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NEW JERSEY'S "DOUBLE-BARRELED" FEDERALISM CHALLENGE TO SPORTS BETTING BAN MAY BE HEADED TO SUPREME COURT

By: Daniel L. Wallach, Attorney at *Becker & Poliakoff, P.A.*, 1 East Broward Boulevard, Suite 1800, Fort Lauderdale, Florida 3330, (954) 965-5049, dwallach@bplegal.com

Should other States (besides Nevada) have the right to legalize sports betting? Can Congress pass laws that enact no federal regime and simply restrict a State's ability to authorize or regulate economic activity taking place solely within its borders? These questions are at the heart of a landmark case that may soon be decided by the Supreme Court. And the answers to these questions will either change the face of sports betting in this country or embolden Congress to further flex its muscles in setting the conditions under which States may license activities that have traditionally been within the States' police power to authorize. The stakes are high, as many industries subject to state-licensing requirements – including the multi-billion dollar insurance industry – could soon find themselves facing an uncertain regulatory and licensing future.

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Sports betting and federalism are strange bedfellows. Nonetheless, they are joined in a closely-watched federal court case arising out of New Jersey's efforts to legalize sports wagering. In January 2012, Governor Chris Christie signed legislation allowing sports betting in New Jersey after it was approved by a two-to-one margin in a statewide voter referendum held in 2011. The new law would permit any of the state's 12 casinos and four racetracks to offer gambling on all professional and college sporting events except for collegiate sporting events involving New Jersey colleges or taking place in New Jersey.

Standing in the way of New Jersey's efforts is the Professional and Amateur Sports Protection Act of 1992 ("PASPA"), a federal law that prohibits state-sponsored sports betting in every state except for those states (such as Nevada) that had constructed a sports-based wagering scheme between January 1, 1976 and August 31, 1990. PASPA's stated purpose is "to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity." PASPA represented a 180-degree turnabout for Congress, which some 15 years earlier in enacting the Interstate Horseracing Act, codified at 15 U.S.C. § 3001(a)(1), expressly found that the States should have the "primary responsibility" for determining what forms of gambling may legally take place within their borders. PASPA also received strong opposition at the time from the United States Department of Justice ("DOJ"), the current defender of the law, which argued that PASPA would constitute a "substantial intrusion" upon States' rights. The DOJ went on to say that "determinations of how to raise revenue have typically been left to the States."

On August 7, 2012, shortly after New Jersey announced its intention to implement its sports betting law, the four major professional sports leagues and the NCAA sued New Jersey in federal district court, arguing that New Jersey's sports-betting law was preempted by PASPA. In response, New Jersey challenged the constitutionality of PASPA, arguing, *inter alia*, that it violates two important federalism principles that underlie our system of dual state and federal sovereignty: one known as the "anti-commandeering" doctrine, on the ground that PASPA impermissibly prohibits States from exercising their sovereignty in a field where there is no underlying federal regulatory scheme; the other known as the "equal sovereignty" principle, in that PASPA permits Nevada to license sports gambling, while banning other states from doing so.

The sports leagues and the NCAA took round one of this "high-stakes" legal after a New Jersey federal district court granted their motion for summary judgment. In its February 28, 2013 Opinion and Order, the district court held that PASPA: (1) is a rational exercise of Congress's power under the Commerce Clause, (2) does not violate the Tenth Amendment's anti-commandeering principle, and (3) does not violate the equal sovereignty doctrine. *See* *National Collegiate Athletic Ass'n, Inc. v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013). The district court also enjoined New Jersey from implementing its sports betting law.

New Jersey then appealed the district court's ruling to the Third Circuit. Because of the significant impact that this decision may have on States' rights, four states (West Virginia, Georgia, Kansas, and Virginia) filed an *amicus curiae* brief with the Third Circuit. The four *amici* States asserted that the district court's decision "threaten[s] the system of dual sovereignty envisioned by the Framers and enshrined in the Constitution." Addressing the anti-commandeering doctrine in particular, the four *amici* States argued that the Supremacy Clause "does not give Congress free-wheeling authority to prohibit State action whenever and however it wishes," particularly when there is no underlying federal regulatory or deregulatory scheme to protect.

