

No. 09-3297

**United States Court of Appeals
For the Third Circuit**

**THE OFFICE OF THE COMMISSIONER OF BASEBALL,
THE NATIONAL BASKETBALL ASSOCIATION, THE NATIONAL
COLLEGIATE ATHLETIC ASSOCIATION, THE NATIONAL
FOOTBALL LEAGUE AND THE NATIONAL HOCKEY LEAGUE,**

Appellants/Plaintiffs

v.

**JACK A. MARKELL, GOVERNOR OF THE STATE OF DELAWARE,
AND WAYNE LEMONS, DIRECTOR OF THE DELAWARE STATE
LOTTERY OFFICE,**

Appellees/Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
CASE NO. 09-538-GMS, THE HONORABLE GREGORY M. SLEET

**APPELLEES' PETITION FOR
REHEARING *EN BANC***

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STATEMENT OF COUNSEL

Undersigned counsel expresses a belief, based on reasoned and studied professional judgment, that the Panel decision (the “Opinion”) is contrary to decisions of the Supreme Court in *United States v. Bass*, 404 U.S. 336 (1971), and its progeny and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), and this appeal involves a question of exceptional importance, *i.e.*, whether the Panel correctly interpreted the Professional and Amateur Sports Protection Act (“PASPA”) to circumscribe Delaware’s sovereignty in a manner contrary to the stated intent of Congress.

STATEMENT OF FACTS

In 1973, Delaware amended its Constitution to authorize “Lotteries under State control for the purpose of raising funds.” Del. Const. Art. II, § 17(a). In 1974, the State enacted legislation authorizing lottery games that “affiliate the determination of the winners of a game with any racing or sporting event held within or without the State[.]” 29 *Del. C.* § 4805(b)(4). In 1976, Delaware debuted a multi-game (parlay) lottery as to NFL games with plans to extend it to other sports,¹ but the lottery was discontinued at the end of the 1976 NFL season.

In 1992, Congress enacted PASPA, 28 U.S.C. § 3701, *et seq.* Section 3702

¹ No record exists on this point and others because Defendants never had the opportunity to present *any* evidence to the District Court on the merits.

generally prohibits sports gambling, while Section 3704(a) exempts every State that previously enacted sports gambling schemes (Delaware, Oregon, Montana and Nevada) and exempts potential future sports gambling in New Jersey, as well as jai alai and animal racing. Section 3704(a)(1) encompasses Delaware's sports lottery:

Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990[.]

The Senate Judiciary Committee Report states that PASPA “provides an exemption for those sports gambling operations which already are permitted under State law,” that “Delaware may conduct sports lotteries on any sport,” and that PASPA “is not intended to prevent Oregon or Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law prior to the enactment of this Act[.]” S. Rep. 102-248, 1991 WL 258663 (Leg. Hist.), *8, *10. PASPA's prime Senate sponsor similarly stated, “[t]he intent of the legislation is not to interfere with existing laws,” and “the grandfather provision only allows those States that have sports gambling authorized by State law to continue to do what they are doing now or could do under State law.” 138 Cong. Rec. S12973 (June 2, 1992). Delaware law permits lotteries on any sport.

In March, 2009, amidst a budget emergency, Governor Jack A. Markell

proposed reinstating a sports lottery, including non-NFL sports and single-game lotteries. Legislation was signed on May 14. Plaintiffs waited until July 24 to file suit and later sought to preliminarily enjoin Delaware from commencing a sports lottery with specific attributes other than that conducted in 1976. At an August 5 scheduling conference, before Defendants submitted evidence or briefing on likelihood of success on the merits, the District Court denied Plaintiffs' motion and set the case for trial.

Plaintiffs appealed under 28 U.S.C. § 1292(a), and obtained expedition. Immediately after oral argument on August 24, the Panel entered an Order invalidating aspects of the lottery – relief Plaintiffs had not sought on appeal. The Panel concluded that “expanding the very manner in which Delaware conducts gambling activities to new sports or to new forms of gambling – namely single-game betting – beyond ‘the extent’ of what Delaware ‘conducted’ in 1976 would engender the very ills that PASPA sought to combat.” (Op. 22) The Panel held that Delaware can vary aspects of the 1976 sports lottery, “as long as they do not effectuate a substantive change from the scheme that was conducted during the exception period.” (*Id.* 21-22)²

² Delaware has begun offering a multi-game (parlay) lottery on at least three NFL contests and has agreed not to offer single-game or non-NFL lottery games absent relief from any injunction resulting from this appeal, eliminating the prior urgency here.

