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In a Landmark Ruling, the U.S. Supreme Court Strikes Down PASPA, Opening the Door for Legal Sports Betting: **What Happens Now?**

By Mark Hichar



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In a Landmark Ruling, the U.S. Supreme Court Strikes Down PASPA: What Happens Now?



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On May 14, 2018, the U.S. Supreme Court issued its long-awaited ruling in the New Jersey sports betting case *Murphy v. NCAA, et al.*¹ In a 6 – 3 ruling, the Court struck down as unconstitutional the Professional and Amateur Sports Protection Act (“PASPA”),² the federal law that, since its enactment in 1992, made it unlawful for state, local and tribal governments to operate, promote, license or authorize sports betting, and also prohibited non-government operators from conducting sports betting pursuant to state, local or tribal law. The majority’s key holdings were the following:

1. PASPA’s provision prohibiting state authorization of sports gambling schemes violates the anticommandeering rule embodied in the 10th Amendment to the U.S. Constitution – the amendment that reserves to the states the powers not granted to Congress. The respondent sports leagues and the U.S. Department of Justice had argued that, while the anticommandeering rule prohibits Congress from compelling states to enact legislation, prohibiting states from enacting new laws is different and does not violate the rule. They argued “that commandeering occurs ‘only when Congress goes beyond precluding state action and affirmatively commands it.’”³ The Court disagreed, stating:



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“This distinction is empty.... The basic principle – that Congress cannot issue direct orders to state legislatures – applies in either event. [The PASPA provision prohibiting state authorization of sports gambling] ‘unequivocally dictates what a state legislature may and may not do, [and therefore] violates the anticommandeering rule.’”

2. PASPA’s anti-authorization provision does not constitute a valid preemption provision under the Constitution’s Commerce Clause.⁴ The Court stated:

“Regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States... [T]here is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.”

3. PASPA’s provision prohibiting state “licens[ing]” “suffers from the same defect as the prohibition of state authorization. It issues a direct order to the state legislature. Just as Congress lacks the power to order a state legislature not to enact a law authorizing sports gambling, it may not order a state legislature to refrain from enacting a law licensing sports gambling.”
4. No provision of PASPA is severable from the provisions directly at issue. The Court did not think –

“that Congress would have wanted to sever the PASPA provisions that prohibit a private actor from ‘sponsoring,’ ‘operating,’ or ‘promoting’ sports gambling schemes ‘pursuant to’ state law. §3702(2). These provisions were obviously meant to work together with the provisions in §3702(1) that impose similar restrictions on governmental entities. If Congress had known that the latter provisions would fall, we do not think it would have wanted the former to stand alone.”

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Concluding its opinion, the Supreme Court reversed the lower court and stated:

"The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA 'regulate[s] state governments' regulation' of their citizens. The Constitution gives Congress no such power."

Note that the Supreme Court's landmark decision did not make sports betting legal throughout the United States. While it will be the catalyst for dramatic changes in state gambling laws, all it did was remove the federal law that prohibited states from passing laws authorizing and regulating sports betting, should they wish to do so.⁵ Thus, states are now free to decide for themselves whether or not sports betting should be allowed within their boundaries. This is consistent with the federal approach to other forms of gambling – the matter is left to the prerogative of each state.

New Jersey, the plaintiff in the lawsuit, is now expected to move quickly to authorize Atlantic City casinos and New Jersey horse racing tracks to conduct Nevada-style sports betting. In addition, five other states passed laws prior to the Supreme Court decision removing prior prohibitions on sports betting (Mississippi), authorizing the adoption of sports betting regulations (Connecticut), allowing sports betting at certain bricks and mortar venues (New York and West Virginia) or allowing sports betting online as well as at certain bricks and mortar venues (Pennsylvania). These states are expected to move quickly to implement their laws authorizing sports betting (and New York has a bill pending that, if enacted, would expand the sports betting allowed under its existing law to include mobile sports betting). Still further, Delaware, which already conducts parlay sports betting as a State Lottery game under a PASPA exemption, is expected to allow Nevada-style sports betting pursuant to a 2009 sports betting expansion law⁶ that had been held to violate the PASPA.⁷ Rhode Island too is expected to move quickly to authorize sports betting. A bill pending in that State would authorize the regulation and operation of

sports betting by the State Lottery, and the budget for the State's 2018 – 2019 fiscal year contemplates the State Lottery's generation of sports betting revenue. Finally, in light of the Supreme Court's decision, other states are expected to look seriously at authorizing sports betting.

