

The Defect in the Supreme Court’s Sports Betting Decision

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Introduction

Four years after its issuance,¹ the defect in the Supreme Court’s sports betting ruling is increasingly evident. By allowing standing-less plaintiffs to obtain an overbroad injunction against a sitting state governor, the decision represents a dubious vehicle for generating lasting precedent on anti-commandeering grounds. More specifically, by permitting five private plaintiffs—instead of the federal government via the Department of Justice (“DOJ”)—to claim irreparable harm and injury from sports betting while simultaneously positioning themselves to profit from the same activity,² the Supreme Court’s sports betting decision can plausibly be characterized as having derived from a ruse. This article explores the uncorrected early misstep in the case and explains why such flaw has implications for expanded legalized sports betting moving forward.

Background

The Supreme Court sports betting case was centered on the constitutionality of the Professional and Amateur Sports Protection Act of 1992 (“PASPA”),³ a federal law bent on preventing states from changing their sports betting laws. The litigation that eventually snaked its way to the Supreme Court was initiated

¹ *Gov. Murphy, et al. v. National Collegiate Athletic Ass’n, et al.*, 138 S. Ct. 1461 (2018).

² See generally, Ben Strauss and Mark Maske, *The NFL once viewed sports betting as a threat. Now the league wants the action*, WASHINGTON POST (Aug. 25, 2021), <https://www.washingtonpost.com/sports/2021/08/25/nfl-sports-betting/>. See also, Joe Vardon, *Without hint of irony, history, NBA NFL, MLB, NHL betting on online gaming licenses*, THE ATHLETIC (April 8, 2021), <https://theathletic.com/2490262/2021/04/08/without-hint-of-irony-history-nba-nfl-mlb-nhl-betting-on-online-gaming-licenses/>

³ 28 U.S.C. § 3701 *et seq.*



jointly in 2014 by five private sports leagues: the National Collegiate Athletic Association (“NCAA”), National Basketball Association (“NBA”), National Football League (“NFL”), National Hockey League (“NHL”), and Office of the Commissioner of Baseball (“MLB”) (collectively “Plaintiff Leagues”).⁴ The DOJ was never a plaintiff or co-plaintiff in the litigation, but did participate as *amici*.

PASPA included a clause purporting to deputize either the DOJ or certain sports leagues to bring litigation thereunder.⁵ The DOJ’s absence as a party throughout, however, resulted in an awkward procedural posture from the beginning. Indeed, before PASPA was enacted, the DOJ found it “particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues.”⁶ Such sentiment was echoed by Senator Chuck Grassley in 1991, who explained: “[PASPA] would prohibit purely intrastate activities. The Federal Government also has never authorized private parties to enforce such restrictions against the States. This legislation would do so.”⁷

Senator Grassley and the DOJ were correct in pinpointing this “troubling” aspect of PASPA because it resulted in two distinct constitutional problems beyond the Tenth Amendment anti-commandeering grounds that the Supreme Court cited to render the law unconstitutional. First, PASPA violated long-established limits pertaining to the legislative delegation of regulatory power to private entities.⁸ This is known as the private non-delegation doctrine. Second, PASPA also violated Article III’s “cases” or “controversies” requirement by allowing overly broad injunctive relief to non-litigant third parties. Taken together, these problems contributed to the standing-related defect in the Supreme Court’s sports betting decision.

⁴ A prior iteration of the case also made it to the certiorari stage of review by the Supreme Court. See *Nat’l Collegiate Athletic Ass’n, et al. v. Gov. Christie, et al.*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014).

⁵ PASPA’s enforcement provision reads as follows: “A civil action to enjoin a violation of Section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.” 28 U.S.C. § 3703. According to the Senate’s post-hearing report: “Section 3703 authorizes the U.S. Attorney General, or an amateur or professional sports organization whose games are alleged to be the basis of a violation of Section 3702, to seek an injunction against such violation in the appropriate Federal District Court.” S. Rep. 102-248, *Professional and Amateur Sports Protection*, Nov. 26, 1991, p. 9.

⁶ Letter from W. Lee Rawls, Assistant Attorney General, Department of Justice, to the Honorable Joseph R. Biden, Jr., Chairman, Committee on the Judiciary (Sept. 24, 1991) (on file with author).

⁷ S. Rep. 102-248, *Professional and Amateur Sports Protection*, Nov. 26, 1991, p. 12.

⁸ See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). See also *Dep’t of Transportation v. Ass’n of American Railroads*, 575 U.S. 43 (2015).



