No. 09-914

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF

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April 13, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

Delaware seeks review not because this case presents an inter-circuit conflict, but because, in an unfairly truncated proceeding, Delaware was permanently deprived of an historic prerogative to raise revenues that Congress had expressly preserved and that the State sought to use to respond to a fiscal crisis. This case is vitally important to Delaware. Yet the Third Circuit issued a final judgment interpreting the relevant provision of the Professional and Amateur Sports Protection Act ("PASPA") and abrogating Delaware's right to raise revenues on review of the denial of respondent Sports Leagues' motion for a preliminary injunction. The State was thus denied a full opportunity to present argument and evidence about the scope of its retained rights. And, despite the proceeding's patent unfairness, Delaware has no realistic possibility of reconsideration of the court's PASPA interpretation unless this Court grants review, because the provision at issue applies to only a few States.

In opposition, the Sports Leagues claim the Court's traditional criteria for certiorari are not met. But this Court has granted review where, as here, a matter is critically important to a State, infringes its sovereign interests and would otherwise evade review. See, *e.g.*, *Hawaii* v. *Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009).

Moreover, as the Sports Leagues recognize, the case presents the important question whether *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991) – which requires Congress to make "unmistakably clear" its intent to constrain the States' "substantial sovereign powers" – applies to federal statutes that constrain the States' revenue-raising authority. Opp. 18-20. It

also presents the related, significant question whether the plain-statement rule applies to a federal statute's *general mandate or prohibition* (here, PASPA's prohibition of sports gambling) or to the *specific section* addressing the State's retained rights (here, PASPA's preservation of Delaware's authority). Both issues merit this Court's attention.

Had *Gregory* been correctly understood, the Third Circuit would have interpreted PASPA to authorize Delaware to conduct sports lotteries unrestricted with respect to the leagues or the details of the lottery's games. The Sports Leagues' contrary contention rests on arguments that reveal PASPA's ambiguity, thus implicating the *Gregory* rule.

Finally, the Sports Leagues belittle the importance of Delaware's contention that the Third Circuit's decision to reach the merits was contrary to this Court's precedent and fundamentally unfair. Opp. 20-21. But, the combination of procedural unfairness, the case's importance to Delaware, the Third Circuit's misunderstanding of *Gregory*, and the absence of another avenue of review warrant this Court's attention.

ARGUMENT

I. ABSENT REVIEW, DELAWARE WILL BE PERMANENTLY DEPRIVED OF SOVEREIGN RIGHTS CONGRESS PRESERVED FOR IT.

The Sports Leagues contend this case is not sufficiently important for this Court's review. Although the case does not fall within the traditional paradigm, review is warranted.

First, PASPA reflects a compromise. Congress did not enact a flat prohibition of sports gambling. It

crafted provisions reserving to specified States the right to raise revenue by this means. New Jersey had an opportunity to conduct sports gaming. And, Delaware, Montana, Nevada and Oregon were authorized to continue sports gambling under schemes previously in place. 28 U.S.C. § 3704(a)(1)-(3). The Sports Leagues argue that the limited scope of PASPA's exceptions makes their accurate construction unimportant. But, Congress chose to preserve a small group of States' rights to raise revenues through sports lotteries. That choice should be respected, not ignored.

Second, the Sports Leagues opine the loss of this right is unimportant. But, Delaware's retained right to raise revenues, including through a sports lottery, is a fundamental sovereign interest. This Court characterizes the States' power "to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits" as "the most plenary of sovereign powers." *Lawrence* v. *State Tax Comm'n of Miss.*, 286 U.S. 276, 279 (1932). See also *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791, 806 (1983); *Leigh* v. *Green*, 193 U.S. 79, 89 (1904). Operating a lottery to raise funds is a traditional state function.[1] Of course, as the Sports Leagues state (Opp. 8), the federal

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[1] Lotteries "enjoy an honored place in American history as a device for raising funds for public purposes. They provided funding for such projects as the Jamestown settlement, Harvard College, and the Continental Army, as well as public works projects throughout the Colonies and early States." Charles T. Clotfelter et al., *State Lotteries at the Turn of the Century: Report to the National Gambling Impact Study Commission* 1 (Apr. 23, 1999), http://govinfo.library.unt.edu/ngisc/reports/lotfinal.pdf.

government can limit the States' authority to raise revenues (and in many other respects). That does not make the States' power less important to their sovereignty and ability to govern.

