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Winner's Playbook: Behind The Scenes Of Sports Bet Case

By **Matthew McGill, Ashley Johnson and Lauren Blas** (July 6, 2018, 4:41 PM EDT)

This article is part of an Expert Analysis series featuring reflections from attorneys who recently won high-profile cases — an inside look at the challenges they faced and the decisions they made that led to victory.

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On May 14, 2018, in Murphy v. National Collegiate Athletic Association (formerly Christie v. National Collegiate Athletic Association), the U.S. Supreme Court ruled that the Professional and Amateur Sports Protection Act "dictates what a state legislature may and may not do" and therefore violated the Tenth Amendment. The court struck down PASPA in its entirety, setting off a wave of activity in states eager to legalize sports betting. Murphy is only the third successful anti-commandeering challenge to a federal statute. Below, three members of the Gibson Dunn & Crutcher LLP team representing the state of New Jersey explain how they kept the faith over six years of litigation that the Supreme Court would eventually see things New Jersey's way.

The 2012 Sports Betting Licensing Law

Matt McGill: In November 2011, the people of New Jersey voted, by a margin of 64 percent to 36 percent, to amend the state constitution to permit the legislature to "authorize by law" sports betting. In August 2012, New Jersey followed up with a law providing for the licensing and regulation of sports betting at casinos and racetracks in the state. The problem was PASPA, which made it unlawful for states to "license" or "authorize by law" sports betting. This, I remember telling our partner Debra Wong Yang early on, is called walking into the teeth of a federal statute. Gov. Chris Christie and Deb were old friends from when they both were U.S. attorneys in the George W. Bush administration — he for New Jersey and she for the Central District of California. The major professional sports leagues and the NCAA had sued New Jersey for its apparent violation of PASPA and Gov. Christie called Deb to see if Ted Olson would quarterback New Jersey's defense. Answer: Of course! We live for this stuff!

I was next on board and started making calls to assemble what I called our "Bright Ideas Squad." We needed to find a way out of this statute, and textual arguments did not seem like they would be of much assistance. My first call was down the hall to John Bash, a former clerk to Justice Antonin Scalia who now is the U.S. attorney for the Western District of Texas. Next was to my colleague in Dallas, Ashley Johnson, who had clerked for Justice Clarence Thomas. After that, it was time to reread the Constitution.

Ashley Johnson: In August 2012, Matt reached out to ask me to join what was clearly a cutting-edge and important constitutional fight. From the beginning, we read PASPA as intended to block any legalization of sports wagering, whether via repeal or via affirmative legislation. Our focus was on finding the flaws in Congress' statute and in the leagues' attempt to enforce that statute. Although Congress had tried to give the leagues the right to sue for any violations of PASPA, the leagues could not plausibly allege they were actually harmed in any way by the New Jersey law — sports wagering was far more likely to increase interest in the leagues' games, as shown by fantasy sports. So we argued that the leagues did not have constitutional standing to bring the challenge in the first place.

On the merits, PASPA operated very unusually, prohibiting the states from allowing sports wagering and then, only secondarily, prohibiting businesses and citizens from participating in sports wagering pursuant to state law. That regulation of the states' regulation of third parties — rather than of third parties directly — was precisely the commandeering of state government that the court prohibited in New York v. United States. In addition, we were immediately struck by the discrimination between Nevada and other states — that Nevada could operate sports wagering freely, taking billions of dollars in bets, while New Jersey was totally prohibited from allowing it at all. Although we found academic support for requiring uniformity in commerce clause legislation generally, language in Supreme Court cases made that a challenge. However, the Supreme Court's then-recent decision in Northwest Austin Municipal Utility District No. One v. Holder (2009) did prohibit discrimination with respect to the states' exercise of their sovereign rights, unless such discrimination was necessary to address "local evils." PASPA did the opposite — it did not regulate the supposedly harmful sports wagering where it was prevalent, but prohibited states from allowing it where it was absent. That aspect of PASPA — the inequity of the different rules applying to Nevada and other states — ultimately found its way into our argument not as one about discrimination under the commerce clause generally, but as an equal sovereignty argument (one that garnered further support in Shelby County v. Holder (2013)).

