

Client Alert

May 2018

Supreme Court Finds PASPA Unconstitutional; Clears Path for States Looking to Successfully Legalize Sports Gambling

The US Supreme Court ruled last week in *Murphy v. NCAA*¹ that the Professional and Amateur Sports Protection Act² (PASPA) is unconstitutional, as it violates the Tenth Amendment prohibition against forcing states to implement federal laws, known as the “anti-commandeering doctrine.” In a 6-3 decision written by Justice Alito, the Court held that “Congress may not commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.” The Court’s decision in *Murphy* opens the door for all states to legalize and regulate sports gambling within their borders, and gain entry into the multibillion-dollar sports betting industry.

Background

Enacted in 1992, PASPA generally prohibited states from authorizing, licensing or sponsoring betting on competitive games in which amateur or professional athletes participate. PASPA also prohibited individuals from engaging in such activities if acting “pursuant to the law or compact of a governmental entity.” PASPA did not make sports betting a federal crime; rather, it allowed the attorney general for the Department of Justice, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations of the act. At the time of PASPA’s passage, all forms of sports betting were illegal in the majority of states, and those few states that already permitted some form of sports betting were “grandfathered” under the statute to allow these activities to continue. Following PASPA, states were dissuaded from taking any legislative action on sports betting, including the repeal of restrictions on sports wagering. However, in recent years, a number of states have proposed or enacted legislation seemingly in direct conflict with PASPA, including the authorization of Daily Fantasy Sports (DFS) contests in a number of states.³ The controversy leading to the Supreme Court’s decision began in 2012 when New Jersey passed the Sports Wagering Act, which legalized and regulated sports gambling in privately owned casinos and racetracks in the state. Several professional sports leagues and the NCAA sued, alleging a violation of PASPA. The Third Circuit agreed and struck down the Sports Wagering Act under PASPA. The court further ruled that PASPA did not commandeer states in violation of the Tenth Amendment because it only prohibits affirmative authorizations and does not prohibit repeals.

In direct response, New Jersey thereafter repealed portions of its existing gambling laws in 2014 to accomplish the same result as the Sports Wagering Act. In a subsequent suit, the Third Circuit again ruled against New Jersey, finding that a selective repeal in effect amounted to an authorization under PASPA. The Supreme Court granted certiorari and heard oral argument on December 4, 2017.

¹ No. 16-476 (U.S. May 14, 2018).

² 28 U.S.C. § 3702.

³ DFS was born out of a seeming exception to the Unlawful Internet Gambling Enforcement Act, which generally excludes “games of skill” from its purview. However, the act was passed in 2006, well prior to the proliferation of DFS and the legality of DFS under the act is not clear. See U.S.C. §§ 5361-5367. Further, the Senate Judiciary Report accompanying PASPA states that the prohibitions apply regardless of whether the scheme is based on chance or skill. See Sen. Rep. 102-248, reprinted in U.S.C.C.A.N. 3553.

The Supreme Court's Decision

The Supreme Court struck down PASPA as a commandeering violation and affront to state sovereignty in violation of the Tenth Amendment. The Court held that prohibiting states from authorizing sports gambling violates the anti-commandeering doctrine because it “unequivocally dictates what a state legislature may and may not do.” The Court also rejected the argument that PASPA simply preempts state law. According to the Court, a federal law such as PASPA can properly preempt an inconsistent state law only when it imposes a scheme of federal regulation or deregulation, rather than just flatly prohibiting a state from authorizing a particular activity. In reaching its decision, the Court noted: “Congress can be allowed to regulate sports gambling directly, but if it elects not to do so, each state is free to act on its own.”

Key Takeaways

The Court's decision is a clear victory for New Jersey and other states desirous of entry into or expansion of the sports betting market. Prior to the Court's decision in *Murphy*, at least 20 states had already introduced or considered legislation that would allow sports betting within their borders if PASPA was ruled unconstitutional or repealed.⁴ It is unclear whether Congress will enact a federal scheme to regulate sports wagering.

It is important to note that while the Court's decision allows for states to legalize sports gambling in whole or in part, it does not per se legalize sports gambling or endorse its legalization. Individual operators hoping to enter the market must still comply with existing state gambling laws or risk violating the Illegal Gambling Business Act (IGBA),⁵ which makes it a federal crime to violate state gambling laws. Accordingly, an entity's liability under IGBA would depend on its legality within the state in which it operates. Moreover, despite PASPA's demise, other federal laws remain on the books that must be complied with in entering the sports betting marketplace, such as the Unlawful Internet Gambling Enforcement Act⁶ and the Federal Wire Act.⁷ Though the impact of the Court's ruling should not be overvalued, it is clearly a significant development for the gambling industry and an invitation for states to potentially increase revenue by legalizing sports betting.

Apart from sports gambling, the decision has wide ramifications for federal-state relations. The decision makes clear that the federal government may have its own laws in controversial policy areas where it has power under the Constitution to regulate, such as immigration, but it cannot simply force states to implement federal policy preferences through state laws.

Authors

Laura Colombell Marshall
lmarshall@HuntonAK.com

Elbert Lin
elin@HuntonAK.com

John J. Delionado
jdelionado@HuntonAK.com

Martha S. Condyles
mcondyles@HuntonAK.com

⁴ Delaware, New Jersey, Mississippi and West Virginia already have legal mechanisms in place to allow sports betting upon PASPA's demise. Other states moving toward legalization are: California, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, Rhode Island and South Carolina.

⁵ 18 U.S.C. § 1955.

⁶ 31 U.S.C. §§ 5361-5367.

⁷ 18 U.S.C. § 1084.