UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

INTERNATIONAL GAME TECHNOLOGY PLC *et al.*,

Plaintiffs,

v.

MERRICK B. GARLAND *et al.*,

Defendants.

Case No. 1:21-cv-00463-WES-PAS

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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INTRODUCTION

Plaintiffs International Game Technology PLC and IGT Global Solutions Corporation (collectively, "IGT") ask this Court to declare what the First Circuit already has held: that the Wire Act of 1961, 18 U.S.C. § 1084(a), does not prohibit any form of non-sports gambling. *See N.H. Lottery Comm'n v. Rosen*, 986 F.3d 38, 45 (1st Cir. 2021) ("*New Hampshire Lottery Commission II*" or "*NHLC II*") ("[T]he Wire Act's prohibitions are limited to bets or wagers on sporting events or contests."). IGT, which alleges that it provides wire-based gambling solutions to state lotteries, physical casinos, and online casino-style gaming databases from its principal place of business in Providence, Rhode Island, does not allege that it engages in sports gambling. Thus, in the First Circuit at least—where IGT has brought this declaratory judgment action, and whose precedent IGT invokes as the basis of its lawsuit—the United States could not successfully prosecute IGT for any of its alleged conduct, absent an overruling of *New Hampshire Lottery Commission II*.

To the extent that IGT implicitly seeks to extend the benefit of favorable First Circuit precedent to other jurisdictions where it engages in non-sports gambling—jurisdictions where courts have not yet decided whether the Wire Act reaches any non-sports gambling—IGT fails to establish a credible threat of prosecution even in those jurisdictions.[1] IGT, which is the largest

[1] Under IGT's theory, moreover, any entity that could satisfy the jurisdictional requirements to seek a declaratory judgment in the First Circuit could obtain the benefit of First Circuit precedent outside of the First Circuit, as well, thereby insulating itself from successful prosecution for any non-sports gambling conduct in other jurisdictions, absent an overruling of *New Hampshire Lottery Commission II*. The potential result would be to freeze the development of law nationwide on an important statutory issue that has been the subject of competing interpretations. *Cf. Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) ("[W]hen frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (noting

gaming and lottery services company in the country, does not allege that it has ceased or even limited its activities that it contends expose it to a risk of prosecution in the nearly one year between the date when the government announced it would no longer forbear from enforcing the Wire Act against conduct in which IGT openly engages and the date IGT filed this lawsuit. In that time, IGT's alleged fear of prosecution for wire-based non-sports gambling apparently was not strong enough to prevent it from continuing to conduct its business as usual. Moreover, IGT does not allege that it has been prosecuted or threatened with prosecution in this time, nor does IGT point to a single prosecution or threatened against any party engaged in like conduct. Under these circumstances, the perceived threat that IGT may be prosecuted in some other jurisdiction for its non-sports gambling activities is merely speculative and certainly not imminent or substantial.

BACKGROUND

The Wire Act provides, as relevant here:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of [1] *bets or wagers* or [2] information assisting in the placing of *bets or wagers on any sporting event or contest*, or [3] for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of *bets or wagers*, or [4] for information assisting in the placing of *bets or wagers*, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1084(a) (emphasis added).

In recent decades, federal courts and the Executive Branch have grappled with whether the phrase "on any sporting event or contest" modifies all four instances of the phrase "bets or wagers" within the subsection or only the instance of that phrase that it directly follows, in the

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"the benefit [the Supreme Court] receives from permitting several courts of appeals to explore a difficult question before [the Supreme] Court grants certiorari").

second clause identified above. Stated differently, they have deliberated over whether the first, third, and fourth clauses identified above apply to all bets or wagers, or merely to sporting bets or wagers.

Until 2011, the "uniform[] . . . position" of the United States Department of Justice ("DOJ") was "that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling." *Whether the Wire Act Applies to Non-Sports Gambling*, 35 Op. O.L.C. 134, 136 (2011) ("2011 OLC Opinion" or "2011 OLC Op.") (internal quotation marks omitted). Indeed, "the Department secured at least seventeen Wire Act convictions between Fiscal Years 2005 and 2011 that involved non-sports betting." *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. __, slip op. at 5 n.8 (Nov. 2, 2018) ("2018 OLC Opinion" or "2018 OLC Op."). Various district courts upheld prosecutions involving non-sports gambling. *See* 2011 OLC Op. at 138 & n.3. *But see In re Mastercard Int'l, Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) (concluding, in a private RICO suit, that the "statutory language" of Section 1084(a) as a whole "clearly requires that the object of the gambling be a sporting event or contest"), *aff'd*, 313 F.3d 257, 262 (5th Cir. 2002) (summarily "agree[ing] with the district court's statutory interpretation").

