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ALL EYES ON THE SUPREME COURT: THE BATTLE FOR WIDESPREAD LEGALIZED SPORTS WAGERING IN AMERICA TO HAVE ITS DAY IN COURT

by Jennifer Gaynor, Greg Gemignani, Kate Lowenhar-Fisher, and Jeff Silver

The biggest legal showdown in a long time on a question of gaming policy is about to come before the United States Supreme Court. At stake is the ability of the states to tap into a legalized sports betting market that could grow to between \$2 billion to \$5.8 billion within the next five years, according to a recent Gambling Compliance study.

On one side: the State of New Jersey, which seeks to overturn the federal law that bans legalized sports wagering in all but a few grandfathered states, the Professional and Amateur Sports Protection Act or "PASPA" (28 U.S.C. 3701). New Jersey claims that PASPA violates states' rights by forcing the states to carry out the federal prohibition against sports wagering and therefore "commandeers" (usurps) the regulatory power of the states.

On the other side: the National College Athletic Association ("NCAA"), National Football League ("NFL"), National Basketball Association ("NBA"), National Hockey League ("NHL"), and Major League Baseball (the "MLB") (together, "the Leagues"). Their claim is that PASPA is not unconstitutional commandeering because it does not require the states to do anything proactively.

With arguments scheduled for December 4, 2017, this should be a vigorous war of words! Here are the highlights of the major arguments:

New Jersey

New Jersey's argument, in short, is that PASPA impermissibly commandeers the regulatory power of the states and is therefore unconstitutional.

New Jersey explains that the Constitution provides for a federal government of limited powers and that the Constitution has never been understood to confer upon Congress the power to dictate how states legislate within their borders. The prohibition on Congress commandeering state governments is essential to maintaining the division of authority between state governments and the federal government as envisioned by the Constitution.

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New Jersey goes on to argue that a federal ban against states repealing their own laws violates this anti-commandeering principle in the same way that a federal command to enact laws would violate the anti-commandeering principle. There is no meaningful difference between an affirmative command by the federal government and a prohibition. Therefore, PASPA's prohibition on New Jersey's 2014 repeal impermissibly commandeered New Jersey's regulatory authority in violation of the Constitution.

The American Gaming Association

The American Gaming Association ("AGA"), the significant lobbying organization for the commercial and tribal gaming industries, has also weighed in on the matter. The crux of the AGA argument is, in accord with New Jersey, that PASPA unconstitutionally permits the federal government to commandeer state legislatures by requiring state laws to remain stagnant despite economic, social, technological, and other changes.

In addition, they argue that PASPA has fueled the growth of illegal sports wagering and the problems illegal sports wagering presents while prohibiting states from providing a safe, legal, and regulated alternative. Therefore, not only is PASPA an unconstitutional commandeering of state government, it is counterproductive to its own aims to diminish sports wagering activity in the country. Ultimately, the AGA believes, PASPA forces states to enforce a failed federal standard regarding the conduct of sports wagering.

The AGA's brief provides substantial federalist arguments that PASPA is an unconstitutional exercise in federal power to control states and require states to enforce federal policy that no longer serves their intent due to social, economic, and technical changes that have occurred since 1992.

The Leagues

The long-awaited respondents' brief on behalf of the Leagues in opposition to New Jersey's appeal was filed recently. For many months, the public had only heard about the positions of New Jersey and the AGA, their primary advocate, and it seemed as if their commonsense arguments to reverse the decision from the Third Circuit Court of Appeals were likely to prevail. However, as with any litigation, there are two sides to every story. In their

brief, the Leagues have emphasized a more simplistic approach to counter the "commandeering" arguments by the Appellants.

The Leagues assert that "this case involves a straightforward application of the Supremacy Clause." In enacting PASPA, they claim, Congress does not force states to enact any federally prescribed legislation or to enforce any federal regulatory regime. Instead, they state that PASPA simply prevents states from operating sports gambling schemes, like sports-based lotteries, and from authorizing third parties to operate such schemes in their stead, all of which was intended by Congress to prevent the spread of state-sponsored gambling.

The Leagues further argue that Congress effectuated its intent without resorting to anything like the affirmative commands that doomed the statutory provisions in the anti-commandeering cases cited by the appellant. The Leagues put forth that Congress has the power to regulate gambling on a nationwide basis (as evidenced by the Wire Act (18 U.S.C. 1884(a)), UIGEA (31 U.S.C. 5362(10)), and other federal anti-gambling statutes) and that it is also well-settled that it has the power to prohibit the states from undertaking or authorizing conduct that conflicts with federal policy.

As to New Jersey's commandeering argument, the Leagues assert that "the relevant question is not whether the state will like what the federal government does if the latter takes control, but whether the state has the option to cede control in the first place. If the answer is yes, then there is no commandeering." PASPA allowed the form of sports wagering authorized by four states (Nevada, Oregon, Montana, and Delaware) to be "grandfathered" and offered a one-year window for any other state to "opt in." After that, the Leagues argue that the states have permissibly ceded authority on this subject to the federal government, subject only to a modification of the law by Congress. The Leagues continue that "this is just the ordinary operation of the Supremacy Clause, not an impermissible effort to force states to maintain their pre-PASPA laws on the books." That New Jersey chose not to avail itself of PASPA's window, should, as the Leagues have asserted, be you snooze, you lose!

Shortly after the filing of the Leagues' brief, the Trump administration, through the Solicitor General's Office, weighed



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in, siding with the Leagues. Meanwhile, Governor Christie is calling the Leagues “hypocrites” for opposing betting, citing the new NHL expansion franchise Vegas Golden Knights and the proposed move to Las Vegas by the NFL’s Oakland Raiders.

Clearly this is a hot topic, and this should be a most interesting case for those of us in the gaming world who are watching this play out.

Making things even more interesting is the fact that this case comes at a time when the boundaries between states’ rights versus federal powers are in the spotlight on a number of issues, including firearm and firearm accessory sales, sanctuary cities, and medical and recreational marijuana, to name a few. This political environment means that the opinions generated by this case are likely to both take into consideration and have implications far beyond gaming law – a point that is made clear by the fact that states such as Utah, which holds all gambling to be illegal within its state, have lined up in support of New Jersey’s position. It is obvious that Utah’s interest is not because it wants to offer sports wagering to its citizens.

Stay tuned for updates as the arguments begin. We will bring the popcorn.