



Supreme Court Strikes Down Federal Limits On Sports Gambling

Theodore B. Olson, Matthew D. McGill, and Debra Wong Yang

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The Professional and Amateur Sports Protection Act

An Act

To prohibit sports gambling under State law, and for other purposes.

“§ 3702. Unlawful sports gambling

“It shall be unlawful for—

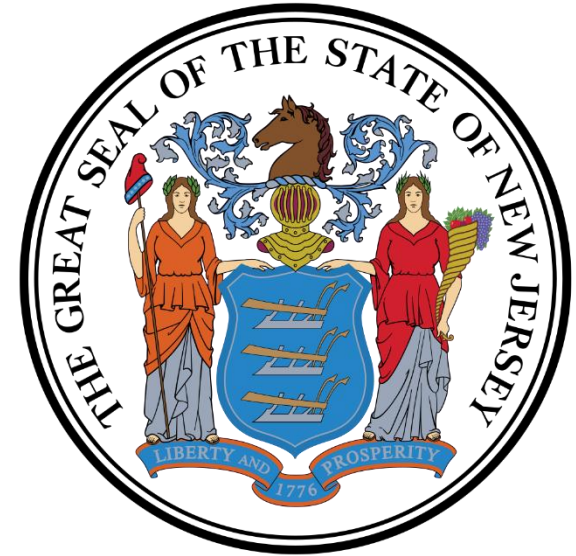
“(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

“(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

In 1992, 46 States prohibited sports betting. PASPA had the effect of freezing in place those state-law prohibitions.

New Jersey Moves to Legalize Sports Betting

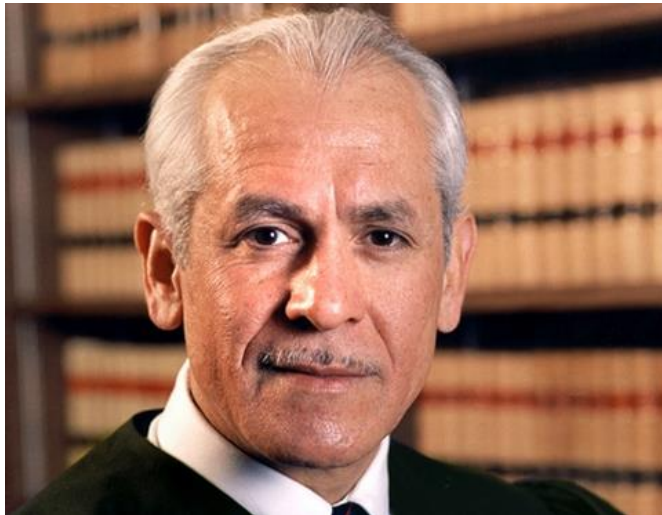
- In 2011, New Jersey citizens voted 64% to 36% to amend the State's constitution to permit the Legislature to “authorize by law” sports wagering at casinos and racetracks in the State.
- **PASPA:** “It shall be unlawful for . . . a governmental entity to . . . *authorize by law*” sports wagering.
- In 2012, New Jersey enacted legislation to provide for licensed and closely regulated Vegas-style sports wagering at casinos and racetracks.
- **PASPA:** “It shall be unlawful for . . . a governmental entity to . . . *license*” sports wagering.



Christie I Litigation

- New Jersey is sued by the NCAA, NFL, MLB, NHL, and NBA, arguing that New Jersey's 2012 law violates PASPA.
- New Jersey defends on the ground that PASPA violates the Tenth Amendment of the United States Constitution.
- In particular, New Jersey argued that PASPA violates principles of federalism by commandeering New Jersey's regulatory apparatus to maintain a ban on sports wagering.

Christie I Litigation



Judge Julio Fuentes

Recognizing the importance of the affirmative/negative command distinction, Appellants assert that PASPA does impose an affirmative requirement that the states act, by prohibiting them from repealing anti-sports wagering provisions.¹³ We agree with Appellants that the affirmative act requirement, if not properly applied, may permit Congress to “accomplish exactly what the commandeering doctrine prohibits” by stopping the states from “repealing an existing law.” *Conant v. Walters*, 309 F.3d 629, 646 (9th Cir.2002) (Kozinski, J., concurring). But we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.