The Third Circuit Opinion: A Divided Panel Upholds PASPA

On September 17, 2013, the Third Circuit affirmed the ruling of the district court. *See* *National Collegiate Athletic Ass'n, Inc. v. Governor of New Jersey*, 730 F.3d 208 (3rd Cir. 2013). In a 128-page opinion, a divided panel concluded that the anti-commandeering doctrine incorporates an "affirmative action" requirement, in that it prohibits only those federal laws that "conscript[] the states into affirmative action," but does not implicate federal laws that merely "prohibit the states from taking certain actions." *Id.* at 231. Observing that PASPA's prohibition against state-sponsored sports betting "does not require or coerce the states to lift a finger," the majority concluded that PASPA is constitutionally valid because it does not "impose an affirmative requirement that states act. It merely *stops* the states from doing something [they want to do]." *Id.*

Turning next to the question of equal sovereignty, the majority distinguished the cases applying that doctrine in

the context of the Voting Right Act, holding that voting and gambling are "fundamentally different," and that the equal sovereignty principle does not apply outside of "sensitive areas of state and local policymaking," opining that PASPA does not reach into such "sensitive areas." *Id.* at 237-38. Moreover, the majority concluded that because the purpose of PASPA was to "stop the spread of state-sponsored sports gambling," regulating states (such as Nevada) in which sports wagering already existed would have been "irrational." *Id.* Instead, the majority reasoned, targeting only those states where the practice did not exist (essentially, all 49 other states) is "sufficiently related" to PASPA's goal of stopping the spread of state-sponsored sports wagering. *Id.*

In a 22-page dissenting opinion, Judge Thomas Vanaskie concluded that PASPA "violates principles of federalism," and, in particular, the anti-commandeering doctrine, because it "directs how *states* must treat [sports wagering]" and "conscripts the states as foot soldiers to implement a congressional policy choice." *Id.* at 241 & 245 n.3. He found "illusory" the majority's distinction between a federal directive that commands states to take affirmative action and one that prohibits states from exercising their sovereignty. *Id.* at 245. In his view, the constitutionality of a federal law "does not turn on the phraseology used by Congress in commanding the states how to regulate," noting that affirmative commands can be easily recast as prohibitions, and, under this rubric, "crucial questions of federalism would turn on empty formalism." *Id.* Judge Vanaskie disagreed with the notion that Congress may preempt state law without setting forth a federal regulatory or deregulatory scheme, declaring that PASPA "stands alone" in this regard and noting that the majority did not cite any case that sustained a federal statute that purported to regulate the states under the Commerce Clause where there was no underlying federal scheme of regulation. *Id.* at 246. He also opined that PASPA impermissibly diminishes the accountability of federal officials at the expense of state officials, which is at the root of the Supreme Court's anti-commandeering jurisprudence. Judge Vanaskie observed that "instead of directly regulating or banning sports gambling, Congress passed the responsibility to the states, which, under PASPA, may not authorize or issue state licenses for such activities." *Id.* at 246. Given that New Jersey already regulates its lotteries and casinos, and its citizens recently voted to approve sports betting in a referendum, he added that "it would be natural for New Jersey to citizens to believe that state law governs sports gambling as well." *Id.* Thus, "when New Jersey fails to authorize or license sports gambling, its citizens will undeniably blame state officials even though state regulation of gambling has become a puppet of the federal government, whose strings are in reality pulled (or cut) by PASPA." *Id.*

The Supreme Court Petition: New Jersey's Federalism Arguments

While the Third Circuit's decision is a setback for New Jersey's efforts to legalize sports wagering, many expect this case to ultimately be decided by the Supreme Court. Indeed, on February 12, 2014, New Jersey filed a petition for writ of certiorari with the high court. As expected, "anti-commandeering" and "equal sovereignty" are the cornerstones of New Jersey's attack on PASPA. The questions presented in the petition are as follows:

1. Does PASPA's prohibition on state licensing or authorization of sports wagering commandeer the regulatory authority of the States, in violation of the Tenth Amendment?