ARGUMENT

I. THE PANEL FAILED TO APPLY SUPREME COURT PRECEDENT REQUIRING CONGRESS'S "UNMISTAKABLY CLEAR" EXPRESSION THAT DELAWARE MAY NOT OFFER SINGLE-GAME OR NON-NFL LOTTERY GAMES

The Panel erred by not applying Supreme Court precedent requiring that a legislative constraint on State sovereignty be unmistakably clear. “[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.” *Bass*, 404 U.S. at 349. “In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Id.* “[A]bsent an ‘unmistakably clear’ expression of intent to ‘alter the usual constitutional balance between the States and the Federal Government,’ we will interpret a statute to preserve rather than destroy the States’ ‘substantial sovereign powers.’” *Pa. Dept. of Corrections v. Yeskey*, 524 U.S. 206, 208-09 (1998) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991)). The constraint must be “unmistakably clear,” taking into account statutory exceptions. *See Yeskey*, 524 U.S. at 209 (“Here, the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt.”) (emphasis in original); *Gregory*, 501 U.S. at 467 (exception “sufficiently broad that we cannot conclude that the statute

plainly covers appointed state judges”).

For three reasons, the Panel’s interpretation of Section 3704(a)(1) cannot be squared with the “unmistakably clear” standard: (i) a reasonable alternative statutory construction maintains the federal-State balance as to Delaware; (ii) authoritative legislative history contradicts the Opinion and demonstrates that Congress intended to maintain the federal-State balance; and (iii) the Panel created an interpretive standard that is not grounded in the statutory text.

First, Delaware proffered a reasonable interpretation of Section 3704(a)(1) that maintains the federal-State balance. *See Salinas v. United States*, 522 U.S. 52, 59 (1997) (when “confronted [with] a statute susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers[,] [w]e concluded that, absent a clear indication of Congress’ intent to change the balance, the proper course was to adopt a construction which maintains the existing balance”).

Section 3704(a)(1) identifies “a lottery” as a type of “lottery, sweepstakes, or other betting, gambling or wagering scheme” that a State may operate if the State satisfies the condition in the clause that follows: “to the extent that the scheme was conducted by that State ... at any time during the period beginning January 1,

1976, and ending August 31, 1990.” PASPA does not define “scheme.”³ The phrase “to the extent that” is reasonably read as introducing a condition that a State either does or does not satisfy. A State may operate a sports lottery *if* it conducted a sports lottery at any time between 1976 and August 1990. Construed as such, the phrase “to the extent that” is a way of identifying Delaware and Oregon as the two States that satisfy the condition. The phrase does not limit the parameters of Delaware’s exempted lottery scheme.⁴

This reading is required by the canon of parallel construction.⁵ Section 3704(a)(3) of PASPA uses the same phrase in precisely the same way. It permits future sports gambling in New Jersey by exempting municipal casinos, “but only to

³ The Supreme Court has noted that “‘scheme’ is hardly a self-defining term.” *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 n.3 (1989) (internal quotation omitted). A standard definition is a “design or plan formed to accomplish some purpose; a system.” *Black’s Law Dictionary* 936 (Abridged 6th ed. 1991). The “scheme” Delaware conducted in 1976 was a lottery under State control in which winners of lottery games were affiliated with the outcomes of sporting events. Del. Const. Art. II, § 17(a); 29 Del. C. § 4805(b)(4).

⁴ See *Paradissiotis v. Rubin*, 171 F.3d 983, 987 (5th Cir. 1999) (declining to “read the phrase ‘to the extent that’ as a limiting device”).

⁵ “[W]e must conclude that Congress intended the same construction of the same language in the parallel provision[.]” *Hillsboro Nat’l Bank v. Comm’r.*, 460 U.S. 370, 402 (1983); 2A Norman J. Singer et al., *Statutes and Statutory Construction* § 47:16, at 357 (7th ed. 2007) (“Where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute.”).

the extent that” – *i.e.*, if – the two conditions that follow are satisfied.⁶ Parallel construction of “to the extent that” in Section 3704(a)(1) is reasonable, internally consistent, and maintains the federal-State balance.

