

## Will New Jersey's Bet On Sports Gambling Pay Off?

By **David Apfel and Brian Burgess**

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On Monday, Dec. 4, 2017, the U.S. Supreme Court heard oral argument in the much anticipated case, *Christie v. NCAA*, in which the court is considering New Jersey's bid to permit sports gambling at the state's casinos and racetracks. A decision from the Supreme Court is expected to have major implications for the multibillion dollar sports gambling industry. In light of oral argument, there appears to be a significant possibility of at least a partial victory for New Jersey, but the practical implications for sports gambling will depend on the precise contours of the court's decision.



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### Background

New Jersey has pressed for years to bring legal sports gaming to the state in an effort to raise revenue and revitalize the Atlantic City casinos. New Jersey first passed a law in 2012 authorizing sports wagering in casinos and racetracks. The NCAA and the NFL, NBA and MLB (collectively, "the leagues") promptly filed suit to prevent the law from going into effect under the Professional and Amateur Sports Protection Act of 1992 (PASPA). PASPA prevents state government entities (subject to certain exceptions, such as a provision grandfathering-in states like Nevada) from, among other things, licensing or authorizing schemes for sports gambling. 28 U.S.C. § 3702(1). PASPA also makes it unlawful for any person "to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity." *Id.* § 3702(2). The Third Circuit rejected New Jersey's constitutional challenges to PASPA, which New Jersey claimed infringed upon state sovereignty. And the Supreme Court turned away New Jersey's initial petition for certiorari.



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Seizing on an apparent opening in the Third Circuit's decision — which had suggested that PASPA's restriction on laws authorizing or licensing sports gambling did not prevent states from repealing preexisting bans — New Jersey enacted a new law in 2014. This time, the New Jersey legislature withdrew legislation licensing and regulating sports wagering, but it also repealed its prohibitions on sports wagers at casinos and racetracks. The NCAA and the leagues once again filed suit in federal court, arguing that the revised law continued to violate PASPA. The Third Circuit agreed (in a 10-3 en banc decision), and the Supreme Court granted review notwithstanding opposition from the NCAA, the Leagues, and the United States Solicitor General.

## **The Parties' Arguments: Routine Preemption or Unconstitutional Commandeering?**

In briefing before the Supreme Court, New Jersey argued that PASPA is unconstitutional because it violates the Tenth Amendment's "anti-commandeering" doctrine. That doctrine limits the federal government's authority to regulate state governments directly by requiring state legislatures to enact particular laws or by conscripting state officials to execute federal policies. New Jersey contends that PASPA improperly compels the states to implement federal policy by ordering them to maintain their prohibitions on sports wagering.

By contrast, the leagues, backed by the United States as an *amicus curiae*, have insisted that PASPA merely includes an express preemption provision that prohibits states like New Jersey from adopting laws that conflict with Congress's policy to prohibit state-sponsored sports gambling schemes (outside of grandfathered states like Nevada). They note that Congress has unquestioned authority to preempt state law under the supremacy clause when regulating pursuant to its commerce clause authority. And they argue that a mere prohibition on enacting certain policies does not "commandeer" the states to take any affirmative action.

Oral argument before the Supreme Court devoted considerable attention to these two competing frameworks. In the argument's first question, Justice Ruth Bader Ginsburg asked counsel for New Jersey (Ted Olson) how he could reconcile New Jersey's assertion that Congress may not regulate how states engage in regulation, with the fact that Congress routinely does just that "whenever it preempts state laws." Similarly, Justice Elena Kagan pressed Olson to explain how PASPA supposedly conscripts state officials to implement federal policy, as opposed to merely prohibiting state legislatures from exercising particular policy choices as the result of preemption. When Olson responded that "the legislature of New Jersey has been told that it may not regulate" sports gambling, Justice Kagan noted that such a prohibition "sounds [like] the language of preemption." Justice Sonia Sotomayor likewise observed that the injunction entered against New Jersey by the district court did not actually compel state officials to enforce laws against sports gambling, but rather simply operated in the same manner as a preemption judgment to displace a state law that conflicts with federal policy.