Defect Takes Hold

The exact moment when the PASPA case moved into unconstitutional territory on standing-related grounds is easy to pinpoint. On October 24, 2014, the trial court judge granted a motion for a temporary restraining order brought by the Plaintiff Leagues.⁹ The judge issued his order from the bench with lawyers participating via teleconference. At the end of the hearing, the official transcript included the following exchange:

THE COURT: Can you hear me?

MR. RICCIO: Yes, I can hear you now. I was unclear whether the scope of your injunction is limited to the plaintiffs' games and not other sporting contests that the plaintiffs have no interest in.

THE COURT: Well, right now the only – the scope is limited to the application that's been put before the Court which is limited to the plaintiffs' games.

MR. RICCIO: That was the clarification I was seeking. Thank you, your Honor.

THE COURT: That's all we have for today counsel.¹⁰

Hours later, with no briefing and no citations to authority, the trial court judge reversed himself *sua sponte* and issued the following at the end of an order:

ADDENDUM: Upon further consideration of the question posed by [Mr. Riccio] as to the scope of the temporary restraining order, this court finds that the temporary restraining order restrains the implementing, enforcing, or taking any action pursuant to New Jersey Senate Bill 2460 (P.L. 2015, c. 62), the 2014 Law, and would apply to any lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly, 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. The scope of restraints is NOT limited to the games sponsored by the plaintiffs' leagues (emphasis in original).¹¹

⁹ Order on Plaintiffs' Application for a Temporary Restraining Order, *NCAA et. al. v. Christie et. al.* No. 3:14-cv-14-6450 (MAS) (LHG) (Oct. 24, 2014).

¹⁰ *Id.*

¹¹ *Id.*



Deciding an issue not furthered by a litigant is unconstitutional under Article III’s “cases” or “controversies” requirement. To do otherwise would result in absurdity, with judges issuing rulings involving claims or defenses of third parties with no nexus to the present lawsuit. Revealingly, the Plaintiff Leagues made this exact point in a court filing during an earlier iteration of the case: “If New Jersey had singled out the World Series, for state-sponsored gambling, then only Major League Baseball could sue.”¹² The DOJ concurred: “PASPA . . . authorizes sports leagues to seek injunctions against violations involving their games” (emphasis added).¹³ Such reasoning is sound, as it provides a useful example of why the five plaintiffs in the case—NFL, NBA, NCAA, NFL and MLB—can potentially secure injunctive relief to address *their* own purported injury under PASPA, but not for other sports leagues uninvolved in the lawsuit.

Both the Supreme Court and the Third Circuit have repeatedly set forth the parameters for constitutional standing and prudential standing. Article III standing derives from a three-part test: (i) “injury in fact,” (ii) “causation,” and (iii) “redressability.”¹⁴ In the Third Circuit, plaintiff injuries must be “based in reality.”¹⁵ Related to constitutional standing is prudential standing, where there is a “general prohibition on a litigant raising another person’s legal rights.”¹⁶

The trial court’s grant of injunctive relief to non-litigant third parties, which persisted during the entire pendency of the case, was particularly glaring because it stemmed from a temporary restraining order. Injunctive relief “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”¹⁷ Importantly, the Plaintiff Leagues never claimed to be harmed if New Jersey offered sports betting on golf, racing, tennis, or mixed martial arts, all sports unconnected to the Plaintiff Leagues.

With the DOJ absent, the Plaintiff Leagues were constitutionally required to maintain standing during the entirety of the litigation. Multiple court filings at least tangentially addressed this mandate vis-à-vis the injunctive relief sought. Below are excerpts from one such brief filed by the Plaintiff Leagues:

¹² Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss the Complaint, *NCAA et. al. v. Christie et. al.* No. 3:12-cv-4947 (MAS) (LHG) (Oct. 1, 2012), p. 15.

¹³ Brief for the United States as Amicus Curiae at 3, *Nat’l Collegiate Athletic Ass’n et al. v. Gov. Christie, et al.*, Nos. 16-476 and 16-477 (May 2017).

¹⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). See also *Spokeo v. Robins*, 136 S. Ct. 1540, 1548 (2016).

¹⁵ *Doe v. Nat’l Bd. of Medical Examiners*, 199 F.3d 146, 153 (3d Cir. 1999).

¹⁶ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

¹⁷ *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). For a detailed discussion on injunctions and the interpretation thereof, see F. Andrew Hessick and Michael T. Morley, *Interpreting injunctions*, 107 VIRGINIA L. REV. 1059 (2021).



