

## Supreme Court and Appellate Alert

May 17, 2018

### Key Points

- The Supreme Court in *Murphy v. NCAA* ruled 7-2 that a federal law prohibiting states from authorizing sports betting violated the constitutional rule that the federal government may not “commandeer” the states.
- The decision gives states wide latitude to legalize (and tax) sports betting without running afoul of current federal law.
- The decision creates uncertainty over how states’ potential authorizations of sports betting will affect tribes’ gaming compacts.



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### Supreme Court Strikes Down Federal Ban on Sports Betting

In *Murphy v. NCAA*, a highly anticipated decision issued on Monday, the Supreme Court struck down a federal law prohibiting most states from legalizing sports betting, holding that the federal act unconstitutionally “commandeers” the states.

#### Background

Congress enacted the Professional and Amateur Sports Protection Act (PASPA) in 1992. PASPA contains two significant provisions: One makes it unlawful for a state or its subdivisions “to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on” competitive sporting events, 28 U.S.C. § 3702(a); the other makes it unlawful for “a person to sponsor, operate, advertise, or promote” those same gambling schemes if done “pursuant to the law or compact of a governmental entity,” id. § 3702(2). Notably, PASPA does not itself criminalize sports gambling, but instead provides for civil actions to enjoin violations of PASPA. Id. § 3703. Finally, PASPA contains “grandfather” provisions that effectively exempt from its prohibitions any states (i.e., Nevada and a few others) that already permitted sports gambling when PASPA was passed and any states that approved a sports gambling scheme within a year of PASPA’s enactment.

New Jersey did not take advantage of that grace period. However, two decades later, in 2012, the New Jersey legislature enacted a law that authorized sports gambling in Atlantic City and at horseracing tracks. The National Collegiate Athletic Association (NCAA) and major professional sports leagues brought an action in federal court seeking to enjoin the New Jersey law on the ground that it violated PASPA. After the District Court and the 3rd Circuit agreed, and the Supreme Court denied review, New Jersey passed a new law in 2014 that effectively sought the same goal by different means: Instead of

affirmatively authorizing sports gambling schemes, the 2014 law substantially repealed state-law provisions that prohibited such schemes. The plaintiffs in the earlier suit filed a new action in federal court. They won again in the District Court and the 3rd Circuit, which held that the new law, no less than the prior one, violated PASPA. This time, however, the Supreme Court agreed to review New Jersey's constitutional challenge to the federal law.

## Decision

On Monday, the Supreme Court reversed the 3rd Circuit. In a 7-2 decision by Justice Alito, the Court held that the PASPA provision barring states from authorizing sports betting violates the anticommandeering rule of the 10th Amendment. The 10th Amendment provides that, if the Constitution does not either give a power to the federal government or take the power away from the states, that power is reserved for the states or the people themselves. The Court has long understood this amendment to prohibit the federal government from “commandeering” the states to enforce federal laws or policies. Until this week, the Court typically applied this anticommandeering doctrine to bar Congress from requiring the states to do something; here, however, the Court has made clear that the doctrine applies equally to bar Congress from directing states not to do something. Because PASPA “unequivocally dictates what a state legislature may and may not do,” the majority held, the federal law constitutes a “direct affront to state sovereignty” and runs afoul of the 10th Amendment. In so holding, the Court rejected the argument, made by the leagues and the federal government, that, rather than commandeer the states, PASPA merely preempted any conflicting state law. Justice Alito explained that, in contrast to a “federal law that regulates the conduct of private actors,” which may find support in the preemption doctrine, “there is simply no way to understand [PASPA’s] provision prohibiting the state authorization as anything other than a direct command to the States.” That, according to the Court, is “exactly what the anticommandeering rule does not allow.”

