The U.S. Supreme Court Could Open the Door to Bricks-and-Mortar Sports Betting in the United States

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I. Introduction

The potential market for sports gambling in the United States is huge and largely untapped. In 2016, legal sports wagers in Nevada totalled approximately $4.5 billion (http://gaming.unlv.edu/reports/NV_sportsbetting.pdf). However, this is a small fraction of the estimated illegal sports gambling market in the United States. In March 2017, the American Gaming Association ("AGA") estimated that Americans' illegal sports wagers totalled between $149 billion and $500 billion per year. Using the $149 billion amount as a conservative estimate, the market for illegal sports gambling in the United States last year was more than double the combined total annual sales for all U.S. lotteries (44 states, D.C., and two U.S. territories), which were $73.8 billion in 2015 (http://www.naspl.org/faq), greater than the revenue of 491 of the Fortune 500 companies, and roughly equal to the combined revenues of Microsoft, Goldman Sachs, and Bristol-Myers Squib. (AGA Brief as *Amicus Curiae* in Support of Petitioners in *Christie v. NCAA, et al.* (U.S. Sup. Ct. 16-476 & 16-477), the "AGA *Amicus* Brief").

Sports betting is the form of illegal gambling most aggressively targeted for enforcement in the United States, largely on account of its association with organised crime. In the early 1960's, Attorney General Robert F. Kennedy waged a much publicised war against organised crime in the United States. Among the "anti-mob" laws passed during this time was the Wire Act (18 U.S.C. §§ 1081, 1084), which expressly targeted sports betting utilising a "wire, cable or other like connection".

After the 1960's, and as the popularity of sports increased in the United States, betting on sports events became a significant concern of the United States' professional and amateur sports leagues, particularly after a few well-publicised scandals involving players paid to "fix" games. (In one well-publicised scandal in 1978–79, organised crime figures bribed Boston College basketball players to ensure that the team would not "cover" the point spread.) Because the successful operation of the professional and amateur leagues in the United States depend, in large part, on the perception that they are true competitions – i.e., "clean" – the professional and amateur sports leagues in the United States lobbied for and obtained a federal law that, with some exceptions, prohibited states from enacting laws authorising or licensing sports gambling, and prohibited private operators from operating sports gambling businesses pursuant to state law. This law is known the Professional and Amateur Sports Protection Act of 1992 (the "PASPA", codified at 28 U.S.C. §§ 3701–3704).

Since the 1992 enactment of the PASPA, lawful sports betting has occurred in the United States (as of this writing) in only four states – Delaware, Montana, Oregon and Nevada – with single-game betting only in Nevada. However, this may soon change. As discussed below, in June 2017, the U.S. Supreme Court announced it would consider New Jersey's appeal of the U.S. Third Circuit Court of Appeals' decision in *Christie v. NCAA, et al*. (*Christie v. NCAA, et al.*, 832 F.3d 389, 396-397 (3rd Cir. 2016), cert. granted, 2017 U.S. LEXIS 4279 (2017) and consolidated with *New Jersey Thoroughbred Horsemen's Association, Inc. v. NCAA, et al.*, U.S. Sup. Ct. Nos. 16-476 and 16-477.) In that case, the Third Circuit Court upheld the PASPA as constitutional and affirmed the lower court's order enjoining the implementation of New Jersey's 2014 law that partially repealed New Jersey's sports betting prohibitions. The respondents in the case are the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League and Major League Baseball.

The Supreme Court's action was a surprise to many in the gaming legal community, because the Supreme Court accepts less than 1% of petitions seeking review, and the question to be decided is not the subject of a dispute between federal circuit courts. Moreover, the acting U.S. Solicitor General had formally recommended that the Supreme Court decline to hear the case. (Brief for the United States as *Amicus Curiae* opposing *certiorari* in *Christie v. NCAA, et al.*) The Supreme Court's decision in the case is expected by the end of June 2018 and has the potential to dramatically change the gaming environment in the United States.

This article explains the PASPA and the Wire Act, and discusses how the gaming landscape in the United States could change as a result of the Supreme Court's decision in *Christie v. NCAA et al.*

II. The Professional and Amateur Sports Protection Act (the "PASPA")

A. The PASPA Prohibitions

Enacted in 1992 to "stop the spread of State-sponsored sports gambling and to maintain the integrity" of sports competitions in the United States, the PASPA provides (at § 3702) that it shall be unlawful for:

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorise by law or compact; or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

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 on one or more performances of such athletes in such games.