Moreover, facing record deficits, Delaware enacted the sports lottery as part of its solution to fiscal crisis. Pet. 12-14. The Sports Leagues fault Delaware for an alleged failure to demonstrate that more than a few million dollars were at stake. Opp. 8. The State, however, projected indirect and direct benefits of $17 million *for the relevant portion of the sports lottery's first year*, Pet. 15-17 (estimating $17 million for ten months), plus increased revenues and employment at the racinos hosting the lottery, *id.* This evidence was submitted in opposing issuance of a preliminary injunction, which unfairly became the entire record on the merits. The State had no opportunity to present evidence about the games' long term fiscal benefits.[2]

The Sports Leagues argue the case lacks practical importance because Governor Markell made the best of the decision below, offering the limited lottery the State was allowed to sponsor. Opp. 9. But Delaware sought review because it cannot raise revenues to help balance its budget and address its citizens' needs in a manner Congress preserved for it. By doing what he can while asking this Court to correct the

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[2] The Sports Leagues argue, without citation, that the case is unimportant because if Delaware prevails, its "significant additional revenues . . . would likely come at the expense of neighboring States." Opp. 9. Congress, however, decided that considerations of fairness weighed in favor of Delaware and the excepted States. *See* Pet. 10.

decision below, the Governor is doing his job, not suggesting the issue is unimportant.[3]

Finally, review is warranted because otherwise this issue, of critical importance to Delaware, will have been finally and likely permanently decided in a proceeding which denied Delaware its right to present evidence and argument on the merits. This Court's general practice of awaiting a conflict is inapt here. This case is akin to an important case arising from the Federal Circuit's exclusive appellate jurisdiction in which no conflict can develop, but the Court nonetheless grants review to address an important question which will otherwise escape review.

II. THE CASE PRESENTS IMPORTANT QUESTIONS ABOUT *GREGORY*'S SCOPE AND APPLICATION.

The Sports Leagues' discussion of the merits shows why this Court should grant the petition. The case presents important issues with respect to *Gregory*'s scope and interpretation in a context of vital importance to the State.

A. The Sports Leagues contend a sports lottery is not a "core state function" and therefore that *Gregory*'s "plain-statement rule" does not apply to construction of the relevant PASPA exception. Opp. 18. They can advance this argument only because this Court has not enunciated a general standard for determining those "traditional and essential state

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[3] The Sports Leagues suggest the issue may not be worthy of review because single-game betting may violate the Delaware Constitution. Opp. 10 n.1. In fact, the Delaware Supreme Court simply declined to decide that issue without further evidence. Pet. 14.

function[s] subject to the plain-statement rule of *Gregory*," *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998) ("assuming" application of *Gregory*), or determined definitively whether the States' authority to raise revenues through a lottery constitutes such a function. This Court instead has conducted a case-by-case assessment of whether an asserted state interest is sufficiently weighty to invoke the plain-statement rule without offering a general standard for determining "'traditionally sensitive areas.'" *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989); see also, *e.g.*, *Gregory*, 501 U.S. at 460-61. This Court should grant the petition to provide guidance concerning which State interests implicate *Gregory*'s plain-statement rule.

Whatever line this Court might draw, Delaware's asserted interest – operation of a sports lottery to raise revenues to help close an historic budget gap – is "the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. As discussed *supra* at 3, this Court has described the States' revenue-raising authority as "the most plenary of sovereign powers." *Lawrence*, 286 U.S. at 279. See also *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 526-27 (1959). PASPA "upset[s] the usual constitutional balance of federal and state powers," *Gregory,* 460 U.S. at 460, just as much as, for example, age discrimination laws, *id.*, at 460-62, or limitations on State taxation authority, *Dep't of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332 (1994).