2. Does PASPA's discrimination in favor of Nevada and other exempted States violate the fundamental principle of equal sovereignty?

New Jersey's petition takes an interesting analytical approach. Instead of focusing solely on state-sponsored sports betting (the subject of PASPA), New Jersey's petition addresses the broader ramifications of the Third Circuit's decision, namely, the potential opening of the floodgates for even further federal intrusion into state sovereignty. The petition conjures up a "parade of horribles" about what the federal government might regulate *next* if the Third Circuit's holding were left undisturbed:

> The Third Circuit's holding would allow almost infinite degrees of federal interference with State regulation of private conduct. Any activity subject to licensure by the States (*e.g.*, driving, fishing, business ownership, or practicing law) could be regulated indirectly by limiting the circumstances under which States may issue a license. Without taking the (perhaps unpopular) step of directly prohibiting big-game hunting, sale of foie gras, or operation of a motor vehicle by any person over a certain age, Congress could accomplish the same objective by prohibiting the

> States from "conferring a label of legitimacy" by licensing or authorizing the activity. . . .
>
> Left undisturbed, the Third Circuit's doctrinal innovation will drive a truck-sized hole through the anti-commandeering doctrine. In any of the myriad areas of activity subject to state licensure, Congress could commandeer the legislative authority of the States simply by prohibiting States from issuing a license outside of defined circumstances. Indeed, as Judge Vanaskie warned in dissent, because virtually any affirmative command could be phrased as a prohibition, the majority's approach "will eviscerate the constitutional lines drawn in *New York* and *Printz*."

Petition, at pp. 3, 4, 27 & 28.

In one particularly effective passage, New Jersey's petition supplies numerous examples of the many different types of benign state-licensing activities that could be the subject of unwarranted federal intrusion based upon the Third Circuit's narrow interpretation of the anti-commandeering doctrine:

> States frequently prohibit conduct unless authorized by a license, and in every instance the Third Circuit's rule would allow extensive federal control over state regulation. In New Jersey, barbers, bakers, accountants, architects, nurses, dentists, electricians, plumbers, midwives, morticians, optometrists, pharmacists, podiatrists, plumbers, pawnbrokers, librarians, welders, teachers, social workers, taxidermists, and veterinarians – among others – are required to obtain permission from the State to practice their trade. It is unlawful to hunt, trap, or fish without a license. Citizens must obtain a license before they can operate a boat or drive a car. And permits are required to carry a gun, sell alcohol, advertise outdoors, build or renovate a home, brew beer for personal consumption, or operate an amusement ride – among many other activities.

Id. at 28. New Jersey's petition thus warns that "[u]nder the Third Circuit's holding, Congress could prescribe the content of the States' regulation of all of these activities by prohibiting the issuance of a license except under defined circumstances. Practically ***any*** area of state regulation could be subjected to federal commandeering, so long as Congress phrased its command as 'thou shall not,' rather than 'thou shall.'" (*Id.*)

In what appears to be an attempt to resonate with the conservative wing of the Supreme Court, New Jersey's petition also uses a "gun rights" hypothetical to illustrate the potential ramifications and dangers of the Third Circuit's decision (and PASPA) remaining intact:

> If PASPA is constitutional, it is easy to imagine a host of issues that the federal government could subject to analogous legislation. Congress, wishing to address perceived cruelty to animals, but unwilling to regulate directly, might make it unlawful for a State to "authorize" sale of foie gras. Or, concerned that a State might provide its "imprimatur" to semi-automatic firearms, Congress might make it unlawful for a State to license sale or possession of such weapons. . . . [T]he Third Circuit's rule will open the door to myriad other forms of federal control of state regulation. In many instances, it will be possible for Congress to ***require*** the States to take action through a prohibition, Few States would allow concealed carry of a firearm, for instance, without requiring some form of licensure; a prohibition on licensure would thus amount to a requirement to prohibit the activity. . . . It is fatuous to suggest that States are "free" to permit those activities if they are barred from issuing licenses.