"Government entity" is defined to include a state and its subdivisions, and self-governing Indian tribes recognised by the U.S. Secretary of the Interior. The terms "lottery", "sweepstakes", and "other betting, gambling, or wagering scheme" are not defined. However, the PASPA's legislative history states:

The prohibition of section 3702 applies ***regardless of whether the scheme is based on chance or skill, or on a combination thereof***. Moreover, the prohibition is intended to be broad enough to include all schemes involving an actual game or games, or an actual performance or performances therein, . . .

(S. Rep. 102-248, 102nd Cong., 1st Sess. (1991) (emphasis added).) The last clause of § 3702 – "one or more performances of such athletes in such games" – covers multiple individual performances, such as those that are used to determine the outcomes of fantasy sports contests. Thus, states may violate the PASPA when they pass laws authorising and/or licensing pay-to-play fantasy sports contests with prizes. Regardless whether skill or chance governs the outcome of such contests, the PASPA would apply if such contests constitute "a lottery, sweepstakes, or other betting, gambling, or wagering scheme". In an effort to avoid risk under the PASPA, the most recently-enacted state laws legalising fantasy sports contests expressly state that such contests shall not be considered "gambling" within the meaning of that term under state law. However, such a conclusion would not be dispositive for purposes of enforcement of the PASPA, a federal law. To date, however, the sports leagues and the U.S. Department of Justice (the "DoJ") – each of which, independently, has the power to enforce the PASPA – have shown no interest in challenging state fantasy sports laws under the PASPA.

B. The PASPA Exceptions

The PASPA excepts from its prohibitions pari-mutuel wagering on animal racing or jai-alai games. It also excepts (and thus "grandfathers") sports betting schemes conducted during certain periods prior to the PASPA's enactment, subject to the satisfaction of certain conditions. One exception applies to government-operated lotteries, sweepstakes and other betting, gambling and wagering schemes "***to the extent*** that the scheme was conducted by that State or other government entity at any time during the period beginning January 1, 1976 and ending August 31, 1990". (28 U.S.C. § 3704(1) (emphasis added).) This exception applies only to government-operated sports betting schemes, and only to the extent such schemes actually were conducted by the government during the applicable time period, regardless whether more expansive gambling was authorised. Expansion of the conducted scheme into other sports is permitted, but this exception does not allow governments to "effectuate a substantive change [to] the scheme that was conducted during the exception period". (*Commissioner of Baseball v. Markell*, 579 F.3d 293, 303 (3rd Cir. 2009).) Certain sports-related games operated by the state lotteries in Delaware, Montana and Oregon fall within this exception.

A second exception applies to lotteries, sweepstakes and other betting, gambling and wagering schemes where both: (1) the scheme was authorised by a statute as in effect on October 2, 1991; and (2) the scheme "actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity". (28 U.S.C. § 3704(2).) This exception applies to the sports wagering conducted in Nevada, which is the only state currently allowed under the PASPA exceptions to conduct single-game, head-to-head betting. In addition, this exception allows for expansion. "[S]ports gambling covered by [this exception] can be conducted in any part of the state in any facility in that state, whether such facility is currently in existence." (S. Rep. 102-248, 102nd Cong., 1st Sess. (1991).)

Finally, the PASPA includes a third exception specific to New Jersey, which prohibited sports gambling at the time the PASPA was enacted, but had several authorised and licensed casinos operating in Atlantic City. Under this third exception, New Jersey was given until "one year after the effective date of [the PASPA]" to authorise sports gambling to be conducted in Atlantic City. (28 U.S.C. § 3704(3).) New Jersey did not act to authorise sports gambling within that one-year period.

C. Enforcement of the PASPA

(28 U.S.C. § 3703.)

D. Federalism Concerns Relating to the PASPA

The PASPA does not prohibit sports gambling itself. Rather, it prohibits the states from carrying out certain acts to further sports gambling, such as "licensing" or "authorising" sports gambling by law. In addition, the PASPA prohibits private operators from operating or promoting sports gambling only if those acts are done "pursuant to the law or compact" of a state or other governmental entity. As stated by the AGA in the AGA *Amicus* Brief:

> While Congress could have regulated or prohibited sports betting as a matter of federal law [pursuant to its "Commerce Clause" powers under Article 1, Section 8, Clause 3 of the U.S. Constitution], it chose not to. Instead PASPA in effect ensures that sports betting continues to violate ***state law***.

