No. 19-1835

United States Court of Appeals for the First Circuit

NEW HAMPSHIRE LOTTERY COMMISSION; NEOPOLLARD INTERACTIVE LLC; POLLARD BANKNOTE LIMITED,

Plaintiffs-Appellees,

v.

WILLIAM P. BARR, Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES,

Defendants-Appellants.

On Appeal From The United States District Court
For The District Of New Hampshire (Nos. 19-cv-00163, 19-cv-00170)

RESPONSE BRIEF FOR APPELLEES NEOPOLLARD INTERACTIVE LLC AND POLLARD BANKNOTE LIMITED

Debra Wong Yang
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071
(213) 229-7472

Theodore B. Olson
Matthew D. McGill
Counsel of Record
Lochlan F. Shelfer
Joshua M. Wesneski
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mmcgill@gibsondunn.com

Counsel for Plaintiffs-Appellees
NeoPollard Interactive LLC and Pollard Banknote Limited

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for NeoPollard Interactive LLC and Pollard Banknote Limited states as follows:

NeoPollard Interactive LLC is a nongovernmental corporation. Each of the following corporations owns 10% or more of its stock: NeoGames S.A.R.L., Pollard Banknote Limited.

The following corporation indirectly owns 10% or more of the stock of NeoGames S.A.R.L.: William Hill PLC.

Pollard Banknote Limited is a nongovernmental corporation. The following corporation owns 10% or more of its stock: Pollard Equities Limited. No publicly held corporation owns 10% or more of its stock.

/s/ *Matthew D. McGill*

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Plaintiffs-Appellees NeoPollard Interactive LLC and Pollard Banknote Limited (together, "NeoPollard") respectfully request oral argument in this matter. This appeal presents an important question of statutory interpretation that implicates billions of dollars in state revenue—in New Hampshire and across the United States—and that threatens to destabilize an entire industry that has flourished in the past decade. Oral argument would aid the Court in resolving the legal questions raised here.

INTRODUCTION

Until last year, the uniform interpretation of the Wire Act of 1961, 18 U.S.C. § 1084—reached by two courts of appeals (including this Court) and a 2011 Opinion by the Department of Justice's Office of Legal Counsel ("OLC")—was that the statute prohibits interstate transmissions of bets, wagers, and certain related information *only* if they involve sporting events. On January 14, 2019, however, OLC abruptly rescinded its 2011 opinion and reinterpreted the Wire Act to prohibit interstate transmissions of bets of *all* types, not just those involving sporting events. The next day, the Deputy Attorney General declared the new OLC interpretation to be "the Department's position on the meaning of the Wire Act" and provided a limited grace period for businesses "to bring their operations into compliance with federal law." Through the new OLC opinion, the Department threatened to shut down a multi-billion-dollar industry that had arisen in direct reliance on OLC's 2011 opinion interpreting the Wire Act to apply only to sports betting. And it did so without a single vote in Congress, or ever having brought a single prosecution.

In a carefully reasoned, 60-page opinion, the district court rejected the Department's newfound reading of the Wire Act, holding that the Act

prohibits only those interstate transmissions of bets and related information that involve sporting events. Assessing the text, structure, and history of the Act, the court concluded that the Department's new interpretation was contrary to law. The court therefore declared non-sports betting to be beyond the scope of the Act, and vacated OLC's opinion holding otherwise.

The district court's thorough opinion is correct and should be affirmed. The Department's new interpretation flies in the face of the statutory language, the structure and context of the Act, the opinions of nearly every federal court to consider the Act's scope, and the historical understanding of both Congress and the Department itself. As the district court correctly concluded, the Wire Act applies only to sports betting.

Seeking to avoid review of the merits of its new interpretation, the Department claims that Plaintiffs-Appellees NeoPollard Interactive LLC and Pollard Banknote Limited (collectively, "NeoPollard")—which provide the technological infrastructure for states' online lotteries, including New Hampshire's iLottery system—lack standing because they have not yet been personally threatened with prosecution. But the Department has publicly affirmed that violators of the Act will be prosecuted following

the expiration of a grace period. It has not carved out state lotteries or vendors from the scope of the Wire Act, and has even rejected arguments by others to that effect. And its recent public statements remove all doubt that the Department intends to enforce its new interpretation vigorously. Controlling precedents from the First Circuit and the Supreme Court make clear that NeoPollard had and continues to have standing to obtain the relief it seeks—a judicial declaration that the Department's new interpretation is contrary to law.

This Court should affirm the judgment below in its entirety and end the Department's baseless and unlawful assault on the online gaming industry.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs' claims are justiciable.

2. Whether the Wire Act, 18 U.S.C. § 1084(a), applies only to sports gambling.

STATEMENT OF THE CASE

A. History Of The Wire Act

In the early 1960s, Attorney General Robert F. Kennedy sought to attack the funding sources of organized-crime syndicates. *See* Martin R.

Pollner, *Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 Brook. L. Rev. 37, 38 (1961). To finance their illicit activities, these syndicates relied heavily on bookmaking—that is, betting on sporting events. *Id.* at 46. The Department of Justice accordingly proposed legislation to Congress that would shut off the flow of these unlawful profits. *See* S. Rep. No. 87-588, at 3 (1961). The result was the Wire Act of 1961, which took direct aim at those bookmaking activities.

The Act sets out two clauses prohibiting the knowing use of a wire communication facility by a person engaged in the business of betting or wagering:

> 1) "for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest"; or
>
> 2) "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers."

18 U.S.C. § 1084(a). Throughout the legislative debates, the Department of Justice repeatedly advised that this language was limited to *sports* betting. Herbert Miller, the Assistant Attorney General of the Criminal

Division, testified before the Senate that the bill was "limited to sporting events or contests." J.A.92 (*The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 278 (1961)). Following some technical revisions to the bill, Deputy Attorney General Byron White confirmed that the bill was "aimed now at those who use the wire communication facility for the transmission of bets or wagers in connection with a sporting event." J.A.370 (*Report of Proceedings: Hearing Before the S. Comm. on the Judiciary, Exec. Sess.*, 87th Cong. 55 (1961)).[1]

For decades, the Department took the same view of the resulting enactment. In the 1990s, members of Congress proposed to amend the Wire Act so that it would cover all types of gambling, not just sports betting. *See* Crime Prevention Act of 1995, S. 1495, 104th Cong. § 1501 (1995); Computer Gambling Prevention Act of 1996, H.R. 3526, 104th Cong. § 2; Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong.

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[1] All internal quotation marks and alterations are omitted unless otherwise indicated.

§§ 2–3; Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. § 2; *see also* Restoration of America's Wire Act, H.R. 707, 114th Cong. § 2 (2015). In hearings related to those proposed amendments, Deputy Assistant Attorney General Kevin DiGregory confirmed that the Wire Act "criminalizes those betting and wagering businesses that transmit bets or wagers on sporting events or contests over the Internet," *Internet Gambling Prohibition Act of 1999: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 36 (2000), and that "Section 1084 applies to sports betting but not to contests like a lottery," *Internet Gambling Prohibition Act of 1999: Hearing Before the Subcomm. on Telecomms., Trade, & Consumer Prot. of the H. Comm. on Commerce*, 106th Cong. 88 (2000).[2]

[2] The Department's assertion (at 4) that "[f]or many decades" it interpreted the Wire Act as not being limited to sports gambling ignores its own testimony and seems to be based entirely on oblique references to the Wire Act in three cases: *United States v. Chase*, 372 F.2d 453 (4th Cir. 1967); *United States v. Manetti*, 323 F. Supp. 683 (D. Del. 1971); and *United States v. Vinaithong*, Nos. 97-6328 *et al.*, 1999 WL 561531 (10th Cir. Apr. 9, 1999). *See* ADD.71. There is no indication that these indictments represented the considered view of the Department.

Federal courts, too, have agreed that the Wire Act applies only to sports betting, and have held that "[a] plain reading of the statutory language of the Wire Act clearly requires that the object of the gambling be a sporting event or contest." *In re MasterCard Int'l Inc.*, 313 F.3d 257, 262 n.20 (5th Cir. 2002); *see also*, *e.g.*, *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014) ("The Wire Act applies only to wagers on any sporting event or contest, that is, sports betting." (citing *MasterCard*)); *United States v. DiCristina*, 886 F. Supp. 2d 164, 215 (E.D.N.Y. 2012) ("The Act applies only to wagering on sporting events."), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013); *In re MasterCard Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 481 (E.D. La. 2001) ("the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests"), *aff'd*, 313 F.3d 257. One federal court has held that the Wire Act's second set of prohibitions extends beyond sports betting, but even that court concluded that *both* offenses enumerated in the first clause are limited to sports betting. *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007) ("[T]he language of the statute limits the prohibition on the transmission of actual bets or wagers to those on sporting events or

contests."). The Department's current assertion (at 5) that "courts generally agreed that the Wire Act extends beyond sports betting" thus is demonstrably incorrect.[3]

In the early 2000s, after courts had affirmed the Wire Act's limited scope and legislative efforts to broaden the Act repeatedly had failed, the Department changed tactics: rather than seeking an amendment of the Act, the Department announced a change in its interpretation of the statutory language. In 2002, the Department advised the Nevada Gaming Control Board that "the Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style gambling." J.A.127–28 (Letter from Michael Chertoff, Assistant Att'y Gen., to Peter C. Bernhard, Nev. Gaming Comm'n (Aug. 23, 2002)). Similarly, in 2005 the Department warned the Illinois lottery that the Wire Act prohibits "the purchase of lottery tickets over the Internet." J.A.124–25 (Letter from Laura H. Parsky, Deputy Assistant Att'y Gen., to Carolyn Adams, Ill. Lottery Superintendent (May 13, 2005)).

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[3] The Department (at 5) also cites *United States v. Kaplan*, No. 06-CR-337-2 (E.D. Mo. Mar. 20, 2008), ECF No. 606, but that report and recommendation of a magistrate judge was never adopted by the district court.

In 2009, in light of the Department's new interpretation—and its direct threat to a state lottery—the New York and Illinois lotteries sought clarification from the Department as to whether the Wire Act would prohibit online sale of lottery tickets. Addendum ("ADD") at 94.[4] In response, OLC issued a formal opinion in 2011.

B. The 2011 OLC Opinion And Its Effects

The 2011 OLC opinion concluded that the Wire Act's prohibitions with respect to the interstate transmission of bets, wagers, or certain related information or communications apply only to those involving sporting events—meaning that sales of lottery tickets online were not covered by the Act. *See* ADD.93–105 (*Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, 35 Op. O.L.C. (2011) ("2011 Opinion")).

First, the 2011 Opinion concluded that the phrase "on any sporting event or contest" modified both uses of "bets or wagers" in the first clause.

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[4] For clarity, Appellees' Addendum employs consecutive pagination, beginning on page ADD.93 and thus picking up from where Appellants' Addendum ends.

ADD.97–99. That was the more "natural" and "logical" reading, given that "it is difficult to discern why Congress" would "forbid[] the transmission of *all* kinds of bets or wagers," but "prohibit only the transmission of information assisting in bets or wagers concerning sports, 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." ADD.97 (emphasis added).

Second, the 2011 Opinion concluded that the second clause—involving transmissions entitling the recipient to receive money or credit—also was limited to sports betting. OLC concluded that the references to "bets or wagers" in the second clause were best understood as "shorthand references" to the "bets or wagers on any sporting event or contest" described in the first clause. ADD.99. OLC noted that the phrase "in interstate and foreign commerce" also appeared only in the first clause, but still applied equally to the second clause. *Id.* These omissions indicated "that Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause." *Id.*

This reading "also ma[de] functional sense of the statute" and avoided creating "a counterintuitive patchwork of prohibitions" wherein the first clause would "allow the transmission of information assisting in the placing of bets or wagers on non-sporting events, but then prohibit transmissions entitling the recipient to receive money or credit for the provision of information assisting in the placing of those lawfully-transmitted bets." ADD.99–100. The 2011 Opinion further noted that its interpretation of Section 1084(a) was supported by the legislative history. ADD.100–02.

Third, OLC noted that Congress—on the same day it enacted the Wire Act—passed legislation targeting interstate transportation of materials for non-sports gambling such as numbers, policy, and bolita. ADD.102–03. "Congress's decision to expressly regulate lottery-style games in addition to sports-related gambling in that statute, but not in the contemporaneous Wire Act, further suggests that Congress did not intend to reach non-sports wagering in the Wire Act." ADD.103.