The Court also decided, by a 6-3 margin, that PASPA’s unconstitutional prohibition on states’ authorizing sports betting could not be severed from the rest of PASPA, including its parallel bans on state-run sports lotteries, the operation of sports-betting schemes by private parties and related advertising. The majority reasoned that it was “most unlikely” that Congress “would have wanted” these other provisions to stand if it had known that the provision barring states from authorizing sports betting would fall. Consequently, the Court struck PASPA in its entirety. Justice Ginsburg authored a dissenting opinion, joined in full by Justice Sotomayor, arguing that, even if PASPA’s state-directed provision were unconstitutional (a conclusion that Justice Ginsburg does not share), PASPA’s provision aimed at privately operated gambling schemes should be salvaged. Justice Breyer joined the majority’s 10th Amendment ruling, but joined Justice Ginsburg’s dissenting view that PASPA’s nonoffending provisions should stand.

## Implications

The Court’s decision will have significant implications for states, the gaming industry and tribes.

**States.** Most states—with the exception of Nevada, which stands to lose its current monopoly on single-game sports betting—benefit from the Court’s decision in at least two respects. First, the Court’s holding that PASPA is unconstitutional removes the major federal impediment to states’ ability to authorize sports

betting, a potentially lucrative tax-revenue-generating industry. Second, the Court's decision lends implicit support to states' 10th Amendment arguments concerning a number of other hot-button legal issues that have little relationship to sports betting, including states' ability to establish "sanctuary cities" by refusing to enforce immigration laws and states' legalization of marijuana in the face of contrary federal law.

**Gaming.** The other obvious beneficiary of the Court's decision is the gaming industry. Although the Court made clear that "Congress can regulate sports gambling directly," it is unlikely that Congress will adopt a blanket ban similar to PASPA. That means that, as the Court concluded, "each State is free to act on its own" in the absence of direct federal regulation. Although the Court's decision did not itself legalize sports-betting activity, it paved the way for states to do so by repealing the state laws that currently restrict such gambling. As the gaming industry awaits states' responses, it is likely to find comfort in the Court's express recognition that several federal laws criminalizing gambling-related activity, including the Federal Wire Act (which prohibits processing of illegal wagers over interstate networks), outlaw the gambling-related activity to only the extent that the specified conduct or the underlying gambling is illegal under state or local law. See 18 U.S.C. §§ 1084, 1952, 1953, 1955. Accordingly, as an increasing number of states authorize a wider scope of betting in the wake of *Murphy*, forms of gambling that, until now, have been generally considered prohibited under federal law, such as mobile and online sports betting, may be permitted.

**Indian Tribes.** The Court did not address the impact of states' legalization of sports betting on tribes. Consequently, it is likely that tribes still must meet the requirements of the Indian Gaming Regulatory Act (IGRA) to conduct sports wagering on Indian lands. This raises at least two significant issues. First, because IGRA permits tribes to engage in Class II or Class III gaming operations only if such gaming is permitted in their home states, a tribe's ability to conduct a particular form of sports betting likely depends on the forms of gambling permitted in the state and on the relevant jurisdiction's approach to defining such forms of gambling. (Some jurisdictions adopt a narrow approach, meaning that the tribe can engage in only a particular type of sports gambling if the state permits that particular type of sports gambling; other jurisdictions adopt a more categorical approach, meaning that the tribe can engage in sports gambling as long as the state permits any gambling activity in the same class.) Second, tribes seeking to conduct Class III sports-wagering operations are likely to continue to be subject to IGRA's requirement to act pursuant to a state-tribe compact. Efforts by a tribe to introduce sports betting could be understood as an expansion in the scope of gaming activity currently permitted under the relevant compact, potentially requiring its renegotiation and amendment. Likewise, any effort by a state to permit sports betting off tribal lands may run afoul of compact provisions granting gaming rights exclusively to tribes.

## Contact Information

If you have any questions regarding this alert, please contact:

**Brian Carney**

[bcarney@akingump.com](mailto:bcarney@akingump.com)  
212.872.8156  
New York

**Donald Pongrace**

[dpongrace@akingump.com](mailto:dpongrace@akingump.com)  
202.887.4466  
Washington D.C.

**Pratik Shah**

[pshah@akingump.com](mailto:pshah@akingump.com)  
202.887.4210  
Washington D.C.

**James Tysse**

[jtyss@akingump.com](mailto:jtyss@akingump.com)  
202.887.4571  
Washington D.C.

**Lide Paterno**

[lpaterno@akingump.com](mailto:lpaterno@akingump.com)  
202.887.4078  
Washington D.C.