ANTICOMPETITIVE SPORTS BETTING LICENSES AND STATE POWER: RESPONSE TO PROFESSOR DAY

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In *State Power and Anticompetitive Conduct*, Professor Gregory Day expertly explains why "states face incentives to monopolize markets"[1] and comprehensively argues that "state action immunity is misguided."[2] While the Supreme Court has repeatedly "exempted states from antitrust review as a matter of federalism"[3] since its seminal *Parker v. Brown*[4] ruling in 1943, Professor Day persuasively posits that "[t]he ideal proposal is to overrule *Parker* in its entirety."[5] Professor Day unpacks his argument by explaining how anticompetitive conduct arises when states use licensing requirements—a modern way of insulating an incumbent's power and excluding competition—in a variety of fields, including "cosmetology, taxidermy, interior design, beekeeping, and fortune telling."[6] In this Response, I extend Professor Day's analytical framework to another timely example of anticompetitive licensing stemming from state regulation: sports betting.[7]

Since the Supreme Court's 2018 decision in *Murphy v. National Collegiate Athletic Ass'n*,[8] sports gambling has been legalized in two-thirds of the states and the District of Columbia.[9] The fervent pace resulted from the Supreme Court's deference to states in the absence of any concrete federal regulation.[10] Writing for the majority in *Murphy*, Justice Samuel Alito concluded, "Congress can regulate sports gambling

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1. Gregory Day, *State Power and Anticompetitive Conduct*, 75 FLA. L. REV. 637, 643 (2023).

2. *Id.* at 642.

3. *Id.* at 640.

4. 317 U.S. 341 (1943).

5. Day, *supra* note 1, at 682.

6. *Id.* at 651 (citing Alexander Volokh, *Antitrust Immunity, State Administrative Law, and the Nature of the State*, 52 ARIZ. ST. L.J. 191, 194 (2020)).

7. Indeed, I cited licensing concerns as a potential legal friction when asked to forecast the future of the U.S. sports betting industry in 2023: "The next five years will see various teams and leagues consolidate power as 'gatekeepers' in the U.S. sports betting market. Whether through licensing schemes, integrity-risky data mandates or equity stakes in sports betting companies, such teams and leagues will build on the legal arguments made during the Supreme Court case and strive to monetize sports wagering as much as possible." David Purdum, *Five Years into Sports Betting Legalization: Breaking Down the Numbers*, ESPN (May 12, 2023, 7:00 AM), https://www.espn.com/chalk/story/_/id/37605381/five-years-sports-betting-legalization-breaking-numbers-supreme-court-us-stats# [https://perma.cc/2DAL-4G8A].

8. 138 S. Ct. 1461 (2018).

9. Purdum, *supra* note 7.

10. *See Murphy*, 138 S. Ct. at 1484–85.

directly, but if it elects not to do so, each State is free to act on its own."[11] Certain states that have accepted the Supreme Court's invitation to regulate sports wagering have adopted a certain anticompetitive practice—restrictive licensing schemes that turn sports teams into betting gatekeepers—that would normally be susceptible to antitrust scrutiny.[12] These sports gambling license protocols provide a revealing test case to illustrate Professor Day's findings about the infirmities of state action immunity under *Parker*.

As a result of lobbying by sports leagues bent on monetizing sports betting in the wake of *Murphy*,[13] there are at least seven U.S. jurisdictions that "have authorized professional sports teams to take part in legal wagering,"[14] despite the fact that none of the favored sports teams have the capacity to conduct sports betting operations. Such jurisdictions include Arizona, Illinois, Kansas, Maryland, Ohio, Virginia, and Washington, D.C.[15] The lobbying strategy—where sportsbook operators have to pay a sports team licensee to gain market entry and participation—surprised some industry observers: "'Teams themselves wanting to have their own licenses, and sort of control the ball as far as who operated in their markets and partner with them directly, that wasn't

11. *Id.* Prior to 2018, full-blown sports betting of the legal variety was relegated to Nevada, with illegal options including neighborhood bookies and websites originating offshore. *See* Adam Liptak & Kevin Draper, *Supreme Court Ruling Favors Sports Betting*, N.Y. TIMES (May 14, 2018), https://www.nytimes.com/2018/05/14/us/politics/supreme-court-sports-betting-new-jersey.html.