Because it was binding on the entire Executive Branch, the 2011 Opinion disabled federal prosecutors from charging activities related to non-sports betting under the Wire Act, notwithstanding the

Department's 2005 threat to do so. With the issue apparently resolved, a number of States authorized certain forms of online gaming within their borders. *See* ADD.7–10. NeoPollard was formed to create online and mobile gaming products. J.A.74. NeoPollard provides both New Hampshire and Michigan with the hardware and software necessary to provide online platforms for purchasing state lottery tickets. J.A.74–76.

C. The 2018 OLC Opinion

Soon after President Trump took office, a lobbyist for Sheldon Adelson—the CEO of Las Vegas Sands Corp., a brick-and-mortar casino company competing against internet-based gaming—submitted a memorandum to the Department seeking reconsideration of the 2011 Opinion. Byron Tau & Alexandra Berzon, *Justice Department's Reversal on Online Gaming Tracked Memo from Adelson Lobbyists*, Wall St. J. (Jan. 18, 2019), https://on.wsj.com/2GVB8FC. Without input from any of the numerous stakeholders who had relied on the 2011 Opinion, on January 14, 2019, OLC published a new opinion (signed November 2, 2018) reversing its 2011 Opinion and finding that the Wire Act applies to interstate transmissions of bets and wagers of *any* kind. *See* ADD.67–89 (*Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42

Op. O.L.C. (2018) ("2018 Opinion")). The new opinion "hewed closely to" Adelson's memorandum. Tau & Berzon, *supra*.

The 2018 Opinion conceded that "the Wire Act is not a model of artful drafting" and acknowledged its "interpretive difficulties," but nevertheless concluded that the phrase "on any sporting event or contest" unambiguously modifies *only* the second prohibition of the first clause: "information assisting in the placing of bets or wagers." ADD.68–69. The new opinion relied principally on the last-antecedent canon of statutory interpretation providing that, absent contrary indication, modifiers apply only to the last item in a sequence. ADD.73–75.

OLC admitted that "[t]here is a logic to th[e 2011 Opinion's] reasoning" that a broad interpretation of the Wire Act would incongruously *permit* transmitting "information assisting in the placing of bets or wagers" on *non-sports-related* gambling, while *criminalizing* the transmissions of the bets themselves. ADD.80. OLC also recognized the "anomaly" of interpreting the Wire Act to allow transmitting information assisting in the placing of bets or wagers on non-sporting events, but then, in Section 1084(a)'s second clause, to prohibit transmitting payment for that lawful information. ADD.81. But it

suggested that "that anomaly largely falls away" so long as the first clause is interpreted to ban bets or wagers of any kind. *Id*.

OLC "acknowledge[d] that some may have relied on the" 2011 Opinion—such as "States" that "began selling lottery tickets via the Internet after [its] issuance." ADD.88. But OLC "d[id] not believe that such reliance interests [we]re sufficient to justify continued adherence to the 2011 opinion." ADD.88–89. And although "[a]n individual who reasonably relied upon [the] 2011 Opinion may have a defense for acts" that OLC now deemed unlawful, that defense would apply only to acts taken "prior to the [2018 Opinion's] publication." ADD.89 n.19. OLC recognized that its new interpretation was "likely" to "be tested in the courts," which would "provide a one-way check on the correctness of t[he new] opinion." ADD.88.

The day after the 2018 Opinion was published, the Deputy Attorney General issued a memorandum addressed to "United States Attorneys," "Assistant Attorneys General," and "Director, Federal Bureau of Investigation," acknowledging the 2018 Opinion as the controlling interpretation of the Wire Act and directing attorneys to "refrain from applying Section 1084(a) in criminal or civil actions to persons who

engaged in conduct violating the Wire Act in reliance on the 2011 OLC opinion prior to the date of this memorandum, and for 90 days thereafter." ADD.90 ("Enforcement Directive"). But the Enforcement Directive further warned that the temporary period of non-enforcement was only an "an internal exercise of prosecutorial discretion" and "not a safe harbor." *Id.*; *see also* ADD.91 (extending forbearance through June 14, 2019); ADD.106 (extending through Dec. 31, 2019); ADD.107 (extending through June 30, 2020).

D. Procedural History

Based in part on this Court's holding in *Lyons* that "[t]he Wire Act applies only to wagers on any sporting event or contest, that is, sports betting," 740 F.3d at 718, NeoPollard sought a declaratory judgment that the Wire Act is limited to wagering on sporting events or contests, ADD.1–2. The court consolidated NeoPollard's suit with a similar one brought by the New Hampshire Lottery Commission the same day. *Id.* In addition to seeking a declaratory judgment, the Lottery Commission also challenged the 2018 Opinion under the Administrative Procedure Act ("APA").

In June 2019, the district court ruled that the Wire Act is limited to sports betting.

First, the court found that Plaintiffs had standing to sue. ADD.15–16. They "have openly engaged for many years in conduct that the 2018 OLC Opinion now brands as criminal," and "[a]fter operating for years in reliance on OLC guidance that their conduct was not subject to the Wire Act, the plaintiffs have had to confront a sudden about-face by the Department of Justice." *Id*. The court further explained that NeoPollard and the Commission "face a directive from the Deputy Attorney General to his prosecutors that they should begin enforcing OLC's new interpretation of the Act after the expiration of a specified grace period." ADD.16.

It was immaterial, the court reasoned, that the 2018 Opinion did not specifically single out state lotteries: "To infer from the OLC's silence on this point that it might conclude in the future that state actors are not subject to the Wire Act requires an unwarranted speculative leap," especially "given the fact that a Department of Justice official warned the Illinois lottery in 2005 that the contemplated online sale of lottery tickets by the state *would* violate the Wire Act." ADD.17. Nor was Plaintiffs'

standing defeated by the Department's Notice—issued just three days before oral argument on the parties' cross-motions for summary judgment—claiming that the "Department of Justice is currently reviewing" "whether the Wire Act applies to state lotteries and their vendors," and directing prosecutors to "extend the forbearance period for 90 days after the Department publicly announces [its] position." ADD.19, 91. The Notice, the court recognized, "is nothing more than a temporary moratorium." ADD.20. And the Department's suggestion that "the temporary moratorium might become permanent at a later date" is purely "speculative," especially given that it has "failed to identify any alternative legal theory as to why state actors might be exempt." *Id*.

Second, the district court held that the Wire Act applies only to sports betting. Concluding that Section 1084(a) is ambiguous, the court turned to statutory context, structure, and coherence. ADD.41. The court observed that "[l]imiting the Wire Act to sports gambling . . . avoids significant coherence problems that result from the OLC's current interpretation." *Id.* For example, the Department's "unlikely reading" would "prohibit[] transmissions of all bets or wagers but bar[] transmissions of information that assist the placement of only those bets

or wagers that concern sports." ADD.41. Moreover, OLC's new "interpretation incongruously permits information transmissions that facilitate non-sports gambling in the first clause while criminalizing transmissions that enable a person to receive payment for the same transmissions in the second clause." ADD.42–43. "It is bizarre to authorize an activity but prohibit getting paid for doing it." ADD.43.

OLC's new interpretation also could not be readily squared with the fact that the Paraphernalia Act, enacted on the same day, used more specific language to target non-sports gambling. ADD.44–47. The court held that it was irrelevant that the second clause of the Act did not explicitly refer to sporting events or contests—the structure of the statute indicated that "Congress used shorthand in the second clause to refer to terms delineated more completely in the first clause." ADD.39.

The court then explained that the Act's legislative history confirmed this conclusion. Particularly significant was the 1961 testimony by Deputy Attorney General Byron White and Assistant Attorney General Herbert Miller that the Wire Act was limited to sports gambling. ADD.51–52 & n.13.

Finally, the district court held that the 2018 Opinion, coupled with the memoranda of the Deputy Attorney General, constituted final agency action reviewable under the APA. ADD.23–27. And because the Wire Act could not bear OLC's new interpretation, it was "not in accordance with law." 5 U.S.C. § 706(2)(A).

The court granted the declaratory relief requested by Plaintiffs and further set aside the 2018 Opinion under the APA. ADD.53–59.

Less than two weeks later, the Department issued an "Updated Directive" regarding the Wire Act. J.A.405. Failing to acknowledge that the district court's opinion had vacated and "set aside" the 2018 Opinion as contrary to law—or that, accordingly, the 2011 Opinion continues to bind the Department—the Department extended the existing "forbearance period" as "an internal exercise of prosecutorial discretion" until December 31, 2019. *Id.* On December 18, 2019, the Department again extended the "forbearance period," this time until June 30, 2020. ADD.107.

SUMMARY OF ARGUMENT

I. NeoPollard's declaratory-judgment claim is justiciable. The 2018 Opinion presents a "realistic" threat of prosecution, given that the

Department has broadcast its new interpretation of the Wire Act and has not unambiguously disclaimed that NeoPollard's conduct violates the statute. Instead, it has declared a temporary moratorium while it considers whether private vendors are covered by the Wire Act, despite refusing to give any reason to think that NeoPollard would *not* be covered. If the Department is able to evade judicial review, its open-ended consideration will smother NeoPollard's business as it labors under the pall of criminality. The Declaratory Judgment Act exists precisely for this type of situation.

II. The application of the Wire Act is limited to bets or wagers on sporting events or contests.

A. As every federal court to decide the issue (including this Court) has held, the first clause of the Act covers only sporting events or contests. That clause speaks to only *one* kind of bets or wagers—those on sporting events or contests—and the most natural, commonsense reading of that clause is that it covers only sports betting. This reading also harmonizes the statutory scheme, whereas, under the Department's reading, the transmission of *all* bets or wagers would be criminalized, but

the transmission of *information* assisting in the placing of a bet or wager would be unlawful *only* if it is related to a sports wager.

B. The second clause of the Act also covers only sporting events or contests. Once the first clause is properly construed as applying only to sports wagers, the second clause naturally operates in parallel. It would make no sense to prohibit only bets or wagers on sporting events while prohibiting payments on *all* bets or wagers. And OLC's reading of *both* clauses would still allow information transmissions that facilitate non-sports gambling in the first clause while criminalizing payments for those transmissions in the second clause.

C. Were there any doubt based on the text and structure of the Act as to its scope, the legislative background and history confirm the Act's focus on sports betting. From the beginning, both the Department and Congress have understood that it is limited only to sports betting.

III. The 2018 Opinion is final agency action subject to review under the Administrative Procedure Act. It is the "consummation of the agency's decisionmaking process" because it resolves the question it addressed, and it is binding on the Department. And legal obligations flow from the 2018 Opinion because it wrongly asserts that NeoPollard's

conduct risks incurring criminal penalties, and it divests NeoPollard of the constitutional fair-notice defense it previously possessed.

ARGUMENT

I. Plaintiffs' Claims Are Justiciable.

A. NeoPollard's Declaratory-Judgment Claim Is Justiciable As Filed.

The district court correctly rejected the Department's arguments that the 2018 Opinion's criminalization of online lottery sales presents no Article III case or controversy. Under the Supreme Court's and this Court's cases, this suit under the Declaratory Judgment Act is justiciable because, "under all the circumstances," the facts "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007).

For a pre-enforcement challenge involving a criminal statute, the justiciability requirements are satisfied so long as there is a "realistic" threat of prosecution. *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000); *see also Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4, 11 (1st Cir. 2000) ("[S]tanding exists when the plaintiff has

manifested an intention to engage in conduct arguably proscribed by the statute, and there exists a 'credible threat' of enforcement."). A threat of prosecution is "realistic" where the government does not "unambiguous[ly] disclaim[]" that plaintiff's conduct violates the statute. *Hemp Council*, 203 F.3d at 5; *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (threat of prosecution is "credible" where the "Government has not argued . . . that plaintiffs will not be prosecuted if they do what they say they wish to do"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) ("the State has not disavowed any intention of invoking the criminal penalty provision," and therefore plaintiffs' fear of prosecution was not "imaginary or wholly speculative"). *Cf. Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014) (finding no standing only because "[t]he Government has affirmatively represented that it does not intend to prosecute [Plaintiff's] conduct because it does not think it is prohibited by the statute"); U.S. Br. 22, 23 (citing *Blum*).

Here, far from an "unambiguous disclaimer of coverage," *Hemp Council*, 203 F.3d at 5, the Department has *threatened* prosecution; as the district court correctly concluded, NeoPollard "easily satisf[ies]" the justiciability test because "the risk of prosecution is substantial."