The Panel’s interpretation violates the canon of parallel construction. The Panel misread Section 3704(a)(3) as “differ[ing] in subject matter, structure and syntax from the language of § 3704(a)(1).” (Op. 18) In fact, the structure and syntax are identical. Each has two clauses: the first clause identifies a broad exception; the second clause begins with the phrase “to the extent that” or “but only to the extent that,” which introduces the conditions that must be satisfied. The Opinion fails to adequately explain why the operative phrase would have a different meaning for purposes of the Section 3704(a)(1) exemption than it would for purposes of the Section 3704(a)(3) exemption.

Second, authoritative legislative history makes clear that Congress did not intend to prohibit the expansion of the Delaware sports lottery to non-NFL sports or create a distinction between prohibited substantive changes and permissible

⁶ 28 U.S.C. § 3704(a)(3) provides (with emphasis added) that Section 3702 shall not apply to:

a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, ***but only to the extent that***—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter ...; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period

non-substantive changes. The “unmistakably clear” standard is meant to assure “that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Bass*, 404 U.S. at 349. Legislative history is appropriately considered to establish whether the “unmistakably clear” standard is satisfied. *See Nixon v. MO Mun. League*, 541 U.S. 125, 141 (2004) (“neither statutory structure nor legislative history points unequivocally to [such] a commitment by Congress”); *Hayden v. Pataki*, 449 F.3d 305, 325 (2d Cir. 2006) (“[W]e will apply the clear statement rule when a statute admits of an interpretation that would alter the federal balance but there is reason to believe, either from the text of the statute, the context of its enactment, or its legislative history, that Congress may not have intended such an alteration of the federal balance.”). Here, legislative history demonstrates Congress’s intent.

The Report of the Senate Judiciary Committee, chaired by Senator Biden, makes clear that Section 3704(a)(1) exempts sports gambling operations permitted by State law and allows Delaware to expand its lottery to other sports:

[The committee] has no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of our legislation.... Therefore, *it provides an exemption for those sports gambling operations which already are permitted under State law....*

...

Under paragraph (1) of subsection (a), *Oregon and Delaware may conduct sports lotteries on any sport*, because sports lotteries were conducted by those states prior to August 31, 1990. *Paragraph*

(1) is not intended to prevent Oregon or Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law prior to enactment of this Act....

S. Rep. 102-248, 1991 WL 258663 (Leg. Hist.), *8, *10 (emphasis added).

When PASPA was debated in the Senate, there was consensus that it did not impede sports gambling authorized by pre-existing law. The prepared statement of the prime Senate sponsor upon introducing the legislation is authoritative;⁷ it is not a “‘cherry-picked’ snippet[.]” (Op. 19 n.5):

*The intent of the legislation is not to interfere with existing laws, operations or revenue streams. Therefore it provides an exemption for those sports gambling operations which already are permitted under State law.... Let me make it clear that **the grandfather provision only allows those States that have sports gambling authorized by State law to continue to do what they are doing now or could do under State law.***

138 Cong. Rec. S12973 (June 2, 1992) (Sen. DeConcini) (emphasis added). The legislative history shows that the only legal constraint on Delaware is the breadth of what constitutes a “lottery” under State control, a question of State law.

Third, the Panel’s interpretation demonstrates that PASPA does not contain

⁷ *Corley v. United States*, 129 S. Ct. 1558, 1569 (2009) (“[A] sponsor’s statement to the full Senate carries considerable weight[.]”); *Kenna v. United States District Court*, 435 F.3d 1011, 1015 (9th Cir. 2006) (“floor statements by the sponsors of the legislation are given considerably more weight than floor statements by other members, and they are given even more weight where, as here, other legislators did not offer any contrary views”) (citation omitted); *Szehinskyj v. Attorney General*, 432 F.3d 253, 257-59 (3d Cir. 2005) (analyzing opening statement of Rep. Holtzman regarding Holtzman Amendment).

an “unmistakably clear” limitation on the “extent” of Delaware’s sports lottery. The Panel found it necessary to engraft onto Section 3704(a)(1) the notion that Delaware may not effectuate any “substantive change” to the scheme conducted in 1976, or any change that would “do violence to [PASPA’s] central purposes” or “engender the very ills that PASPA sought to combat.” (Op. 21, 22) The Panel’s creation and application of such vague non-textual standards betrays the absence of any “unmistakably clear” prohibition against single-game and non-NFL lotteries.