In an opinion issued in 2011, DOJ's Office of Legal Counsel ("OLC") interpreted the Wire Act to "prohibit[] only the transmission of communications related to bets or wagers on sporting events or contests." 2011 OLC Op. at 138 (citation omitted). In reaching this conclusion, OLC reasoned that "[t]he text itself can be read either way" but that "the statutory scheme" as a whole marshals in favor of the narrower interpretation. *Id.* at 140-41. More specifically, as to the first instance of the phrase "bets or wagers" in Section 1084(a), OLC concluded that "it is difficult to discern why Congress, having forbidden the transmission of *all*

kinds of bets or wagers" through that clause, "would have wanted to prohibit only the transmission of information assisting in bets or wagers concerning sports" through the second clause—"thereby effectively permitting covered persons to transmit information assisting in the placing of a large class of bets or wagers whose transmission was expressly forbidden by the clause's first part." *Id.* "The more reasonable inference," OLC continued, "is that Congress intended the Wire Act's prohibitions to be parallel in scope, prohibiting the use of wire communication facilities to transmit both bets or wagers *and* betting or wagering information on sporting events or contests." *Id.* at 141. As to the third and fourth instances of the phrase "bets or wagers," OLC concluded that these references "are best read as shorthand references to the 'bets or wagers on any sporting event or contest'" described in the previous sentence. *Id.* at 143. Finally, OLC determined that "[r]eading the entire subsection . . . as limited to sports-related betting . . . makes functional sense of the statute" and accords with the legislative history of the Wire Act, which "reveals that Congress's overriding goal in the Act was to stop the use of wire communications for sports gambling in particular." *Id.* at 144-45.

In 2018, OLC reconsidered the 2011 OLC Opinion at the request of the Criminal Division of DOJ and reversed its position, concluding that "the prohibitions of 18 U.S.C. § 1084(a) are not uniformly limited to gambling on sporting events or contests." 2018 OLC Op., slip op. at 23. Rather, "[b]ased upon the plain language of the statute," OLC concluded that "all but one of [the statute's] prohibitions sweep beyond sports gambling." *Id.* at 2. OLC thus determined that the 2011 OLC Opinion "incorrectly interpreted the limitation 'on any sporting event or contest' . . . to apply beyond the second prohibition that it directly follows: the prohibition on transmitting 'information assisting in the placing of bets or wagers.'" *Id.* at 6. The 2018 OLC Opinion acknowledged that the resulting inconsistency in prohibited conduct

across the four relevant clauses of Section 1084(a) is somewhat anomalous, but reasoned that, because "the statutory language [is] plain," and its plain meaning is not absurd, the Executive Branch "must apply the statute as written" and leave it to Congress "to fix or improve [the statute] as it sees fit." *Id.* at 14-15. OLC also addressed whether the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5361 *et seq.*—a statute that Congress enacted in 2006 "to strengthen the enforcement of existing prohibitions against illegal gambling on the Internet"—"modifies the scope of the Wire Act" and "conclude[d] that it does not." *Id.* at 17-18.

Beginning in early 2019, DOJ Deputy Attorneys General issued a series of memoranda advising that DOJ should not use the Wire Act to prosecute state lotteries or their vendors until DOJ issued guidance on that topic upon completion of an internal review, and that any determination by DOJ that the Wire Act applies to state lotteries or their vendors would include a 90-day forbearance period from the date DOJ publicly announced its position. *See* ECF No. 1 ("Compl."), ¶ 11(c) & n.3; Ex. C (Apr. 8, 2019 Mem.); *see also* Ex. D (June 12, 2019 Mem.); Ex. E (Dec. 18, 2019 Mem.); Ex. F (June 11, 2020 Mem.). DOJ has not yet announced its position on that question. The Deputy Attorneys General also directed DOJ attorneys not to apply the Wire Act to any persons or businesses who engaged in conduct in reliance on the 2011 OLC Opinion for a period of time, to allow them to bring their operations into compliance with the 2018 OLC Opinion. *See* Ex. A (Jan. 15, 2019 Mem.); Ex. B (Feb. 28, 2019 Mem.); Exs. C-F. That forbearance period, for entities other than state lotteries and their vendors, expired on December 1, 2020. *See* Compl. ¶ 23; Ex. F.

