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## Christie v. National Collegiate Athletic Association

Tenth amendment

federalism

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Supremacy Clause

ANTI-COMMANDEERING

### Issues

Does the Professional and Amateur Sports Protection Act violate the Tenth Amendment anti-commandeering doctrine by preventing states from modifying or repealing state-law prohibitions on sports gambling?

**Oral argument:** December 4, 2017

**Court below:** United States Court of Appeals for the Third Circuit

The Court will decide whether § 3702(1) of the Professional and Amateur Sports Protection Act ("PASPA"), which prohibits state authorization of sports gambling, is a lawful preemption of New Jersey's 2014 law repealing previous state bans on sports gambling or is a violation of the Tenth Amendment anti-commandeering doctrine. The issue was originally presented when the National Collegiate Athletic Association ("NCAA") sued New Jersey claiming PASPA preempted a 2012 New Jersey law which legalized and regulated sports gambling. There, the Third Circuit held that PASPA did not violate the anti-commandeering doctrine because it did not require states to act. In response, New Jersey enacted a 2014 law which repealed existing state-law bans of sports gambling. The NCAA once again filed suit and the case once again rose through the Third Circuit. Christie claims PASPA's prohibition of authorization of sports gambling violates the anti-commandeering doctrine because requiring states to maintain prohibitions is just as harmful to federalism as is requiring states to act. The NCAA contends that PASPA is a lawful preemption of state law, and even if § 3702(1)'s prohibition of authorization is unlawful, the rest of PASPA's provisions should remain in effect. The Court's decision will determine the scope of the Tenth Amendment and could have significant consequences for the legality of sports gambling nationwide.

### Questions as Framed for the Court by the

## Parties

Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of *New York v. United States*, 505 U.S. 144 (1992)?

## Facts

In 1992, Congress passed the Professional and Amateur Sports Protection Act ("PASPA"), which prohibits states and their political subdivisions from authorizing, licensing, regulating, and controlling sports gambling. **See *NCAA v. Governor of New Jersey*, 832 F.3d 389, 392 (3d Cir. 2016).** PASPA granted an exception for Nevada, Oregon, and Delaware, and further exempted New Jersey if legislation allowing such sports gambling was enacted within a year. **See *id.*** No such legislation was enacted. **See *id.*** Rather, New Jersey continued to prohibit sports gambling in the New Jersey Constitution and by statute. **See *id.***

### *Christie I*

In 2010, the New Jersey Legislature held public hearings about allowing sports gambling. In 2011, the Legislature initiated a referendum asking voters in New Jersey whether sports gambling should be permitted. **See *id.* at 392.** Sixty-four percent of voters supported amending the New Jersey Constitution to allow sports gambling. **See *id.*** In 2012, responding to the vote, the New Jersey Legislature enacted the Sports Wagering Act ("2012 Law"), which legalized and regulated sports gambling in privately owned casinos and racetracks located in the state. **See *id.* at 393.** The National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League, and the Office of the Commissioner of Baseball (collectively, "NCAA") sued the Governor of the State of New Jersey, Christopher Christie, and other state officials (collectively, "Christie"), thus initiating *Christie I*. **See *id.***

The NCAA alleged that the 2012 Law violated PASPA's key provision, codified at 28 U.S.C. § 3702(1), which prohibits states from authorizing or licensing sports gambling. **See *id.*** Christie admitted that the 2012 Law violated PASPA, but argued that PASPA was unconstitutional under the Tenth Amendment anti-commandeering doctrine because it prevented New Jersey from, effectively, repealing its own state-law gambling prohibitions. **See *id.*** The District Court rejected Christie's argument and held that PASPA did not violate the anti-commandeering doctrine. **See *id.*** The Third Circuit affirmed by drawing a formal distinction between 'repeals' and 'affirmative authorizations,' reasoning that PASPA does not commandeer states because it only prohibits affirmative authorizations and does not prohibit repeals. **See *id.*** The Supreme Court denied Christie's petition for writ of certiorari. **See *id.* at 394.**

### *Christie II*

In response to the Third Circuit's findings in *Christie I*, New Jersey legislators passed SB 2460 ("2014 Law") which—rather than affirmatively authorizing sports gambling—repealed several longstanding state prohibitions on sports gambling. **See *id.*** The law repealed bans on gambling at casinos and racetracks on specific sports by people at least twenty-one-years-of-age. **See *id.***