New Jersey's 2014 Repeal

SENATE, No. 2460



STATE OF NEW JERSEY

216th LEGISLATURE

INTRODUCED OCTOBER 9, 2014

SYNOPSIS

Partially repeals prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events.

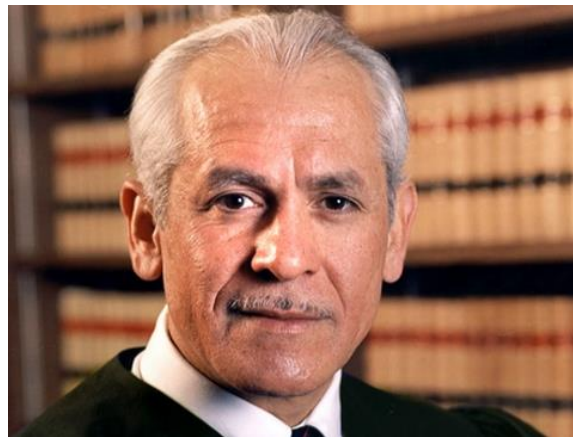
Christie II Litigation



Christie II Litigation



“[T]he 2014 Law **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.”

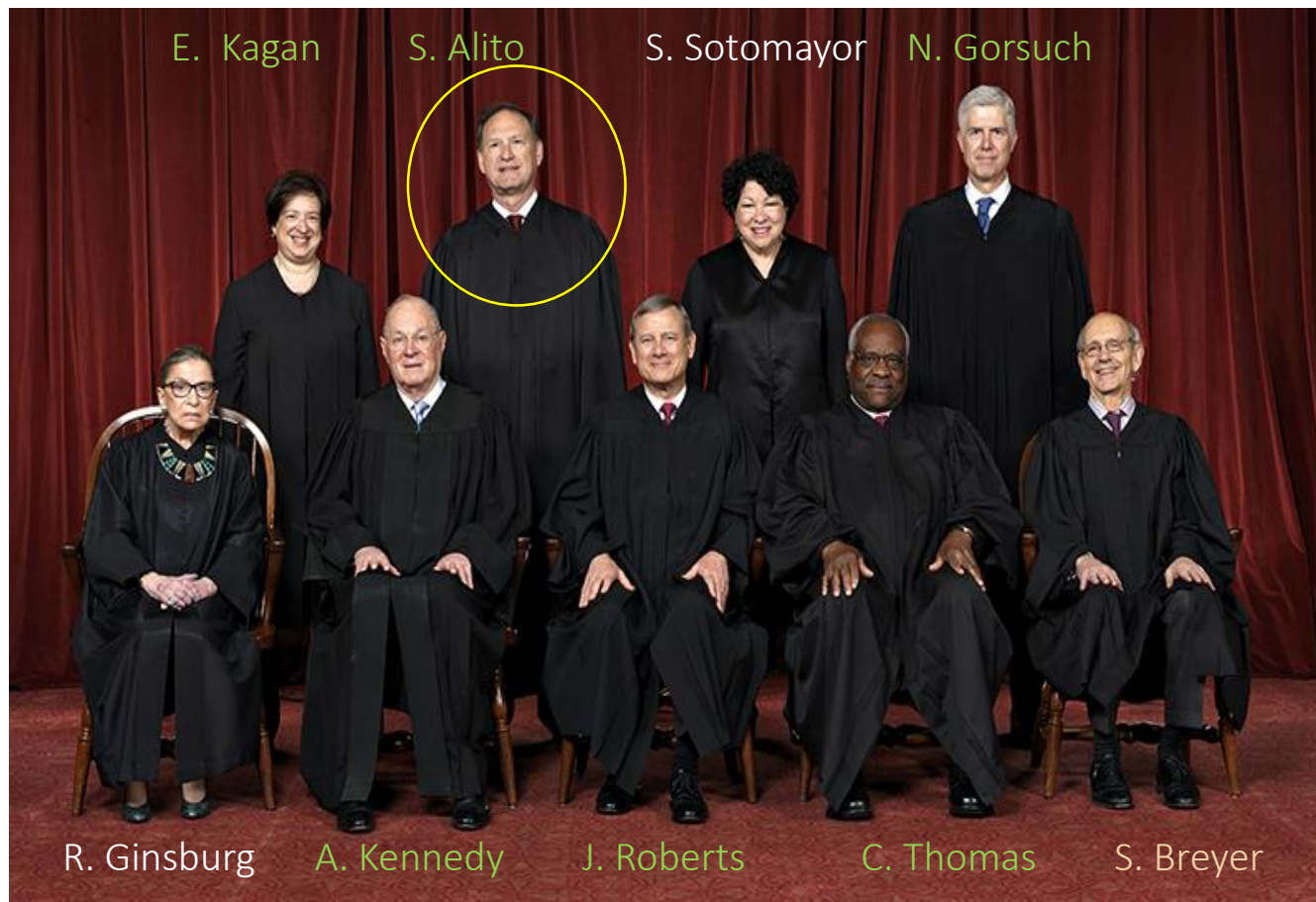


“**[T]he majority’s position that the 2014 Repeal ‘selectively grants permission to certain entities to engage in sports gambling’ is simply incorrect.** There is no explicit grant of permission in the 2014 Repeal for any person or entity to engage in sports gambling. ... [T]he 2014 Repeal ... repeals existing prohibitions and regulations for sports betting and requires the State to abdicate any control or involvement in sports betting.”

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)?



Murphy v. NCAA – The Supreme Court's Decision



On May 14, 2018, the Supreme Court, by a 6-3 vote, ruled that PASPA was unconstitutional.

Murphy v. NCAA – Statutory Analysis



On the meaning of “authorize” in PASPA:

“When a State completely or partially repeals old laws banning sports gambling, it ‘authorize[s]’ that activity, as it not only ‘permits’ sports gambling but also ‘gives those now free to conduct a sports betting operation the right or authority to act’ and ‘empowers’ them.”

Murphy v. NCAA – Anti-commandeering Analysis



On the Tenth Amendment:

“The PASPA provision at issue here ... violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. ...

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.***”

Murphy v. NCAA – Preemption Analysis



On federal preemption:

PASPA does not “confer any federal rights on private actors interested in conducting sports gambling operations,” nor does it “impose any federal restrictions on private actors.”

“Thus, there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.”

Murphy v. NCAA – Severability Analysis



On severability:

- Struck down provisions on licensing, operating, sponsoring, advertising, and promoting sports betting.
