

## Amicus Corner

# Betting on Sanctuary Jurisdictions

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What do sports wagering and sanctuary jurisdictions have in common? The Tenth Amendment, of course! And in a huge victory for state and local governments, the Supreme Court held on May 14th, 2018 in *Murphy v. National Collegiate Athletic Assn.* that the Professional and Amateur Sports Protection Act (PASPA) unconstitutionally violated anti-commandeering principles under the Tenth Amendment, concluding that a "more direct affront to state sovereignty is not easy to imagine." 584 U.S. __ (2018) (slip. op., at 18). This case is about the legalization of sports gambling in New Jersey (and elsewhere). But at its core, it is about our constitutional system of dual sovereignty, issues of preemption, and anti-commandeering. And while the issue of sanctuary jurisdictions is fraught with political tension, it has these same issues at its core as well. As explained below, the decision in Murphy may end up carrying the day for at least part of the sanctuary jurisdiction issue.

*Murphy v. NCAA* has to do with PASPA, which does not directly prohibit sports betting under federal law. Instead, PASPA prohibits state-sanctioned sports gambling, a distinction which ultimately was decisive in this case. PASPA made it "unlawful" for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" sports wagering. 28 U.S.C. § 3702(1). There was a provision in PASPA, which was enacted in 1992, which essentially grandfathered in any then-current state laws that authorized sports wagering~ which is why Nevada's laws authorizing sports gambling remained legal. Congress gave New Jersey one year to enact a law to allow sports gambling in its casinos when it enacted PASPA, but New Jersey declined to do so at that time.

Times change, and 20 years later, New Jersey amended its constitution to allow some sports gambling. Unsurprisingly, the state was sued by the NFL and other sports leagues for violating PASPA. New Jersey argued PASPA is unconstitutional under the anti-commandeering doctrine because it requires the states "to affirmatively keep a prohibition against sports wagering on their books, lest they be found to have authorized sports gambling by law by repealing the prohibition." The Third Circuit responded in *Christie I* that New Jersey's position "'rest[ed] on a false equivalence between repeal and authorization,' implying that a repeal is not an authorization." New Jersey then petitioned the Supreme Court for certiorari and the United States submitted an amicus in opposition, arguing that under the Third Circuit's construction of PASPA, states were free to repeal their prohibitions on sports wagering "in whole or in part."

After losing at the Third Circuit, in 2014 New Jersey passed a law repealing restrictions on sports gambling (as opposed to affirmatively allowing it and setting up a state regulatory scheme). The repeal was partial and essentially amounted to a reprieve for the Atlantic City casinos, but it retained the existing state prohibition everywhere else (because the casinos were already heavily regulated). New Jersey was sued again by many of the same parties, and in *Christie II,* New Jersey again argued that PASPA unconstitutionally commandeers states, this time by not allowing New Jersey to repeal its own laws. The Third Circuit again rejected the state's anti-commandeering argument.

The issue before the Supreme Court was whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commandeers the regulatory power of states in contravention of *New York v. United States.*

Justice Alito and at least six other justices concluded that PASPA amounts to an unlawful commandeering of New Jersey's legislature because it is ordering the States to act (or not act) in a certain way, as opposed to regulating individuals directly. *Murphy,* 584 U.S. __ (2018) (slip. op., at 18). In concluding that PASPA amounts to a direct affront to state sovereignty, the Court notes that "[i]t 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." *Id.* The Court explained that "[t]he anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States." *Id.* at 14. Put another way, "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States." *Id.* at 15.

The majority explained that the rationales for the anti-commandeering principle include: 1) it protects liberty as a "healthy balance of power between the States and the Federal Government and [reduces] the risk of tyranny and abuse from either front"; 2) it promotes political accountability; and 3) it prevents Congress from shifting costs of regulations onto States. *Id.* at 17-18.

