The End of PASPA: *Murphy v. NCAA*

By Erica L. Okerberg

New Jersey has challenged the legality of the Professional and Amateur Sports Protection Act ("PASPA") since 2012. After nearly six years of state legislative efforts and judicial challenges, New Jersey's perseverance has proven successful. On May 14, 2018, in *Murphy v. NCAA*, the United States Supreme Court ("Supreme Court") held that PASPA is unconstitutional. A brief review of PASPA, New Jersey's legislative actions, and the previous lower court decisions is helpful to understand the *Murphy* decision.[1]

The Text and Scope of PASPA

PASPA does not prohibit sports wagering. Rather, PASPA states that it is unlawful for a governmental entity or another person to "sponsor, operate, advertise, or promote" sports wagering or for a governmental entity to "license or authorize" sports wagering.[2] PASPA is enforceable only by a civil action brought by the United States Attorney General or by a professional or amateur sports organization.[3]

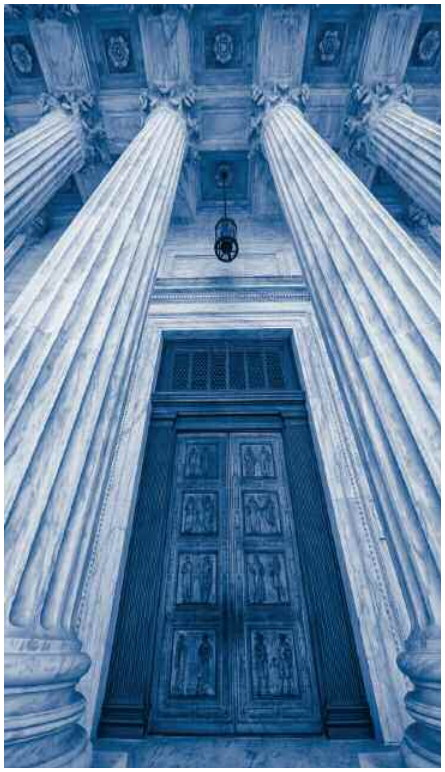
PASPA has a handful of exemptions – often referred to as the "grandfather" provisions – for certain states that had legalized gambling or wagering before PASPA's enactment. The exemptions permitted Nevada to continue offering full sports wagering and allowed a few other states (Delaware, Oregon, and Montana) to continue to offer limited forms of sports wagering as they each had before the enactment of PASPA.[4] One specific exemption also would have allowed New Jersey to offer sports wagering if it passed a law to permit sports wagering within one year of PASPA's enactment. New Jersey did not pass such a law within the one-year period and, thus, did not maintain an exemption.

ROUND 1 – Authorize Sports Wagering

In 2012, New Jersey enacted a law authorizing sports wagering ("2012 Law").[5] Certain professional sports leagues and the NCAA sought an injunction to prevent the 2012 Law from being carried out, arguing that the 2012 Law violated PASPA.[6] New Jersey argued that PASPA violated the "anticommandeering principle," pursuant to which a federal law may not require a state to enforce federal standards.[7] The District Court held that there was no violation of the anticommandeering principle, because PASPA did not impose any affirmative command upon states.[8] The Third Circuit Court of Appeals ("Third Circuit") affirmed the District Court's decision, but stated that a state's repeal of a state law prohibiting sports wagering would not be an "authoriz[ation]" and would not be prohibited under PASPA.[9] The Supreme Court denied New Jersey's writ of certiorari.[10]

ROUND 2 – Partially Decriminalize Sports Wagering

In 2014, New Jersey enacted a law that partially repeals the state's ban on sports wagering ("2014 Law"). Specifically, the 2014 Law repealed the ban on sports wagers on events not involving a college event in New Jersey if such wagers were placed by persons 21 or older at a racetrack, casino, or gambling house in Atlantic City.[11] Certain professional sports leagues and the NCAA again sought an injunction to prevent the 2014 Law's enactment pursuant to PASPA.[12] The District Court held for the sports leagues and the Third Circuit sitting *en banc* affirmed the District Court's decision.[13] Specifically, the Third Circuit found that the 2014 Law amounted to authorizing sports wagering and violated PASPA because the law "selectively removed a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators."[14] The Supreme Court granted review of this decision.[15]



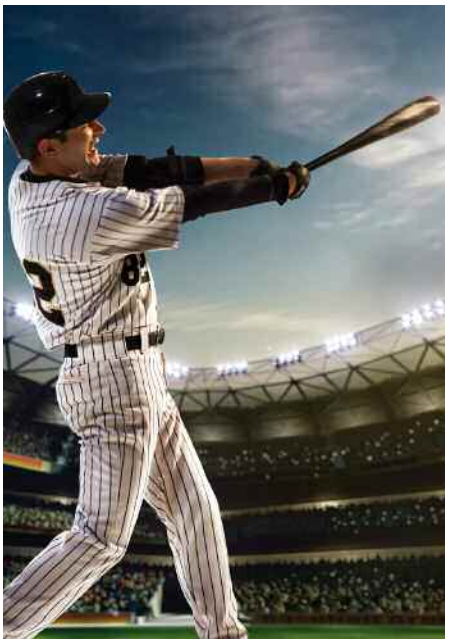
Decision in *Murphy*

The Supreme Court granted review of the Third Circuit's decision regarding the 2014 Law to analyze whether PASPA violates the anticommandeering principle.[16] Only PASPA's prohibition against authorizing or licensing state wagering was challenged.[17] The Supreme Court held that (a) such prohibition was unconstitutional under the anticommandeering principle and (b) the other provisions in PASPA were not severable, so PASPA was struck down in its entirety.