Christie I

McGill: The district court, needless to say, was not receptive to any of our bright ideas. We raised our challenge to standing at the motion to dismiss stage, arguing that if anything, the sports leagues would benefit from legal sports betting. Although current events suggest the leagues have since come around to our view, the district court was not buying it. It similarly dismissed our constitutional arguments. The district court held that PASPA did not impermissibly commandeer the states because it did not require the states to enact any legislation or require them to implement a federal law. Turning to our equal sovereignty argument, the district court concluded that the principle, while applicable to Texas in Northwest Austin, did not apply to the original 13 states. By the time we got to the Third Circuit, however, the leagues had brought in Paul Clement, and their defense of PASPA began to shift. Perhaps recognizing the vulnerability of the distinction drawn by the district court between requiring a state to enact a prohibition, and requiring a state to keep one in place, the leagues argued that PASPA actually allowed states to repeal their prohibitions on sports wagering and thus could not be said to require New Jersey to maintain its prohibitions.

Johnson: Although it seemed clear to us that PASPA was intended to block any state action that had the effect of permitting sports betting, the leagues' new conception of PASPA as allowing repeals found traction in the Third Circuit. Writing for the majority, Judge Julio Fuentes held that PASPA prohibited licensing of sports wagering but not repeals of state-law prohibitions, and that because it did not require states to keep their laws on the books, it did not commandeer. (The majority also rejected our equal sovereignty argument.) The Third Circuit's statutory ruling sharply restricted the scope of the commandeering issue and, notwithstanding a prescient dissent by Judge Thomas Vanaskie, made it more difficult to get certiorari. In its brief in opposition to our cert petition, the United States eagerly adopted the Third Circuit's view of PASPA, telling the Supreme Court that the statute allowed New Jersey to repeal prohibitions on sports wagering "in whole or in part." Those words would come back to haunt the government.

The 2014 Repeal

Lauren Blas: I got an email from Ashley on a Saturday afternoon in the summer of 2014, asking me to help quickly put together a motion in a case involving sports betting and federalism. (This was one of those rare Saturday work requests I am very glad I agreed to!) Following the denial of cert, the New Jersey Legislature took the United States at its word and repealed its state-law prohibitions on sports gambling "in part," which is to say, only at licensed racetracks and Atlantic City casinos. This repeal did not confer any power on state authorities to license or regulate anything in connection with sports betting. New Jersey simply lifted its prohibitions at the particular locations where licensed gambling already was taking place.

Christie II

McGill: The leagues immediately sued New Jersey claiming that the 2014 repeal was no less a violation of PASPA than the 2012 licensing law. Shifting their arguments for a second time, the leagues now argued that PASPA did not allow states to repeal state-law prohibitions "in part," but instead presented states only with the option of maintaining their ban on sports betting or lifting the prohibitions in their entirety. The district court again agreed with the leagues and entered an injunction that prohibited Gov. Christie from giving effect to the 2014 repeal, meaning that he had to continue to enforce state-law prohibitions that the New Jersey Legislature had repealed. The federal government (through a federal court injunction) now was directly dictating the content of state law. This had to be commandeering!

Johnson: Back at the Third Circuit, the parties offered dueling interpretations of the Third Circuit's opinion in Christie I: As they did in district court, the leagues argued that PASPA put states to an all-or-nothing choice between complete prohibition and total deregulation. We argued that under Christie I, New Jersey could repeal "in part," as the United States had told the Supreme Court. And if PASPA did not permit a repeal 'in part," we argued, then it commandeered because the total repeal hypothesized by the leagues was not a legitimate option for states, since, as a policy matter, it could force the state to allow betting on sports by kindergartners. In that case, the only real "option" available to states was to continue to maintain prohibitions on sports wagering.

Blas: Heading into the oral argument at the Third Circuit, things were looking up when we saw that Judge Fuentes was on our panel. We were reasonably confident that, in Christie I, Judge Fuentes did not intend to limit states to a choice between maintaining prohibitions or allowing schoolchildren to gamble. We were right about that, but the panel majority ruled against us holding that, while PASPA permitted more than just total repeals, it did not permit "selective" repeals like New Jersey's.

That, predictably, drew a strong dissent from Judge Fuentes, who believed his prior opinion permitted exactly what New Jersey had done.

