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U.S. Supreme Court to Decide Constitutionality of Federal Prohibition on Sports Gambling

By Yehudah L. Buchweitz*

On June 27, 2017, the U.S. Supreme Court granted certiorari in *Christie, Gov. of N.J., et al. v. NCAA, et al.*,¹ agreeing to hear an appeal brought by Gov. Chris Christie and the state of New Jersey challenging a federal prohibition on sports gambling in the United States.² At issue is the constitutionality of a federal statute known as the Professional and Amateur Sports Protection Act of 1992 (“PASPA”). PASPA prohibits both governments and private entities from organizing or operating a sports gambling enterprise.³ The statute further decrees that, with a few exceptions,⁴ states may not license or otherwise authorize sports betting, and prohibits individuals from participating in sports betting. Since 2012, New Jersey has enacted two laws intended to circumvent PASPA and legalize sports betting in its casinos and racetracks, both of which were later struck down in federal court. Its most recent attempt came in 2014, when Governor Christie signed into law a partial repeal of New Jersey’s prior state-level prohibitions on sports gambling.⁵ The four major sports leagues and the NCAA filed suit, arguing that the law was a violation of PASPA.⁶ The case made it to the Third Circuit Court of Appeals, which found in August 2016 that despite being couched as a partial repeal, the 2014 New Jersey law in effect authorized sports betting, which was impermissible under PASPA. The court, in striking down the New Jersey law, also rejected New Jersey’s argument that PASPA was unconstitutional under the 10th amendment’s anti-commandeering principle. By granting New Jersey’s appeal of the 2016 Third Circuit decision, the Supreme Court has evidenced an apparent readiness to opine on whether Congress can, through PASPA, constitutionally restrict states from authorizing sports betting, or whether such a restriction is a violation of the Tenth Amendment. The decision is expected to have far-reaching implications on the status of sports gambling in the United States.

New Jersey’s Fight to Legalize Sports Betting

In January 2012, Governor Chris Christie signed into law legislation affirmatively legalizing sports wagering at casinos and racetracks in New Jersey.⁷ The four major sports leagues and the NCAA sued to enjoin New Jersey from implementing the law. New Jersey argued that, to the extent PASPA prohibited such legislation, it was unconstitutional under the Tenth Amendment’s anti-commandeering principle, as established by the Supreme Court, that Congress may not “directly . . . compel the States to require or prohibit acts which Congress itself may require or prohibit.”⁸ After the district court held that PASPA was constitutional and enjoined New Jersey from

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implementing its law,⁹ the Third Circuit affirmed in 2013, holding that PASPA did not violate the anti-commandeering principle because it merely prohibits states from enacting laws to license sports wagering; it does not affirmatively require states to pass laws or prevent states from completely repealing their sports gambling laws, and therefore was a valid exercise of congressional authority.¹⁰

In 2014, New Jersey passed different legislation (the “2014 Law”) that partially repealed its existing state laws prohibiting sports gambling, but did not go as far as the 2012 law affirmatively authorizing sports betting and establishing a regulatory scheme.¹¹ The 2014 Law removed most sports betting prohibitions from New Jersey casinos and racetracks, but still limited sports betting to people aged 21 or over, and prohibited betting on New Jersey college teams or collegiate competitions that take place in New Jersey.¹² The leagues once again filed suit, and the District Court again ruled in their favor and issued an injunction.¹³ On appeal to the Third Circuit, New Jersey argued that because the 2014 Law merely repealed existing laws, and did not affirmatively authorize sports gambling, it was not a violation of PASPA.¹⁴ In a 2016 decision, the Third Circuit rejected the characterization of New Jersey’s 2014 Law as a repeal, and focused instead on the fact that the 2014 Law still authorized sports gambling by certain people in certain areas.¹⁵ The court found that the law, while “artfully couched in terms of a repealer,” still authorized sports gambling at state casinos and racetracks in violation of PASPA.¹⁶

Addressing the question of PASPA’s constitutionality, the Third Circuit once again held that PASPA does not violate the anti-commandeering doctrine, for two reasons: first, unlike previous statutory schemes that did violate the anti-commandeering doctrine, PASPA does not coerce states into adopting a federal program.¹⁷ Second, PASPA does not require states to take any action. Rather, it merely prohibits them from authorizing sports gambling by law, and leaves sufficient room for New Jersey to craft its own policies.¹⁸

Question for the Supreme Court

The pertinent question facing the Supreme Court is whether PASPA’s prohibitions amount to a valid exercise of Congress’ authority to regulate state activities, or whether such prohibitions unconstitutionally commandeer the states in a way that runs afoul of the Tenth Amendment. This question may turn on whether the statute unduly coerces states by not leaving them sufficient room to craft their own policies—which two dissenting Third Circuit justices opined it does.¹⁹ A finding that PASPA is unconstitutional would potentially open the door for legalization of sports betting at the state level. Indeed, several states, including Pennsylvania and Connecticut, have already enacted legislation which would legalize sports betting in the event that PASPA is overturned, and a number of other states are currently considering similar legislation.

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1. *Christie v. NCAA*, 2017 U.S. LEXIS 4279. In addition to granting certiorari in this case, the Supreme Court also granted certiorari in *NJ Thoroughbred Horsemen v. NCAA*, 2017 U.S. LEXIS 4274. As this case was a challenge of the same issue, the Supreme Court consolidated both cases.
 2. The Court granted certiorari notwithstanding a May 2017 brief from the U.S. Solicitor General’s Office recommending that the Court decline to hear the case.
 3. See 28 U.S.C. § 3702(2) (It is “unlawful for either a governmental entity . . . or a person to sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate.”).
 4. PASPA carved out three exemptions to these prohibitions, expressly permitting: (1) Nevada to continue to allow and operate sports betting after PASPA was enacted; (2) Delaware, Oregon, and Montana to continue the “limited” sports lotteries and sports betting pools that they had previously conducted; and (3) New Jersey to license sports wagering in Atlantic City provided it did so within one year of PASPA’s enactment, which it failed to do. 28 U.S.C. § 3704.
 5. N.J. Stat. § 5:12A-7 (2014).

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6. Notably, PASPA gives the four major professional sports leagues and the NCAA a direct cause of action to sue states to enjoin them from violating PASPA's provisions. See 28 U.S.C. § 3703.
7. N.J. Stat. Ann. §§ 5:12A-1 to 5:12A-6 (West 2012) (Repealed 2014).
8. *NCAA v. Governor of N.J.*, 730 F.3d 208, 227 (3d Cir. 2013).
9. *NCAA v. Christie*, 926 F. Supp. 2d 551, 579 (D.N.J. 2013).
10. *NCAA v. Governor of N.J.*, 730 F.3d 208, 233 (3d Cir. 2013).
11. N.J. Stat. Ann. § 5:12A-7 (2014).
12. *Id.*
13. *NCAA v. Christie*, 61 F. Supp. 3d 488 (D.N.J. 2014).
14. *NCAA v. Governor of N.J.*, 832 F.3d 389 (3d Cir. 2016) (en banc).
15. *Id.* at 397–98.
16. *Id.*
17. *Id.* at 402. By contrast, in *New York v. United States*, the Supreme Court held that a federal law requiring states to enact a federal regulatory program or take title to radioactive waste “crossed the line distinguishing encouragement from coercion.” 505 U.S. at 175.
18. *NCAA*, 832 F.3d 389.
19. See *id.* at 408 (Fuentes, J. and Vanaskie, J., dissenting).

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