ADD.15–16. NeoPollard established its business "in reliance on" the 2011 opinion, which stated that NeoPollard's "conduct was not subject to the Wire Act." ADD.16. But now, the Department has broadcast to the world that it is reversing that position. And OLC pointedly admonishes those who, like NeoPollard, "began selling lottery tickets via the Internet after the issuance of [the] 2011 Opinion," that any "defense" they "may have" is limited to acts taken "*prior to* the publication of" the new opinion, ADD.88–89 & n.19 (emphasis added)—in other words, they should expect to be prosecuted for any acts taken *after* the new opinion's publication.

Confirming this threat, the Deputy Attorney General's Enforcement Directive specifically warns *all* entities that the temporary period of non-enforcement is only "an internal exercise of prosecutorial discretion" and "is not a safe harbor." ADD.90. This is no "general threat[] by officials to enforce those laws which they are charged to administer," as the government would have it. U.S. Br. 19. Rather, it is a specific "directive from the Deputy Attorney General to his prosecutors that they should begin enforcing OLC's new interpretation of the Act after the expiration of a specified grace period." ADD.16. The message could not be clearer: gambling platforms that were established in reliance

on the 2011 Opinion—especially online lotteries—now face the real and immediate choice of winding down their operations or risking criminal prosecution.

Moreover, contrary to the government's contention, courts *have* held that "the existence of a statute" alone "implies a threat to prosecute." *Bauer v. Shepard*, 620 F.3d 704, 708 (7th Cir. 2010); *see also Blum*, 744 F.3d at 798 n.11 (recognizing "the assumption that the [government] will enforce its own non-moribund criminal laws, absent evidence to the contrary"); 13B Wright & Miller, *Fed. Prac. & Proc. Juris.* § 3532.5 (3d ed.) ("If there is a present desire to engage in apparently criminal activity," then the "existence of a criminal prohibition should alone be sufficient basis for adjudication," and courts should not try "to measure actual enforcement prospects"). The Department (at 19) relies on out-of-circuit cases like *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005), but that court recognized that the circuit rule it was bound to apply was in "tension[]" with Supreme Court cases such as "*United Farm Workers*." *Id.* at 1254.

The Department objects that NeoPollard's claim is not ripe because the 2018 Opinion, while it did make clear that it applies to state lotteries,

see ADD.88–89 & n.19, did not expressly state that it applies to private vendors for state lotteries. U.S. Br. 21. Of course, the 2018 Opinion did not expressly state that it applies in northeastern states or that it applies to corporations whose names end in "d," either, but the Department has given no reason to think that being a vendor is any more useful a defense. Indeed, after oral argument, the district court invited the Department to formulate some reason why private lottery vendors and other downstream businesses might be exempt from the Wire Act. But in response, the Department vigorously *defended* its power to prosecute those very entities. *See* ECF No. 70, U.S. Suppl. Mem. 2–3, 7–8; *see also id.* at 10 ("vendor liability would follow *a fortiori* from employee liability"); ADD.20 (the Department "failed to identify any alternative legal theory as to why state actors might be exempt").

Next, the Department contends that there is no "history of enforcement against State lotteries or their vendors." U.S. Br. 21. But as the district court put it, "the record tells a different story." ADD.16. In 2005, the Department warned the Illinois Lottery that selling "lottery tickets over the Internet" would violate the Wire Act, and that all those who engage in that activity or "knowingly assist" it would "be subject to

prosecution." *See* J.A.124–25. Only a few years later, in response to requests for clarification by the Illinois and New York state lotteries, OLC released its 2011 Opinion. That opinion "did not even hint at the possibility that," if the Act reached non-sports betting, "states [or their vendors] would be exempt from the Act's proscriptions." ADD.16–17.

As the district court recognized, "[a]ny remaining doubt about the OLC's view on the issue is dispelled by both the 2018 Opinion itself and the Government's actions after its issuance." ADD.17. The 2018 Opinion reversed its prior position, even while acknowledging that "States" had "beg[u]n selling lottery tickets via the Internet after the issuance of our 2011 Opinion." ADD.88. The Enforcement Directive then declared that these reliance interests would not protect entities beyond a 90-day grace period. ADD.90. The Department never "suggest[ed] that state entities [or their vendors] that had relied on the 2011 Opinion would be exempt from prosecution after the grace period expired." ADD.18. Given that the 2018 Opinion took aim at and tore down the 2011 Opinion—which was issued specifically in response to questions posed by state lotteries—the Department's reversal can only be construed as a resurrection of its 2005 position that States violate the Wire Act by selling lottery tickets

over the internet. The district court was correct to conclude that "the plaintiffs face[] a sufficiently imminent threat of prosecution to give them standing to sue." *Id*.

Indeed, this case is strikingly similar to *Hemp Council*. There, just as here, the federal government publicly took the position that, under its interpretation of the statute, hemp cultivation violated federal law, and there was no "reason to doubt the government's zeal in" enforcing its interpretation. 203 F.3d at 3–5. The hemp-farmer plaintiffs therefore faced a "realistic" threat of prosecution sufficient to support standing. *Id.* at 5; *see also Monson v. DEA*, 589 F.3d 952, 958 (8th Cir. 2009) (relying on *Hemp Council* and concluding that, despite not being "threatened with federal criminal prosecution," plaintiffs have standing when they "allege[] a threat of prosecution that 'is not imaginary or wholly speculative'" (quoting *United Farm Workers*, 442 U.S. at 302)). The same is true here: the Department itself highlights its "seventeen Wire Act convictions between Fiscal Years 2005 and 2011 that involved non-sports betting." ADD.71 n.8. And its public statements in the 2018 Opinion and the Enforcement Directive remove all doubt that the Department intends

to enforce its new interpretation vigorously. *Hemp Council* decisively resolves the justiciability question here.

B. The Department's Post-Filing Memorandum Does Not Diminish Plaintiffs' Standing.

The government's only response to *Hemp Council* is to point to a Notice that the Deputy Attorney General later issued—only three days before the hearing in the district court—stating that the Department is currently reviewing "whether the Wire Act applies to State lotteries and their vendors," and will not prosecute entities like the Plaintiffs in the meantime. ADD.91. This made-for-litigation document changes nothing.

First, contrary to the Department's contention (at 26–27), the Notice cannot moot this case (or, as the government suggests, retroactively unripen it), because on its face the Notice is *not* an "unambiguous disclaimer" either that the Wire Act "cover[s]" plaintiffs' conduct, or of any intent to prosecute. *Hemp Council*, 203 F.3d at 5. Rather, it explicitly *preserves* the possibility of future prosecutions. At any moment, the government could declare open season on state lotteries and their vendors. This temporary forbearance is leagues away from a disavowal of "*any* intention of invoking the criminal penalty provision."

United Farm Workers, 442 U.S. at 302 (emphasis added). The Department even conceded before the district court that it had not found a case "where the commitment not to prosecute" was "not open-ended and lasting forever." J.A.145. Indeed, as courts have noted, even when an official "has disavowed prosecution" for the moment, pre-enforcement review is still available if the official "can change his mind and prosecute" the plaintiff, because plaintiffs should not be "required to live under the specter of prosecution"—as NeoPollard currently is forced to do—"with nothing more than a non-committal promise as protection." *Seals v. McBee*, 898 F.3d 587, 592–93 (5th Cir. 2018).

The government cites *Reddy v. Foster*, 845 F.3d 493 (1st Cir. 2017), for the proposition that plaintiffs lack standing when a precondition to enforcement has not occurred. *See* U.S. Br. 22–26. But in *Reddy*, the plaintiffs' desired conduct—protesting within 25 feet of an abortion clinic—was not illegal, and could not expose them to prosecution unless and until the private clinic decided to demarcate a buffer zone. *Id.* at 502. No clinic had ever established such a demarcation, and so the government was powerless to prosecute plaintiffs. *Id.* Here, by contrast, the government has declared that the Wire Act applies to non-sports

gambling *now*; there is no precondition to enforcement other than the expiration or withdrawal of the Deputy Attorney General's grace period and the filing of an indictment.

More fundamentally, as the district court correctly concluded, the Notice should be analyzed not under the ripeness doctrine, but under the *mootness* doctrine. This Court has explained that the ripeness inquiry in pre-enforcement review turns only on whether the issue is "an abstract one of statutory interpretation." *Hemp Council*, 203 F.3d at 5. That is undisputedly the case here. The Notice, meanwhile, is an "intervening circumstance" that arose after the lawsuit began—and therefore should be analyzed under the mootness doctrine. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013). And because the Notice is "nothing more than a temporary moratorium," ADD.20, it is merely voluntary cessation of unlawful conduct that cannot moot this case. The government has not carried its "heavy burden" of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The Department cannot "evade judicial review" simply "by temporarily altering questionable behavior." *City News & Novelty,*

Inc. v. City of Waukesha, 531 U.S. 278, 284 n.1 (2001). Otherwise, "a defendant could immunize itself from suit by altering its behavior so as to secure a dismissal, and then immediately reinstate the challenged conduct afterwards." *Brown v. Colegio de Abogados de Puerto Rico*, 613 F.3d 44, 49 (1st Cir. 2010).

But even if the Department had sworn *never* to prosecute NeoPollard—and it has not done anything close—this case would still be justiciable because the 2018 Opinion "has an adverse effect on [Plaintiffs] that does not depend upon any effort by the Department of Justice to enforce the opinion." ADD.26. For example, the Department's declaration subjects NeoPollard to the potential of liability under statutes like the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *See* 18 U.S.C. § 1961 (defining violations of 18 U.S.C. § 1084 as "racketeering activity"); *In re MasterCard Int'l Inc.*, 313 F.3d 257 (5th Cir. 2002) (private RICO suit alleging violations of the Wire Act); *see also Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1173–74 (9th Cir. 2018) (pre-enforcement review available because, "even if the Attorney General would not enforce the law, Section 1748.1(b) gives private citizens a right of action to sue for damages"). Moreover, under Section 1084(d) of the

Wire Act, any law-enforcement agency—federal, state, or local—could at any time direct that NeoPollard be disconnected from any common-carrier facility, which obviously would be fatal to its business operations. ADD.26–27. The Department argues that broadband internet-access providers are not common carriers subject to the Federal Communication Commission's ("FCC") jurisdiction. U.S. Br. 51. But broadband internet is certainly not the only wire-based transmission service to which Section 1084(d) could apply.[5]

Finally, the 2018 Opinion, were it to be revived, would itself injure Plaintiffs by wrongly declaring their activities to be unlawful. Even if there are no prosecutions, the Department's public declaration of criminality deters others from investing or partnering with NeoPollard. The Supreme Court has long recognized that plaintiffs' standing to seek pre-enforcement review is bolstered when, as here, the threat of prosecution "deter[s] others from maintaining profitable or advantageous relations with the complainants." *Poe v. Ullman*, 367 U.S. 497, 508

[5] Moreover, the FCC has reversed course on its position with respect to broadband internet three times in the past two decades. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019).

(1961) (plurality) (citing *Truax v. Raich*, 239 U.S. 33 (1915); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)). As a practical matter, NeoPollard cannot operate a business that the United States has asserted is unlawful, even if the government (currently) claims it lacks any present intention to prosecute. J.A.76, 78–79. If the Department is able to avoid judicial review of its reinterpretation of the Wire Act, it effectively could put NeoPollard and countless others out of business without ever having to bring a single prosecution or otherwise have its new interpretation of the Wire Act tested in court.

This is exactly why pre-enforcement review exists. Entities like NeoPollard should not be forced to choose between the Scylla of investing resources into a business that may someday expose them to prosecution, and the Charybdis of abandoning the venture altogether despite their belief that the activity is lawful. "The dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution—is 'a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.'" *MedImmune*, 549 U.S. at 129 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). Pre-

enforcement review provides NeoPollard with "a way to resolve the legal correctness of its position without subjecting an honest business[] to criminal penalties." *Hemp Council*, 203 F.3d at 5.[6]

II. The Wire Act Applies Only To Sports Gambling.

The text and structure of the Wire Act each point to the same conclusion: the Wire Act's prohibitions are limited to those transmissions of bets, wagers, or certain information or communications related to sporting events or contests, as this Court has already held. *See United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014). The Wire Act identifies only one species of bets or wagers: those "on any sporting event or contest." And the provision's textual prohibitions are most naturally read as involving transmissions related to sports betting. The Department's labored construction, meanwhile, requires one to misapply canons of statutory interpretation and disregard the statutory structure. Finally,

[6] As a last-ditch argument, the government contends that the district court should have exercised its discretion to deny pre-enforcement review. U.S. Br. 24–25. But *Hemp Council* instructs that where, as here, the government stakes out an "emphatic position" on the scope of a criminal statute, that assertion itself "equitably argues for review." 203 F.3d at 5.

the overwhelming weight of the Wire Act's pre-enactment and post-enactment history confirms that the Wire Act covers only sports gambling.