The Sports Leagues raise a further important question about *Gregory*'s scope by asserting that it is not applicable in areas involving substantial federal regulation. Opp. 18. But, federal law pervasively regulates workplace discrimination, and *Gregory* nonetheless held that the Age Discrimination in

Employment Act could not be applied against Missouri without a clear statement. Similarly, the plain-statement rule was invoked in *ACF Industries*, *supra*, despite extensive federal regulation of the area at issue.

Finally, the Sports Leagues are wrong to suggest that *Gregory* is inapplicable because this case involves an "[e]xception to [a] general rule[]." Opp. 19. *Gregory* addressed an "exception[]" to the ADEA's general prohibition of age discrimination, 501 U.S. at 465, 467, yet this Court concluded that because the exception's scope was "at least ambiguous," it had to be construed in the State's favor, *id.* at 467.

In sum, this case raises substantial, important questions about *Gregory*'s scope.

B. Alternatively, the Sports Leagues wrongly contend that PASPA "unmistakably" forbids the lotteries that Delaware intended to offer. Opp. 11-16. The PASPA exception's scope is "at least ambiguous" as to whether it encompasses the sports lotteries Delaware proposed; and under *Gregory*, that ambiguity must be construed in the State's favor.

For the most part, the Sports Leagues attack a strawman. Opp. 11-12, 15. Delaware is not contending that it is entitled to conduct any sports gaming without regard to the scheme Delaware had in place during the grandfathered period. Rather, as the Leagues ultimately acknowledge, *id.* at 12-13, Delaware asserts that, at the very least, § 3704(a)(1) permits it to offer lotteries that "follow the same structure as the prior lotteries," or are "akin to those

that were part of" the prior lottery scheme. Pet. 26, 4.[4]

The Sports Leagues fail to show their reading of PASPA is "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (citation omitted). They do not dispute that the term "scheme" in § 3704(a)(1) is "hardly [] self-defining," *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 US. 229, 241 n.3 (1989), or that its plain meaning includes a "design or plan formed to accomplish some purpose; a system," *Black's Law Dictionary* 1344 (6th ed. 1990). But, they say, "scheme" means only the "specific scheme conducted during the grandfathered period" because the term "scheme" is modified by "betting" and "lottery." Opp. 13. This does not follow; "scheme" may also be interpreted broadly or at a higher level of generality to authorize lotteries akin to those part of the previous scheme.

The Sports Leagues then argue that the phrase "to the extent" in § 3704(a)(1) cannot plausibly be read to mean "if." Opp. 13-14. Preliminarily, this point is not, as the Leagues suggest, *id.* at 13, a full answer to Delaware's interpretation. Even accepting the

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[4] The Sports Leagues contend that Delaware waived this argument because it argued below in favor of a *broader* reading. The notion that Delaware "waived" the argument in this context is absurd; Delaware did not get an opportunity to file a brief in the *preliminary injunction* proceeding before the district court; and the Third Circuit *sua sponte* decided the case on the merits. Pet. 15-18. Moreover, Delaware clearly presented the claim that its proposed lotteries were permissible under PASPA. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

Leagues' premise, the statute grandfathers "schemes." If "scheme" is given its natural broad reading, then even the Leagues' reading of "to the extent" would allow new lotteries that follow the basic structure of prior lotteries, and would not require that the State had "actually conducted" those new lotteries in the past.

In all events, the term "to the extent" can plausibly be read as "if" in this context. The Sports Leagues recognize that as a matter of grammar and linguistics the phrase can be synonymous with "if." Opp. 14 n.3. But, they suggest such a reading is foreclosed by *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 510 U.S. 86 (1993). As the Leagues recognize, however, the term's meaning is influenced by its "surrounding text and context." Opp. 14. Thus, in *John Hancock*, this Court found only that reading the phrase "to the extent" as "if" in the ERISA provision at issue would contravene Congress' intent. 510 U.S. at 97 Indeed, since *John Hancock*, the Fifth Circuit declined to "read the phrase 'to the extent' as a limiting device" and instead interpreted it as "a proxy for 'to whatever extent' or 'to any extent.'" *Paradissiotis* v. *Rubin*, 171 F.3d 983, 987 (5th Cir. 1999).

