

Supreme Court Rules States May Authorize Sports Gambling

By Lisa Soronen, State & Local Legal Center

May 31, 2018

In a 6-3 decision in *Murphy v. National Collegiate Athletic Association* the U.S. Supreme Court has declared the federal Professional and Amateur Sports Protection Act (PASPA) unconstitutional. PASPA, adopted in 1992, prohibits states from authorizing sports gambling. The State & Local Legal Center (SLLC) filed an *amicus brief* asking the Court to rule PASPA violates the Constitution's anticommandeering doctrine. As a result of this decision, state legislatures may repeal state laws banning sports betting and/or pass laws allowing sports betting.

New Jersey first amended its constitution to allow some sports gambling. The Third Circuit held that doing so violated PASPA as an "authorization" of gambling but concluded that repealing restrictions on sports gambling would be okay. New Jersey then passed a law repealing restrictions on sports gambling. The Third Circuit changed course, ruling the repeal violated PASPA. It reasoned that the repeal "authorizes sports gambling by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling."

The New Jersey Governor asked the Third Circuit and the Supreme Court to declare PASPA unconstitutional per the anticommandeering doctrine. The Third Circuit concluded PASPA is constitutional, reasoning that it "does not command states to take affirmative actions, and it does not present a coercive choice." The Supreme Court disagreed.

In an opinion written by Justice Alito, the Court first concluded that "authorizing" per PASPA includes state laws permitting sports gambling and states completely or partially repealing old laws banning sports gambling. With this opinion the High Court rejected the Third Circuit's narrower definition of authorizing. "The Third Circuit could not say which, if any, partial repeals are allowed. [The NCAA] and the United States tell us that the PASPA ban on state authorization allows complete repeals, but beyond that they identify no clear line. It is improbable that Congress meant to enact such a nebulous regime," wrote Alito.

Regarding the statute's constitutionality, Justice Alito admitted that the anticommandeering doctrine "sounds arcane." But it is simply the notion that Congress lacks the power to "issue orders directly to the States." By telling states they could not authorize sports gambling (either outright or by repealing bans on the books) PASPA violates the anticommandeering rule. "[PASPA] unequivocally dictates what a state legislature may and may not do.... [S]tate legislatures are put under the direct control of Congress. It is as if federal officers were installed

in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”

PASPA contains provisions prohibiting states from operating a sports betting lottery, private actors from operating sports betting schemes pursuant to state law, and restrictions on both state and private actors regarding advertising sports gambling. The Court struck down the entire law, concluding that none of the provisions are severable—meaning Congress would not likely have enacted them alone.

Richard A. Simpson, Tara Ward, and Emily Hart, attorneys with Wiley Rein LLP, wrote the SLLC *amicus* brief, which was joined by the National Governors Association, the National Conference of State Legislatures, The Council of State Governments, the National League of Cities, and the International Municipal Lawyers Association.

The State & Local Legal Center will host a webinar on this case on June 12 at 10:00 a.m. PDT/1:00 p.m. EDT. For more information on the webinar, [click here](#).

The State & Local Legal Center (SLLC) files amicus curiae briefs in support of State & Local governments in the U.S. Supreme Court, conducts moot courts for attorneys arguing before the Supreme Court, and provides other assistance to states and local governments in connection with Supreme Court litigation.