The NCAA brought a second complaint, this time challenging the 2014 Law. *See id.* The NCAA argued that because the 2014 Law's repeal only applied to certain locations that are otherwise licensed by the state, the 2014 Law was in effect an affirmative authorization rather than a repeal. *See id.* at 395. The District Court held the 2014 Law violated PASPA and permanently enjoined the state from giving operation or effect to the law. *See id.* at 394. A Third Circuit panel affirmed the lower court's ruling in a divided opinion. *See id.* at 395. It held that the specific repeals affirmatively allowed sports gambling in certain locations for certain athletic contests. *See id.* The Third Circuit then granted a petition for rehearing en banc and, agreeing with the reasoning of the panel decision, held that the 2014 Law violates PASPA because it affirmatively allows sports gambling. *See id.* at 395–96. It further held that the Court correctly found in *Christie I* that PASPA does not commandeer states in violation of the Constitution, disclaiming the formal distinction in *Christie I* between repeals and affirmative authorizations as dicta. *See id.* at 397–98.

The Supreme Court granted certiorari in June 2017 to determine whether PASPA violates the anti-commandeering principle of the Tenth Amendment. *See Brief for Petitioner, Christie et al.* at i, 1.

## Analysis

### *Anti-Commandeering Doctrine*

Christie argues that our system of dual sovereignty requires states to have the ability to control their own laws. *See Brief for Petitioner, Christie et al.* at 30. The Professional and Amateur Sports Protection Act, Christie contends, infringes on this right and violates the Tenth Amendment's anti-commandeering doctrine. *See id.* at 22. Christie argues first that PASPA's prohibition on repealing state-law bans against sports gambling violates the anti-commandeering principle in the same way federal requirements to enact state-law prohibitions do. *See id.* at 22–23. In both, Christie maintains, the federal government is dictating state law. *See id.* at 25. Congress can lawfully induce states to follow federal law through financial incentives under the spending clause or cooperative federalism wherein federal law preempts state law in absence of state action, but Christie asserts that Congress cannot simply commandeer state law in pursuit of federal legislative goals. *See id.* at 28–29. Relying on *New York v. United States*, Christie states that Congress does not have the authority to require states to govern according to Congress's instruction. *See id.* at 23–24. Christie argues that the Third Circuit's holding that the anti-commandeering doctrine is violated only when the federal government requires states to affirmatively act is a formalistic view of the doctrine and is incompatible with the policies of political accountability and "diffusion of sovereign power." *See id.* Further, Christie emphasizes that the Supreme Court in both *Reno v. Condon* and *Coyle v. Smith* held that the anti-commandeering analysis turned not on whether the federal law required an affirmative act, but instead on whether the federal law controlled or influenced how states govern. *See id.* at 32–33.

Christie also contends that the lower court's injunction prohibiting New Jersey from enacting the 2014 Law—which would repeal New Jersey's ban against sports gambling—is actually a federal requirement for states to maintain and enforce sports-law prohibitions on sports gambling at casinos and racetracks. *See id.* at 36. This, Christie argues, is commandeering. *See id.* Further, Christie posits that the Third Circuit's finding that Congress intended PASPA to allow states

alternative avenues to legalize sports gambling, such as through repeals, is neither supported by legislative history nor expansive enough. **See id. at 42–43.** Christie maintains that under the Third Circuit’s interpretation of PASPA—that state-law repeals cannot have too much of an “authorizing effect”—New Jersey does not have any realistic options to permit sports gambling at casinos and racetracks. **See id. at 47–48.** That, Christie argues, is not a choice, but a compulsion, and thus violative of the principles of federalism. **See id. at 48.**

The NCAA argues that PASPA does not commandeer, but rather, preempts the 2014 Law. **Brief for Respondent, NCAA et al. at 22.** Commandeering, the NCAA contends, arises only when Congress requires states to affirmatively act. **See id.** The NCAA distinguishes *New York v. United States* and *Printz v. United States* from this case by maintaining that in both *New York* and *Printz* Congress unambiguously required the states to take affirmative action. **See id. at 23–24.** The NCAA argues Christie mistakenly claims PASPA commands states to maintain preexisting prohibitions on sports gambling. **See id. at 19.** This, the NCAA asserts, is false. **See id.** PASPA does not compel states to enact, maintain, consider, or enforce state-law prohibitions on sports gambling, the NCAA argues. **See id. at 32.** States with preexisting sports-gambling laws, the NCAA clarifies, are not required to take any action at all under PASPA. **See id.** Instead, the NCAA contends, PASPA merely prohibits states from sponsoring or operating sports gambling, from authorizing or licensing a third party to sponsor or operate sports gambling, and from advertising or promoting sports gambling. **See id.**