Between the issuance of the 2018 OLC Opinion and the expiration of the forbearance period as to non-lottery, wire-based gambling, the New Hampshire Lottery Commission and its vendor filed actions in the District of New Hampshire challenging the 2018 OLC Opinion

pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, and seeking a declaratory judgment that the Wire Act "is limited to gambling on sporting events." *N.H. Lottery Comm'n v. Barr*, 386 F. Supp. 3d 132, 139-40 (D.N.H. 2019) ("*New Hampshire Lottery Commission I*" or "*NHLC I*"), *aff'd in part, vacated in part sub nom. N.H. Lottery Comm'n v. Rosen*, 986 F.3d 38 (1st Cir. 2021). As relevant here, the district court held that the plaintiffs had established Article III standing because the threat of prosecution was sufficiently imminent notwithstanding the forbearance memoranda. *Id.* at 140-44. The court reasoned that the plaintiffs faced a "substantial" risk of prosecution for conduct in which "they [had] openly engaged for many years" and which the 2018 OLC Opinion "now brands as criminal." *Id.* at 141-42. In reaching this conclusion, the court noted that the plaintiffs "face[d] a directive from the Deputy Attorney General to his prosecutors that they should begin enforcing the OLC's new interpretation of the Act after the expiration of a specified grace period." *Id.* at 142. Turning to the merits, the district court in *New Hampshire Lottery Commission I* adopted the same interpretation as set forth in the 2011 OLC Opinion, namely, that Section 1084(a) is ambiguous with respect to whether the phrase "on any sporting event or contests" modifies all instances of the phrase "bets or wagers," but that "[t]he OLC's 2018 Opinion . . . produces an unlikely reading of § 1084(a) that the 2011 OLC Opinion avoids." *Id.* The district court also reasoned that the legislative history supported the interpretation set forth in the 2011 OLC Opinion. *Id.* at 154-57. As a remedy, the district court issued a declaratory judgment that bound "the United States vis-à-vis [the plaintiffs] everywhere the plaintiffs operate or would be otherwise subject to prosecution," including "beyond the geographic boundaries of [the] district." *Id.* at 158 (citing RESTATEMENT OF JUDGMENTS § 1 (1942)). Further, it purported to "'set aside' the 2018 OLC Opinion" pursuant to the APA. *Id.* at 159.

On appeal, the First Circuit affirmed the district court's holdings with respect to standing and on the merits. *See NHLC II*, 986 F.3d at 45. It "depart[ed] from the district court only by deciding that relief under the Declaratory Judgment Act alone [was] sufficient," and, accordingly, "vacate[d] the district court's grant of relief under the APA," *id.* at 45, 62 (emphasis omitted), which would have "set aside" the 2018 OLC opinion.

On November 23, 2021, IGT filed this action, seeking a declaration pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, "that the Wire Act applies only to 'bets or wagers on any sporting event or contest.'" Compl. 18; *see also id.* ¶ 12. As noted, IGT alleges that it is "the largest gaming and lottery services provider in the United States," as well as "the world's largest end-to-end gaming company." *Id.* ¶ 25.[2] Plaintiff IGT Global Solutions Corporation—the United States subsidiary of London-based plaintiff International Game Technology PLC—is a Delaware corporation with its principal place of business in Providence, Rhode Island. *Id.* ¶¶ 5-6. IGT provides physical equipment and/or operational services to thirty-seven of the forty-six state lotteries in the United States; manufactures and operates state-regulated, casino-style gaming machines that are located in "many of the largest casinos in the United States"; and provides platforms for online casino-style gaming, including for money in six states where such online gaming is currently legal. *Id.* ¶¶ 27, 33, 36-37. Because IGT "uses wire communication facilities for the interstate transmission of non-sports bets and wagers," it alleges that its "entire non-lottery gaming business is subject to prosecution" at any time and that "DOJ offers only the promise of a 90-day heads up before it can subject IGT's lottery business to

[2] All factual representations are drawn from the Complaint and are not contested by Defendants for purposes of the Court's assessment of IGT's standing.

the Wire Act as well," *id.* ¶¶ 3, 11(a), notwithstanding the First Circuit's decision in *New Hampshire Lottery Commission II*.