While states move forward, tension is building as to whether sports betting should be regulated at the state or federal level. Promptly after the Supreme Court's decision was announced, the National Football League ("NFL") issued a statement asking Congress "to enact a core regulatory framework for legalized sports betting."⁸ The NFL had not sought to influence state sports betting legislation prior to the decision, unlike the National Basketball Association ("NBA") and Major League Baseball ("MLB"), which had lobbied state legislatures to include in their sports betting legislation an "integrity fee" to compensate the leagues for their additional efforts to keep their games free from corruption, and also sought to be the exclusive source of in-game data. However, although it had been working with state legislatures as aforesaid, after the decision, the NBA issued this statement: "We remain in favor of a federal framework that would provide a uniform approach to sports gambling in states that choose to permit it, but we will remain active in ongoing discussions with state legislatures."⁹

After the NFL and NBA issued their statements, the National Collegiate Athletic Association ("NCAA"), which has long opposed betting on collegiate athletic competitions, issued a surprising statement pledging support for the federal regulation of wagering on college games. NCAA President Mark Emmert stated in a news release: "While we recognize the critical role of state governments, strong federal standards are necessary to safeguard the integrity of college sports and the athletes who play these games at all levels."¹⁰

Efforts by the leagues to lobby for a federal sports betting infrastructure likely will be met with resistance from state governors, state attorneys general and state lotteries, as were federal bills that would have imposed a federal regulatory licensing scheme upon online poker several years ago. Ethan Wilson, a policy director for commerce and financial services for the National Conference of State Legislatures stated: "The Supreme Court decision was a big win for states, and not just on the issue of sports betting. . . . States can now debate this issue

to decide whether they want sports betting or not, and that's much better than having a one-size-fits-all regulatory scheme imposed by the federal government."¹¹ The states will have the American Gaming Association ("AGA") in their corner, as that lobbying association has stated that it is in favor of state-by-state regulation of sports betting. Sare Slane, the AGA's Senior Vice President of Public Affairs stated: "Gaming always has been a states' rights issue, and there really is, at this point, no role for the federal government."¹²

In summary, the Supreme Court's ruling will trigger dramatic changes in the U.S. gambling landscape. States now are free to decide for themselves whether or not to authorize sports betting within their boundaries. A few states are expected to move quickly to implement previously-enacted laws authorizing sports betting, and others surely will follow. Who gets to conduct sports betting likely will vary depending on the state, as a result of differences in existing state laws and state constitutions. One thing is certain, however – the sports leagues will continue to seek to participate in revenues generated by sports betting. ■

⁵ Formerly, "Christie v. NCAA," before Phil Murphy succeeded Chris Christie as Governor of New Jersey on January 16, 2018. *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. Respondents were the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League and Major League Baseball.

⁶ 28 U.S.C. §§ 3701 – 3704.

⁷ Unless otherwise indicated, quotes are from the U.S. Supreme Court's opinion, available at https://www.supremecourt.gov/opinions/17pdf/16-476_dbfi.pdf (last accessed May 20, 2018). Internal citations have been omitted.

⁸ U.S. Const. Art. I, Sec. 8, Cl. 3.

⁹ The PASPA had provided exceptions for previously existing sports betting applicable to Nevada, Delaware, Montana and Oregon. However, only Nevada was allowed to conduct single-game sports betting.

¹⁰ The Delaware Sports Lottery Act, Del. Laws Ch. 28 (H.B. No. 100) (2009), codified at 29 Del. Code § 4801 et seq.

¹¹ *MLB, et al. v. Delaware*, 579 F.3d 293 (3rd Cir. 2009).

¹² "NFL, MLB, NBA, NCAA and others react to Supreme Court decision on Sports Betting," Tom Schadt, USA Today, May 14, 2018 at <https://www.usatoday.com/story/sports/2018/05/14/sports-betting-nfl-mlb-nba-ncaa-reaction-supreme-court/607459002/> (last accessed May 20, 2018).

¹³ <http://www.ncaa.org/about/resources/media-center/news/ncaa-supports-federal-sports-wagering-regulation> (last accessed May 20, 2018).

¹⁴ *Id.*

¹⁵ "Leagues Turn to Congress as Last Resort on Sports Betting," by Tony Batt, GamblingCompliance, May 18, 2018, <https://gamblingcompliance.com/premium-content/insights-analysis/leagues-turn-congress-last-resort-sports-betting> (last accessed May 20, 2018) by subscription only.

¹⁶ *Id.*