Finally, the PASPA's grant of enforcement authority to private sports leagues is arguably an unconstitutional delegation of Congress' lawmaking power. (Brief of Professor Ryan M. Rodenberg as *Amicus Curiae* in Support of Petitioners in *Christie v. NCAA, et al.*) As the Supreme Court has stated, a delegation of regulatory power to a private, non-governmental entity "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interest may be and often are adverse to the interests of others in the same business". (*Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).) As stated in 1991 by the DoJ, which opposed the enactment of the PASPA:

> The Department is concerned that, to the extent the [PASPA] can be read as anything more than a clarification of current law, it raises federalism issues. It is particularly troubling that [the PASPA] would permit enforcement of its provisions by sports leagues.

(S. Rep. 102-248, 102nd Cong., 1st Sess. (1991).)

The above points are keys to understanding New Jersey's PASPA challenge now pending before the Supreme Court.

III. New Jersey's PASPA Challenge

In 2014, New Jersey enacted a law that repealed the state's sports betting prohibitions, but only (1) to the extent applicable to Atlantic City casinos and New Jersey horse racing tracks, (2) with respect to sports gambling by persons 21 years old and older, and (3) to the extent that the wagering is not on a collegiate sports event taking place in New Jersey or in which a New Jersey college team is participating (regardless where the event takes place). (N.J. 2014 P.L. c. 62, § 1.) By structuring the law as a "repeal", New Jersey believed that it was

not "authorising" sports gambling and thus was not in violation of the PASPA. Indeed, New Jersey followed guidance provided by the sports leagues, the DoJ and the U.S. Third Circuit Court of Appeals in a 2013 case. In that case, the Third Circuit Court upheld the sports leagues' PASPA challenge to a 2012 New Jersey law which would have established a sports wagering licensing and regulatory scheme in New Jersey. (*NCAA v. Christie et al.*, 730 F.3d 208 (3rd Cir 2013), cert. denied 134 S.Ct. 2866 (2014).) The Court construed the PASPA to prohibit only the "affirmative 'authorization by law' of gambling schemes", and not repeals of states' existing sports betting prohibitions. Moreover, in its brief opposing New Jersey's effort to have the Supreme Court hear that earlier case (the Supreme Court eventually declined), the sports leagues argued that "[n]othing in [the] unambiguous language [of the PASPA] compels [S]tates to prohibit or maintain ***any*** existing prohibition on sports gambling" (emphasis added). Still further, in its brief opposing New Jersey's appeal to the Supreme Court, the DoJ argued that the PASPA did not "obligate New Jersey to leave in place the state law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment", and New Jersey was "free to repeal those prohibitions ***in whole or in part***." (emphasis added).

However, after New Jersey enacted the 2014 law partially repealing its sports betting prohibitions (and repealing the 2012 law), the sports leagues, the DoJ and the Third Circuit Court changed their minds and interpreted the PASPA as making it unlawful for New Jersey to repeal its sports betting prohibitions when limited to specific geographic venues. In a nine to three decision rendered by the full 12-member Court, the Third Circuit Court enjoined implementation of the New Jersey partial-repeal law, holding that it "authorize[d] sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling". According to the majority, "[t]hat selectiveness constitute[d] specific permission and empowerment" and thus violated the PASPA. Further, the Third Circuit Court concluded that the PASPA does not unconstitutionally commandeer state legislatures, because it does not "require or coerce the states to lift a finger" or "take affirmative action" to enact any particular state law.

New Jersey sought an appeal before the U.S. Supreme Court, arguing that the PASPA "commandeers" the regulatory power of the states in violation of the 10th Amendment to the U.S. Constitution (which reserves to the states or the people the powers not expressly granted to the federal government), because it requires New Jersey to enforce through its laws a federal regulatory policy banning sports gambling, even though a majority of New Jersey citizens and legislators voted to permit sports gambling in the state.

Arguing in support of New Jersey's appeal, the AGA argued in the AGA *Amicus* Brief as follows:

> A State's ability to decide what its law is (and is not) is a "quintessential attribute of sovereignty" and precisely what gives the State its sovereign nature. Indeed, protecting a State's autonomy to enact, enforce, and repeal its own laws as it sees fit protects individual rights and promotes democratic accountability. By adopting a system of dual sovereignty, our Constitution embraces these principles and rejects a central government that would act upon and through the States' in favor of a system in which the State and Federal Governments would exercise *concurrent* authority over the people.
>
> For these reasons, this Court has always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel ***the States*** to require or prohibit those acts. Thus, for well over a century, it has been a central tenet of this Court's so-called anti-commandeering jurisprudence that Congress cannot compel the States to enact and enforce a federal regulatory program, or require the States to govern according to Congress' instructions. . . .
>
> [The PASPA] enshrines a federal policy that, with a few grandfathered exceptions, makes sports betting illegal nationwide. . . . As interpreted by the Third Circuit, PASPA not only prohibits States from enacting laws that ***authorize*** sports gambling; it forces States to maintain laws (and accompanying enforcement apparatuses) that ***prohibit*** the practice.
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> . . .
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> There is no dispute that Congress cannot directly compel New Jersey to enact a prohibition on sports betting. It should follow, then, that Congress may not prevent New Jersey from repealing its sports-betting prohibition. After all, preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated.