A. The Text, Structure, And Context Of The Wire Act Demonstrate The Act's Limited Scope.

As this Court put it only six years ago: "The Wire Act applies only to wagers on any sporting event or contest, that is, sports betting." *Lyons*, 740 F.3d at 718 (citing *MasterCard*, 313 F.3d at 263). The district court held that this statement was dictum because it was not strictly necessary to the outcome. ADD.31. But "when a federal appellate court confronts an issue germane to the eventual resolution of the case," then "that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense," or whether the court "might have grounded [its] decision on" a different basis. *Berhe v. Gonzales*, 464 F.3d 74, 83 (1st Cir. 2006). Thus, this Court has already decided the principal merits issue in this case.

Even if *Lyons*'s statement were not binding, this Court's unanimous conclusion was entirely correct. Under the most natural reading of the Wire Act, each of Section 1084(a)'s two clauses is limited to sports betting.

1. The First Clause Is Limited To Sports Betting.

a. The first clause of Section 1084(a)—which prohibits certain knowing wire transmissions in interstate commerce of "bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest"—is limited to gambling on sporting events. *Every* federal court to address the issue has concluded that the entire first clause is limited to gambling on sporting events. *See Lyons*, 740 F.3d at 718; *MasterCard*, 313 F.3d at 262 n.20 ("[A] plain reading of the statutory language of the Wire Act clearly requires that the object of the gambling be a sporting event or contest."); *United States v. DiCristina*, 886 F. Supp. 2d 164, 215 (E.D.N.Y. 2012) ("The Act applies only to wagering on sporting events."), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013); *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007) ("[T]he language of the statute limits the prohibition on the transmission of actual bets or wagers to those on sporting events or contests."); *In re MasterCard Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) ("the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests"), *aff'd*, 313 F.3d 257.

That straightforward interpretation is compelled by the "plain and unambiguous statutory language," which must be enforced "according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). The Wire Act mentions only *one* type of bets or wagers—those on "any sporting event or contest." 18 U.S.C. § 1084(a). The Department asks this Court to read into the term "bets and wagers" numerous other terms such as "lotteries" and "games of chance." But the statute says not a word about any of those activities.

Indeed, when Congress wanted to refer to non-sports gambling, it did so explicitly. The Wire Act's "Definitions" section *distinguishes* "bets" from "lotter[ies]" and "game[s] of chance." 18 U.S.C. § 1081. The Act's limited language also stands in stark contrast to that used in the Interstate Transportation of Wagering Paraphernalia Act, Pub. L. 87-217, 75 Stat. 492 (1961) (codified at 18 U.S.C. § 1953), passed the *very same day* as the Wire Act. There, Congress was specific about what types of gambling were prohibited—"(a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game." 18 U.S.C. § 1953(a). Thus, had Congress wanted the Wire Act to sweep more broadly than sports gambling, "it knew how to say so."

Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 826 (2018). That it did not strongly suggests that the Wire Act's reference to bets or wagers on "any sporting event or contest" applies throughout the first clause. *See* ADD.44–45.

Indeed, the language of the first clause—"bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest"—replicates its meaning in ordinary speech. Consider the following hypothetical e-mail to a realtor: "Would you please help me find a house or condo or information about buying a house or condo anywhere in New Hampshire?" If the realtor later responded, "I found a house for you in California, just like you asked," the prospective homebuyer understandably would be frustrated; no one would read that request as inquiring about houses or condos *generally*, in addition to separately seeking information about buying a house or condo specifically in New Hampshire. As the district court pointed out, ADD.35–36, had Congress actually intended to introduce such a perplexing formulation into the Wire Act, it could at the very least have inserted a comma after the first reference to "bets or wagers." Absent such a contraindication, however, the first clause plainly is limited to sports wagers.

While further resort to interpretive canons is not necessary, the natural reading of the first clause also aligns with the series-qualifier rule, which provides that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Paroline v. United States*, 572 U.S. 434, 447 (2014) (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)). In *Mor*, the Supreme Court applied this canon to a statute providing jurisdiction over suits involving "citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico." 253 U.S. at 345. The Court concluded that the modifier "not domiciled in Porto Rico" applied equally to "citizens or subjects of a foreign State or States." The Wire Act's structure is nearly identical. In fact, the Wire Act is even *clearer*, given that in *Mor*—unlike here—the two provisions were separated by a comma, and the Court nonetheless concluded that the entire clause was limited to suits involving individuals "not domiciled in Porto Rico." *Id.*

The Department contends that the structure of the Wire Act's first clause is not "simple and parallel," and therefore the series-qualifier

canon is inappropriate. U.S. Br. 40. Not so. The relevant term being modified is the same throughout: "bets or wagers." That the second usage of "bets or wagers" appears within a larger phrase ("information assisting in the placing of") presents no obstacle to reading the statute in its most natural light. There is no substantial variation in the statute's syntax that makes it difficult to apply the limitation "on any sporting event or contest" to both parts of the same clause.

Indeed, the Department largely glosses over the language of the first clause, summarily asserting that the "last antecedent" canon (or the "nearest reasonable referent" canon) favors its construction. U.S. Br. 33. But that canon "is not an absolute and can assuredly be overcome by other indicia of meaning." *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016). It applies only "where no contrary intention appears," *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), and does not apply where the modifying phrase can be "rationally construed to refer distributively to the more remote antecedent words or phrases," *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir. 1985). Thus, this Court has long viewed the canon as having "no great force: it is only operative when there is *nothing* in the statute indicating that the" modifier "is intended to have

a different effect," and even "very slight indication of legislative purpose or a parity of reason, or the natural and common sense reading of the statute, may overturn it and give it a more comprehensive application." *Buscaglia v. Bowie*, 139 F.2d 294, 296 (1st Cir. 1943) (emphasis added). Further hobbling the Department's argument, the last-antecedent canon does not apply "in a mechanical way where it would require accepting 'unlikely premises.'" *Paroline*, 572 U.S. at 447. Indeed, the Supreme "Court has long acknowledged that structural or contextual evidence may rebut the last antecedent inference." *Lockhart*, 136 S. Ct. at 965. As demonstrated below, the Department's interpretation of the first clause results in substantial incongruity. Finally, the absence of "a comma before the conjunction 'or' separating the phrases 'bets or wagers' and 'information assisting in the placing of bets or wagers'" means that "the appropriateness of the last antecedent canon is unclear." ADD.35–36. Thus, the last-antecedent canon is overwhelmed here by the natural reading of the plain text, the text's structure, and the series-qualifier rule.

The Department contends that the uses of the phrase "sporting event or contest" in Section 1084(b) show that Congress would repeat the

sports-gambling modifier when it wanted to apply that term beyond its nearest referent. U.S. Br. 31. But unlike Section 1084(a)—which repeats the exact same noun ("bets or wagers")—Section 1084(b) contains three completely different formulations with varied nouns: (1) "*news reporting of* sporting events or contests"; (2) "*bets or wagers on* a sporting event or contest"; and (3) "*betting on that* sporting event or contest." 18 U.S.C. § 1084(b) (emphases added). It is unremarkable that in a section that uses "varied syntax," Congress would reiterate the statute's limited scope. *See Lockhart*, 136 S. Ct. at 963; ADD.46 (because "§ 1084(b) has varied formulations of phrases," "those diverse phrases are not susceptible to an abridged reference"). But there was no such reason to employ that construction in Section 1084(a). On the contrary, the fact that Section 1084(b)'s exemption is expressly limited to news and betting involving *sporting events* is evidence that Section 1084(a) is similarly cabined. *See MasterCard*, 132 F. Supp. 2d at 480 ("Both the rule and the exception to the rule expressly qualify the nature of the gambling activity as that related to a 'sporting event or contest.'").

The Wire Act's plain text thus applies only to sports gambling.

b. Additionally, the Department's reading of the Wire Act produces "significant coherence problems" that Plaintiffs' interpretation "avoids." ADD.41. Under the 2018 Opinion's interpretation, the "first clause prohibits transmissions of all bets or wagers but bars transmissions of information that assist the placement of only those bets or wagers that concern sports." *Id*. There is no coherent rationale for imposing such disparate rules on transactions that are so functionally interrelated. The 2011 Opinion rightly observed that it would be "difficult to discern why Congress, having forbidden the transmission of *all* kinds of bets or wagers, would have wanted to prohibit only the transmission of information assisting in bets or wagers concerning sports." ADD.97. And even the 2018 Opinion admitted, "[t]here is a logic to this reasoning." ADD.80.

The Department protests that incongruities cannot overcome "a statute's plain language" absent "absurd[ity]." U.S. Br. 35. This objection is a non sequitur. First, as demonstrated above, the statute's plain language indicates that *it applies only to sports betting*. And even were that not the case, at the very least, the statute would be ambiguous, ADD.33, meaning there is no "plain meaning" to overcome. In fact,

the government itself asserts that "the Wire Act is not a model of artful drafting," ADD.68, and the whiplash produced by OLC's recent U-turn is evidence enough that the government's reading is not compelled by the plain statutory language.

Second, neither the district court nor NeoPollard is invoking the "absurdity" canon. Rather, a textual analysis requires a court to consider the context and structure of the statute. "Context is a primary determinant of meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). Therefore, courts "must, to the extent possible, ensure that the statutory scheme is coherent and consistent," *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008), and "interpret the statute as a symmetrical and coherent regulatory scheme," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). This does not require a showing of "absurdity." To the contrary, it is part of the process of determining a text's plain meaning. "The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* at 132. Considering the context and structure of a statute does not entail a resort to "policy

arguments," U.S. Br. 35; rather, it is an ordinary step in a faithful interpretation of statutory text.

The Department contends that its reading is rational because, as the 2018 Opinion suggested, sports gambling "depend[s] on the real-time transmission of information." ADD.80; *see also* U.S. Br. 36. But sports gambling equally depends on the real-time transmission of *bets or wagers*, so this rationale in fact proves *NeoPollard's* point. As Deputy Attorney General Miller testified, the bill as a whole was "limited to sporting events or contests" not only because of bookmakers' need for real-time information, but also because they must quickly "take[] the bets" and themselves place "layoff bet[s]" "practically simultaneously" with the commencement of the sporting event. J.A.91–92.

Moreover, *any* form of remote gambling over the wires necessarily entails not only the transmission of the bet, but also the transmission of information of the details surrounding the game on which the wager is being placed. If Congress were so concerned with wire transmissions of all "bets and wagers" that it banned them altogether, it is hard to see why Congress would bar "real-time transmission of information" only as to sports. The Department also vaguely suggests that Congress might have

been concerned about "criminaliz[ing] a range of speech-related conduct." U.S. Br. 36. But the Department does not specify what free-speech concerns it has in mind, or why *non*-sports-betting information would be entitled to *more* speech protection than sports-betting information, which is protected only by the reporting exemptions in Section 1084(b). And in fact, that Congress *did* address free-speech concerns in Section 1084(b) by targeting news and reports on sporting events further evinces Congress's focus on sports betting.

In any event, as the district court pointed out (ADD.42), these conjectures suggest at most only that the Department's reading is not patently absurd; it does not establish that the Department has the better reading of the text, or that its reading "fit[s] . . . all parts into an harmonious whole," *Brown & Williamson*, 529 U.S. at 133. As the district court correctly observed, it does not.

The government cannot contend that the coherence prong of the textual analysis supports its reading. Nor can it contest that mechanically employing the last-antecedent canon here produces "unlikely" results. *See Paroline*, 572 U.S. at 447. The best the Department can say about its reading of the first clause is that it "is not

absurd." U.S. Br. 36. Even were that true, it is plain that the Department's new interpretation contravenes the structure of the Act, results in an incoherent and unintelligible scheme, and, most critically, conflicts with the natural reading of the text of the Act. In contrast, construing the first clause to apply only to sports betting results in a coherent and rational scheme: both sports wagers themselves and information related to those wagers are complementarily prohibited by the Act. *See MasterCard*, 132 F. Supp. 2d at 480 ("[A] plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest.").