Further, the NCAA argues that although states can leave preexisting prohibitions as they are, states are also free to repeal or enhance such prohibitions. **See id. at 33.** Thus PASPA, the NCAA contends, is simply a lawful preemption in which Congress prohibits states from engaging in certain activity unless the states comply with federal law and policy. **See id. at 34–35.** The NCAA counters Christie’s proposition that PASPA requires New Jersey to maintain state law prohibitions by arguing that PASPA does not require New Jersey to maintain prohibitions, but instead regulates the ways in which New Jersey can alter the scope of state-law prohibitions against sports gambling. **See id. at 37.** The NCAA further contends that limiting states’ options for regulation is not unlawful, but rather is a valid exercise of federal government authority under the Supremacy Clause. **See id. at 32.** The 2014 Law, the NCAA argues, is invalid not because PASPA prohibits “any and all” efforts by states to repeal sports gambling prohibitions, but because the 2014 Law is merely a tactic to circumvent the federal preemption by enacting partial repeals that amount to authorization. **See id. at 42, 49.**

## Severability

Christie argues that the standard for determining the severability of unconstitutional provisions is not only that the remaining provision be “fully operative as a law,” but also that the remaining provisions be consistent with the original intent of Congress. **See Brief for Petitioner at 53–54.** Christie notes that PASPA’s legislative history shows Congress’s intent was to prevent states from legalizing sports gambling. **See id. at 54.** Christie contends that the principal section of PASPA, 28 U.S.C. § 3702(1), which prohibits authorization, is the unconstitutional provision. **See id. at 53.** Further, Christie points out that the other provisions regarding state sponsorship, operation, advertisement, promotion, and licensing are all ancillary to § 3702(1)’s prohibition of authorization. **See id. at 54.** Thus, Christie maintains that Congress did not intend such ancillary items to function without the principal prohibition on authorization and if the ban on authorization was ruled

unconstitutional and severed, any remaining provisions would function only to prevent states from ensuring the newly legal sports gambling is responsibly operated and regulated. *See id.* This, Christie contends, is inconsistent with Congress's demonstrated interest in a "comprehensive system of State regulation." *See id.* at 55. Finally, Christie argues that § 3702(1)'s prohibition on authorization is textually linked to § 3702(2) and further, § 3702(2) is dependent on § 3702(1). *See id.* Thus, Christie concludes that the anti-authorization provision is not severable and that PASPA should be stricken in its entirety. *See id.* at 56.

The NCAA argues that instead of looking for excuses to strike down a statute in its entirety, as Christie offers, the Court should try to sever any problematic portions of the statute while leaving the remainder of the statute in effect. *See Brief of Respondent, at 54.* Further, the NCAA contends, the "normal rule" the Court uses requires partial rather than facial invalidation. *See id.* Thus, the NCAA maintains that as long as the remaining portion of the statute is "fully operative as a law" and so long as it is not "evident" that Congress would have passed no law before it passed the remaining provisions on their own, the Court must sever the offending provision and leave the remainder of the statute. *See id.* at 55. The United States as amicus curiae agrees with the NCAA about the test of severability, arguing that if the Court were to find § 3702(1) invalid, the remaining provisions would be functional and would still comport with Congress's intent. *See Brief of Amicus Curiae United States, in Support of Respondent at 31.* The government contends that none of the language of § 3702(2) is dependent on the language of § 3702(1). *See id.* at 32. The government counters Christie's assertion that everything other than prohibition on authorization in § 3702(1) is ancillary by arguing that Congress aimed to prevent state-authorized sports gambling through two layers: first, by preempting state authorization in § 3702(1), and second, by prohibiting the underlying private conduct in § 3702(2). *See id.* at 33. The government contends that if § 3702(1) was stricken, § 3702(2), instead of becoming obsolete, would be even more important to realizing Congress's intent of stopping state-sponsored sports gambling. *See id.* The NCAA argues similarly that the two provisions work as "belt and suspenders." *See Brief for Respondent, at 56.*

## Discussion

### *Undermining States' Rights Versus Supporting Federal Policy Objectives*

The Pacific Legal Foundation ("PLF"), in support of Christie, claims that the Third Circuit's decision threatens federalism because states would cease to be sovereigns and instead become instrumentalities of the federal government. *See Brief of Amici Curiae Pacific Legal Foundation et al. ("PLF"), in Support of Petitioner at 4.* PLF argues that state autonomy leads to better public policy outcomes by promoting experimentation and innovation. *See id.* at 5. Additionally, the PLF contends that commandeering undermines political accountability because federal officials will not bear the fallout from poor policy choices, but can nevertheless claim credit for effective ones. *See id.* at 6. Researcher John T. Holden, also in support of Christie, argues that the protection of states' rights effectively creates a double layer of protection of individual liberty by having the state and federal government serve as a check on each other's power. *See Brief of Amicus Curiae Researcher John T. Holden, in Support of Petitioner at 9.* The National Governors Association ("NGA") argues that the Third Circuit's decision effectively freezes state legislature's decisions