(Emphasis in original, quotations and citations omitted.)

Thus, the legal question to be decided by the Supreme Court is whether the PASPA "commandeers" states to maintain state-law prohibitions on sports betting in violation of the 10th Amendment to the U.S. Constitution and the Supreme Court's fundamental related decision in *New York v. United States*, 505 U.S. 144 (1992). (That decision stated that it is unconstitutional for Congress to "directly . . . compel the States to require or prohibit [certain] acts".)

Briefs in the case are expected to be submitted by the end of 2017, and a decision is anticipated by the end of June 2018.

IV. Possible Effects of the U.S. Supreme Court's Decision in *Christie v. NCAA et al.*

The Supreme Court's decision has the potential to change the gaming landscape in the United States. A decision favouring New Jersey could (1) provide a road-map for other states to follow in order to permit bricks-and-mortar sports betting, or (2) remove entirely the federal prohibition on state-authorised bricks-and-mortar sports betting. Either result would allow states to decide for themselves whether bricks-and-mortar sports betting should be allowed within their boundaries. Of course, a third possible result exists which is unfavourable to New Jersey: the Court could hold the PASPA is constitutional and does not violate the 10th Amendment's anti-commandeering principle as applied to New Jersey's 2014 law.

Thus, if the Supreme Court upholds the PASPA, and also holds that New Jersey's repeal of its sports gambling prohibitions does not constitute an "authorisation" of sports gambling (and thus does not violate the PASPA), other states could follow New Jersey's example and repeal their sports betting laws to the extent applicable at certain venues – e.g., otherwise regulated gaming venues. This would not be optimal for states, however, because states likely would want to impose at least some general regulation (e.g., regulation ensuring the games are honest and fair, and otherwise protecting consumers), and it would be unclear how much general regulation could be made applicable and not run afoul of the PASPA. Many of those watching this case believe that Congress will intervene to repeal or amend the PASPA if the Supreme Court renders this narrow decision.

Alternatively, if the Supreme Court strikes down the PASPA entirely, this will open the door for states – if they so choose – to pass laws authorising and regulating sports betting, although some state constitutions may first need to be amended on account of constitutional restrictions limiting their legislatures' power to enact laws authorising certain forms of gambling. In addition to New Jersey, Connecticut, Delaware and Mississippi have already enacted laws authorising sports betting in anticipation of a Supreme

Court decision striking down the PASPA or a federal law repealing it. Other states have introduced laws that would authorise sports betting (subject to a change in federal law) or provide for it to be studied. As of this writing, such states include California, Hawaii, Maryland, Michigan, New York, Oklahoma, Pennsylvania, South Carolina and West Virginia.

Finally, U.S. Congressman Frank Pallone, Jr., of New Jersey, has issued a discussion draft of a bill that would repeal the PASPA and allow states to legalise sports betting and online gambling if appropriate consumer protections were in place. As of this writing, the bill – the Gaming Accountability and Modernization Enhancement Act (the "GAME Act") – has not been introduced.

V. The Wire Act

The Wire Act prohibits those "in the business of betting or wagering" from using "a wire communication facility" for the transmission:

- "in interstate or foreign commerce of bets or wagers or information assisting . . . bets or wagers on any sporting event or contest"; or
- "of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting . . . bets or wagers, . . . "

(18 U.S.C. § 1084(a).)

The Wire Act excepts information assisting bets transmitted between states in which betting on such particular sporting event is lawful. However, this exception does not apply to the bets themselves, it applies only to information assisting in sports bets.

In 2011, the DoJ issued an opinion declaring the Wire Act applicable only to betting and wagering on sporting events, changing its earlier interpretation (or arguably re-adopting its original interpretation) that the Wire Act applied to all gambling involving a wire. This DoJ opinion opened the door to internet (online) betting in the United States on lotteries, poker and other games of chance and/or mixed skill and chance, subject to approval of the applicable states. ("Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processers to Sell Lottery Tickets to In-State Adults Violate the Wire Act", September 20, 2011.) As a result of the DoJ's interpretation of the Wire Act, no federal law currently prohibits state-authorised non-sports online gambling conducted on an intrastate basis. However, the DoJ left no doubt that the Wire Act applies to online sports betting where the bets or wagers are sent in interstate or foreign commerce by a means involving a wire.

