



Experts See Trump's Shadow on Future of Sports Betting

Nick Rummell

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With the United States poised to see its first casino mogul in the Oval Office, experts are weighing in about the sports-betting law that New Jersey wants revived by the U.S. Supreme Court.

Still one vote shy of a full bench after the February death of Justice Antonin Scalia, the Supreme Court is likely to announce whether it will consider the case weeks before Donald Trump's swearing-in.

A writ of certiorari is just one factor in play for the law's future, however, given Trump's past vested interest in casinos.

"In the '90s Trump pushed hard for New Jersey to legalize [sports gambling], so we know how he feels about it," Daniel Wallach, a constitutional and gaming law attorney at Becker & Poliakoff, said in an interview.

The biggest legal obstacle New Jersey faces in its attempts to legalize sports betting is PAPSA, short for the Professional and Amateur Sports Protection Act, a federal law that prohibits sports gambling in casinos in all but a handful of states.

If he doesn't sign legislation nullifying PASPA, Wallach said, Trump could simply appoint an attorney general who refuses to enforce the statute.

Still, short-term relief for New Jersey would be minimal — "this will be a two- or three-year endeavor," Wallach added.

Another iron that New Jersey has in the fire is the possible allegiance Trump owes Gov. Chris Christie for his early endorsement in the Republican primary.

Restarting the conversation on sports betting would be unlikely in the early days of the next administration, but Trump or Christie's voices could come up when it does, said Chris Soriano, a gaming-law attorney with the firm Duane Morris.

Soriano noted that PASPA was written before there were online gambling options available.

“It’s really a matter of whether it’s time to have this national discussion about where we go with sports betting,” he added.

Christie is a Republican but New Jersey Democrats have been supportive of sports gambling as well, seeing it as a salve to heal foundering racetracks and Atlantic City casinos. Despite in-state popularity, sports gambling has faced uphill battle made tougher by a [loss this summer](#) in the Third Circuit.

Courts have been unfavorable toward New Jersey’s argument that its 2014 state law repealed restrictions on sports betting in casinos and racetracks, rather than authorizing the practice in violation of PASPA.

Allies of the state in the battle include five states — West Virginia, Arizona, Louisiana, Mississippi and Wisconsin — that filed a Nov. 14 brief, urging the Supreme Court to take up the case.

The American Gaming Association filed a similar brief, with a Trump-focused statement by association president Geoff Freeman.

“As President-elect Donald Trump has acknowledged, illegal sports betting is a thriving industry,” Freeman said. “The United States Supreme Court should consider New Jersey’s important claims and allow all states to address the serious problems associated with illegal sports betting.”

Given that the en banc Third Circuit was largely unified in its decision, and there is no circuit court split, experts predict that the Supreme Court will not take the case.

“What we have is an issue of great importance but not one that has resulted in division between federal courts,” said Wallach, the attorney at Becker & Poliakoff.

Wallach does think, however, that the Third Circuit’s decision opened the door to potential constitutional issues. “The real danger is it’s a more frontal assault on state sovereignty,” he said.

The fight to keep sports gambling out of New Jersey has been spearheaded by the National Collegiate Athletic Association and all four major professional sports associations, which sued New Jersey in 2012, arguing that sports gambling constitutes a commercial activity that impacts interstate commerce.

The Third Circuit sided with the sports leagues 10-2 in August, saying that New Jersey’s 2014 law was an attempt to get around the 1992 PASPA legislation. In the majority opinion, U.S. Circuit Judge Majorie Rendell wrote that the 2014 law “provides the authorization for conduct that is otherwise clearly and completely legally prohibited.”

U.S. Circuit Judge Thomas Vanaskie meanwhile wrote in dissent that PASPA required states to “leave gambling prohibitions on the books to regulate their citizens.”

In their amicus brief, the five states argued that PASPA “blurs the line” between accountability by federal regulators and state governments. “Congress has obscured its own responsibility by forcing state governments to carry out federal policy rather than doing so itself,” the 33-page filing states.

In cases where gaming permits are denied, the brief continues, “at least some (if not all) of the blame will fall wrongly on the states, even if a particular state would prefer as a matter of policy to have acted otherwise.” (Parentheses in original.)

The states painted a bleak picture of “unprecedented” federal overreach in their amicus. “If permitted to stand, the Third Circuit’s decision threatens the constitutional balance of power between states and the federal government,” the brief states.

The Supreme Court has set a Dec. 14 deadline for the sports leagues to respond to the petition for certification, and the high court’s decision is expected sometime in mid-January.

Soriano, the Duane Morris attorney, said the odds that the Supreme Court takes the case are probably less than in 2014, when it was petitioned to address the constitutionality of PASPA. “A constitutional question was squarely presented [the last time],” he said. “Now it’s more a case of statutory interpretation.”

That said, constitutional questions are subsumed in the Third Circuit’s latest decision, and the fact that five states have raised those issues “will probably get more attention from the court” than from other petitioners, Soriano added.

The Justice Department is expected to file a brief in support of PASPA.

In the meantime, the amici joining New Jersey includes the Cato Institute.

A libertarian think tank, Cato’s amicus brief said the Third Circuit “threw a curveball” instead of clarifying whether PASPA allows states to repeal anti-sports gambling laws. The August decision “threatens state sovereignty and could lead to absurd results,” the brief states.

In a separate brief filed on Nov. 4, Florida State University professor Ryan Rodenberg said PASPA “violates well-established constitutional limits” in that grants regulatory powers to private entities, in this case sports league commissioners.

“PASPA gives sports leagues a substantial role in determining what types of sports betting are either legal or illegal,” Rodenberg’s 31-page brief says.

If the U.S. Supreme Court hears New Jersey’s case, it would be the first time the court tackled PASPA.

The law has come up only once, in dicta, with the unanimous 1999 ruling in *Greater New Orleans Broadcasting Company v. United States*. In that case, Justice John Paul Stevens wrote that PASPA’s exemptions were “unclear” and that advertising restrictions on gambling were unconstitutional.

A writ of certiorari would show an interest among at least four justices in overturning the Third Circuit decision, but that does not mean reversal is certain.

“We’re drawing on a blank slate, here,” Wallach said.

Since Scalia’s death, 4-4 ties have been a regular occurrence. With three conservatives, four liberals and Justice Anthony Kennedy, a tie on sports-gambling would let the Third Circuit decision stand.

Sports gambling has been relatively popular in New Jersey. Some say the basis for the 2014 law as a referendum New Jersey voters approved three years earlier, permitting sports gambling by a margin of 3-2. Previous attempts at referendums to approve sports betting in the state go back at least until 1993.

Until the Supreme Court decides the issue, a holding pattern is in place for related legislation in Congress and in New Jersey. Rep. Frank Pallone put forward the former to “harmonize” current gambling laws, including PASPA. Three state assemblymen proposed the latter, to repeal all prohibitions and licensures on sports gambling.

“The focus of is on the Supreme Court right now,” Wallach said. “If it’s good news, we could have the potential for sports betting by week one of the NFL season next year.”