- Also struck down prohibition on private parties doing any of the above pursuant to state law.
- Bottom line: ***“no provision of PASPA is severable from the provision directly at issue here.”***
- 3 justices dissented from this holding.
- Justice Thomas concurred, but urged the Court to revisit its severability jurisprudence.

Murphy v. NCAA – Concluding Thoughts



“Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA ‘regulate[s] state governments’ regulation’ of their citizens, *New York*, 505 U. S., at 166. The Constitution gives Congress no such power.”

Murphy v. NCAA – Dissents



“The petition for certiorari filed by the Governor of New Jersey invited the Court to consider a sole question: ‘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)?’

Assuming, *arguendo*, a ‘yes’ answer to that question, ***there would be no cause to deploy a wrecking ball destroying the Professional and Amateur Sports Protection Act (PASPA) in its entirety, as the Court does today.***”

Murphy v. NCAA – Implications

- States now free to choose whether to legalize sports gambling within their borders—subject to any restrictions from other federal laws.
- Significant victory for states' rights—under the Tenth Amendment's anti-commandeering rule, Congress can neither affirmatively direct the States to enact a certain law nor prohibit them from repealing an existing law.
- May have implications for other areas.



Murphy v. NCAA – Implications

- The Court also struck down the additional federal prohibitions on state-run lotteries, private operation of sports gambling schemes, and advertising of sports gambling.
- In advance of the Court's ruling, bills authorizing sports gambling had been introduced in approximately 15 States, and they have already been enacted in **Pennsylvania, Mississippi, New Jersey, and West Virginia**. Other States, including **Delaware** and **Nevada**, already permitted some forms of sports gambling.
- Some sports leagues (most notably, the MLB and the NBA) have embraced some form of legalized sports betting and are lobbying Congress and state legislatures aggressively.

