposite and let stand the restrictions on private parties, New Jersey's victory would have been, as Justice Breyer put it, "mostly Pyrrhic."

What next?

It has been widely reported that in the United States, illegal sports wagering reaches \$150 billion annually. While social acceptance of sports betting has continued to grow (with an assist from the expansion of regulated daily fantasy sports wagering), PASPA was a roadblock to state legislators seeking to capture taxable revenues via legal bookmaking.

Before the Court's ruling, at least four states had passed legislation authorizing sports betting and fourteen states had introduced or are actively moving similar legislation. Related federal legislation is sure to follow – legislation was introduced in Congress late in 2017 that called for the repeal of PASPA, seeking to introduce certain protections for consumers wanting to engage in sports betting, including age/identity verification, data privacy and problem gambling.

Now that PASPA's fate has been decided, it is likely that many states will move quickly to define their positions relative to sports betting, driving regulatory activity at the federal and state level. The resulting proliferation will surely add a complex and interesting layer to the existing patchwork quilt of gambling legislation in the United States. Prudent businesses are planning accordingly.

Learn more about the implications of PASPA's repeal by contacting any of the authors.

¹ Montana failed to amend its enabling authority prior to the statutory deadline; therefore, only limited forms of sports betting were grandfathered (e.g., sporting pools, fantasy sports and sport tab games). In 2005, Oregon repealed its legislative authority that permitted its state lottery to offer a form of sports betting known as "Sports Action." As a result of these actions and inactions, Nevada became the only state with extensive sports betting offerings, Delaware and Montana having very limited offerings.

AUTHORS



Timothy J. Lowry

Partner

New York | T: +1 212 335 4500

New Jersey (Atlantic City) | T: +1 609 449 7000

timothy.lowry@dlapiper.com



David R. Pahl

Senior Counsel

New York | T: +1 212 335 4500

david.pahl@dlapiper.com