LEGAL STANDARDS

Defendants move to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. In evaluating a Rule 12(b)(1) motion, the Court "may consider whatever evidence has been submitted." *Aversa v. United States*, 99 F.3d 1200, 1210 (1st Cir. 1996).

ARGUMENT

I. The Court Must Dismiss for Lack of Jurisdiction Because IGT Fails to Establish a Credible Threat of Prosecution Under the Wire Act.

The Court should dismiss this case for lack of Article III standing because IGT fails to plead the existence of any live controversy for this Court to resolve. Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. CONST., art. III, § 2. The doctrine of "Article III standing . . . enforces the Constitution's case-or-controversy requirement." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 597-98 (2007) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "[A] plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan*, 504 U.S. at 560-61). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), and standing is assessed "based on the facts as

they existed at the time the lawsuit was filed," *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) (quoting *Steger v. Franco, Inc.*, 228 F.3d 889, 893 (8th Cir. 2000)).

As noted, "[t]o satisfy Article III," a plaintiff's "injury 'must be "concrete and particularized" and "actual or imminent, not 'conjectural or hypothetical.'"'" *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). For example, "[i]n certain circumstances, 'the threatened enforcement of a law' may suffice as an 'imminent' Article III injury in fact." *Id.* at 500 (quoting *Susan B. Anthony List*, 573 U.S. at 158). To establish standing for purposes of pre-enforcement review, the Supreme Court has suggested that either the alleged threatened enforcement must be "certainly impending," *Clapper v. Amnesty International USA*, 568 U.S. 398, 409-10 (2013); or there must be "a substantial risk that harm will occur," *Reddy*, 845 F.3d at 500 (citing *Susan B. Anthony List*, 573 U.S. at 158, and adopting its "disjunctive framing of the test"); *see also Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014) (noting that, in *Clapper*, "the Supreme Court may have adopted a more stringent injury standard for standing than [the First Circuit had] previously employed in pre-enforcement challenges on First Amendment grounds to state statutes"). Under the prevailing Supreme Court standard, "[i]t is not enough . . . to allege a subjective fear of injurious government action, even if that subjective fear is 'not fanciful, irrational, or clearly unreasonable.'" *Blum*, 744 F.3d at 797 (quoting *Clapper*, 568 U.S. at 416); *see also Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) ("A plaintiff's subjective and irrational fear of prosecution is not enough to confer standing under Article III.").

Applying these standards here, IGT faces no threat of successful prosecution in this District (or, for that matter, in any other District within the First Circuit) absent an overruling of *New Hampshire Lottery Commission II*, because the First Circuit already has held that "the Wire

Act applies only to interstate wire communications related to sporting events or contests." *NHLC II*, 986 F.3d at 62; *cf.* Compl. 18 (seeking a declaration "that the Wire Act applies only to bets or wagers on any sporting event or contest" (internal quotation marks omitted)). IGT does not allege that it engages or plans to engage in any conduct related to sports betting. Accordingly, there is no dispute between the parties with respect to whether IGT is likely to be prosecuted in this jurisdiction for activities *New Hampshire Lottery Commission II* has declared lawful under the Wire Act.

IGT's Complaint is silent with respect to the scope of the declaratory judgment that it seeks from this Court. To the extent that Defendants seek declaratory relief that would preclude DOJ from prosecuting IGT anywhere in the nation, IGT still fails to establish a credible threat of prosecution in any jurisdiction—including those where *New Hampshire Lottery Commission II* is not binding law. IGT does not point to a single case in which DOJ has prosecuted anyone under the Wire Act for engaging in conduct like IGT's in the time since the 2018 OLC Opinion issued, including since the last forbearance period for non-lottery gambling expired on December 30, 2020—almost one year before IGT filed this lawsuit on November 23, 2021. (IGT alleges that it engages in wire-based gambling both in connection with state lotteries and otherwise, *see* Compl. ¶¶ 27-38, so the expiration of the forbearance periods for non-state lottery, wire-based gambling is relevant to its risk of prosecution.) The landscape of past enforcement actions is thus entirely different from that which informed the decision in *New Hampshire Lottery Commission II*. In that case, the First Circuit rested its pre-enforcement standing holding in large part on the fact that, "when DOJ attorneys last held the view expressed in the 2018 Opinion (between 2005 and 2011), DOJ had prosecuted seventeen cases involving non-sports betting under the Wire Act." *NHLC II*, 986 F.3d at 50. Accordingly, the First Circuit determined that it