2. The Second Clause Also Is Limited To Sports Betting.

a. Once the first clause of Section 1084(a) is properly construed as limited to bets or wagers on sporting events—as every federal court to confront the issue has concluded—it follows naturally that the second clause is similarly limited. Even the 2018 Opinion acknowledged that reading the two clauses differently would produce an "improbable" and "anomal[ous]" result. ADD.81; *see* ADD.42 ("The OLC's current construction of the second clause gives rise to an even more serious

coherence problem" under which the two clauses "cannot easily be reconciled."). This undeniable tension is presumably why the Department has briefed this case by analyzing the second clause *first*, giving the first clause only the most cursory scrutiny: if the Department is wrong about the scope of the first clause, it surely also is wrong about the scope of the second clause.

The Wire Act's second clause prohibits wire transmissions that "entitle[] the recipient to receive money or credit" either (1) "as a result of bets or wagers," or (2) "for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a). The Department's reading of the second clause—that it applies broadly to payments related to *any* sort of bet or wager—would result in two major incongruities. First, it would mean that, even though (as explained above) the first clause prohibits transmissions of bets or wagers only when they are sports-related, the second clause would prohibit transmissions regarding payouts for *any* bets, even lawful, non-sports-related ones. *See* ADD.100 (2011 Opinion rejecting this "counterintuitive patchwork of prohibitions," under which the statute would "permit wire transmissions of non-sports bets and wagers, but prohibit wire transmissions through which the recipients of

those communications would become entitled to receive money or credit as a result of those bets"); *see also* Charles P. Ciaccio, Jr., *Internet Gambling: Recent Developments and State of the Law*, 25 Berkeley Tech. L.J. 529, 536 (2010) (describing this reading as "irrational," "unreasonable," and "highly suspect," particularly because "[n]ormally Congress starts with a broad or general term and then carves out specifics," but under the Department's reading, "Congress has begun with a specific carve out and then followed it with two broader, more general prohibitions"). The government responds that this "anomaly largely falls away" so long as the first clause's first prohibition is not limited to sports betting. U.S. Br. 37 (quoting ADD.80–81). But, as explained above, that interpretation of the first clause is untenable, and so the "anomaly" is front and center.

Second, and even more "bizarre," even under the *Department's* reading of the Wire Act, the second clause "prohibits transmissions that enable a recipient to receive payment for information that facilitates both *sports and non-sports* gambling, but the first clause prohibits only transmissions of *sports-related* information." ADD.42–43. "In other words, the OLC's current interpretation incongruously permits

information transmissions that facilitate non-sports gambling in the first clause while criminalizing transmissions that enable a person to receive payment for the same transmissions in the second clause." ADD.42–43. As the district court recognized, "[i]t is bizarre to authorize an activity but prohibit getting paid for doing it." ADD.43. The Department has no response to this incoherence of its position other than to cursorily suggest that "[t]hat choice might again be explained by" First Amendment concerns. U.S. Br. 36. *See supra* at 46–47.

Both of these incongruities are resolved by reading both the first and second clauses as applying only to sports betting. The result is a comprehensive and coherent scheme.

b. The Department defends its "bizarre" reading chiefly on the ground that the sports modifier cannot travel "forward" to limit the second clause. U.S. Br. 30. But as the district court (ADD.37–38) and the 2011 Opinion (ADD.99) both observe, the Wire Act contains another example of this exact sort of syntax: the first clause of the Wire Act is expressly limited to transmissions "in interstate or foreign commerce," but that limitation does not appear in the second clause. 18 U.S.C. § 1084(a). Nevertheless, the Supreme Court has construed that

limitation as applying to Section 1084(a) as a whole. *United States v. Bass*, 404 U.S. 336, 341 n.8 (1971). That the interstate modifier appears only in the first clause, yet unquestionably applies to the second clause as well, shows that in drafting Section 1084(a), Congress considered the limitations set forth in the first clause to apply equally to the second clause, not anticipating that the Department or a court would attempt to read the two clauses in isolation of one another. *See* ADD.38 ("[T]his instance of borrowing by the drafters of § 1084(a) gives textual support for similarly importing the sports-gambling modifier into the second clause."); ADD.99 (2011 Opinion concluding that this example "suggests that Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause").

The Department suggests that the interstate-commerce modifier perhaps *does not* carry over to the second clause. U.S. Br. 37. But the Supreme Court expressly identified the Wire Act as an instance in which an interstate modifier applies beyond the words or phrases it immediately precedes. *See Bass*, 404 U.S. at 341 n.8.

Next, the Department contends that "[t]he interstate-commerce modifier appears before the beginning of Offense 1 and sweeps forward

. . . across the entire first clause." U.S. Br. 38. That is inaccurate—the interstate modifier appears in the *middle* of the first clause, *following* the word ("transmission") that it modifies (" . . . for the transmission *in interstate or foreign commerce* of bets or wagers . . . ") and nowhere in the second clause. 18 U.S.C. § 1084(a) (emphasis added); *see also* ADD.38–39 & n.10 ("the interstate-commerce modifier appears *in* the first prohibition . . . , not prior to the prohibition" (emphasis added)). And the Department still does not explain how the modifier could reach the *second* clause under its theory. The answer, of course, is that the Wire Act, like all other statutes, should be read sensibly and in light of its context and structure. *See Bass*, 404 U.S. at 340. That mandate applies equally to the sports modifier as it does to the interstate modifier.

Finally, the Department argues that the example of the interstate-commerce modifier is inapt because "constitutional-avoidance concerns" are "not present for the sports-gambling modifier." U.S. Br. 38–39. The Supreme Court in *Bass*, however, affirmatively chose *not* to rely on the doctrine of constitutional avoidance. *See* 404 U.S. at 338–39 & n.4 (affirming for "substantially different reasons" than the lower court's reliance on "doubt about the statute's constitutionality" under "the

Government's construction"). Instead, the Supreme Court relied on the ordinary tools of statutory construction: the "natural construction of the language," the "curious reach" of the statute under the government's reading, the series-qualifier rule, the rule of lenity, statutory background, and the requirement of a clear statement before a federal law will be interpreted as reaching traditionally local criminal conduct. *Id.* at 339–49.

3. Any Remaining Ambiguity Should Be Construed Against The Government.

Even if the Department's dubious arguments were accepted, the statute at most would be ambiguous, and "any ambiguity must be resolved in favor of lenity." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408–09 (2003). If it is even "arguably true" that the Wire Act is "less than clear," then the rule of lenity "adds a measure of further support to" NeoPollard's narrower reading. *United States v. Douglas*, 644 F.3d 39, 44 (1st Cir. 2011). Thus, "when there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *United States v. Burhoe*, 871 F.3d 1, 20 (1st Cir. 2017). "This

familiar rule of statutory construction applies even" when courts construe a criminal statute "in a declaratory judgment action, a civil context." *Bingham, Ltd. v. United States*, 724 F.2d 921, 924–25 (11th Cir. 1984). Given that only two years ago OLC held the opposite position on the Wire Act's meaning, even if the Department's new interpretation is a permissible one, it surely is not the *only* permissible reading. The Wire Act therefore must be construed narrowly.

B. Legislative Background And History Confirm The Act's Limited Reach.

The text and structure of the Wire Act being apparent on its face, this Court need go no further to discern the scope of the Act. But even if the Court were to examine the background of the Wire Act, it would find that the Wire Act's pre-enactment and post-enactment history confirms that it was designed to cover only sports betting. *See* ADD.47.

1. The Wire Act was enacted in 1961 as part of then-Attorney General Robert F. Kennedy's effort to combat organized-crime syndicates by interrupting the flow of bookmaking funds, which made up a significant portion of their illicit revenue. *See* Martin R. Pollner, *Attorney General Robert F. Kennedy's Legislative Program to Curb Organized*

Crime and Racketeering, 28 Brook. L. Rev. 37, 38 (1961). "[T]he only type of gambling activity for which crime syndicates were using wire communication facilities at that time was bookmaking." Ciaccio, *supra*, at 537.

When the Senate was considering the first draft of the bill, Herbert Miller, the Assistant Attorney General of the Criminal Division, testified that "[t]his bill, *of course*, would not cover [gambling on other than a sporting event or contest] because it is limited to sporting events or contests." J.A.92 (emphasis added). Moreover, testimony in support of the bill in both the Senate and the House focused on the Act's effect on bookmaking and other sports betting. *See*, *e.g.*, J.A.87 (statement of R. Kennedy); J.A.104–06 (statement of F. O'Connor); J.A.108 (statement of N. Skolnik). And when the House Judiciary Committee was considering the Wire Act, Chairman Emanuel Celler noted: "[t]his particular bill involves the transmission of wagers or bets and layoffs on horseracing and other sporting events." 107 Cong. Rec. 16,533 (1961) (statement of E. Celler).

The Department places substantial weight on an amendment to the draft bill that removed two commas from Section 1084(a), claiming this

change indicates that Congress deliberately broadened the scope of the Act. U.S. Br. 41. This interpretation of the removal of punctuation was soundly rebutted by the district court (ADD.50–51) for reasons not even acknowledged by the Department on appeal. And in fact, this drafting history supports *NeoPollard's* reading of the statute, not the Department's.

When the Department first introduced a draft of the Wire Act to Congress, it contained only one clause, targeting wire-communication facilities that transmitted "bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest." ADD.62 (S. 1656, 87th Cong. § 2 (Apr. 18, 1961)). All parties agree that this draft was plainly limited to sports betting. U.S. Br. 41; ADD.82.

The text of the bill was then amended into its final form. *See* ADD.63 (S. 1656, 87th Cong. § 2 (July 24, 1961)). As detailed in the Senate report, the bill was revised to target the entities that were engaged in the business of betting or wagering—*i.e.*, bookmakers—rather than wire-communication facilities, and to add the second clause, "which is designed to close another avenue utilized by gamblers for the conduct of their business." S. Rep. No. 87-588, at 2 (1961).

The Department points to the fact that the final version of the bill removed the commas before and after the phrase "or information assisting in the placing of bets or wagers." U.S. Br. 41; *see* ADD.63. But it is inconceivable that Congress would seek to dramatically expand the scope of the Wire Act by doing nothing more than omitting two commas. Nowhere did the report suggest that the amendment was intended to substantially alter the scope of the Wire Act to include a whole swath of gaming activities—lotteries, poker, slots, numbers games—not previously covered. *See* ADD.51 ("The report does not even hint that by omitting a single comma from the original bill, the Committee also intended to dramatically expand the scope of prohibited transmissions."). It is "improbable" that Congress intended to effect such a dramatic transformation if there is not "even any mention in the legislative history" of the change. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988). In fact, as the district court observed, the stricken text in the amendment does not even accurately reflect the comma preceding "on any sporting event or contest" in the original draft, suggesting that the deletion of the comma was nothing more than a scrivener's error. ADD.50. The apparently inadvertent

omission of one or two commas is "too 'subtle a move' to support such a 'fundamental change in the scope'" of the Act. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016).

Far more probative is the fact that *after* the bill was amended, the Department *continued* to assert that the Wire Act was limited to sports gambling. In subsequent testimony, Deputy Attorney General Byron White confirmed that the revised bill was "aimed now at those who use the wire communication facility for the transmission of bets or wagers *in connection with a sporting event*." J.A.361–62 (emphasis added).[7]

2. If the Act's pre-enactment history were not already conclusive, Congress's post-enactment treatment of the Act resolves any doubt. *See MasterCard*, 132 F. Supp. 2d at 480 (discussing post-enactment history).

No less than five times since the Act's passage, members of Congress have introduced legislation in an attempt to *broaden* the Wire

[7] The Department points to post-enactment memoranda in which Byron White does not expressly mention the Act's limited scope. U.S. Br. 42. But as the district court recognized, ADD.52 n.14, not only did those memoranda postdate Congress's passage of the Act, they also are patently incomplete in that they fail to note that at least one of the Act's prohibitions *is* undisputedly focused only on sports gambling, *see* J.A.132, J.A.134.

Act to cover more than sports gambling—precisely what the Department now claims the Act *already* does. *See* Crime Prevention Act of 1995, S. 1495, 104th Cong. § 1501; Computer Gambling Prevention Act of 1996, H.R. 3526, 104th Cong. § 2; Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. §§ 2–3; Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. § 2; Restoration of America's Wire Act, H.R. 707, 114th Cong. § 2 (2015). These repeated efforts would make no sense if the Department's interpretation of the Wire Act were correct. Indeed, supporters of these bills appeared to understand the significant change that would occur if the Wire Act were amended. *See Internet Gambling Prohibition Act of 1999: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 29 (2000) (statement of Sen. Kyl) ("we need to bring the 1961 Telephone and Wire Act up to date—that is the sports gambling prohibition—and extend it to the casinos").