In rejecting the Respondents' and the United States' argument that PASPA was preempting state law (and thus not an unlawful commandeering), the Court concluded that it is not enough to point to the Supremacy Clause ~ preemption is a principle that is based on a federal law that regulates the conduct of private actors, not the States. *Id.* at 21. Thus, the Court concluded that "the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors." *Murphy,* 584 U.S. __ (2018) (slip. op., at 24). After it concluded that the provision at issue was unconstitutional, the majority concluded that provision was not severable from the entire statute and struck down PASPA in its entirety. *Id.* at 25-30.

Justice Ginsburg dissented, joined by Justice Sotomayor and by Justice Breyer in

part. Interestingly, in her dissent, Justice Ginsburg was silent on the commandeering issue (though in theory she disagreed with the majority on this point, given that she had dissented in *Printz v. United States*). Instead, she noted "assuming arguendo" that PASPA unconstitutionally commandeers the regulatory power of the States, she would not have "deploy[ed] a wrecking ball" to destroy the statute in its entirety. *Murphy,* 584 U.S. __ (2018) (Ginsburg, J. dissenting, at 1). In other words, the primary criticism in the dissent is aimed at the majority's severability analysis. Even if the provision of PASPA in question violated the Tenth Amendment, the dissent did not think the majority was correct in striking down the entire statute.

**What's that got to do with Sanctuary Jurisdictions?**

Immediately after the *Murphy* decision, briefs were filed in at least three sanctuary jurisdiction cases, asking the courts in those cases to consider the constitutionality of 8 U.S.C. § 1373 (Section 1373) in light of the Supreme Court's decision.

Section 1373 is titled "Communication between government agencies and the Immigration and Naturalization Service" and provides as follows:

> (a) In General. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

On June 6, 2018, the district court in *City of Philadelphia v. Sessions* held that "[b]ecause Section 1373 directly tells states and state actors that they must refrain from enacting certain state laws, it is unconstitutional under the Tenth Amendment." No. 17-3894, 2018 U.S. Dist. LEXIS 94709, at *99 (E.D. Pa. June 6, 2018).

The bottom line of *Murphy* is that Congress can only regulate private individuals and the Constitution prohibits Congress from issuing direct orders to the governments of the States. There is no way to read Section 1373 other than as a directive to state and local governments. As the district court explained in *City of Philadelphia v. Sessions,* "the PASPA provision violated the Tenth Amendment because it 'unequivocally dictates what a state legislature may and may not do.' Murphy, 138 S.Ct. at 1478. Sections 1373(a) and (b) do the same, by prohibiting certain conduct of government entities or officials." *City of Philadelphia v. Sessions*, No. 17-3894, 2018 U.S. Dist. LEXIS 94709, at *96 (E.D. Pa. June 6, 2018).

The Department of Justice sees *Murphy* differently. First, the DOJ argues that Section 1373 is constitutional because the Constitution gives the federal government sole province over immigration matters and 1373 is merely "an information-sharing component of the overall removal scheme, in which the federal government takes full responsibility for regulation of and enforcement against individuals." *See Id.* at *97 *quoting* Def. Post-Trial Br., at 6. The district court in *City of Philadelphia* rejected this argument, which it characterized as a preemption argument, noting that *Murphy* "made clear that, for a statute to preempt state law, it must not only represent the exercise of a power conferred on Congress by the Constitution, but also be best read as [a provision] that regulates private actors, rather than governmental entities or officials." *Id.* (internal quotations omitted).

The DOJ's second argument in support of the constitutionality of Section 1373 comes from *Reno v. Condon*, 528 U.S. 141 (2000). The DOJ argues that under *Reno*, Section 1373 is constitutional because it does not "regulate States in their sovereign capacity" but rather it regulates "the States as the owners of data bases." *Id.* at *98 (E.D. Pa. June 6, 2018), *quoting Reno* 528 U.S. at 151. The district court again rejected this argument, concluding that *Reno* does not support the constitutionality of 1373 because the Drivers Privacy Protection Act (which was at issue in *Reno*), does not "require [state legislatures] to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals." *Id.* *98-99. Conversely, the court explained that under *Murphy*, a law that restricts state legislatures from enacting certain laws is the same as requiring state legislatures to enact a law, and because Section 1373 directly tells states that they cannot enact certain state laws, it is unconstitutional under the Tenth Amendment. *Id.* *99.