Post-PASPA Federal Statutory Framework – Wire Act

- **Wire Act (18 U.S.C. § 1084)** – Prohibits the transmission in interstate or foreign commerce of “bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest.”
 - Does not make unlawful the transmission of “information assisting in the placing of bets or wagers on a sporting event or contest” if made from and into States “in which such betting is legal.”
 - But that exception does not apply to the actual bets or wagers.
 - In 2011, the DOJ opined that the entirety of the Wire Act is limited to sports betting.
- **KEY QUESTION:** How would DOJ prioritize Wire Act enforcement where customer and gaming operator are both in States with lawful sports betting, but the electronic transmission of the wager may be deemed to touch other States?

Post-PASPA Federal Statutory Framework - UIGEA

- **Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) (31 U.S.C. §§ 5361 *et seq.*)** – “[P]rohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law.”
 - Targets payment processors (ACH systems, card systems, check collection systems, money transmitting businesses, and wire transfer systems) that might otherwise facilitate transactions.
- Other possibly relevant federal gambling-related statutes remain in effect, including: Johnson Act, Travel Act, Interstate Transportation of Wagering Paraphernalia Act, Sports Bribery Act, Illegal Gambling Business Act, and the Racketeering Influenced and Corrupt Organizations Act.

Post-PASPA Federal Statutory Framework – Money Laundering

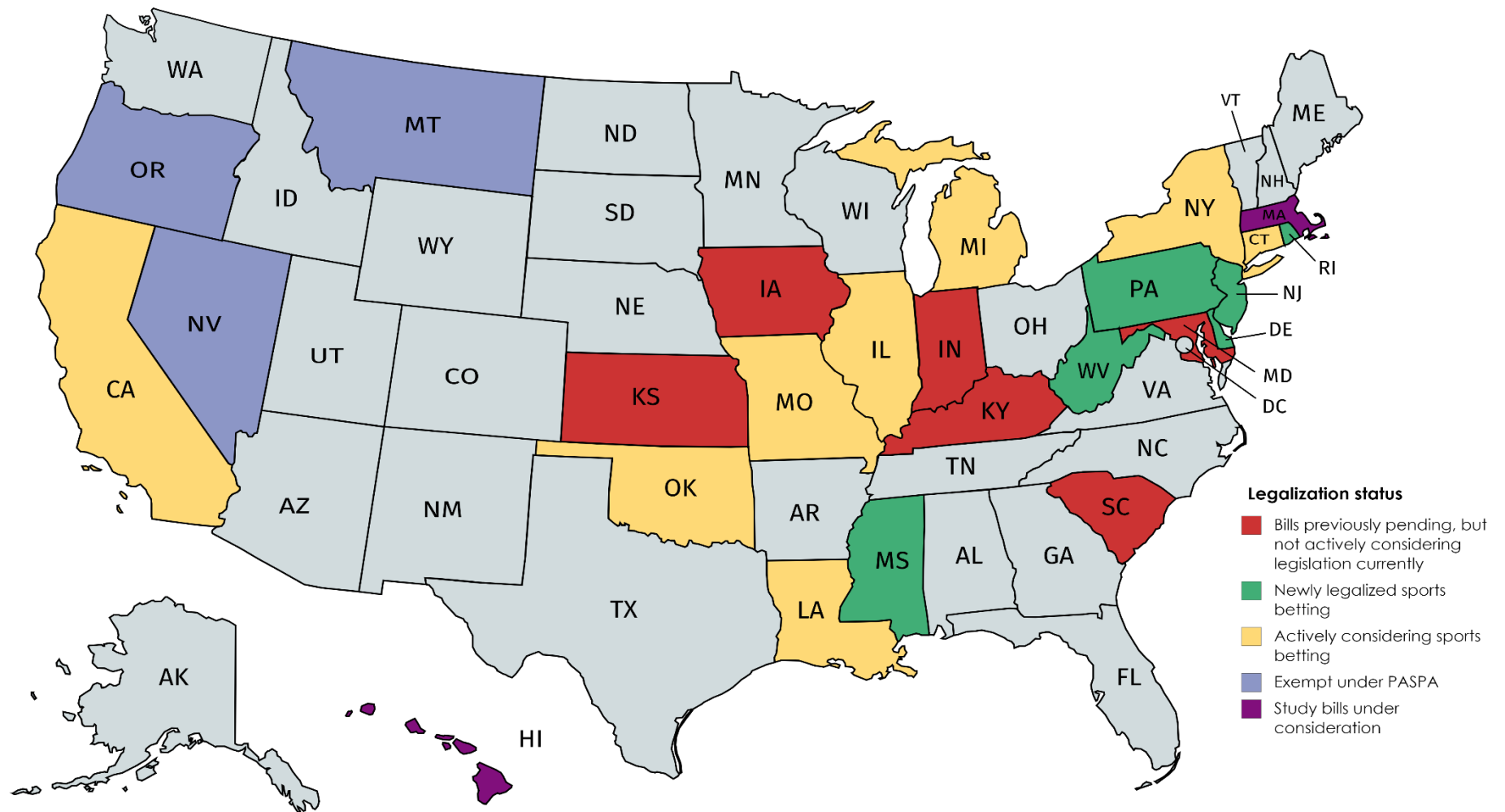
- **18 U.S.C. §§ 1956 and 1957** are the main U.S. anti-money laundering (“AML”) laws, which make it a crime to engage in a financial transaction with the *knowledge* that the proceeds involved were derived from *unlawful activity*.
- ***Money laundering can consist of gaming with the proceeds of illegal activity – win or lose.***
- **The Bank Secrecy Act (31 U.S.C. §§ 5311 *et seq.*)** is the main source of AML recordkeeping, reporting, and compliance program requirements for “financial institutions.”
 - Casinos = “financial institutions.” Subject to regulatory requirements and compliance program requirements similar to banks due to ability to move funds domestically and abroad.
- In 2014, the FinCEN warned the gaming industry that even legitimate sports books carry high anti-money laundering risks.