12. *See, e.g.*, Grace Gedye, *California Sports Betting Initative Backed by FanDuel, DraftKings Would Block Small Competitors*, CALMATTERS (Apr. 27, 2022), https://calmatters.org/economy/2022/04/california-sports-betting-initiative-backed-by-fanduel-draft-kings-would-block-small-competitors/ [https://perma.cc/E8HD-GURC].

13. Joe Vardon, *Without a Hint of Irony, History, NBA, NFL, MLB, NHL Betting on Online Gaming Licenses*, THE ATHLETIC (Apr. 8, 2021), https://theathletic.com/2490262/2021/04/08/without-hint-of-irony-history-nba-nfl-mlb-nhl-betting-on-online-gaming-licenses/ [https://perma.cc/9MH5-4ZLX] ("[A] lobbyist for the Cleveland Browns strode into the . . . Ohio Capitol hearing room, and told those lawmakers that the Browns, as well as the other pro teams in the state, and the PGA Tour should get roughly half of all licenses to offer online sports betting . . . .").

14. Jill R. Dorson, *Caesars Now Has Two Retail Sportsbooks in Arizona*, SPORTS HANDLE (June 28, 2022), https://sportshandle.com/caesars-arizona-two-retail-sportsbooks/ [https://perma.cc/NTP3-G7GN]; David Purdum, *Washington Football Team Becomes First NFL Team to Land Betting License*, ESPN (Jan. 21, 2021, 4:17 PM), https://www.espn.com/nfl/story/_/id/30754549/washington-football-team-becomes-first-nfl-team-land-betting-license# [https://perma.cc/X7NQ-8VXS].

15. Dorson, *supra* note 14; Purdum, *supra* note 14. In September 2023, North Carolina altered the state's sports betting licensing application process and granted "professional sports franchises and venues power in choosing the operators who will be allowed to launch in the state." Bennett Conlin, *North Carolina Budget Proposal Would Shift Sports Wagering Power to Teams, Venues*, SPORTS HANDLE (Sept. 19, 2023), https://sportshandle.com/north-carolina-budget-proposal-teams-venues/ [https://perma.cc/E66A-VA64].

on the radar at the time' of the U.S. Supreme Court's ruling . . . in 2018."[16]

An executive from a prominent sportsbook operator described how the gatekeeper process works in Virginia: "The way the Virginia legislation is written, there is preferential treatment to the team."[17] According to a sports league representative, "NFL franchises are not allowed to directly participate in or provide sports betting; however, in states that grant teams market access, they can designate a sportsbook to utilize the license."[18] In Illinois, two sports leagues hired a law firm to urge the Illinois Gaming Board to codify a five-block exclusive sports betting "bubble zone" around certain stadiums.[19]

Sports betting operators must pay teams for market access via quasi-sub-licenses in Arizona, a requirement that has had profound results: "every professional sports team in Arizona is partnered with a sportsbook."[20] Caesars Sportsbook entered the market through baseball's Arizona Diamondbacks, and MGM partnered with football's Arizona Cardinals.[21] There are also licensing-related arrangements for market entry privileges between Bally Bet and the Phoenix Mercury in basketball, SaharaBet and the Arizona Coyotes in hockey, and BetRivers and the Arizona Rattlers in minor league football.[22] These licensing schemes grant *de facto* monopolies for a single sports betting operator in a specific venue.

Professor Day thoroughly traces the "anti-trust" rationale to the Sherman Act and points out the glaring blind spot in the primary antitrust statute's coverage: "Absent from the Sherman Act's text, however, is its application to state action. This omission is remarkable because states do engage in otherwise per se illegal acts such as dividing markets and fixing prices."[23] This blind spot has important implications in the sports betting market with numerous states enacting entry-inhibiting licensing requirements under the guise of regulation.[24] Absent state action

16. Vardon, *supra* note 13.

17. Purdum, *supra* note 14.

18. *Id.*

19. *See* Letter from Donna More, Att'y, Fox Rothschild LLP, to Marcus Fruchter, Adm'r, Illinois Gaming Bd. (Sept. 27, 2019) (on file with author).