The games on which New Jersey intends to authorize gambling belong to the [Plaintiff Sports Leagues]. They are plaintiffs’ games, and defendants do not – indeed, cannot – claim otherwise ... In PASPA, Congress did not grant a cause of action to remedy some undifferentiated public interest, but granted a right of action only to those whose discernable interests PASPA was enacted to protect – professional and amateur sports organizations whose own games are the object of a challenged violation ... Plaintiffs have an obvious, undisputed and particularized interest in how their own games will be presented to the public and their fans, including with respect to whether those games will be the basis for state-sponsored sports wagering. Congress agreed, concluding that the spread of state-sponsored sports gambling threatens to harm the integrity of plaintiffs’ games.¹⁸

The Plaintiff Leagues also addressed the issue during oral argument:

And PASPA actually responds to that very specifically because it gives the NFL the right to bring an action based on authorized gambling on NFL games. It gives the NBA standing to bring the challenge based on gambling on NBA games. So it’s not like the NFL can bring a claim about NBA, gambling on NBA. It’s very specific to their legal entitlement to protect their product.¹⁹

The Plaintiff Leagues never claimed an entitlement to injunctive relief beyond the alleged harm each suffered individually. The formal title of PASPA—“Professional and Amateur Sports Protection Act”—illustrates why. The statute purported to extend “protection” to sports leagues who claimed injury from legalized sports betting. As described by the Plaintiff Leagues: “[A]s its very title confirms, PASPA was enacted to protect *professional and amateur sports organizations* and to grant such organizations a legally protected interest in operating their own sporting events free of the spread of state-sponsored gambling.”²⁰

The Plaintiff Leagues, and other sports organizations, have now flipped such claim on its head, arguing via concerted lobbying efforts that they have an interest in controlling how sports betting is regulated by states while simultaneously seeking to monetize the activity for their own revenue-generating aims. Indeed, an executive from one of the Plaintiff Leagues foreshadowed the pivot in a 2012

¹⁸ Plaintiffs’ Reply Brief in Support of Their Motion for Summary Judgment, *NCAA et. al. v. Christie et. al.* No. 3:12-cv-4947 (MAS) (LHG) (Dec. 12, 2012).

¹⁹ Transcript of Oral Argument at 38, *Nat’l Collegiate Athletic Ass’n et al. v. Gov. Christie et al.*, 730 F.3d 208 (3d Cir. June 26, 2013) (Nos. 13-1713, 13-1714 & 13-1715).

²⁰ Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss the Complaint, *NCAA et. al. v. Christie et. al.* No. 3:12-cv-4947 (MAS) (LHG) (Oct. 1, 2012), p. 2 (emphasis in original).



deposition: “The NFL is in a revenue-generating business. If the NFL believes that sports gambling would allow it to increase its revenue, the NFL would engage in that activity.”²¹

The Plaintiff Leagues proceeded to obtain PASPA-sourced injunctive relief for their own “protection,” not others. Sports leagues and organizations completely unconnected to the case were nevertheless subject to an injunction based on Plaintiff Leagues’ alleged harms,²² with the trial court granting an across-the-board injunction against New Jersey’s offering of sports betting on all sports, even those unrelated to Plaintiff Leagues. This expanded PASPA’s relief beyond Article III’s allowance, tainting the Supreme Court’s eventual ruling in the case. Pointedly, the Plaintiff Leagues and other sport organizations will now likely point to the ruling as a *de facto* grant of a sports betting property right. This defect looms large in 2022 and beyond.

The Defect’s Lasting Impact

The Plaintiff Leagues and other sports organizations are now positioned—with an assist from the flawed Supreme Court ruling—to monetize sports betting moving forward. The same leagues that claimed to be injured and irreparably harmed by sports betting for the purposes of securing a sweeping injunction are now firmly entrenched commercially in the sports betting industry and are direct competitors of sportsbook operators. Hints of the shift were evident early on. The Plaintiff Leagues wrote that they have a proprietary interest in “the degree to which others derive economic benefits from their own games.”²³ Likewise, they posited to “have an essential interest in how their games are perceived and the degree to which their sporting events become betting events” (emphasis removed).²⁴

This is where characterizing the Supreme Court sports betting case as a clever ruse evidences itself. While the five Plaintiff Leagues avidly supported PASPA in the lead-up to the law’s 1992 enactment, all or most of them started to experience buyer’s remorse a decade ago. With technology catching up to the leagues’ profit-generating motives, the sports betting market was increasingly

²¹ Lawrence P. Ferazani 30(b)(6) Deposition, *NCAA et. al. v. Christie et. al.* No. 3:12-cv-4947 (MAS) (LHG) (Nov. 5, 2012).