was reasonable to assume that, once the forbearance period expired, DOJ would once again enforce the Wire Act against entities like the New Hampshire Lottery Commission and its vendor. *See id.*

Here, by contrast, there was a DOJ-imposed forbearance period for approximately eighteen months from the issuance of the 2018 OLC Opinion for those who relied on the 2011 OLC Opinion other than state lotteries and their vendors, followed by nearly one year during which DOJ attorneys were not barred by any forbearance directives from prosecuting non-sports betting unconnected with state lotteries under the Wire Act. During that time, IGT has identified no Wire Act prosecutions of conduct like that in which it engages in any jurisdiction. Against this backdrop, IGT has not met its burden to establish that its prosecution in a jurisdiction outside the First Circuit (where *New Hampshire Lottery Commission II* does not govern) either is "certainly impending," or even that it presents a "substantial risk." *Susan B. Anthony List*, 573 U.S. at 158 (internal quotation marks omitted).

To be sure, the absence of a history of prosecution of like conduct is "not dispositive" with respect to the objective reasonableness of a plaintiff's fear of prosecution. *NHLC II*, 986 F.3d at 51 (citing *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 32 (1st Cir. 1999)); *see also Blum*, 744 F.3d at 798 n.11 (noting the continued vitality of the First Circuit's "assumption that the state will enforce its own non-moribund criminal laws, absent evidence to the contrary"). In general, however, in cases where like-conduct prosecution history is lacking, the Supreme Court and courts in the First Circuit have found a credible threat of prosecution only where: (1) the plaintiff brings a First Amendment challenge, in which case the standard to establish a

credible threat of enforcement is significantly relaxed;[3] or (2) the challenged law only recently took effect or has not yet taken effect. *See, e.g.*, *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (First Amendment challenge); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (First Amendment challenge); *R.I. Ass'n of Realtors*, 199 F.3d at 32 (First Amendment challenge); *R.I. Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 303 (D.R.I. 1999) ("[T]his law was in effect for no more than a week, so defendants' forebearance [sic] is not weighty evidence."), *aff'd*, 239 F.3d 104 (1st Cir. 2001).[4] Neither of these circumstances is present here.

This case is also unusual in another respect: the Complaint is replete with allegations that IGT has been openly engaged in interstate and online non-sports betting in a widespread manner,

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[3] *See, e.g.*, *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 829 (1st Cir. 2020) (noting "the Supreme Court's consistent admonition that we avoid putting First Amendment plaintiffs to the stark choice of having their speech chilled or committing a crime"), *cert. denied*, 142 S. Ct. 560 (2021); *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 9 & n.5 (1st Cir. 2012) (explaining that, "when free speech is at issue, concerns over chilling effect call for a relaxation of ripeness requirements" because of the "potential for irretrievable loss often involved in cases where First Amendment rights are at stake" and noting that "standing and ripeness inquiries overlap" in "cases that deny standing because an anticipated injury is too remote" (internal quotation marks omitted)); *Ramírez v. Sánchez Ramos*, 438 F.3d 92, 99 (1st Cir. 2006) (noting "the relaxed standing requirements reserved for facial First Amendment challenges"); *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000) (noting that the requirement to establish a credible threat of prosecution in pre-enforcement cases is "somewhat relaxed where First Amendment interests are threatened"); *R.I. Ass'n of Realtors*, 199 F.3d at 31 ("[W]hen First Amendment values are at risk, courts must be especially sensitive to the danger of self-censorship.").