As in 1961, the Department sent representatives to Congress to testify as to its view of the proposed amendments. On three occasions, Deputy Assistant Attorney General Kevin DiGregory testified to Congress that "Section 1084 criminalizes those betting and wagering businesses that transmit bets or wagers on sporting events or contests

over the Internet." 106th Cong. 36; *see also Internet Gambling Prohibition Act of 1997: Hearings on H.R. 2380 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 78 (1998) (the Wire Act "currently prohibits someone in the business of betting and wagering from using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers on any sporting event or contest"); *Internet Gambling Prohibition Act of 1999: Hearing Before the Subcomm. on Telecomms., Trade, & Consumer Prot. of the H. Comm. on Commerce*, 106th Cong. 88 (2000) ("Section 1084 applies to sports betting but not to contests like a lottery.").

If there were any lingering doubt about the scope of the Wire Act, the history and treatment of the Act resolve it in favor of NeoPollard and the Commission.

III. The 2018 Opinion Is Final Agency Action Reviewable Under The APA.

The district court was also correct to conclude that the 2018 Opinion is "final agency action" under the APA. ADD.27. And the APA claim is independently justiciable because in the context of the APA, pre-enforcement review is "the norm." *Clean Air Implementation Project v.*

EPA, 150 F.3d 1200, 1204 (D.C. Cir. 1998); *see also Abbott Labs.*, 387 U.S. at 139–41; *Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 604 (D.C. Cir. 1995) (agency rules are "typically reviewable without waiting for enforcement").

Finality of agency action is a "pragmatic" and "flexible" inquiry. *Abbott Labs.*, 387 U.S. at 149–50. Final agency action must (1) "mark the consummation of the agency's decisionmaking process," and (2) determine "rights or obligations" or establish "legal consequences." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). The 2018 Opinion satisfies both of these criteria.

First, the 2018 Opinion marks the consummation of the agency's decision-making process. The Department contends that the 2018 Opinion is not final because it did not specifically address NeoPollard's liability or the applicability of the Wire Act to state lotteries and private vendors. U.S. Br. 45. Even if that were true—and it is a dubious proposition at best—the 2018 Opinion is undisputedly final as to the issue it addressed: whether the Wire Act covers more than sports betting. ADD.72. No agency action anticipates and resolves all potential issues flowing from it. For example, in *U.S. Army Corps of Engineers v. Hawkes*

Co., the Supreme Court held that the agency's determination that certain property contained "waters of the United States" was final agency action, even though the agency had not determined whether the challenger was unlawfully discharging pollutants into those waters or might be able to obtain a license. 136 S. Ct. 1807, 1813–14 (2016). Similarly, here, the mere possibility that the Department might, at some unspecified time in the future, address a *different* legal question bearing on NeoPollard's liability does not make the 2018 Opinion any less final as to the question on which it *did* opine. And contrary to the Department's argument (at 46), it *has* adopted the 2018 Opinion as its working law, ADD.90, and acknowledged that the opinion is "binding" as to the Department, ADD.85.

Second, legal obligations flow from the 2018 Opinion. In the 2018 Opinion, the Department exposed numerous industry participants to potential criminal prosecution, and likewise opened the door to criminal or civil RICO liability. *See* 18 U.S.C. § 1961(1); *see also Frozen Food Express v. United States*, 351 U.S. 40, 44 (1956) (holding that agency order warning regulated parties that they undertake certain conduct "at the risk of incurring criminal penalties" is final agency action). The 2018

Opinion also empowers federal, state, or local law enforcement agencies to order that NeoPollard be disconnected from any wire-based services that the FCC classifies as "common carrier[s]." 18 U.S.C. § 1084(d).

Additionally, the Department's reversal divests NeoPollard of a constitutional fair-notice defense it would have had to a Wire Act prosecution. *United States v. Penn. Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973). The Department contends that OLC only "provides legal guidance to other parts of the government." U.S. Br. 50. But the only plausible explanation for OLC's publication of the 2018 Opinion and the Enforcement Directive was to advise companies like NeoPollard of the alleged unlawfulness of their activities. *See* ADD.89 n.19 (2018 Opinion noting that some individuals "reasonably relied upon our 2011 Opinion" and "may have a defense" for acts taken "after the publication of that opinion and prior to the publication of this one").

The Department also relies (at 49) on *Valero Energy Corp. v. EPA*, 927 F.3d 532 (D.C. Cir. 2019), where the court held that "an agency works no legal effect merely by expressing its view of the law." *Id.* at 536. But that case explicitly distinguished an agency action that "expose[s] a[] regulated party to the possibility of an enforcement action or to enhanced

fines or penalties." *Id.* Thus, agency action imposes legal obligations where it "effectively declare[s] the [challenger's] operations unlawful," "cast[s] a cloud of uncertainty over the viability of [the challenger's] ongoing business," and puts the challenger "to the painful choice between costly compliance and the risk of prosecution." *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011). The 2018 Opinion plainly possesses all of those characteristics. It is final agency action, and reviewable under the APA.

Because the 2018 Opinion is final agency action, it must be set aside if it is "not in accordance with law." 5 U.S.C. § 706(2)(A). For the reasons set forth above, the 2018 Opinion is contrary to the law, and the district court therefore was correct to vacate the opinion.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Dated: March 2, 2020

Respectfully submitted,

/s/ *Matthew D. McGill*

Theodore B. Olson
Matthew D. McGill
Counsel of Record
Lochlan F. Shelfer
Joshua M. Wesneski
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mmcgill@gibsondunn.com

Debra Wong Yang
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071
(213) 229-7472

Counsel for Plaintiffs-Appellees NeoPollard Interactive LLC and Pollard Banknote Limited

CERTIFICATE OF COMPLIANCE

1. The foregoing Response Brief for Appellees NeoPollard Interactive LLC and Pollard Banknote Limited complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,989 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point New Century Schoolbook font.

Dated: March 2, 2020 /s/ *Matthew D. McGill*

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2020, I caused the foregoing Response Brief for Plaintiffs-Appellees NeoPollard Interactive LLC and Pollard Banknote Limited to be electronically filed with the Clerk of the Court via the Court's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ *Matthew D. McGill*

ADDENDUM

Addendum Contents

WHETHER PROPOSALS BY ILLINOIS AND NEW YORK TO USE THE INTERNET AND OUT-OF-STATE TRANSACTION PROCESSORS TO SELL LOTTERY TICKETS TO IN-STATE ADULTS VIOLATE THE WIRE ACT

Interstate transmissions of wire communications that do not relate to a "sporting event or contest" fall outside the reach of the Wire Act.

Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests, the Wire Act does not prohibit them.

September 20, 2011

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

You have asked for our opinion regarding the lawfulness of proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults. *See* Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Lanny A. Breuer, Assistant Attorney General, Criminal Division (July 12, 2010) ("Crim. Mem."); Memorandum for Jonathan Goldman Cedarbaum, Acting Assistant Attorney General, Office of Legal Counsel, from Lanny A. Breuer, Assistant Attorney General, Criminal Division (Oct. 8, 2010) ("Crim. Supp. Mem."). You have explained that, in the Criminal Division's view, the Wire Act, 18 U.S.C. § 1084 (2006), may prohibit States from conducting in-state lottery transactions via the Internet if the transmissions over the Internet during the transaction cross State lines, and may also limit States' abilities to transmit lottery data to out-of-state transaction processors. You further observe, however, that so interpreted, the Wire Act may conflict with the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §§ 5361-5367 (2006), because UIGEA appears to permit intermediate out-of-state routing of electronic data associated with lawful lottery transactions that otherwise occur in-state. In light of this apparent conflict, you have asked whether the Wire Act and UIGEA prohibit a state-run lottery from using the Internet to sell tickets to in-state adults where the transmission using the Internet crosses state lines, and whether these statutes prohibit a state lottery from transmitting lottery data associated with in-state ticket sales to an out-of-state transaction processor either during or after the purchasing process.

Having considered the Criminal Division's views, as well as letters from New York and Illinois to the Criminal Division that were attached to your opinion request,[1] we conclude that interstate transmissions of wire communications that do not relate to a "sporting event or contest," 18 U.S.C. § 1084(a), fall outside of the reach of the Wire Act. Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests,

[1] *See* Letter for Portia Roberson, Director, Office of Intergovernmental Affairs, from William J. Murray, Deputy Director and General Counsel, New York Lottery (Dec. 4, 2009) ("N.Y. Letter"); Letter for Eric H. Holder, Jr., Attorney General of the United States, from Pat Quinn, Governor, State of Illinois (Dec. 11, 2009) ("Ill. Letter"); Letter for Bruce Ohr, Chief, Organized Crime and Racketeering Section, Criminal Division, from John W. McCaffrey, General Counsel, Illinois Department of Revenue (Mar. 10, 2010); Department of Revenue and Illinois Lottery, State of Illinois Internet Lottery Pilot Program (Mar. 10, 2010) ("Ill. White Paper").

the Wire Act does not, in our view, prohibit them. Given this conclusion, we have not found it necessary to address the Wire Act's interaction with UIGEA, or to analyze UIGEA in any other respect.

I.

In December 2009, officials from the New York State Division of the Lottery and the Office of the Governor of the State of Illinois sought the Criminal Division's views regarding their plans to use the Internet and out-of-state transaction processors to sell lottery tickets to adults within their states. *See* Crim. Mem. at 1; Ill. Letter; N.Y. Letter. According to its letter to the Criminal Division, New York is finalizing construction of a new computerized system that will control the sale of lottery tickets to in-state customers. Most of the tickets will be printed at retail locations and delivered to customers over the counter, but some will be "virtual tickets electronically delivered over the Internet to computers or mobile phones located inside the State of New York." N.Y. Letter at 1. New York also notes that all transaction data in the new system will be routed from the customer's location in New York to the lottery's data centers in New York and Texas through networks controlled in Maryland and Nevada. *Id.* Illinois, for its part, plans to implement a pilot program to sell lottery tickets to adults over the Internet, with sales restricted by geolocation technology to "transactions initiated and received or otherwise made exclusively within the State of Illinois." Ill. Letter at 2 (citation and internal quotation marks omitted). Illinois characterizes its program as "an intrastate lottery, despite the fact that packets of data may intermediately be routed across state lines over the Internet." Ill. White Paper at 12 (italics omitted). Both States argue in their submissions to the Criminal Division that the Wire Act is inapplicable because it does not cover communications related to non-sports wagering, and that their proposed lotteries are lawful under UIGEA. *Id.* at 11-12; N.Y. Letter at 3.

In the Criminal Division's view, both the New York and Illinois Internet lottery proposals may violate the Wire Act. Crim. Mem. at 3. The Criminal Division notes that "[t]he Department has uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling." *Id.* at 3; *see also* Crim. Supp. Mem. at 1-2. The Division also explains that "the Department has consistently argued under the Wire Act that, even if the wire communication originates and terminates in the same state, the law's interstate commerce requirement is nevertheless satisfied if the wire crossed state lines at any point in the process." Crim. Mem. at 3; *see also* Crim. Supp. Mem. at 2. Taken together, these interpretations of the Wire Act "lead[] to the conclusion that the [Act] prohibits" states from "utiliz[ing] the Internet to transact bets or wagers," even if those bets or wagers originate and terminate within the state. Crim. Supp. Mem. at 2.

The Criminal Division further notes, however, that reading the Wire Act in this manner creates tension with UIGEA, which appears to permit out-of-state routing of data associated with in-state lottery transactions. Crim. Mem. at 4-5. UIGEA prohibits any person engaged in the business of betting or wagering from accepting any credit or funds from another person in connection with the latter's participation in "unlawful Internet gambling." 31 U.S.C. § 5363; *see* Crim. Mem. at 3. Under UIGEA, "unlawful Internet gambling" means "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet" in a jurisdiction where applicable federal or state law makes such a bet illegal. 31 U.S.C. § 5362(10)(A). Critically, however, UIGEA specifies that "unlawful Internet

gambling" does not include bets "initiated and received or otherwise made exclusively within a single State," *id.* § 5362(10)(B), and expressly provides that "[t]he intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made," *id.* § 5362(10)(E).