Other Post-PASPA Considerations

- **Office of Foreign Assets Control (“OFAC”)** administers economic sanctions programs primarily against certain countries and groups of individuals, such as terrorists and narcotics traffickers.
- OFAC regulations prohibit entering into transactions with individuals or entities identified on any of the OFAC sanctions lists.
- Each State will have a **State-level gaming regulator** and its own unique gaming compliance regulations.



Future Status of State-by-State Liberalization



Legalized: New Jersey



- Two additional bills currently pending; would authorize sports wagering at **7+ Atlantic City casinos, racetracks**, and the **sites of former racetracks** on professional/collegiate games (not involving NJ college teams), and establish gaming taxes.
- Bets could be placed **in person** or **online (through casino “skins”)** if not inconsistent with federal law.
- Bills would not allow companies to operate online sports wagering exclusively under their own brands.
- State regulators must still develop regulatory framework; expected within months given past experience with internet gaming.
- Monmouth Park (in partnership with William Hill) may have sports betting by Memorial Day.

Legalized: Pennsylvania

- Legalized sports betting at State's **12 casinos** in October 2017; law took effect following Court's decision.
- Permits wagering on professional and collegiate events, **in person, online, or on a mobile device** used physically within the State's borders.
- Betting can commence once the Pennsylvania Gaming Control Board implements necessary regulations and certifications.
- License applicants must pay one-time fee of **\$10 million**.
- **36% state tax** on gross gaming revenue.
- Churchill Downs may operate sports book at casino in Erie, PA.



Legalized: West Virginia



- Passed law in March 2018 legalizing in-person sports betting at **five casinos** and via **online platforms** tied to those casinos; law has taken effect with Court's ruling.
- No integrity fee currently required (despite League lobbying).
- Governor Justice has suggested calling a special session to reconsider the integrity fee issue, however.
- Still awaiting regulations from West Virginia Lottery Commission.