After determining that the repeal of a law banning sports wagering is tantamount to authorizing sports wagering,[18] the Supreme Court then found PAPSA unconstitutional under the anticommandeering principle. Pursuant to the anticommandeering principle, "the Federal Government" may not "command the States' officers or those of their political subdivisions, to administer or enforce a federal regulatory program."[19] PASPA prohibited states from authorizing sports wagering and, in doing so, "unequivocally dictate[d] what a state legislature may and may not do."[20] The Supreme Court saw no legally recognizable distinction between a federal law that required a state to affirmatively enact a law and a federal law that prohibited a state from enacting a law.[21] Because the anticommandeering principle precludes the federal government from affirmatively requiring or prohibiting a state to enact a law, the Supreme Court found that PASPA violated the anticommandeering principle.[22]

The Supreme Court then analyzed PASPA under the Supremacy Clause and held that PASPA did not preempt state laws on sports wagering.[23] "[F]ederal law is supreme in case of a conflict with state law" if the federal law (a) is an exercise of power given to Congress through the Constitution and (b) regulates private actors.[24] These two requirements exist in every form of preemption – conflict, express, and field.[25] Accordingly, a federal law does not preempt a state law if such law is not based on a power given to Congress or if such law regulates states instead of private actors. PASPA does not give any rights or impose any restrictions on private actors; rather, PASPA prohibits state action.[26] As the Supreme Court described, a private citizen's sports wagering business could not violate PASPA's prohibition against state wagering laws.[27] Therefore, because PASPA does not regulate private actors, PASPA does not preempt state wagering laws.[28]

Lastly, the Supreme Court determined that the remaining provisions in PASPA – the provisions that prohibited the state and private parties from operating, sponsoring, promoting, or advertising sports wagering authorized by a state in violation of PASPA – could not be severed from the unconstitutional state authorization prohibition.[29] As to the provisions related to the state operation, sponsorship, and promotion of sports wagering, the Supreme Court determined that they could not be severed because it "would have seemed exactly backwards" to the federal government to prohibit state-run sports lotteries if the state could authorize sports wagering in private casinos.[30] Noting that the prohibition on private actions was intended to work with the provision prohibiting a state from authorizing sports wagering, the Supreme Court determined that the provision prohibiting private operation, sponsorship, and promotion of sports wagering could not be severed because it would be a "perverse policy" for a federal law to make a private activity illegal when such activity is authorized by a state.[31] As to the provisions of PASPA prohibiting advertising of sports wagering, the Supreme Court determined the federal government had only rarely forbidden advertising of a legal activity and would not have intended to do so in this case.[32] Therefore, no provision of PASPA was severable from the prohibition against state authorization of sports wagering and PASPA, as a whole, was struck down.



The Supreme Court noted that Congress may, if it so desires, choose to directly regulate sports gambling.[33] If it does not act, all U.S. states and territories are free to make the public policy choice to legalize and regulate intrastate sports wagering.

Erica L. Okerberg focuses her practice on gaming law, including licensing and regulatory work; and promotional law, including sweepstakes and social gaming. Erica's experience includes: assisting U.S. and international clients with regulatory and operational matters; representing clients in connection with gaming applications; researching and analyzing a variety of gaming-related topics – from state and federal sports wagering requirements to the application of anti-gambling laws; preparing materials for and assisting with sweepstakes, contests, and other promotional offers; and counseling clients regarding social gaming and skill games.

1 The case was formerly titled *Christie v. NCAA*.
2 28 U.S.C. § 3702.
3 *Id.* § 3703.
4 A few commentators have suggested that other states may have been able to take advantage of one of the exemptions, but the widely held position is that the exemptions apply to Nevada, Delaware, Oregon, and Montana.
5 *Murphy v. National Collegiate Athletic Ass'n*, No. 16-476, slip op. at 6 (2018).
6 *Id.*
7 *Id.*; *see also National Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 561 (NJ 2013).
8 *Murphy*, No. 16-476, slip op. at 7.
9 *Id.*
10 *Id.* at 7-8.
11 *Id.* at 8.
12 *Id.*
13 *Id.*
14 *Id.* at 8-9.
15 *Id.* at 9.
16 *Id.*
17 *Id.* at 24.
18 *Id.* at 11.
19 *Id.* at 17 (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997)).
20 *Id.* at 18.
21 *Id.* at 18-19.
22 *Id.* (The Court also distinguished prior decisions relied upon by the respondents, finding that such decisions did not address federal laws that required states to enact or refrain from enacting laws or regulations on intrastate activity.)
23 *Id.* at 21.
24 *Id.*
25 *Id.* at 21-24.
26 *Id.* at 24.
27 *Id.* (The Court acknowledged that one provision in PASPA restricts private conduct, but stated that such provision was not challenged in this case.)
28 *Id.*
29 *Id.* at 25.
30 *Id.* at 27.
31 *Id.* at 28-29.
32 *Id.* at 29-30.
33 *Id.* at 30-31.

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