While the Philadelphia district court is the only one to rule on the constitutionality of Section 1373 as of this writing, it seems likely that the district court in Chicago will agree with its analysis. That is because before the *Murphy* decision was rendered, Judge Leinenweber, the district court judge handling the *City of Chicago v. Sessions* case, ruled at the preliminary injunction stage that because commandeering requires some sort of affirmative mandate by Congress on the states, Chicago was unlikely to prevail on its arguments that Section 1373 was unconstitutional. *See City of Chicago v. Sessions,* no. 1:17-cv-05720 (N.D. Ill. Sept. 15, 2017). This is similar to what the sports leagues argued in *Murphy,* claiming that commandeering occurs "only when Congress goes beyond precluding state action and affirmatively commands it." *Murphy*, slip. op. at 18. In *Murphy*, Justice Alito called this distinction - affirmatively commanding state action versus preventing states from acting - empty. *Id.* at 19. "It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded 'affirmative' action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event." *Id.*

Judge Leinenweber summarized the issue of the constitutionality thusly: "At its core, this case boils down to whether state and local governments can restrict their officials from voluntarily cooperating with a federal scheme. The Court has not been presented with, nor could it uncover, any case holding that the scope of state sovereignty includes the power to forbid state or local employees from voluntarily complying with a federal program." *City of Chicago,* at *33. Since he wrote that, the Supreme Court has answered this question, providing Judge Leinenweber with a precedent squarely on point.

Section 1373 is at the heart of the litigation involving sanctuary jurisdictions. If Section 1373 is unconstitutional, then the Department of Justice's entire sanctuary cities house of cards will likely come crashing down. After the Supreme Court's decision in *Murphy*, that seems like a safe bet.

**Notes**

1. The case was formerly *Christie v. NCAA*, but because it was decided after New Jersey elected a new governor, the name of the case as it was decided is *Murphy v. NCAA*.
2. Five Justices joined Justice Alito's majority opinion in full, while Justice Breyer only joined the anti-commandeering portion

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was adopted to raise their First Amendment retaliation claim, and that granting their request would have been disruptive to the 2018 elections. The Court also noted that the lower court's order denying injunctive relief had been issued after the Supreme Court announced that it would review *Gill v. Whitford*, and that the lower court could have believed that it might be better off waiting for guidance from the Supreme Court, rather than "charging ahead."

*Gill v. Whitford* has now been remanded to the three-judge district court in Wisconsin and *Benisek v. Lamone* is going back to the lower court for further proceedings following its denial of injunctive relief. But there is still another case on the Court's docket that may address partisan gerrymandering.

*League of Women Voters v. Rucho*

*Rucho* is a partisan gerrymandering challenge to the First and Twelfth Congressional Districts under North Carolina's 2016 congressional map. Admittedly drawn by a Republican-dominated legislature to reflect a pro-Republican tilt and give Republicans a large majority, the N.C. map was struck down by the lower court as an unconstitutional partisan gerrymander.

The lower court ordered the state legislature to draft and submit a new plan before the end of January 2018, but the Supreme Court stayed the lower court's order on January 18, 2018. That stay order in *Rucho* placed the N.C. Republicans' appeal on hold for several months, presumably waiting for the Court to rule in *Gill* and *Benisek*, both of which were remanded on June 18, 2018 for further proceedings, *Gill* for lack of Article III standing and *Benisek* because the lower court had not erred when it decided not to require the state to redraw the challenged Maryland Congressional District map in time for the 2018 election.

On June 25, 2018, the Court vacated the judgment in the consolidated *Rucho* cases and remanded to the United States District Court for the Middle District of North Carolina for further consideration in light of *Gill*.

