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U.S. Supreme Court Strikes Down PASPA, Opening the Door to State-Authorized Sports Gambling

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On May 14, 2018, the U.S. Supreme Court issued its long-awaited decision in *Murphy v. NCAA*, striking down a 26-year old federal statute that banned states from "authorizing" sports gambling. Although the Court's ruling is expected to prompt many states to adopt new legislation permitting intrastate wagering on sporting events, Congress still has the authority to enact a federal scheme that could permit regulated wagering on a nationwide basis. Until that day, however, each state is "free to act on its own" to regulate – or not regulate – sports gambling as it sees fit.

The Statute

In 1992, Congress enacted the Professional and Amateur Sports Protection Act ("PASPA") in an attempt to prohibit the expansion of sports betting beyond Nevada and three other states that were effectively "grandfathered" in. The key provision of PASPA was 28 U.S.C. § 3702(1), which made it "unlawful" for a state or any of its subdivisions to "sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events. In addition, 28 U.S.C. § 3702(2) prohibited private entities from operating those gambling schemes, but only to the extent done "pursuant to the law or compact of a governmental entity." Contrary to popular belief, PASPA did not make sports gambling a federal crime. Rather, it authorized the Attorney General, as well as professional and amateur sports organization, to bring civil actions to enjoin violations of the statute.

Background

PASPA initially gave New Jersey the option to legalize sports gambling in Atlantic City if it acted within one year of the law's effective date; however, the State declined to do so. But by 2011, with Atlantic City facing stiff competition from other jurisdictions that had permitted some form of gambling, the State had a change of heart. New Jersey voters approved an amendment to the State Constitution that allowed the legislature to authorize sports gambling. The legislature passed a law in 2012, but that law was struck down by the federal courts, which concluded that it violated PASPA.

In 2014, the New Jersey legislature tried again by enacting Senate Bill 2460, the law at issue in *Murphy*. Notably, the new law did not affirmatively authorize any regulatory framework for sports gambling schemes. Instead, it simply repealed the existing provisions of New Jersey law that prohibited wagering on sporting events (other than sporting events involving a New Jersey college team and collegiate events being held in New Jersey) at horseracing tracks and Atlantic City casinos by persons aged 21 or older. The NCAA and various professional sports leagues filed a lawsuit in federal court attempting to enjoin the law by arguing that the repeal violated PASPA by effectively authorizing sports gambling. New Jersey argued that (1) the law was not subject to PASPA because it did not "authorize" sports gambling, and (2) PASPA itself was unconstitutional because it contravened the "anti-commandeering principle" under the Tenth Amendment of the U.S. Constitution, which prevents Congress from dictating what a state legislature may or may not do. The District Court granted summary judgment to the plaintiffs and issued a permanent injunction against the State of New Jersey, holding that the law violated PASPA and there was no constitutional violation. The Third Circuit affirmed en banc.

The Supreme Court Strikes Down PASPA

In an opinion authored by Justice Alito and joined by five other Justices (plus Justice Breyer, who joined most, but not all, of the opinion), the Supreme Court reversed the Third Circuit's decision and held that PASPA had unconstitutionally infringed upon New Jersey's sovereign authority by impermissibly commandeering the State's regulatory power.

Before the Supreme Court could assess the constitutionality of PASPA, it had to determine whether New Jersey had violated the statute by repealing in part its existing gambling laws. This determination required the Court to examine the meaning of the term "authorize" as used in the statute. New Jersey argued that a complete or partial repeal of existing laws did not constitute "authorization" and thus was not subject to PASPA. Otherwise, the State argued, § 3702(1) would have required New Jersey to maintain all of its existing laws against sports gambling, in perpetuity, without any modification. The Court disagreed with New Jersey, holding that when a state "completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity." Because the repeal violated PASPA, the Court had to consider whether PASPA was constitutional.

Following a lengthy analysis of the history and purpose of the Tenth Amendment's anti-commandeering doctrine, the Court explained that PASPA violated the doctrine because, under any interpretation of the statute, it "unequivocally dictates what a state legislature may and may not do." As Justice Alito noted colorfully: "It is as if federal officials were installed in state legislative chambers and were armed with the authority to stop legislatures from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine." The Court also held that there is no distinction under the doctrine between ordering the states to take "affirmative" action as opposed to imposing a prohibition, since either way Congress would be issuing "direct orders" to state legislatures.