Delaware's preferred reading is reinforced by PASPA's structure. Pet. 25-26. Congress used the same term in § 3704(a)(3) in a context that makes clear that it means "if." Pet. 25. Congress presumptively intends "the same construction of the same language in [a] parallel provision." *Hillsboro Nat'l Bank* v *Comm'r*, 460 U.S. 370, 402 (1983).

The Sports Leagues implicitly recognize that their reading of § 3704(a)(1) would allow only lotteries identical to those Delaware conducted in 1976. They, like the Third Circuit, seek to ameliorate this

absurdity by arguing that the law permits "de minimis" differences. Opp. 16. But, where, as here, "the purported 'plain meaning' of a statute's word or phrase happens to render the statute senseless, we are encountering ambiguity rather than clarity." *Alarm Indus. Commc'ns Comm.* v. *FCC*, 131 F.3d 1066, 1068 (D.C. Cir. 1997). And, in light of that ambiguity, *Gregory* applies.

Finally, the legislative history confirms that Delaware's reading of § 3704(a)(1) is reasonable. Pet. 8-12, 26-29. The Sports Leagues ignore the provision's drafting history that shows Congress' intent to broaden the exception's scope. See, *e.g.*, *Hayden* v. *Pataki*, 449 F.3d 305, 325 (2d Cir. 2006) (en banc) (citing legislative history's importance in determining whether Congress intended "an alteration of the federal balance"). Indeed, in arguing that "Congress wanted to permit sports betting schemes only to the extent that States *actually* conducted such schemes," Opp. 14 (emphasis added), the Leagues reveal that their reading is based on a term that Congress *struck* in crafting PASPA. See Pet. 27. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983). The Leagues also assert that legislative history is irrelevant because it contains contradictory statements. Opp. 17. But, the Senate Report's clarity about extending Delaware's lottery to "other sports" confirms that § 3704(a)(1) is at least ambiguous. Under *Gregory*, that ambiguity should be construed to permit Delaware to operate the sports lotteries it intended to offer.

III. DELAWARE WAS DENIED A FAIR PROCEEDING.

The Sports Leagues claim this Court should not review the question whether the Third Circuit appropriately decided this case on the merits on appeal from the denial of a preliminary injunction.

First, the Sports Leagues correctly observe that this Court has carved out an exception to its general rule that it is inappropriate for a court to reach the merits in a preliminary-injunction proceeding, when the trial court's ruling "rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986). But no other court of appeals would have concluded that this exception applies here. See Pet. 22. Here, the trial court denied the Leagues' preliminary injunction motion before the State even filed a brief in opposition, let alone presented its evidence, and where the court's focus had been on irreparable harm.

The Sports Leagues note the "facts about [Delaware's] gambling scheme in 1976 and the scheme it currently wishes to implement are undisputed," Opp. 20, and incorrectly assert that the specific disputed facts that Delaware would have presented to the trial court are irrelevant, *id.* at 21. For example, the question whether Delaware is implementing a different "scheme" (or making a "substantial" change) if it conducts the same lottery games using, *e.g.*, college football or Major League Baseball games instead of National Football League games, is not a pure question of law. It is an appropriate subject for expert testimony and factual development that turns on knowledge of the details of sports lotteries and how they are designed and

played. See Pet. 31. The Third Circuit's intuition that there were no factual issues underlines how inappropriate it was for that court to decide the merits on appeal from denial of a preliminary injunction.

Finally, Delaware does not seek review of the Third Circuit's process in isolation. Delaware contends that the Third Circuit's erroneous decision to reach the merits is worthy of review, because it finally resolved the scope of Delaware's right to exercise its Congressionally-preserved revenue-raising power in an unfairly truncated proceeding.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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