The Wire Act is not at issue in *Christie v. NCAA et al.* and, therefore, its prohibitions on the use of the internet (and other systems using wires) for the transmission in interstate or foreign commerce of sports wagers, or information assisting in sports wagers, will not be affected by the Supreme Court's decision. Accordingly, even if the Supreme Court strikes down the PASPA in its entirety, the federal ban on the interstate transmission of sports bets will remain intact. Accordingly, while states could implement ***intrastate*** mobile wagering if the PASPA is struck down (such intrastate mobile wagering is currently conducted in Nevada), states could not implement online sports betting that processed sports bets from out-of-state bettors or where the bets were processed out-of-state.

VI. Opinions Regarding Sports Gambling Have Changed Since the PAPSA's Enactment

In the United States, public opinions towards sports gambling have changed dramatically since the PASPA was enacted in 1992. "A 1989 Gallup Survey found that a majority of Americans opposed allowing the States to legalize sports betting". (AGA *Amicus* Brief.) However, according to a 2017 poll by Public Opinion Strategies and Greenberg Quinlan Rosner Research cited by the AGA on its website, 57% of Independents, 58% of Republicans and 50% of Democrats support ending the federal ban on state-authorised sports gambling. In addition, according to the same poll, "[n]early 7 in 10 Americans (69%) agree that 'allowing sports betting is something for the people of each state to decide, not the federal government'".

States too want the freedom to decide whether or not sports betting should be allowed within their boundaries. As mentioned above, four states have passed laws authorising sports betting, and nine others have proposed that it be authorised or studied.

Finally, the opinions of the sports leagues have softened towards sports betting. In November, 2014, National Basketball Association Commissioner Adam Silver penned an opinion piece in the *New York Times*, in which he stated: "Times have changed…I believe sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated". In October 2015, Major League Baseball Commissioner Rob Manfred stated on ESPN Radio: "[T]he landscape is changing and . . . baseball, during this offseason, principally will take a look at its relationships with legalized gambling – whether it's sponsorship, whatever – and re-evaluate given that the country has changed in terms of its approach to legalized gambling". Major League Soccer Commissioner Don Garber, in a March 2017 interview with *Sports Illustrated*, stated:

> I'm very open to understanding how we can get more engaged in this market [i.e., legalized sports betting] in a way that I think if done properly, can be regulated and managed and controlled. I'll join the chorus of saying it's time to bring it out of the dark ages. We're doing what we can to figure out how to manage that effectively.

The National Football League ("NFL"), however, remains opposed to legalised sports betting. In an April 2017 interview with ESPN Radio, NFL Commissioner Roger Goodell stated:

> [T]here clearly is a change I think in society with respect to gambling in general. Where we draw the line is when anything can impact the integrity of the game. And legalized sports betting is something that we're concerned about on that level. So we'll remain opposed to that. But we're obviously recognizing what's going on in society and we're going to have to adapt policies from time to time. But we think this is something – protecting that integrity of the game is critical.

Notwithstanding this stance, in 2017, the NFL owners voted 31-1 to approve moving the Oakland Raiders to Las Vegas, where they will play starting as early as 2019. Moreover, to date, the NFL has not taken action to prohibit betting on Raiders' games when they play in Las Vegas.

VII. Conclusion

Currently in the United States, the amount of money wagered on sports events illegally is at least 30 times greater than the amount wagered legally. Illegal sports bets may total as much as $500 billion annually. This represents wagering that is untaxed, unregulated and "[m]uch of this revenue generated by illegal sports gambling is used to fund organized crime and other illicit activity, such as drug and human trafficking, money laundering, and racketeering". (AGA *Amicus* Brief.) Although the PASPA was intended to reduce sports gambling, it "has simply allowed [sports gambling] to flourish underground, benefitting criminal elements and creating a thriving black market". (*Id.*)

At the same time, opinions of United States voters and state legislatures have changed. Almost 70% of Americans now agree that whether to allow sports betting should be decided by the people of each state, not the federal government.

In 2018, the Supreme Court in *Christie v. NCAA et al.* may overturn the PASPA, allowing states to once again decide for themselves whether to allow bricks-and-mortar sports gambling within their boundaries. The Nevada monopoly on single-game sports betting may finally end.

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