The Court also rejected the respondents' argument that PASPA constituted a valid preemption of state law. It explained that the various preemption doctrines are all based "on a federal law that regulates the conduct of private actors, not the States." The provision at issue, however, could not reasonably be understood as a regulation of private actors because it conferred no federal rights and imposed no federal restrictions on private actors. "Thus, there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States," which is exactly what the anti-commandeering rule prohibits.

Finally, the Court addressed whether the remaining provisions of PASPA – including the provision regulating private actors – could survive if § 3702(1) was invalidated. The Court determined that § 3702(1) could not be severed from § 3702(2) because the two provisions were "obviously meant to work together." Allowing § 3702(2) to survive would create a regulatory scheme in which private conduct would violate federal law only if it was permitted by state law. Such a rule would be "exactly the opposite" of the general federal approach to gambling – in which federal gambling laws only apply if the conduct is illegal under state or local law – and Congress could not have contemplated that "such a weird result would come to pass." Consequently, the Court held that no provision of PASPA could be severed from § 3702(1) and therefore the entire statute was unconstitutional. In a separate opinion, Justice Breyer (concurring) and Justices Ginsburg and Sotomayor (dissenting) disagreed with the Court's conclusions regarding severability, explaining they would have severed and upheld § 3702(2).

The Court concluded by acknowledging that the legalization of sports gambling is a controversial subject that requires an important policy choice. However, it explained, "the choice is not ours to make." Rather, "Congress can regulate gambling directly," but if it chooses not to do so, then each State must be "free to act on its own."

What Happens Next?

Although the Supreme Court's opinion invalidated PASPA, the decision itself did not change the gambling laws of any State. It is now up to individual States to decide whether and to what extent – if at all – they will allow wagering on sporting events. Any State that wishes to legalize sports gambling must undertake the necessary legislative process for changing its laws and, if it decides do to so, adopt a regulatory scheme (such as a gaming commission) that oversees these gambling operations. In addition to New Jersey (which is expected to adopt a more comprehensive law, now that PASPA is no longer an impediment), Delaware, Mississippi, Pennsylvania and West Virginia have already enacted legislation and may be able to offer wagering later this year. Other States have indicated an interest in adopting legislation though some, like New York, are nearing the end of their annual legislative sessions.

While individual States may choose to allow gambling within their borders, numerous other federal laws that regulate gambling – namely, the Wire Act (18 U.S.C. § 1084), the Illegal Gambling Business Act (18 U.S.C. § 1955) and the Unlawful Internet Gambling Enforcement Act (31 U.S.C. § 5361) – remain on the books. The Wire Act, in particular, prohibits anyone "engaged in the business of betting or wagering" from "knowingly us[ing] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . on any sporting event or contest." Therefore, interstate wagering remains illegal. As a result, a New York City resident will have to physically cross the Hudson River to place a wager at a New Jersey gambling establishment.

Perhaps the most interesting aspect of the opinion was Justice Alito's unequivocal statement that "Congress can regulate sports gambling directly," if it elects to do so. While Justice Thomas, citing an 1867 Supreme Court case, expressed doubt that Congress could prohibit sports betting that does not cross state lines, there appear to be at least eight Justices who believe that Congress has this authority under the Commerce Clause. Thus, Congress could adopt a uniform federal policy that would permit and regulate sports gambling throughout the nation and thereby preempt the various state laws. Alternatively, it could choose to outlaw sports gambling throughout the country, although that approach seems unlikely at this point.

Some professional sports organizations have already indicated that they would be receptive to federal regulation. Over the past few months, in anticipation of the Court's ruling, a number of leagues have begun to advocate for a regulated approach to sports gambling that would be designed to ensure consistency across the various states in which they operate, protect the integrity of their games and allocate a portion of wagering revenues to the leagues to compensate them for their intellectual property and additional risk management expenses. While some members of Congress have announced their intention to propose federal legislation, it remains to be seen whether Congress will act.

Until then, the arena for debating the merits of sports gambling will shift from the Supreme Court to the fifty state capitols across the country. Many states are eager to legalize sports betting in the hope that it will attract jobs and generate tax revenues. The rush to embrace these opportunities will likely result in a patchwork of policies across jurisdictions and a variety of different licensees and authorized operators in different states. Some will succeed while others fail. The only thing clear at this point is that the end of the *Murphy* case is not the end of the story on sports gambling – it is just the beginning.

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