The core issue of whether, when and under what judicially manageable standard, if any, the Court can or will decide any of these partisan gerrymandering cases has yet to be resolved, but the machinery is in place to push toward a resolution possibly during the October 2018 term. The ball is in the challengers' court, and the stakes can potentially be as high as which party ultimately commands even a razor-thin majority in the U.S. House of Representatives. ML

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of his opinion. Justice Breyer wrote separately to explain that he dissented as to the majority's severability analysis. Interestingly, although Justice Ginsburg, joined by Justice Sotomayor, dissented in full, she provided no analysis in her dissent as to the anti-commandeering argument and instead noted even assuming arguendo that the challenged portion of PASPA was unconstitutional, she also disagreed with the Court's severability analysis.

3. IMLA joined an amicus brief filed by the State and Local Legal Center in this case, arguing that PASPA not only violates the Tenth Amendment, but the issue in the case implicates a host of other critically important state and local laws. Specifically, to allow Congress to "freeze" into place state gambling laws through PASPA, would also allow Congress to do the same thing in areas like state authorization of medical marijuana, autonomous vehicles, physician assisted suicide, etc.

4. Chicago filed a brief in *City of Chicago v. Sessions,* No. 1:17-cv-05720, the State of California filed a brief in *United States v. State of California,* No. 2:18-cv-00490, and Philadelphia cited to *Murphy* in its post-trial briefing in *City of Philadelphia v. Sessions,* No. 17-3894.

5. While Philadelphia was not directly challenging the constitutionality of Section 1373 in its lawsuit, the court nonetheless held that the statute was unconstitutional because the DOJ had placed a certification condition on the Byrne JAG Grant and was thus requiring the City to certify compliance with an unconstitutional statute. *See City of Philadelphia v. Sessions*, No. 17-3894, 2018 U.S. Dist. LEXIS 94709, at *95-96 (E.D. Pa. June 6, 2018).

6. The primary basis of Judge Leinenweber's decision was *City of New York v. United States,* 179 F.3d 29 (2d Cir. 1999), decided by the only circuit court to assess the constitutionality of Section 1373 so far. In that case, the Second Circuit found that the Tenth Amendment, normally a shield from federal power, could not be turned into "a sword allowing states and localities to engage in passive resistance that frustrates federal programs." The Second Circuit concluded that Section 1373 was constitutional on its face and did not run afoul of the Tenth Amendment. That ruling is now highly suspect in light of *Murphy*. ML

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**County Council Expropriation Satisfies Reasonableness Standard**

*Woodward v Cardston (County),* 2018 ABQB 460 (CanLII) http://canlii.ca/t/hshzv

The Applicant, a resident of Cardston County (County) owned a private road that he used to access his property. The County decided to expropriate the private road lands to create a public road and provided appropriate notice to the Applicant. The Applicant objected, and the matter was sent before a hearing officer. The hearing officer held that the County's intention to expropriate was to further a municipal purpose and it was within its authority under the *Municipal Government Act,* RSA 2000, c M-26 (MGA). The Applicant did not challenge the hearing officer's decision. As a result, County Council approved the expropriation. The Applicant sought judicial review of the decision by Council's decision.

**HELD:** Application dismissed.

**DISCUSSION:** To determine the standard of review, the Court relied on *Dunsmuir v. New Brunswick,* 2008 SCC 9 and noted that deference to elected officials is well established law. When the Court is faced with judicial review of a decision made by any elected officials, including Council it must determine first if the Council acted legally. If the court can determine that Council has, then the Court can review its decision with the standard of reasonableness. (*Northland Material Handling Inc. v. Parkland (County)* 2012 ABQB 407). The Court applied the first requirement to the issue before it, finding that s.14 of the MGA authorized the County to acquire lands within its jurisdiction by expropriation for a municipal purpose. The Court proceeded to review Council's decision on a reasonableness standard. Section 3 of the MGA outlines the municipal purposes for expropriation. The County relied on s.3(b): to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality. The Court held that the County's decision was reasonable and was made for a proper municipal purpose and dismissed the Applicant's application. ML