Id. at 29 (emphasis in original). Since it only takes the vote of four Justices to grant certiorari (under the so-called "Rule of Four"), playing to the Court's conservative wing (Scalia, Thomas, Roberts and Alito) may prove to be a wise move by New Jersey.

The "equal sovereignty" argument also returns to center stage in the petition, with New Jersey pointing out the obvious: that "PASPA does not regulate all

States equally; instead, it affords uniquely favorable treatment to Nevada and a handful of other States that are permitted to allow sports wagering to varying degrees." *Id.* at 4. Thus, as New Jersey's petition states, "[n]ot only does PASPA commandeer the legislative authority of the States, but it also imposes that restriction ***unequally***. As a result, PASPA violates yet another principle of federalism—that 'all the States enjoy equal sovereignty.'" *Id.* at 31 (quoting *Shelby County v. Holder*, 133 S. Ct. 2612, 2621 (2013)) (emphasis in original).

New Jersey's petition takes aim at the Third Circuit's view that the principle of equal sovereignty is limited to "sensitive areas of state and local policymaking," and does not apply to the regulation of commerce (such as sports betting), asserting that "[n]othing in [the Supreme Court's] decisions suggests that the principle of equal sovereignty is limited to the election context, or that Congress has authority to facially discriminate between the States when attempting to regulate those States' exercise of their sovereign authority to regulate commerce within their borders." *Id.* As New Jersey explains in its petition, "States' ability to enact regulatory measures in response to the expressed preferences of their citizens is no less central to their 'broad autonomy in structuring their governments and pursuing legislative objectives,' than is their ability to regulate elections." *Id.*

Cautioning that the Third Circuit's opinion "authorizes" Congress to regulate the regulatory authority of the States in a "facially discriminatory" manner, New Jersey's petition imagines a bevy of other similar (albeit, extreme) facially discriminatory laws that could theoretically be enacted under the authority of the Third Circuit's holding:

> If Congress can prohibit authorization of sports wagering outside of Nevada, then a bloc of congressmen could likewise prohibit licensing of lobster fishing outside of Maine, registration of corporations outside of Delaware, or authorization wine cultivation outside of California.

Id. at 4. New Jersey's attempt to draw a parallel between Nevada's sports betting monopoly and a similar monopoly being extended to California wineries, Maine lobster fishermen and Delaware incorporators is a fair point, but one can argue that limiting sports betting to Nevada is in line with PASPA's stated goal of curbing the spread of legalized sports betting, whereas a similar justification does not appear obvious for Napa Valley wines or Maine lobsters (other than on a purely qualitative level!).

New Jersey also urges the Supreme Court to review the case based upon the "rare" occurrence of two separate federalism principles being violated simultaneously, coining it a "double-barreled infringement" on the "sovereign prerogative" of the States:

> Precisely because of the bedrock importance of state sovereignty to our system of government, laws that violate ***either*** of the federalism doctrines at issue in this case are rare. For a law to violate ***both*** simultaneously is practically unheard of. It impermissibly trenches on the States' authority to regulate their own citizens, and it does so in a manner that discriminates among the States. That double-barreled infringement on the sovereign prerogatives of the States calls out for review.

Id. at 12 (emphasis in original).

New Jersey argues that the "combination" of the two federalism frameworks (Anti-Commandeering and Equal Sovereignty) makes the constitutional violation here even more pronounced, emphasizing that "[w]hile both constitutional errors in this case are significant, and worthy of this Court's attention, the combination of the two would be fatal to our federalist system." *Id.* at 33-34. In other words, what New Jersey is in effect saying is that they are both good arguments standing alone, but in combination they present an even more compelling case. New Jersey hadn't tried that tactic previously, instead presenting both as separate stand-alone arguments before the Third Circuit and the district court. Now, they have presented both in a synergistic and highly effective way – suggesting that even if each one is a close call, when viewed together, they put New Jersey's situation over the top.