20. Dorson, *supra* note 14.

21. *Id.*

22. *Id.*

23. Day, *supra* note 1, at 648.

24. Although beyond the narrow scope of this Response, it is revealing to note that monopolies are banned in certain state constitutions. *See* Steven G. Calabresi et al., *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J.L. & LIBERTY 685, 717–18 (2015) ("Arizona, Arkansas, Colorado, Georgia, Idaho, Kentucky, Maryland, Minnesota, North Carolina, Tennessee, and Texas . . . ."). Of the eleven such states, three—Arizona, Maryland, and North Carolina—are also among the handful of states with legislation favoring sports teams when allocating betting licenses. *See* Ryan Randazzo, *Legal Sports Betting Could Start by End of Year*

immunity under *Parker*, such anticompetitive conduct—where a sports team effectively controls who can operate in the sports wagering industry within the state—would likely be found to violate the Sherman Act.[25]

Professor Day's discussion of the modern contours of state action immunity highlights the two-pronged requirement for *Parker* immunity to attach.[26] While state action immunity is generally "disfavored,"[27] the Supreme Court has "held that under certain circumstances, immunity from the federal antitrust laws may extend to nonstate actors carrying out the State's regulatory program."[28] Specifically, "[w]hen determining whether the anticompetitive acts of private parties are entitled to immunity, [the Supreme Court] employ[s] a two-part test, requiring first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'"[29] This double requirement helps ensure that state-derived anticompetitive conduct furthers the public interest, not just private interests.[30]

The Supreme Court has recently set forth how to satisfy each part of the test. To satisfy the "clear articulation" component, "the displacement of competition [must be] the 'inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the state must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.'"[31] The "active supervision" component requires "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[32]

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in Arizona After Legislation Approves Wagering Bill, AZCENTRAL (Apr. 12, 2021, 7:30 PM), https://www.azcentral.com/story/news/politics/legislature/2021/04/12/arizona-legislature-passes-bill-legalize-betting-sports/7159280002/ [https://perma.cc/L4RZ-G872]; MediaWize, *What Is the State of Maryland's Current Sports Betting Legislation?*, OCNJ DAILY (Oct. 16, 2020), https://ocnjdaily.com/what-is-the-state-of-marylands-current-sports-betting-legislation/ [https://perma.cc/YP9V-YHNK]; Bennett Conlin, *North Carolina Mobile Licensing Change Attracts Industry Attention*, SPORTS HANDLE (Sept. 26, 2023), https://sportshandle.com/north-carolina-mobile-wagering-licensing-change/ [https://perma.cc/LF32-2MYD].

25. While the focus of this Response is on anticompetitive licensing mandates in the sports betting regulatory environment, there are non-licensing antitrust issues that have arisen in the nascent industry as well, with data-related concerns among the most prevalent. *See* Ryan M. Rodenberg, *Regulating Sports Gaming Data*, 11 UNLV GAMING L.J. 9, 35–41 (2020).

26. Day, *supra* note 1, at 661–62.

27. Fed. Trade Comm'n v. Ticor Title Ins., 504 U.S. 621, 636 (1992).

28. Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 224–25 (2013).

29. *Id.* at 225 (citing Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (internal quotation marks omitted)).

30. *Midcal Aluminum*, 445 U.S. at 105–06.

31. N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 574 U.S. 494, 506–07 (2015) (citing *Phoebe Putney*, 568 U.S. at 229).

32. *Id.* at 507 (citing Patrick v. Burget, 486 U.S. 94, 101 (1988)).