regarding sports gambling in its 1992 form, not reflecting the current will of New Jersey's constituents. **See Brief of Amici Curiae The National Governors Association et al. ("NGA"), in Support of Petitioner at 17.** Moreover, the NGA contends that the Third Circuit's reasoning prevents states from adopting divergent policies in areas of law where there is no federal legislation, such as marijuana legalization, euthanasia, or driverless cars. **See id. at 18.**

Stop Predatory Gambling ("SPG"), in support of the NCAA, argues that PASPA requires nothing of the states, and is instead a federal prohibition on states and individuals creating or operating sports gambling regimes. **See Brief of Amici Curiae Stop Predatory Gambling et al. ("SPG"), in Support of Respondent at 11.** SPG further states that the purpose of PASPA is to protect the public from the dangers of gambling, which Congress is authorized to do. **See id. at 10.** State-sanctioned gambling, SPG argues, spreads rapidly because interstate competition leaves state governments with a Hobson's choice, creating a race to the bottom because states cannot limit their citizens' access to gambling in neighboring states. **See id. at 13.** Without PASPA, a state that did not legalize sports gambling, SPG contends, bears the social costs associated with its citizens travelling to other states to wager on sports. **See id. at 11.** PASPA was enacted, SPG argues, to prevent these social ills in the context of sports gambling. **See id. at 14.** The Eagle Forum Education and Legal Defense Fund argue that upholding New Jersey's legislation would exemplify the "law without values" philosophy, promising gambling as a means of economic development, but leading to "moral bankruptcy". **See Brief of Amicus Curiae Eagle Forum Education and Legal Defense Fund, in Support of Respondents at 8.**

## *Government REGULATION AND Revenues Versus Social Costs*

The Pacific Legal Foundation argues that state sports gambling bans have failed because they create immense black markets for gambling that cannot be regulated. **See Brief of PLF at 17.** PLF contends that between \$80 and \$380 billion in illegal bets are placed on sports annually. **See id.** The size of the illegal market, PLF explains, prevents states from investigating and prosecuting truly bad actors. **See id. at 18.** The American Gaming Association ("AGA") further argues that legalizing sports betting can benefit citizens by providing much-needed tax revenues. **See Brief of Amicus Curiae The American Gaming Association ("AGA"), in Support of Petitioner at 17.** Additionally, the AGA contends that legalizing sports betting could increase GDP by \$26.6 billion annually, as well as create 150,000 jobs. **See id. at 17-18.** The additional revenues, the AGA states, can be directed to law enforcement or social services. **See id. at 18.** Additionally, the AGA notes that legalized sports gambling creates an incentive to maintain the integrity of the leagues involved. **See id.** When bookkeepers share information, irregular betting patterns indicating potential match-fixing can be identified and authorities alerted, as currently happens in Nevada. **See id. at 18.**

Stop Predatory Gambling counters that gambling revenues, by disproportionately affecting low-income citizens, function as a regressive tax. **See Brief of SPG at 17.** SPG also argues that problem gambling is more closely associated with sports gambling than with lotteries or casinos. **See id. at 22.** Gambling addiction, SPG notes, has been recognized by the American Psychiatric Association as a mental disorder since 1980. **See id.** The financial costs of the disorder, SPG contends, are enormous. **See id.** SPG states that between 20 and 30% of compulsive gamblers declare bankruptcy, as compared with only 4.2% of the general population. **See id.** Additionally,

SPG points out that studies have shown that legalizing new types of gambling, such as sports gambling, worsens crime rates such as money laundering and match-

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## Acknowledgments

## Additional Resources

- Elbert Lin & Thomas M. Johnson Jr., *Symposium: High Stakes for Federalism in Heavyweight Clash Over the Anti-Commandeering Doctrine*, SCOTUSBlog (Aug. 17, 2017).
- Michael McCann, *All Bets Are Off: Supreme Court to Review Sports Betting Ban*, Sports Illustrated (June 27, 2017).
- Steven Schwinn, *Symposium: It's Time to Abandon Anti-Commandeering (But Don't Count on This Supreme Court to Do It)*, SCOTUSBlog (Aug. 17, 2017).
- Jonathan Wood, *Symposium: In Sports-Betting Case, the Supreme Court Should Be on Federalism*, SCOTUSBlog (Aug. 16, 2017).

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