Legalized: Mississippi



- Mississippi legalized sports betting last year by repealing part of state law that prohibited betting on any games occurring outside casinos.
- Sports betting will be limited to Mississippi's **28 water- and land-based casinos**. Online betting will **NOT** be permitted.
- Full sports betting must await regulatory approval; regulations from the Mississippi Gaming Commission expected by late summer.
- Churchill Downs has announced it will set up sports wagering at two casinos it owns in MS, with a third potentially on the way.

Legalized: Delaware

- Legislation passed in 2008 permits sports book operations, but existing sports betting market limited to parlay bets on professional football.
- Governor plans to allow placing of bets on NFL, NBA, NHL, MLB and out-of-state college teams at Delaware's **three casinos**, possibly before the end of June.
- Online betting would **NOT** be permitted.
- Does not seem like additional regulatory or legislative actions will be necessary.



Legalized: Rhode Island



- Sports betting appears to be legal already at **two casinos** under previously approved ballot measures; further legislation pending.
- One proposal would authorize fantasy sports; another would authorize state-operated sports betting at Rhode Island's two casinos. Online betting would **NOT** be permitted.
- Sports betting would be prohibited in connection with college athletic events taking place in Rhode Island or in which any Rhode Island college team participates.
- Sports betting is supported by the Governor, Senate President and House Speaker.
- State regulators will accept requests for proposals; looking at October launch.

Legislation Pending: California



- Resolution pending before legislature since July 2017 would authorize proposal of a constitutional amendment to California voters. Needs 2/3 majority to pass legislature. Proposal to voters could come as early as November.
- If approved by voters, legislature and regulatory bodies would still need to act.
- Any bill would likely have to meet with approval from state tribes; tribes would oppose any provision allowing non-tribal “card clubs” to offer sports betting.

Legislation Pending: Connecticut

- HB5307 died when legislative session ended on May 9, despite strong support from gambling operators and state legislators.
- Gov. Malloy would support calling a special session to consider sports betting bill.
- Action by state regulators would still be required.
- **Online betting** would be run through state-licensed operator.
- BUT – CT tribal casino operators (Mashantucket Pequot and Mohegan Sun) believe they have the **exclusive** right to offer sports betting under tribal-state gaming compact.



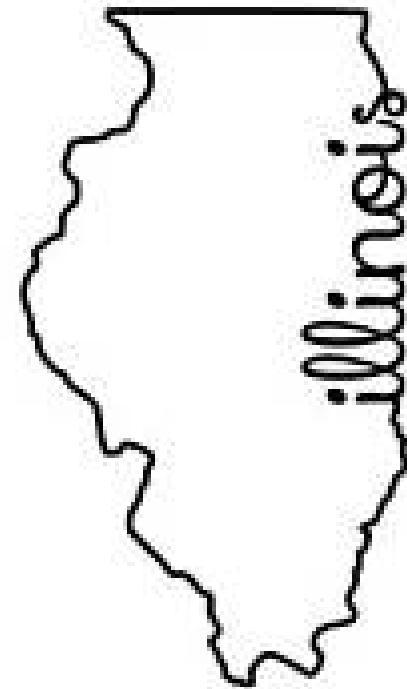
Legislation Pending: New York



- New York previously amended its constitution to permit sports betting; no voter referendum would be required for bills to become law.
- S7900 approved by Racing, Gaming and Wagering Committee; awaiting review by Senate Finance Committee.
- Would permit sports betting at **licensed gaming facilities** (including **5 tribal casinos** and **9+ racetracks**) and **via mobile phone** (if bettor is physically present in the State). NY college teams would likely be excluded.
- S7900 likely will not move forward until Assembly proposes its own bill.

Legislation Pending: Illinois

- Two bills pending since January 2018; Senate bill would authorize sports betting or electronic sports betting (limited to IL residents). Unlikely to pass before legislature adjourns on May 31.
- Would require sports betting operators to “share” 1% of their handle with sports leagues.
- Casinos would be required to pay \$10,000 licensing fee; wagers would be taxed at 12.5%.
- Additional action by state regulators would still be required.