Having professional sports teams serve as sports betting gatekeepers serves no state interest. Inserting language into statutes declaring professional sports teams as designated recipients of licenses—when such teams are simultaneously incapable of providing traditional sports gambling services such as taking bets and paying winning bettors—has no value to the public at large and only represents legislative kowtowing to special interest lobbyists. Sports teams doubling as license holders under a state-derived regulatory scheme is also ironic given that the teams' leagues described sports betting as causing irreparable harm and injury during the entire six-year pendency of the *Murphy* case.[33]

Against this backdrop, it is useful to note that the Supreme Court has stated a preference for a "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."[34] Such a consideration is apt in the context of sports betting licensure. Here's why: As co-plaintiffs in the *Murphy* case, the five most powerful sports leagues in the United States—the National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL), Major League Baseball (MLB), and the National Collegiate Athletic Association (NCAA)—litigated the case cohesively.[35] Throughout the case, the plaintiff quintet spoke with a single voice about their purported collective interest in sports betting.

The five leagues claimed to have a proprietary interest in "the degree to which others derive economic benefits from their own games."[36] In the same court filing, the quintet argued that they also "have an essential interest in how their games are perceived and the degree to which their sporting events become betting events."[37] Finally, in a different legal filing, the NFL, NBA, NHL, MLB, and NCAA alluded to "legally protected interests of the organizations that produce the underlying games."[38]

Five-plus years removed from the Supreme Court's *Murphy* decision, the shared sentiment has manifested itself in lobbying bent on securing licenses for league teams as a way to control the spigot of sports wagering tethered to the venues where the respective teams play games.[39] With at

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33. *See generally* Ryan M. Rodenberg, *The Defect in the Supreme Court's Sports Betting Decision*, 32 J. LEGAL ASPECTS SPORT 121, 126 (2022).

34. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 191 (2010).

35. *See* Rodenberg, *supra* note 33, at 124.

36. Response Brief of Plaintiffs-Appellees at 18, Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714, 13-1715).

37. *Id.* at 13–14 (emphasis omitted).

38. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint at 1, Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 3:12-cv-4947).

39. Since *Murphy* was decided in 2018, there have been "five pecuniary-related lobbying requests made by various sports leagues." Rodenberg, *supra* note 25, at 12 n.13.

least seven jurisdictions now granting sports teams the power to exclude other market participants via licensing, state action immunity could be litigated if an aggrieved party files an antitrust lawsuit and the defendant teams claim immunity under *Parker*.[40] To date, no state has clearly articulated how a licensing apparatus that treats betting licenses as a commodity and market filter is affirmatively part of prudent sports betting regulatory policy. Likewise, there is no evidence so far of any state actively supervising—via audit or otherwise—the downstream activities that occur after a gambling license is granted to a sports team, and such license is later used as a bargaining chip for market entry and participation.

Professor Day concludes by recommending that *Parker* be abrogated.[41] Professor Day's recommendation is not as drastic as it seems. The Eleventh Amendment would provide a barrier against private parties suing states on antitrust grounds.[42] Only federal agencies such as the Department of Justice (DOJ) or Federal Trade Commission (FTC) would have "the right to contest a state's anticompetitive practices,"[43] and past practice suggests that the DOJ and FTC "would use this power with restraint."[44]

Professor Day's modest approach—whether applied to sports betting licensing or any of the other examples of anticompetitive conduct flagged in his article—is consistent with Supreme Court precedent pinpointing the "real danger" resulting from a private entity "acting to further his own interests, rather than the governmental interests of the State."[45] Likewise, Professor Day's framework would coexist nicely with the Supreme Court's proclamation that the state action doctrine does not allow a state to "confer antitrust immunity on private persons by fiat."[46] As such, neither Professor Day nor I would likely wager on the Supreme Court finding state action immunity in an antitrust case challenging a sports gambling license that creates a betting monopoly bubble zone around Wrigley Field in Chicago.

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40. With sports leagues (and teams) firmly in place as direct competitors of sports betting operators that offer and take wagers, the state licensing schemes described in this Response also have due process and private non-delegation doctrine concerns. *See id.* at 34–36, 63–64.

41. Day, *supra* note 1, at 679.

42. *Id.*

43. *Id.*

44. *Id.*

45. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985).

46. Fed. Trade Comm'n v. Ticor Title Ins., 504 U.S. 621, 633 (1992).