²² A partial list of U.S.-based sports leagues that were uninvolved in the litigation that eventually landed at the Supreme Court include: (i) Major League Soccer; (ii) National Women’s Soccer League; (iii) WTA Tour; (iv) ATP World Tour; (v) Women’s National Basketball Association; (vi) PGA Tour; (vii) PGA Tour; (viii) Ultimate Fighting Championships; (ix) NASCAR; (x) United States Olympic Committee; (xi) World Boxing Organization; and (xii) Arena Football League.

²³ Response Brief of Plaintiffs-Appellees at 18, *NCAA et. al. v. Christie et. al.*, (June 7, 2013) No. 13-1713, 13-1714, 13-1715.

²⁴ *Id.* at 13-14.



viewed as an untapped revenue source. But PASPA, in a twisted irony, constrained the leagues pecuniary ventures in the wagering space. PASPA's accompanying Senate Report explained: "The committee would like to make it clear that this bill does not benefit professional sports financially. It does not reserve the right to the leagues to hold their own sports gambling operations. They are clearly prohibited under this bill from instituting their own sports betting scheme."²⁵ In declaring PASPA unconstitutional, the Supreme Court ensured the statute is no longer a barrier to the leagues' monetization of sports betting domestically.

With PASPA now cleared as a roadblock via the litigation initiated by the leagues themselves, the Plaintiff Leagues and other sports organizations have seized on the defect in the Supreme Court to strategically lobby federal and state lawmakers for 'ownership' over sports betting. For example, in early 2018, before the Supreme Court even issued its ruling on May 14, MLB and the NBA lobbied for an 'integrity fee' payable to leagues by sportsbook operators.²⁶ While the concept of an 'integrity fee' flopped as a trial balloon, the Plaintiff Leagues and others moved to lobbying for an 'official data' mandate whereby licensed sportsbook operators would be required to purchase news and information from a monopoly provider.²⁷ Likewise, leagues and certain teams lobbied for arrangements where local franchises obtained licenses and served as gatekeepers for sportsbook operators.²⁸

The shadow cast by the defect in the Supreme Court's sports betting decision is long. Beyond the direct commercial impact on the burgeoning legal sports betting industry, the legal implications are profound. Ignoring justiciability runs directly counter to "the interpretive rule that constitutionally doubtful constructions should be avoided where possible."²⁹ Such rule remains germane given that

²⁵ S. Rep. 102-248, *Professional and Amateur Sports Protection*, Nov. 26, 1991, p.8.

²⁶ David Purdum, *Indiana House bill includes 1% 'integrity fee' for NBA, MLB*, [ESPN.com](https://www.espn.com/chalk/story/_id/22006278/indiana-bill-includes-integrity-fee-nba-mlb) (Jan. 8, 2018), https://www.espn.com/chalk/story/_id/22006278/indiana-bill-includes-integrity-fee-nba-mlb. The so-called 'integrity fee' was later described as a 'royalty,' 'commission,' and otherwise. As of February 8, 2022, no state had enacted legislation mandating the payment of an integrity fee, royalty, commission, or otherwise.

²⁷ Examples of lobbying for 'official data' mandates abound. In 2021, MLB told Maryland government officials that the league "strongly supports the official league data provision included in the proposed regulations." See Letter from Marquest Meeks, Senior Counsel, Sports Betting & Compliance Group, Major League Baseball, to Maryland Lottery and Gaming Control Commission at 3 (Sept. 27, 2021) (on file with author). A year earlier, the NFL urged Congress to "require use of official league data." National Football League, Hearing on "Protecting the Integrity of College Athletics," United States Senate, Committee on the Judiciary (July 22, 2020) (on file with author).