On the other side, however, several justices expressed skepticism about Congress's choice in PASPA to rely on states to prohibit sports gambling schemes rather than adopting a stand-alone federal ban. As Justice Anthony Kennedy put it, PASPA seems to "blur[] political accountability" by forcing states to maintain restrictions on sports gambling that they do not want, but which have been imposed by Washington. Justice Neil Gorsuch similarly expressed concerns that PASPA allowed Congress to implement its goals on the "cheap" by using the states rather than federal officials to maintain and enforce prohibitions on sports gambling. And several justices seemed to reject the suggestion that PASPA does not commandeer the states merely because they have the theoretical option of simply repealing all rules concerning sports gambling. As Chief Justice John Roberts put it in a colloquy with counsel for the United States, forcing the state to accept the federal government's policy preferences or to adopt a Wild West regime that removed all regulations on sports gambling is "not a real choice."

## **Potential Outcomes**

Judging from oral argument, there appears to be a very real possibility that the Supreme Court will find at least some aspect of PASPA unconstitutional on the ground that it is inconsistent with the Tenth Amendment's reservation of authority to the states. The questions from Chief Justice Roberts, Justice Kennedy, Justice Samuel Alito, and Justice Gorsuch all suggested considerable skepticism about PASPA's constitutionality. Justice Clarence Thomas did not ask any questions at oral argument, but his

jurisprudence in federalism cases provides reason to believe that he is sympathetic to New Jersey's arguments. Even Justice Stephen Breyer, who typically votes in favor of the federal government in Tenth Amendment cases, appeared to question PASPA's validity because the law directly regulates state policy choices as opposed to implementing a broader federal scheme with incidental preemptive effects.

If the Supreme Court decides that PASPA is constitutionally suspect, the real impact of a decision will depend on the court's remedy. The leagues and the United States have stressed that New Jersey's constitutional arguments only apply to the two PASPA provisions that bar states from "licens[ing] or authoriz[ing]" various schemes of sports betting. 28 U.S.C. § 3702(1). In addition to these two provisions, PASPA also prohibits governmental entities from "sponsor[ing], operat[ing], advertis[ing], [or] promot[ing]" the same betting schemes. *Id.* And as noted above, a separate provision of PASPA makes it unlawful for "a person to sponsor, operate, advertise, or promote" such betting schemes "pursuant to the law or compact of a governmental entity." *Id.* § 3702(2). These additional provisions do not raise the same constitutional concerns as the two restrictions that New Jersey has challenged because Section 3702(2) regulates individuals directly (rather than regulating the states), while the additional provisions of Section 3702(1) permissibly regulate states' commercial activities (not their exercise of sovereign authority).

If the Supreme Court leaves these additional provisions of PASPA in effect, then the practical impact of a decision in New Jersey's favor could be quite limited. New Jersey could repeal restrictions on sports gambling at its casinos, but neither it nor its casinos or racetracks would be permitted to advertise or otherwise promote such sports gambling. And the leagues and the United States could still seek injunctive relief under Section 3702(2) to prevent individuals from engaging in sports gambling "pursuant" to the state's law.

New Jersey has argued that these provisions of PASPA are all inextricably linked, so they should rise and fall together. Notably, this argument appeared to gain some traction among the justices, at least with respect to Section 3702(2). If the Supreme Court were to strike down PASPA in its entirety, then the implications for the sports gambling industry could be dramatic. Most obviously, such a ruling would clear the way for New Jersey and other states to authorize and regulate sports gambling at licensed casinos. A favorable ruling for New Jersey could also eliminate questions about states' ability to explicitly authorize and regulate new sports-based contests that have been characterized by a number of state attorneys general as gambling, such as fantasy sports.

The court is expected to rule by June 2018.

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[1] Danielle Paquette, More companies are buying insurance to cover executives who sexually harass employees, *The Washington Post* (Nov. 3, 2017), available at [https://www.washingtonpost.com/business/economy/more-companies-are-buying-insurance-against-sexual-harassment-complaints/2017/11/02/a7297f9a-bd69-11e7-959c-fe2b598d8c00\\_story.html?utm\\_term=.f29238502944](https://www.washingtonpost.com/business/economy/more-companies-are-buying-insurance-against-sexual-harassment-complaints/2017/11/02/a7297f9a-bd69-11e7-959c-fe2b598d8c00_story.html?utm_term=.f29238502944) ("U.S. companies spent an estimated \$2.2 billion

last year on insurance policies covering the legal fallout from sexual harassment, racial discrimination and unfair-dismissal accusations. The market is projected to grow to \$2.7 billion by 2019, according to MarketStance, a research firm that tracks insurance trends.”).