Potential Developments in Other Large Markets

- **Massachusetts:** Bill pending to establish special commission to study and propose legislation relating to online sports betting; state gaming commission has already published white paper on the issue.
- **Ohio:** No bills currently pending; action could be taken through legislation or voter referendum.
- **Michigan:** 8 bills pending to expand gambling in the State, including sports betting and fantasy sports. Four have gotten votes in committee, but none have received full votes in either state house or senate.
- **Iowa:** Has introduced legislation to permit betting on collegiate/professional sports on “excursion boats,” in “gambling structures,” and “racetrack enclosures”; online gaming a possibility, too.

Tribal Involvement

- Some tribes have threatened to block sports wagering in CT and CA.
- Degree of involvement may depend on tribal-state gaming compacts. Most forms of sports gambling would likely constitute Class III gaming and require amendment of existing compacts or new compacts.
 - North Dakota's compact permits sports wagering by tribes "except as prohibited by PASPA."
 - Arizona has also expressed interest in renegotiating its compact to permit sports wagering.
 - At least one tribal casino in Nevada already offers sports betting.
- Approval of the **new** compacts by the Secretary of the Interior required under the Indian Gaming Regulatory Act (IGRA). Approval generally granted unless compact violates IGRA or other federal laws.
- National Indian Gaming Commission (NIGC) committed to helping tribes navigate "new opportunities" and asks that they be given a "seat at the table" in sports betting discussions.

Potential Federal Legislation

- Senator Orin Hatch (R-Utah), one of the drafters of PASPA, plans to introduce legislation in the coming weeks.
- Concerned about “uneven enforcement” that is made possible by online sports betting across state lines; believes federal standards will be necessary to avoid a “race to the bottom” in light of online betting and the connectedness of the sports betting market.
- Goal: protect consumers, safeguard against underage/problem gambling; ensure States that don’t want sports gambling won’t have to have it.



Potential Federal Legislation



- U.S. Congressman Frank Pallone Jr. (D-NJ) has called on Congress to consider his legislation—the Gaming Accountability and Modernization Enhancement Act or GAME Act—that would formally allow States to legalize sports and online gambling with appropriate consumer protections.
- Bill would remove federal obstacles to legalized gambling at the state level and would permit States to regulate themselves.
- Hardline federal ban on sports betting unlikely given Republican majority in Congress and the state-autonomy principles inherent in the Supreme Court’s ruling.

Integrity Fees?

- Professional sports leagues have been lobbying state legislatures to include “integrity fees” (i.e., taxes on the total amount wagered payable to the leagues) in their bills. NBA/MLB actively opposing bills without these fees.
- 1% tax on the handle could amount to much higher effective tax (up to 20%) on total sports betting revenue.
- State legislators have generally been hostile and no State has yet passed integrity fee proposal.
 - Don’t believe leagues deserve the money—State will be regulating, sports books will be operating; leagues merely exist.
 - Reduces state revenue.
 - Fees would raise costs, hurt consumers and businesses, and perpetuate black market.

Integrity Fees?

Rhode Island State Senator William Conley, Jr.:

I don't think either logic or fairness leads you to the conclusion that it's your game and therefore you ought to profit from this. It's our state. We ought to benefit from this opportunity.

You're in a business; that's a good thing. And you should make a profit off your business; that's a good thing. But gentlemen, those games do not belong to you. They belong to the fans...

No logic and no fairness suggests that you are to get a piece of the action. I'm not saying that this discussion is over, but I'm suggesting that your presentation this afternoon has fallen far short of a compelling argument.

Integrity Fees – Potential Legal Challenges

- May not be ripe for challenge until such a fee provision is actually passed as legislation. Pending bills in Missouri, Indiana, and Illinois currently include such provisions.
- May be subject to challenge as unlawful taking for a private purpose.
- May be considered an unlawful “tax” under some state laws.
- Leagues may not have intellectual property rights over game statistics.

Transactions – Market Impact

- Shares of casino companies up substantially following ruling:
- **Churchill Downs** stock up from \$278 to \$306 at close on May 16.
- **Webis Holdings plc** stock up from 1.08 GBX to 3.30 GBX at close on May 16.

