Nos. 16-476, -477

In the Supreme Court of the United States

CHRISTOPHER J. CHRISTIE, GOVERNOR OF NEW JERSEY, ET AL.,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

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

MOTION OF PROFESSOR RYAN M. RODENBERG FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE* AND FOR DIVIDED ARGUMENT

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1. Professor Ryan M. Rodenberg respectfully seeks leave to participate in oral argument (for five minutes divided equally between the parties or such other time as the Court deems appropriate) as *amicus curiae* in support of neither party under Rule 28.7. If this motion is granted, the time for oral argument would not be expanded. Granting this motion would materially assist the Court by addressing how a "cardinal principle" of statutory construction—the canon of constitutional avoidance—can attach in this case. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); see also *Bond v. United States*, 134 S. Ct. 2077 (2014). *Amicus curiae* filed a merits-stage brief in support of neither party that argued, among other things, for such a constitutional avoidance approach. Petitioners and Respondents oppose this motion.

2. Construing the correct scope of injunctive relief available under the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3703, is consistent with "the interpretive rule that constitutionally doubtful constructions should be avoided where possible." *Jones v. United States*, 529 U.S. 848, 851 (2000). Such concerns are particularly germane here, as the lower court's interpretation of PASPA invalidated New Jersey's statute. The Court emphasized that "premature adjudication of constitutional questions bear[s] heightened attention when a federal court is asked to invalidate a State's law." *Arizonans for Official English, et al. v. Arizona, et al.*, 520 U.S. 43, 79 (1997). Likewise, principles of constitutional avoidance are even more cogent when discerning whether a federal statute like PASPA should be construed "to alter the usual constitutional balance between the

States and the Federal Government." *Gregory, et al. v. Ashcroft*, 501 U.S. 452, 460 (1991) quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). Following the district court judge's *sua sponte* self-reversal, the lower court issued 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 Respondents' alleged injuries.

3. It is important that a potential non-constitutional resolution—vacatur of the underlying injunction and remand to determine whether Respondents have Article III standing to assert PASPA claims for themselves and others—be vetted by the Court. To do otherwise would oppugn the precedential value of this case and irreparably taint the correct resolution of future PASPA cases, with non-parties potentially being bound by the preclusive effect of the judgment. See generally *Taylor v. Sturgell*, 553 U.S. 880, 893-95 (2008). As evidenced by the Third Circuit's fractured *en banc* decision, the constitutional claims are complex, shifting, and sometimes paradoxical. But the Court need not disentangle the Gordian knot that is PASPA's Tenth Amendment anti-commandeering implications. *Amicus curiae's* approach is straightforward. Indeed, when "a court can 'readily' dispose of a case on one threshold ground, it should not reach another one that 'is difficult to determine.'" *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).

4. The lower court's injunction runs counter to well-established Court precedent requiring that the "remedy…be limited to the inadequacy that produced the injury." *Lewis v. Casey*, 518 U.S. 343, 357 (1996); see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006). The injunction here also outstripped the court's remedial jurisdiction, which is confined to redressing recognizable injuries suffered by plaintiffs in the case. See, *e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). With Respondents jointly filing a single complaint under 28 U.S.C. § 1367, whether Respondents have 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." *Lewis*, 518 U.S. 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."). Standing "remains open to review at all stages of the litigation." *National Organization for Women, Inc., et al. v. Scheidler, et al.*, 510 U.S. 249, 255 (1994). This persists "even if the courts below have not passed on it and even if the parties fail to raise the issue." *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). Justiciability is a topic that the Court has previously allowed *amici* to address as late as oral argument. *Honig v. Doe*, 484 U.S. 305, 317, n. 5 (1988).

5. Granting leave to participate in oral argument would materially assist the Court for another reason: the government is not a litigant. The government's

absence as a plaintiff or intervenor makes this case a less-than-ideal vehicle for disposition on constitutional grounds. Indeed, "[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." William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 874 (2001). The unusual posture of this case—five private sports leagues sued various government officials under PASPA to enjoin New Jersey from repealing its own laws—underscores the importance of adversarial presentation of *all* relevant avenues for resolution, not merely the constitutional thicket of arguments on which the litigants have now opted to focus. The Court has recently recognized the value of *amici* accentuating a crucial issue elided by the parties and granted the motion of *amici* to participate in oral argument. See, *e.g. Pac. Bell Tel. Co. v. Linkline Comm. Inc.*, 129 S. Ct. 1109, 1117 (2009). *Amici* have previously participated in oral argument in "support of a third position" not advanced by the parties in order to ensure a "full airing" of the issues. *Alabama v. Shelton*, 535 U.S. 654, 661 (2002). The Court has even found the arguments furthered by *amici* to be dispositive. See, *e.g.*, *United States v. Halper*, 490 U.S. 435 (1989).

6. The Court would benefit from the opportunity to test *amicus curiae's* views given that the bedrock principle of constitutional avoidance "has for so long been applied by th[e] Court that it is beyond debate." *DeBartolo*, 485 U.S. at 575. Doing so would also help the Court adhere to a "longstanding principle of judicial restraint requir[ing] that courts avoid reaching constitutional questions in advance of the

necessity of deciding them." *Camreta*, 131 S. Ct. at 2031 quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988). *Amicus curiae* is cognizant that leave to participate in oral argument is rarely granted and only in the most extraordinary circumstances. *Amicus curiae* submits that such threshold is met here and respectfully requests that this motion for leave to participate in oral argument and for divided argument be granted, as it would provide assistance to the Court in its consideration of this case that is not otherwise available.

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Respectfully submitted,

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