The Panel did not interpret “to the extent that the scheme was conducted” as confining the Delaware sports lottery to the attributes or magnitude of its 1976 operation. Delaware need not use “identical venues,” or offer identical parlay games, or limit the duration of the lottery to an identical four months. (Op. 22, 23) The Panel’s own standard recognizes that new venues may be larger, more enticing, and elicit NFL parlay wagering on a larger scale than “the extent” that occurred in 1976.

What constitutes a “substantive change” cannot be divined from the statutory text. PASPA does not identify any attributes of a lottery. PASPA contains no findings of harm. (Such findings were stricken in an amendment reported by Senator Biden.) PASPA does not target single-game betting or betting on additional sports for legislative prohibition. To the contrary, Section 3704(a)(2) permits casino sports gambling to continue in Nevada, and Section 3704(a)(3)

permits its expansion to New Jersey. In these provisions, as in Section 3704(a)(1), there is no express restriction on the sports involved or types of wagers. The allowance of new sports wagering in New Jersey evidences the absence of any clear statutory purpose to prohibit any particular aspect of Delaware's sports lottery. Moreover, the fact that Congress explicitly stated its intent to allow Delaware to expand its lottery to other sports demonstrates that the Panel's contrary holding is not based on an "unmistakably clear" statute.

II. THE PANEL ERRED IN DECIDING THE MERITS IN A SECTION 1292(a) APPEAL WHERE NO FACTUAL RECORD WAS CREATED AND ADJUDICATION OF THE MERITS TURNED ON FACTUAL CONSIDERATIONS

The District Court denied Plaintiffs' preliminary injunction motion at a scheduling conference. Defendants never briefed the merits or obtained discovery in District Court. Plaintiffs never asked this Court for final relief, and Defendants never had the opportunity to brief the appropriateness of awarding final relief. Nevertheless, the Panel determined on a highly expedited basis that Delaware's sports lottery violates PASPA, relying on fact-based considerations and virtually no record. This extraordinary exercise of appellate review was improper.

Generally, in a Section 1292(a) appeal, "the reviewing Court will go no further into the merits than is necessary to decide the interlocutory appeal." (Op. 11 (internal quotation omitted)). Even where "the parties seemed to agree that there are no factual issues to be decided and no further evidence to be taken that

would be relevant to a ruling on a permanent injunction,” this Court has declined to reach the ultimate merits. *St. Thomas – St. John Hotel & Tourism Assn. v. Virgin Islands*, 218 F.3d 232, 246 (3d Cir. 2000) (“we will not presume to go further than the appellants request, *i.e.* that we vacate the preliminary injunction.”).

It is inappropriate to adjudicate the merits if the “legal issue might be seen in any different light after final hearing than before.” *United Parcel Serv., Inc. v. United States Postal Serv.*, 615 F.2d 102, 107 (3d Cir. 1980). A final ruling is allowed on an appeal from entry of a preliminary injunction only if “the facts are established or of no controlling relevance.” *Thornburgh*, 476 U.S. at 757.

The circumstances when this Court has reached the merits in a Section 1292(a) appeal are rare and extraordinary. Defendants have identified only five such cases. Four involved constitutional challenges that did not require further factual development,⁸ and the fifth was a statutory case involving a pure question