MGM
MGM RESORTS INTE
31.92 USD
▲ +0.19 +0.60%

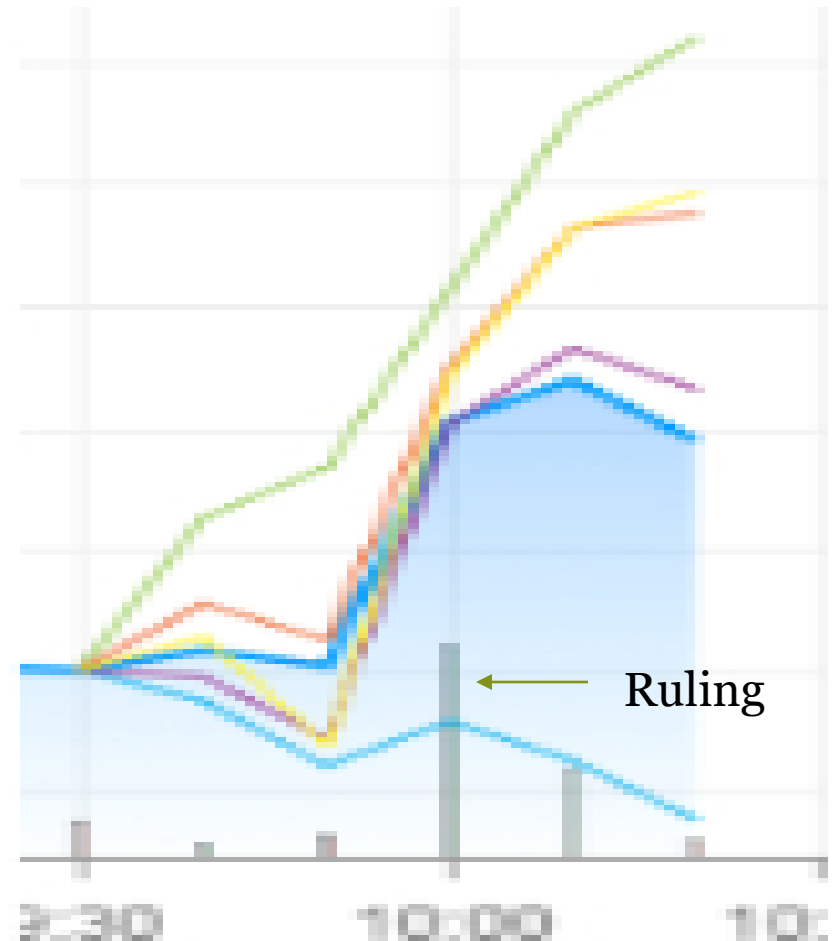
SGMS
SCIENTIFIC GAMES
60.25 USD
▲ +1.40 +2.38%

BYD
BOYD GAMING CORP
36.30 USD
▲ +0.14 +0.39%

CZR
CAESARS ENTERTAI
13.20 USD
▲ +0.50 +3.94%

TSGI
STARS GROUP INC/
47.53 CAD
▲ +1.39 +3.01%

May 14, 2018



Transactions – Some Recent Deals

- William Hill has already partnered with Monmouth Park to bring sports wagering to New Jersey.
- Churchill Downs inked deal with Golden Nugget Atlantic City; partnership with SBTech to enter NJ, PA markets for sports betting and online gaming; purchasing third casino in MS.
- Paddy Power Betfair already has partnership with Parx Casino in PA and is in talks to buy FanDuel.



Transactional Issues

- Many state regulators will likely impose detailed licensing and regulatory requirements, along with fees.
- Companies seeking to offer online gaming should be mindful of federal laws governing interstate transmission of wagers.
- Companies will also need to be mindful of state consumer protection laws.
- Patchwork of regulations may pose compliance challenges to companies seeking to operate in multiple States.

Questions?



Advocates for the State of New Jersey



Theodore Olson
Partner, Washington DC
tolson@gibsondunn.com



Debra Wong Yang
Partner, Los Angeles
dwongyang@gibsondunn.com



Matthew McGill
Partner, Washington DC
mmcgill@gibsondunn.com