²⁸ David Purdum, *Washington Football Team becomes first NFL team to land betting license*, [ESPN.com](https://www.espn.com/nfl/story/_id/30754549/washington-football-team-becomes-first-nfl-team-land-betting-license) (Jan. 21, 2021), https://www.espn.com/nfl/story/_id/30754549/washington-football-team-becomes-first-nfl-team-land-betting-license

²⁹ *Jones v. United States*, 529 U.S. 848, 851 (2000).



the Plaintiff Leagues used a quasi-property rights theory to invalidate New Jersey’s statute and could recycle the same injunction-seeking litigation strategy in the future to offensively attack another state law. Indeed, the Court has stressed that “premature adjudication of constitutional questions bear[s] heightened attention when a federal court is asked to invalidate a State’s law.”³⁰

Remedial Measure Ignored

The Supreme Court should have followed a simpler non-constitutional track and addressed the defect early on instead of allowing it to fester and persist. Following the district court judge’s *sua sponte* self-reversal and imposition of a sweeping injunction that prevented New Jersey from implementing any portion of the state’s statute, even pertaining to non-litigants and in realms unrelated to Plaintiff Leagues’ alleged injuries, the Supreme Court had a simple option—vacatur of the underlying injunction and remand to determine whether the Plaintiff Leagues had Article III standing to assert PASPA claims for themselves and others. The failure to do so will forever oppugn the precedential value of the case generally. The misstep will also likely taint the correct resolution of future sports betting cases, with non-parties potentially being bound by the preclusive effect of the judgment.³¹ Simply put, when “a court can ‘readily’ dispose of a case on one threshold ground, it should not reach another one that ‘is difficult to determine.’”³²

But the Supreme Court ignored the optimal path and sports betting legalization in the United States is left with the wreckage. Legal precedent on the proper scope of injunctions is now awry too. The arguments supporting the lower court’s injunction run counter to the requirement that the “remedy ... be limited to the inadequacy that produced the injury.”³³ With the Plaintiff Leagues filing a single joint complaint in the case, whether they suffered an injury sufficient to obtain an injunction for both themselves and non-litigants is a “point [that] relates to standing, which is jurisdictional and not subject to waiver.”³⁴ Standing “remains open to review at all stages of the litigation,”³⁵ with the inquiry persisting “even if the courts below have not passed on it and even if the parties fail to

³⁰ *Arizonans for Official English, et al. v. Arizona, et al.*, 520 U.S. 43, 79 (1997).

³¹ *Taylor v. Sturgell*, 553 U.S. 880, 893-95 (2008).

³² *Camreta v. Greene*, 131 S. Ct. 2020, 2036 (2011) (J. Sotomayor concurring in the judgment) quoting *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 436 (2007).

³³ *Lewis v. Casey*, 518 U.S. 343, 357 (1996); see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006).

³⁴ *Id.* at 349, n. 1; see also *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (C. J. Roberts, concurring) (“Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.”).

³⁵ *National Organization for Women, Inc., et al. v. Scheidler, et al.*, 510 U.S. 249, 255 (1994).



raise the issue.³⁶ Justiciability can even be addressed during Supreme Court oral argument.³⁷

Both the Supreme Court and appellate court had years to cure the defect. This inaction continued despite the Court expressing “serious constitutional doubt” whether Congress can statutorily establish standing as an end run around Article III.³⁸ Pointedly, “[a]lthough ‘Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules, Art[icle] III’s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself.’”³⁹ From 2014 to 2018, the parties did not dispute jurisdiction in the case. However, the Court “bear[s] an independent obligation to assure [itself] that jurisdiction is proper,”⁴⁰ with the requirement that “an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.”⁴¹ Relatedly, the Court never publicly addressed the specter of mootness, which attaches when “the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome”⁴² or the plaintiffs fail to “maintain a ‘personal stake’ in the outcome of the litigation throughout its course.”⁴³

All of this circles back to the now-easy-to-spot conclusion that the Supreme Court sports betting lawsuit was the wrong case—with the wrong plaintiffs—to generate a ruling with lasting precedential value about the contours of the anti-commandeering doctrine.⁴⁴ This was exacerbated due to the DOJ’s status as a non-litigant in the case, making the lawsuit a poor vehicle for resolution on the merits. To be sure, “[i]t is rare for the Court to face a decision on a constitutional issue involving a federal statute without the government in some form being in court as a party.”⁴⁵ Instead, a majority of the Plaintiff Leagues were claiming to

³⁶ *FW/PBS, Inc., dba Paris Adult Bookstore II, et al. v. City of Dallas, et al.*, 493 U.S. 215, 230-31 (1990) (internal citations omitted).

³⁷ *Honig v. Doe*, 484 U.S. 305, 317, n. 1 (1988).

³⁸ *Gollust v. Mendell*, 501 U.S. 115, 125 (1991).

³⁹ *Id.* quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975); see also John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993).

⁴⁰ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

⁴¹ *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

⁴² *Murphy v. Hunt*, 455 U.S. 478, 481 (1982).