[4] *But see N.H. Hemp Council*, 203 F.3d at 1-7 (finding standing to decide an "abstract [issue] of statutory interpretation" in a pre-enforcement posture where the DEA's "conduct in New Hampshire and elsewhere" and "[a] recent DEA ruling" reflected the government's view that plaintiff's desired conduct violated federal law). Importantly, though, the *Hemp Council* court noted that for pre-enforcement challenges in general, "just how clear the threat of prosecution needs to be turns very much on the facts of the case and on a sliding-scale judgment that is very hard to calibrate." *Id.* at 5. In that case in particular, the court was persuaded in part by the fact that there was no "reason to doubt the government's zeal in suppressing any activity it regards as fostering marijuana use." *Id.* The existence of an appellate decision preventing future prosecutions in this Circuit from resulting in convictions, absent the overruling of that decision, is such a reason in this instance.

including since the forbearance period for non-lottery betting expired. *See, e.g.*, Compl. ¶ 33 ("IGT is . . . a leading manufacturer and operator of gaming machines, and its gaming machines are found in many of the largest casinos in the United States."); *id.* ¶ 34(a) ("Interstate wire facilities are used to report information about what has occurred at [certain such gaming] machines and within the casinos—for example, that a certain number of bets were placed."); *id.* ¶ 34(c) ("As of August 2021, IGT had an installed base of approximately 3,800 WAP slot machines," which "are necessarily connected by a data network" and "which generate approximately $169 million in annual revenue."); *id.* ¶¶ 36-38 (describing IGT's iGaming solutions, which operate in six states where online gambling for money is legal and rely on a structure with various parts that "may all be located in different states"). These allegations are significant because, where courts have found a credible threat of prosecution absent a recent history of enforcement, they generally have done so on the theory that "[i]t would be little short of perverse to deny a party standing because the statute she challenges is so potent that no one dares violate it." *R.I. Ass'n of Realtors*, 199 F.3d at 33.

Thus, courts have found it reasonable to infer that where the Government has not recently prosecuted or threatened with prosecution the plaintiffs themselves or anyone engaging in like conduct, that may be because either "a statutory prohibition may have proven to be an effective deterrent, or the proscribed behavior may be difficult to detect." *Id.* at 32. Here, IGT directly alleges that the 2018 OLC Opinion has not deterred it from continuing to operate its business as usual, and it is implausible that the behavior that it describes is difficult to detect. *See, e.g.*, Compl. ¶ 34(c) (describing IGT's "installed base of approximately 3,800 WAP slot machines, which generate approximately $169 million in annual revenue"). Accordingly, this Court should conclude based on the "totality of the circumstances," *R.I. Ass'n of Realtors*, 199 F.3d at 31, that

IGT has not met its burden to demonstrate a credible threat of prosecution, even in those jurisdictions where *New Hampshire Lottery Commission II* is not binding law.

In short, the district court and First Circuit's standing determinations in *New Hampshire Lottery Commission I & II* were predicated on the objective foreseeability of prosecutions for non-sports gambling once the DOJ-imposed forbearance period expired. The forbearance period for entities other than state lotteries and their vendors expired nearly one year before IGT filed this action. Meanwhile, IGT continues to openly engage in widespread non-sports gambling, including in contexts unconnected with state lotteries. Under such circumstances, IGT must bring to bear more than mere speculation to establish a credible fear of prosecution for any of its alleged conduct. Failing to identify any history of prosecution of like conduct since the forbearance period expired, IGT fails to satisfy its burden to establish standing.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion to dismiss the Complaint.

Dated: February 23, 2022

Respectfully submitted,

BRIAN BOYNTON
Principal Deputy Assistant Attorney General

BRIGHAM J. BOWEN
Assistant Branch Director

/s/ *Taisa M. Goodnature*
TAISA M. GOODNATURE
N.Y. Bar No. 5859137
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20530
Telephone: (202) 514-3786

Fax: (202) 616-8470
Email: Taisa.M.Goodnature@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that, on February 23, 2022, I caused the foregoing document to be filed by means of this Court's Electronic Case Filing (ECF) system, thereby serving it upon all registered users in accordance with Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure and Rules 304 and 305 of this Court's Local Rules.

/s/ *Taisa M. Goodnature*
TAISA M. GOODNATURE
N.Y. Bar No. 5859137
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20530
Telephone: (202) 514-3786
Fax: (202) 616-8470
Email: Taisa.M.Goodnature@usdoj.gov

Counsel for Defendants