The Criminal Division is thus concerned that the Wire Act may criminalize conduct that UIGEA suggests is lawful. On the one hand, the Criminal Division believes that the New York and Illinois lottery plans violate the Wire Act because they will involve Internet transmissions that cross state lines or the transmission of lottery data to out-of-state transaction processors. Crim. Mem. at 4; Crim. Supp. Mem. at 2. On the other hand, the Division acknowledges that state-run intrastate lotteries are lawful and that UIGEA specifically provides that the kind of "intermediate routing" of lottery transaction data contemplated by New York and Illinois cannot in itself render a lottery transaction interstate. Crim. Supp. Mem. at 2; Crim. Mem. at 4-5. The Criminal Division further notes that the conclusion that the Wire Act prohibits state lotteries from making in-state sales over the Internet creates "a potential oddity of circumstances" in which "the use of interstate commerce," rather than simply supplying a jurisdictional hook for conduct that is already wrongful, would transform otherwise lawful activity—state-run in-state lottery transactions—into wrongful conduct under the Wire Act. Crim. Supp. Mem. at 2.[2]

In light of this tension, the Criminal Division asked this Office to provide an opinion addressing whether the Wire Act and UIGEA prohibit state-run lotteries from using the Internet to sell tickets to in-state adults (a) where the transmission over the Internet crosses state lines, or (b) where the lottery transmits lottery data across state lines to an out-of-state transaction processor. Crim. Mem. at 5; Crim. Supp. Mem. at 1.

II.

The Criminal Division's conclusion that the New York and Illinois lottery proposals may be unlawful rests on the premise that the Wire Act prohibits interstate wire transmissions of gambling-related communications that do not involve "any sporting event or contest." *See* Crim. Mem. at 3; Crim. Supp. Mem. at 2. As noted above, both Illinois and New York dispute this premise, contending that the Wire Act prohibits only transmissions concerning sports-related wagering. *See* Ill. White Paper at 11-12; N.Y. Letter at 3; *see also In re Mastercard Int'l, Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) ("[A] plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest."), *aff'd*, 313 F.3d 257 (5th Cir. 2002). The sparse case law on this issue is divided. *Compare, e.g.*, *Mastercard*, 313 F.3d at 262-63 (holding that the Wire Act does not extend to non-sports wagering), *with United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah. 2007) (taking the opposite view), *and* Report and Recommendation of United States Magistrate Judge Regarding Gary Kaplan's Motion to Dismiss Counts 3-12, at 4-6, *United States v. Kaplan*, No. 06-CR-337CEJ (E.D. Mo. Mar. 20, 2008) (same).[3] We conclude that the Criminal

[2] State-run lotteries are exempt from many federal anti-gambling prohibitions. *See, e.g.*, 18 U.S.C. §§ 1307, 1953(b)(4) (2006).

[3] A New York court also found that subsection 1084(a) applied to gambling in the form of "virtual slots, blackjack, or roulette," but did so without analyzing the meaning of the "sporting event or contest" qualification. *See New York v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 847, 851-52 (N.Y. Sup. Ct. 1999).

Division's premise is incorrect and that the Wire Act prohibits only the transmission of communications related to bets or wagers on sporting events or contests.

The relevant portion of the Wire Act, subsection 1084(a), provides:

> 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 bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or 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) (codifying Pub. L. No. 87-216, § 2, 75 Stat. 491 (1961)).[4]

This provision contains two broad clauses. The first bars anyone engaged in the business of betting or wagering from knowingly using a wire communication facility "for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest." *Id.* The second bars any such person from knowingly using a wire communication facility to transmit communications that entitle the recipient to "receive money or credit" either "as a result of bets or wagers" or "for information assisting in the placing of bets or wagers." *Id.*[5]

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[4] The Wire Act defines "wire communication facility" as "any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission." 18 U.S.C. § 1081 (2006).

[5] The Criminal Division reads this second clause of subsection 1084(a) as if it were two separate clauses: the first prohibiting the use of a wire communication facility "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers," and the second prohibiting the use of a wire communication facility "for information assisting in the placing of bets or wagers." *See* Crim. Mem. at 3; Crim. Supp. Mem. at 1 n.1. We do not find this reading convincing. Under that reading, the latter clause would prohibit the "use[] [of] a wire communication facility . . . for information assisting in the placing of bets or wagers," but it is unclear what, if anything, "us[ing]" a wire communication facility "for information" would mean. This difficulty could be remedied by reading the phrase "the transmission of" into the statute. However, doing so would both add words to the text and make the last clause in subsection 1084(a)—prohibiting use of a wire facility "for [the transmission of] information assisting in the placing of bets or wagers"—overlap with the first part of subsection 1084(a), which prohibits using wire communications for "the transmission . . . of . . . information assisting in the placing of bets or wagers on any sporting event or contest." This redundancy counsels against the Criminal Division's reading. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (invoking "rule against superfluities"). We believe the second half of subsection 1084(a) is better read as a single prohibition barring "the transmission of a wire communication which entitles the recipient *to receive money or credit* [*either*] as a result of bets or wagers[] *or* for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a) (emphasis added). This reading avoids the illogic and redundancy of the first reading. It is also supported by the Wire Act's legislative history, which characterizes the second half of subsection 1084(a) as a provision that would prohibit "the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering," S. Rep. No. 87-588, at 2 (1961)—*not* as a set of two provisions that both would prohibit the transmission of wire communications entitling the recipients to receive money or credit as a result of bets or wagers *and* broadly bar the transmission of information assisting in the placing of bets or wagers. *See* H.R. Rep. No. 87-967, at 2 (1961) (subsection (a) "also prohibits the transmission of a wire communication which entitled the recipient to receive

Our question is whether the term "on any sporting event or contest" modifies each instance of "bets or wagers" in subsection 1084(a) or only the instance it directly follows. The second part of the first clause clearly prohibits a person who is engaged in the business of betting or wagering from knowingly using a wire communication facility to transmit "information assisting in the placing of bets or wagers on any sporting event or contest" in interstate or foreign commerce. *Id.* § 1084(a). It is less clear that the "sporting event or contest" limitation also applies to the first part of the first clause, prohibiting the use of a wire communication facility to transmit "bets or wagers" in interstate or foreign commerce, or to the second clause, prohibiting the transmission of a wire communication "which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." *Id.* For the reasons set forth below, we conclude that both provisions are limited to bets or wagers on or wagering communications related to sporting events or contests. We begin by discussing the first part of the first clause, and then turn to the second clause.

A.

In our view, it is more natural to treat the phrase "on any sporting event or contest" in subsection 1084(a)'s first clause as modifying both "the transmission in interstate or foreign commerce of bets or wagers" and "information assisting in the placing of bets or wagers," rather than as modifying the latter phrase alone. The text itself can be read either way—it does not, for example, contain a comma after the first reference to "bets or wagers," which would have rendered our proposed reading significantly less plausible. By the same token, the text does not contain commas after *each* reference to "bets or wagers," which would have rendered our proposed reading that much more certain. *See* 18 U.S.C. § 1084(a) ("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 bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . . .").

Reading "on any sporting event or contest" to modify "the transmission . . . of bets or wagers" produces the more logical result. The text could be read to forbid the interstate or foreign transmission of bets and wagers of all kinds, including non-sports bets and wagers, while forbidding the transmission of information to assist only sports-related bets and wagers. But it is difficult to discern why Congress, having forbidden the transmission of *all* kinds of bets or wagers, would have wanted to prohibit only the transmission of information assisting in bets or wagers concerning sports, 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. *See id.*; *see also id.* § 1084(b) (providing exceptions for news reporting, and for transmissions of wagering information from one state where betting is legal to another state where betting is legal, both expressly relating to "sporting events or contests"). The more reasonable inference 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. Given that this interpretation is an equally plausible reading of the text and makes better sense of the statutory

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money or credit as a result of a bet or wager or for information assisting in the placing of bets or wagers"), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2632.

scheme, we believe it is the better reading of the first clause. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) ("[O]ur construction . . . must, to the extent possible, ensure that the statutory scheme is coherent and consistent.").

The legislative history of subsection 1084(a) supports this conclusion. As originally proposed, subsection 1084(a) would have imposed criminal penalties on anyone who "leases, furnishes, or maintains any wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of *bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest* . . . ." S. 1656, 87th Cong. § 2 (1961) (as introduced) (emphasis added). The commas around the phrase "or information assisting in the placing of bets or wagers" make clear that the phrase "on any sporting event or contest" modifies both "bets or wagers" and "information assisting in the placing of bets or wagers."

In redrafting subsection 1084(a), the Senate Judiciary Committee altered the provision's first clause, changing the class of covered persons and removing the commas after both references to "wagers," and added a second clause prohibiting transmissions relating to "money or credit" (which we discuss below in section II.B). The Senate Judiciary Committee Report noted that the purpose of this amendment was to limit the subsection's reach to persons engaged in the gambling business, and to expand its reach to include "money or credit" communications:

> The second amendment changes the language of the bill, as introduced (which prohibited the leasing, furnishing, or maintaining of wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of bets or wagers), to prohibit the use of wire communication facility by persons engaged in the business of betting or wagering, in the belief that the individual user, engaged in the business of betting or wagering, is the person at whom the proposed legislation should be directed; and has further amended the bill to prohibit the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering which is designed to close another avenue utilized by gamblers for the conduct of their business.

S. Rep. No. 87-588, at 2 (1961). Nothing in the legislative history of this amendment suggests that, in deleting the commas around "or information assisting in the placing of bets or wagers" and adding subsection 1084(a)'s second clause, Congress intended to expand dramatically the scope of prohibited transmissions from "bets or wagers . . . on any sporting event or contest" to *all* "bets or wagers," or to introduce a counterintuitive disparity between the scope of the statute's prohibition on the transmission of bets or wagers and the scope of its prohibition on the transmission of information assisting in the placing of bets or wagers. *See also* 107 Cong. Rec. 13,901 (1961) (Explanation of S. 1656, Prohibiting Transmission of Bets by Wire Communications, submitted for the record by Sen. Eastland, Chairman, S. Judiciary Comm.) (describing Senate Judiciary Committee's two major amendments to S. 1656 without mentioning an expansion of prohibited wagering to reach non-sports wagering); *cf. Report of Proceedings: Hearing Before the S. Comm. on the Judiciary, Exec. Sess.*, 87th Cong. 55 (1961) ("Senate Judiciary Comm. Exec. Session") (statement of Byron R. White, Deputy Att'y Gen.) (the bill, as amended, "is aimed now at those who use the wire communication facility for the

transmission of bets or wagers in connection with a sporting event").[6] Given that such changes would have significantly altered the scope of the statute, we think this absence of comment in the legislative history is significant. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.").

B.

We likewise conclude that the phrase "on any sporting event or contest" modifies subsection 1084(a)'s second clause, which prohibits "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a). The qualifying phrase "on any sporting event or contest" does not appear in this clause. But in our view, the references to "bets or wagers" in the second clause are best read as shorthand references to the "bets or wagers on any sporting event or contest" described in the first clause.

Although Congress could have made such an intent even clearer by writing "*such* bets or wagers" in the second clause, the text itself is consistent with our interpretation. And the interpretation gains support from the fact that the phrase "in interstate and foreign commerce" is likewise omitted from the second clause, even though Congress presumably intended *all* the prohibitions in the Wire Act, including those in the second clause, to be limited to interstate or foreign (as opposed to intrastate) wire communications. *See* Crim. Mem. at 3 (to violate the Wire Act, the wire communication must "cross[] state lines"); *see also*, *e.g.*, H.R. Rep. No. 87-967, at 1-2 ("The purpose of the bill is to . . . aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information *in interstate and foreign commerce*.") (emphasis added), *reprinted in* 1961 U.S.C.C.A.N. at 2631. This omission suggests that Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause.