⁴³ *Gollust v. Mendell*, 501 U.S. 115, 125 (1991) quoting *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 395-97 (1980). See also, Ryan Rodenberg, *Tossing out the Supreme Court sports betting case: Does the ‘mootness’ doctrine apply?* LEGAL SPORTS REPORT (April 13, 2018), <https://www.legalsportsreport.com/19814/supreme-court-sports-betting-case-mootness/>

⁴⁴ For an example of other criticism of the ruling, see Vikram David Amar, “Clarifying” *Murphy’s Law: Did something go wrong in reconciling commandeering and conditional preemption doctrines?* 2018 SUP. CT. REV. 299 (2019).

⁴⁵ William K. Kelley, *Avoiding constitutional questions as a three-branch problem*, 86 CORNELL L. REV. 831, 874 (2001).



be injured and irreparably harmed by sports betting while simultaneously taking equity positions in sports betting businesses.

The Court should have embraced the bedrock principle of constitutional avoidance.⁴⁶ Doing so would have also allowed the Court to adhere to the “longstanding principle of judicial restraint requir[ing] that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”⁴⁷ Simply put, “[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”⁴⁸

PASPA was never intended to be wielded as some sort of *qui tam* statute or quasi-class action where one or more sports leagues can file suit on behalf of other non-litigant sports leagues.⁴⁹ But with the defect in place and the underlying arguments in support of the overbroad injunction now tested, non-PASPA sequels will likely become more common. If one sports league—or a quintet like in the Supreme Court sports betting case—does not like a new state law, the league will likely claim a property interest over sports betting and seek an injunction to block the state statute.⁵⁰ Revealingly, before PASPA’s enactment, the NFL sued the Governor of Delaware in the 1970s⁵¹ and the NBA sued the Oregon Lottery in 1989.⁵² Both lawsuits included claims that the leagues’ purported property interests were being misappropriated for sports betting purposes.

Conclusion

The real winners of the Supreme Court sports betting case are the five sports league plaintiffs—NFL, NCAA, NBA, MLB, and NHL—that ‘lost’ the case. Through their own litigation, the leagues successfully got PASPA declared

⁴⁶ *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam); see also *Ashwander v. TVA*, 297 U.S. 288, 347 (J. Brandeis, concurring).

⁴⁷ *Camreta*, 131 S. Ct. at 2031 quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988).

⁴⁸ *Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 465-66 (1989) quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

⁴⁹ See generally, Ryan C. Williams, *Due process, class action opt outs, and the right not to sue*, 115 COLUMBIA L. REV. 599 (2015). For a textured discussion of judicial authority to create or extend private causes of action via federal statutes, see *Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁵⁰ Ryan Rodenberg, *What if one sports league wants sports betting when others do not?* SPORTS HANDLE (Jan. 23, 2018), <https://sportshandle.com/sports-betting-carve-outs-carve-in-paspa-ncaa/>

⁵¹ *National Football League, et al. v. Governor of Delaware*, 435 F.Supp. 1372 (D. Del. 1977).

⁵² Associated Press, *NBA files suit against Oregon Lottery*, LA TIMES (Dec. 22, 1989), <https://www.latimes.com/archives/la-xpm-1989-12-22-sp-792-story.html>



unconstitutional. In so doing, the quintet also disposed of a constraint that PASPA had long held over the heads of revenue-motivated sports leagues. Per the PASPA's Senate Report: "The committee would like to make it clear that this bill does not benefit professional sports financially. It does not reserve the right to the leagues to hold their own sports gambling operations. They are clearly prohibited under this bill from instituting their own sports betting scheme."⁵³

Freed from PASPA's shackles, the Plaintiff Leagues—and many other sports organizations, events, and college conferences/teams—are moving forward at warp speed. While licensed sportsbook operators are paying the leagues millions of dollars for 'official sports betting partnerships,' the payees are climbing the sports betting learning curve and will soon emerge as full-blown direct competitors bent on putting licensed sportsbook operators out of business. At the same time, the five leagues who initiated the lawsuit against New Jersey will leverage the lingering defect in the Supreme Court's sports betting ruling to: (i) obtain gatekeeper-like betting licenses in various states, (ii) procure equity stakes in select sports betting businesses, including middlemen companies who sell news and information about wagering, and (iii) lobby for additional states to enact integrity-destroying monopolistic laws pertaining to 'official data.' And in that way, losing a defect-filled Supreme Court case, whether via an intentional ruse to buy time or otherwise, will be a pecuniary win for the losers.

⁵³ S. Rep. 102-248 at 8, *Professional and Amateur Sports Protection* (1991).