Forecasting the Chances of Supreme Court Review

A lone circuit court decision is usually not enough to merit certiorari review, as the majority of the cases on the Court's docket involve circuit splits. But that is not a hard and fast rule. The Supreme Court accepts high-profile cases even in the absence of a circuit split when it believes that "a United States court of appeals has decided an important question of federal law that

has not been, but should be, settled by this Court." *See* Supreme Court Rule 10(c). The Supreme Court has never addressed the constitutionality of PASPA, and this case also presents important questions of federalism not often addressed by the Supreme Court (such as the anti-commandeering and equal sovereignty principles) that are plainly in need of clarification. The high-profile nature of this case (pitting former U.S. Solicitors General Ted Olson and Paul Clement on opposite sides and involving a high-profile governor, the four major professional sports leagues, and the Department of Justice as parties) also enhances the prospects for Supreme Court review, certainly above the normal 2%-5% success rate for petitions. But even if the Supreme Court decides not to hear this case, this will remain a hot legal issue that other federal circuit courts are likely to soon consider. California and Minnesota legislators have recently introduced bills that would legalize sports wagering, with several other States poised to similarly act. Thus, the question of PASPA's constitutionality – and the future of state-sponsored sports betting – may be addressed by other federal circuits in the near future, leading eventually to Supreme Court review if there is a split among the circuits on that question.

Thus, it is possible that the moment of truth will arrive only after other federal circuits have weighed in on the constitutionality of PASPA and a split among the circuits develops. At that point, the Supreme Court could step in to resolve the circuit conflict. Nonetheless, the Supreme Court might still grant New Jersey's petition if for no other reason than to clarify the rules surrounding federal preemption (such as whether the preemption doctrine applies in the absence of any federal regulatory or deregulatory scheme) and the circumstances under which the anti-commandeering doctrine are applicable. The future of this case may have little to do with sports or gambling, but, rather, may turn on broader constitutional principles. ⚖

ANOTHER WAY TO LOSE AN…

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court's decision could not be implemented. The court ruled that in a case where corporal punishment was certain, before an appeal will be heard the defendant must be in the power of the court and in the custody of the sheriff.

The U.S. Supreme Court first applied the fugitive disentitlement doctrine, without calling it by that name, in *Smith v. United States*, 94 U.S. 97 (1876). Smith had applied to the Court for review of his conviction, but in the meantime he jumped bail. The Court ruled that "unless the plaintiff in error submit himself to the jurisdiction of the court below on or before the first day of our next term, the cause be left off the docket after that time." *Id.* at 98. Drawing on state court decisions such as *Rippon*, the Court gave a practical justification for its ruling: "If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case." *Id.* at 97.

In later cases, the Supreme Court articulated a variety of more theoretical justifications for the fugitive disentitlement doctrine: An escape constitutes a waiver or abandonment that "disentitles the defendant to call upon the resources of the Court for determination of his claims," *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970); disentitlement discourages escape, encourages voluntary surrender, and "promotes the efficient, dignified operation of the" courts, *Estelle v. Dorrough*, 420 U.S. 534, 537 (1975); and, "a fugitive 'flouts' the authority of the court by escaping, and that dismissal is an appropriate sanction for this act of disrespect," *Ortega-Rodriguez v. United States*, 507 U.S. 234, 245 (1993).

The Doctrine Expands to Criminal Fugitives in Related Civil Appeals

Some federal courts expanded the fugitive disentitlement doctrine to related civil appeals as well. For example, in *Conforte v. Commissioner of Internal Revenue*, 692 F.2d 587 (9th Cir. 1976), the court dismissed an appeal from a civil tax assessment by an appellant who was a fugitive from a related criminal tax conviction. The court reasoned that disentitlement "should apply with greater force in civil cases where an individual's liberty is not at stake." *Id.* at 589.

But not all courts followed suit. For example, in *In re Feit & Drezler, Inc.*, 760 F.2d 406, 414 (2nd Cir. 1985), the court refused to dismiss an appeal where the defendant had been held in contempt of judgment enforcement orders, because the defendant was not a fugitive from justice and was already being sanctioned