McGill: I've never had a stronger case for rehearing en banc. The Third Circuit's decision conflicted with a recent prior panel decision that involved the identical parties and the same legal issues, as recognized by the author of that prior panel decision. We experienced a surge of optimism when the Third Circuit granted our petition for rehearing en banc, but the full Third Circuit ruled against us by a 9-3 margin. It held that PASPA generally prohibited state legislatures from enacting state laws that permitted sports wagering, but that it might permit some relaxation of prohibitions — such as de minimis bets among friends and family members. It "excised" as improvident Christie I's statements that PASPA permits repeals. The Third Circuit then concluded PASPA did not impermissibly commandeer the states because it left the states some "room" to make policy concerning sports betting, though it pointedly refused to "articulate a line" showing states what policies they could enact other than prohibiting sports betting outright. If you are keeping score, at this point we had lost five times — twice in the district court and three times in the Third Circuit — by a combined vote of 16-5. Bleak.

The Grant of Certiorari and Supreme Court's Decision

Johnson: The much greater breadth of the en banc court's holding and the fact that there was a split en banc decision put us in a better position for cert the second time around. Still, we had to confront the fact that, to the casual observer or busy law clerk, it looked like the same cert petition we had filed in Christie I, and we lacked any circuit split on PASPA or the scope of the anti-commandeering principle to get the court's attention. What we did have was the United States' brief from just two years before, which told the Supreme Court that New Jersey could repeal its prohibitions "in whole or in part." That, evidently no longer was true, and the Third Circuit refused to say what PASPA allowed states to do.

Blas: Given that we were challenging the constitutionality of an act of Congress, and the United States had supported the leagues as an amicus in the Third Circuit, it was somewhat surprising that court called for the views of the solicitor general. Was there really any doubt that the government was going to urge denial of our cert petition?

McGill: In a way, it was a lucky break for us. When the court first conferenced on the cert petition, it was December 2016, and the court still had just eight justices. The court at that time seemed quite reluctant to grant cert in a case that possibly could result in a 4-4 split, and ours was one of those cases. But by the time the government filed its brief in May 2017 (predictably, urging that cert be denied), Justice Neil Gorsuch had been appointed and the court was back to its full complement of nine. But if President Donald Trump instead had selected Third Circuit Judge Thomas Hardiman to replace Justice Scalia, he would have been recused and we might have been cooked.

Johnson: I don't know that I ever thought we had a realistic chance of getting cert. It is exceedingly rare for the court to grant cert in a case when it has sought the SG's views and the SG says "deny." The SG recommended deny in 16 cases this term and ours was the only one in which the court granted cert.

McGill: Immediately after cert was granted, Ted Olson made clear to us that our mission was not merely to preserve New Jersey's 2014 repeal, but to restore New Jersey's power to license and regulate sports wagering as it had sought to do in 2012. The problem we had to overcome was that our question presented to the Supreme Court focused on the fact that PASPA had been interpreted to prohibit New Jersey from repealing its own state-law prohibitions. New Jersey's 2014 repeal did not provide for licenses, so there was no clear vehicle to challenge PASPA's ban on licensing.

The strategy we settled on was to argue that PASPA's prohibition on state legalization of sports wagering impermissibly commandeered and that none of PASPA's other provisions were severable from that core prohibition of legalization. It was four pages at the end of our opening brief, but it might have been the most important strategic decision we made in the entire litigation because it gave the court a pathway to strike down PASPA in its entirety and to bring an end to litigation over whether and to what extent states may legalize sports betting.

Blas: We had always envisioned this as a 5-4 case. Justice Ruth Bader Ginsburg and Justice Stephen Breyer had dissented in the last successful anti-commandeering challenge and we had no particular reason to think Justice Elena Kagan or Justice Sonia Sotomayor would join a holding that PASPA unconstitutionally commandeered state regulatory authority. So it was a pleasant surprise that the vote was 7-2, with both Justice Breyer and Justice Kagan agreeing that PASPA impermissibly commandeered. Indeed, even though Justice Ginsburg and Justice Sotomayor dissented, the dissenting opinion takes issue only with the court's severability analysis. I can't help but wonder whether Justice Ginsburg has her eye on future anti-commandeering cases, including the case now headed to the Third Circuit concerning sanctuary cities.

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