⁸ See *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 535-36 (3d Cir. 2004) (“we hold, based on undisputed facts in the record and well established Supreme Court precedent, that Stafford has clearly engaged in a practice of viewpoint discrimination”); *Maldonado v. Houstoun*, 157 F.3d 179, 183 (3d Cir. 1998) (“Because this appeal presents solely legal questions pertaining to the constitutionality of Section 9(5)(ii) of Pennsylvania’s welfare act, our review is plenary.”); *Tustin v. Heckler*, 749 F.2d 1055, 1060 (3d Cir. 1984) (“Because the preliminary injunction in this case rested on the district court’s decision that the Secretary’s classification was unconstitutional, a decision that did not turn on any fact-finding, we consider here whether the district court committed an error of law.”); *American College of Obstetricians and Gynecologists. v. Thornburgh*, 737 F.2d 283, 290 (3d Cir. 1984) (“although this appeal arises from a ruling on a

of law.⁹ All five were appeals from the *grant* of a preliminary injunction.¹⁰ In that posture, the legal issues have been more fully explored, and the factual record developed sufficient to warrant entry of an injunction. Moreover, when preliminary injunctive relief is granted, the defendant can opt to develop a fuller factual record at trial, rather than appeal. When the denial of preliminary injunctive relief is appealed, the defendant is stuck with whatever record was created at the time of the denial.

Here, Defendants were deprived of the opportunity to create a record on the merits. Virtually no record was created about the substance of the Delaware sports lottery, which had not yet begun. The proceedings in the District Court were highly expedited and truncated. A major focus of the expedited appeal was irreparable injury and the balance of the equities. The Panel's rendering of a final decision on the merits in this procedural context was particularly inappropriate because its holding relied on contested factual considerations, such as whether single-game betting or betting on new sports constitutes a "substantive change" and "engender[s] the very ills that PASPA sought to combat." (Op. 21, 22)

For example, if afforded the opportunity, Defendants would present

request for a preliminary injunction, we have before us an unusually complete factual and legal presentation"), *aff'd*, 476 U.S. 747 (1986).

⁹ *United Parcel Serv.*, 615 F.2d at 107 ("the issue of which waiting period applies to the request ... is a pure question of law").

¹⁰ *Thornburgh* involved both the grant and denial of injunctive relief.

evidence that single-game betting is substantively the same as parlay betting. Ray C. Fair, John M. Musser Professor of Economics at Yale University, would testify how he has demonstrated, using powerful statistical methods in a manner not possible when PASPA was enacted, that skill is not relevant to single-game betting on sporting events with major betting markets, since “[n]o computer ranking system or combination of systems has any useful predictive information not found in the final Las Vegas point spread.”¹¹ He also would testify that parlay games can replicate single-game bets. The distinction the Panel drew between single-game betting and parlay betting is not “substantive,” just as distinctions between forms of parlay games are not substantive (such as use of a point spread or the distinction between two-game and three-game parlays).

The Panel’s conclusions respecting PASPA’s purposes and the “ills” of the invalidated games also raise factual issues. There is no factual record from which it can be concluded that an expanded Delaware sports lottery would create any harm that PASPA sought to combat. At oral argument, Defendants’ counsel concurred with the Panel’s observation that “[t]here are a lot of factual issues regarding harm.” (8/24/09 Tr. at 65) Defendants had no opportunity to introduce evidence about the pervasiveness of sports betting or take discovery into the

¹¹ Ray C. Fair et al., *College Football Rankings and Market Efficiency*, J. Sports Econ., Feb. 2007, at 13, available at <http://fairmodel.econ.yale.edu/rayfair/recent1.htm>

credibility of Plaintiffs' two declarations alleging harm from the relatively small incremental amount of single-game betting that might occur at Delaware's three sports lottery venues. If afforded the opportunity, Defendants would present evidence that State-controlled sports gambling enhances the integrity of sports, by requiring the reporting of suspicious wagers and increasing the probability of detecting game-fixing, and that parlay betting in Delaware on additional sports is not a "substantive change" that poses a threat to the integrity of those sports.¹²

CONCLUSION

The Panel's ruling is inconsistent with Supreme Court precedent, contradicted by legislative history, factually ungrounded, and an improper exercise of appellate review in a Section 1292(a) appeal. Defendants respectfully request rehearing *en banc*.

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¹² See Adam Hosmer-Henner, Preventing Game-Fixing: Sports Books as Information Markets (unpublished manuscript), available at <http://www.theiaga.org/scholarship.shtml>. NASCAR welcomed the prospect of betting on its events in Delaware. Pete Schnatz, Trackside betting entices Dover Downs, NASCAR, (May 28, 2009), available at <http://www.philly.com>.