Reading the entire subsection, including its second clause, as limited to sports-related betting also makes functional sense of the statute. *Cf. Corley v. United States*, 129 S. Ct. 1558, 1567 n.5 (2009) (construing the statute as a whole to avoid "the absurd results of a literal reading"). On this reading, all of subsection 1084(a)'s prohibitions serve the same end, forbidding wagering, information, and winnings transmissions of the same scope: No person may send a wire communication that places a bet on a sporting event or entitles the sender to

[6] The legislative history indicates that the Department of Justice played a significant role in drafting S. 1656 as part of the Attorney General's program to fight organized crime and syndicated gambling. *See, e.g.*, S. Rep. No. 87-588, at 3 (noting that S. 1656 was introduced by the committee chairman on the recommendation of the Attorney General); *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 12 (1961) ("Senate Hearings") (statement of Robert F. Kennedy, Att'y Gen.) ("We have drafted this statute carefully to protect the freedom of the press."), *quoted in* S. Rep. No. 87-588, at 3; Senate Judiciary Comm. Exec. Session at 54-55 (statement of Byron R. White, Deputy Att'y Gen.) (describing amendments to S. 1656 negotiated by the Justice Department); *Legislation Relating to Organized Crime: Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. 5 (1961) ("House Hearings") (statement of Rep. McCulloch) (referring to "the legislative proposals of the Kennedy administration").

receive money or credit as a result of a sports-related bet, and no person may send a wire communication that shares information assisting in the placing of a sports-related bet or entitles the sender to money or credit for sharing information that assisted in the placing of a sports-related bet.

Reading subsection 1084(a) to contain some prohibitions that apply solely to sports-related gambling activities and other prohibitions that apply to all gambling activities, in contrast, would create a counterintuitive patchwork of prohibitions. If the provision's second clause is read to apply to *all* bets or wagers, subsection 1084(a) as a whole would prohibit using a wire communication facility to place bets or to provide betting information only when sports wagering is involved, but would prohibit using a wire communication facility to transmit *any and all* money or credit communications involving wagering, whether sports-related or not. We think it is unlikely that Congress would have intended to permit wire transmissions of non-sports bets and wagers, but prohibit wire transmissions through which the recipients of those communications would become entitled to receive money or credit as a result of those bets. We think it similarly unlikely that Congress would have intended to allow the transmission of information assisting in the placing of bets or wagers on non-sporting events, but then prohibit transmissions entitling the recipient to receive money or credit for the provision of information assisting in the placing of those lawfully-transmitted bets.

The legislative history of subsection 1084(a) supports our reading of the text. *Cf. Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope.") (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989)); *cf. Green*, 490 U.S. at 527 (Scalia, J., concurring) (finding it "entirely appropriate to consult all public materials, including the background of [Federal] Rule [of Evidence] 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word 'defendant' in the Rule"). To begin, when Congress revised the Wire Act during the legislative process to add the second clause, it indicated (as noted above) that its purpose in doing so was to "further amend[] the bill to prohibit the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering[,] which is designed to close another avenue utilized by gamblers for the conduct of their business." S. Rep. No. 87-588, at 2. There is no indication that Congress intended the prohibition on money or credit transmissions to sweep substantially more broadly than the underlying prohibitions on betting, wagering, and information communications, let alone any discussion of any rationale behind such a counterintuitive scheme. *Cf. Am. Trucking*, 531 U.S. at 468.

More broadly, the Wire Act's legislative history reveals that Congress's overriding goal in the Act was to stop the use of wire communications for sports gambling in particular. Congress was principally focused on off-track betting on horse races, but also expressed concern about other sports-related events or contests, such as baseball, basketball, football, and boxing. The House Judiciary Committee Report, for example, explains:

> Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present, the immediate receipt of information as to results of a horserace permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events. The availability of wire communication facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a particular sporting event begins.

H.R. Rep. No. 87-967 at 2, *reprinted in* 1961 U.S.C.C.A.N. at 2631-32 (reprinted report entitled "Sporting Events—Transmission of Bets, Wagers, and Related Information"); *see also* 107 Cong. Rec. 16,533 (1961) (statement of Rep. Celler, Chairman, H. Judiciary Comm.) ("This particular bill involves the transmission of wagers or bets and layoffs on horseracing and other sporting events."); House Hearings at 24-26 (statement of Robert F. Kennedy, Att'y Gen.) (describing horse racing bookmaking operations and the importance to the bookmaker of rapid inbound and outbound communications); House Hearings at 236-38 (statement of Frank D. O'Connor, District Attorney, Long Island City, N.Y.) (describing the operation of the Delaware Sports Service, a wire service that enables bookies and gambling syndicates to lay off horse race bets with other bookies, reduce odds on a horse, and even cheat by taking bets after a race has finished).

Legislative history from the Senate similarly suggests that Congress's motive in enacting the Wire Act was to combat sports-related betting. The Explanation of S. 1656, Prohibiting Transmission of Bets by Wire Communications, provided by Chairman Eastland during the Senate debate, describes the problem addressed by the legislation this way:

> Information essential to gambling must be readily and quickly available. Illegal bookmaking depends upon races at about 20 major racetracks throughout the country, only a few of which are in operation at any one time. Since the bookmaker needs many bets in order to operate a successful book, he needs replays, including money on each race. Bettors will bet on successive races only if they know quickly the results of the prior race and the bookmaker cannot accept bets without the knowledge of the results of each race. Thus, information so quickly received as to be almost simultaneous, prior to, during, and immediately after each race with regard to starting horse, scratches of entries, probable winners, betting odds, results and the prices paid, is essential to both the illegal bookmaker and his customers.

107 Cong. Rec. 13,901 (1961); *see also* S. Rep. No. 87-588, at 4 (quoting Letter for Vice President, U.S. Senate, from Robert F. Kennedy, Att'y Gen. (Apr. 6, 1961)); Senate Hearings at 12 (statement of Robert F. Kennedy, Att'y Gen.) ("The people who will be affected [by S. 1656] are the bookmakers and the layoff men, who need incoming and outgoing wire communications in order to operate.").

Although Congress was most concerned about horse racing, testimony during the hearings also highlighted the increasing importance of rapid wire communications to "large-scale betting operations" involving other professional and amateur sporting events, such as baseball, basketball, football, and boxing. House Hearings at 25 (statement of Robert F. Kennedy, Att'y Gen.). The Attorney General testified, for instance, that recent disclosures revealed that gamblers had bribed college basketball players to shave points on games, and that up-to-the-minute information regarding "the latest 'line' on the contest," "late injuries to key players," and the like was critical to bookmakers. *Id.*; *accord* Senate Hearings at 6 (statement of Robert F. Kennedy, Att'y Gen.); *see also* House Hearings at 272 (statement of Nathan Skolnik, N.Y. Comm'n of Investigation) (bookmakers handling illegal baseball, basketball, football, hockey, and boxing wagering need wire communications to obtain "the line," to make layoff bets, and to receive race results); *id.* at 298-99 (statement of Dan F. Hazen, Assistant Vice President, W. Union Tel. Co.) (discussing baseball-sports ticker installations refused or removed by Western Union because of illegal use). This focus on sports-related betting makes sense, as the record before Congress indicated that sports bookmaking was the principal gambling activity for which crime syndicates were using wire communications at the time. *See* Charles P. Ciaccio, Jr., *Internet Gambling: Recent Developments and State of the Law*, 25 Berkeley Tech. L.J. 529, 537 (2010); *see also* Senate Hearings at 277-78 (testimony of Herbert Miller, Assistant Attorney General, Criminal Division).[7]

Our conclusion that subsection 1084(a) is limited to sports betting finds additional support in the fact that, on the same day Congress enacted the Wire Act, it also passed another statute in which it expressly addressed types of gambling other than sports

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[7] As noted above, the Justice Department played a key role in drafting S. 1656, and it understood the bill to reach only the use of wire communications for sports-related wagering and communications. The colloquy between Mr. Miller and Senator Kefauver, chairman of a committee that held hearings to investigate organized crime and gambling in the 1950s, underscores that Congress was well aware of that understanding:

> SENATOR KEFAUVER. The bill [S. 1656] on page 2 seems to be limited to sporting events or contests. Why do you not apply the bill to any kind of gambling activities, numbers rackets, and so forth?
>
> MR. MILLER. Primarily for this reason, Senator: The type of gambling that a telephone is indispensable to is wagers on a sporting event or contest. Now, as a practical matter, your numbers game does not require the utilization of communications facilities.
>
> . . . .
>
> SENATOR KEFAUVER. I can see that telephones would be used in sporting contests, and it is used quite substantially in the numbers games, too.
>
> How about laying off bets by the use of telephones and laying off bets in bigtime gambling? Does that not happen sometimes?
>
> MR. MILLER. We can see that this statute will cover it. Oh, you mean gambling on other than a sporting event or contest?
>
> SENATOR KEFAUVER. Yes.
>
> MR. MILLER. This bill, of course, would not cover that because it is limited to sporting events or contests.

Senate Hearings at 277-78.

gambling, including gambling known as the "numbers racket," which involved lottery-style games. In addressing these forms of gambling, Congress used terms wholly different from those employed in the Wire Act. For example, the Interstate Transportation of Wagering Paraphernalia Act, Pub. L. No. 87-218, 75 Stat. 492 (1961) (codified at 18 U.S.C. § 1953), specifically prohibits the interstate transportation of wagering paraphernalia, including materials used in lottery-style games such as numbers, policy, and bolita.[8] Subject to exemptions, the statute provides, in part:

> Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.

18 U.S.C. § 1953(a) (2006). The legislative history indicates that the reference to "a numbers, policy, bolita, or similar game" under subpart (c) of this provision was intended to cover lotteries. *See* H.R. Rep. No. 87-968, at 2 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2634, 2635; *see also* House Hearings at 29-30 (1961) (statement of Robert F. Kennedy, Att'y Gen.) (highlighting the need for legislation prohibiting the interstate transportation of wagering paraphernalia to help suppress "lottery traffic" and to close loopholes created by judicial decisions).

Congress thus expressly distinguished these lottery games from "bookmaking" or "wagering pools with respect to a sporting event," and made explicit that the Interstate Transportation of Wagering Paraphernalia Act applied to all three forms of gambling. 18 U.S.C. § 1953(a).[9] Congress's decision to expressly regulate lottery-style games in addition to sports-related gambling in that statute, but not in the contemporaneous Wire Act, further suggests that Congress did not intend to reach non-sports wagering in the Wire Act. *See Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 124 (1998) (construing one federal statute in light of another congressional enactment the same year).[10]

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[8] As Assistant Attorney General Herbert Miller explained, "numbers, policy, and bolita[] are similar types of lotteries wherein an individual purchases a ticket with a number." House Hearings at 350; *see generally* National Institute of Law Enforcement and Criminal Justice, United States Department of Justice, *The Development of the Law of Gambling: 1776-1976*, at 748-52 (1977) (describing the numbers game and lotteries).

[9] The Supreme Court later held that 18 U.S.C. § 1953 barred the interstate transportation of records, papers, and writings in connection with a sweepstake race operated by the state of New Hampshire. *United States v. Fabrizio*, 385 U.S. 263, 266-70 (1966). In 1975, Congress amended the statute to exempt "equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law," Pub. L. No. 93-583, § 3, 88 Stat. 1916 (1975) (codified at 18 U.S.C. § 1953(b)(4)), and established a new provision, 18 U.S.C. § 1307, exempting state-conducted lotteries from statutory restrictions governing lotteries in 18 U.S.C. §§ 1301-1304, Pub. L. No. 93-583, § 1, 88 Stat. 1916 (1975). No similar exemption for state lotteries was added to the Wire Act.

[10] The legislative history of the Wire Act does contain numerous references to "gambling information." However, in context, this term is best read as a reference to the specific kinds of gambling information covered by the statute being discussed, not evidence of an independent intent to include other kinds of gambling information

In sum, the text of the Wire Act and the relevant legislative materials support our conclusion that the Act's prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.[11]

III.

What remains for resolution is only whether the lotteries proposed by New York and Illinois involve "sporting event[s] or contest[s]" within the meaning of the Wire Act. We conclude that they do not. The ordinary meaning of the phrase "sporting event or contest" does not encompass lotteries. As noted above, a statute enacted the same day as the Wire Act expressly distinguished sports betting from other forms of gambling, including lotteries. *See supra* pp. 10-11 (discussing § 1953(e)). Other federal statutes regulating lotteries make the same distinction. *See* 18 U.S.C. § 1307(d) (2006) ("'Lottery' does not include the placing or accepting of bets or wagers on sporting events or contests.").[12] Nothing in the materials supplied by the

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within the scope of the statute—let alone an intent to include that other kind of information *only* with respect to money or credit communications. *See, e.g.*, H.R. Rep. No. 87-967, at 3 (citing the exemption in subsection 1084(b) for the transmission of "gambling information" from "a State where the placing of bets and wagers on a sporting event is legal, to a State where betting on that particular event is legal," even though subsection 1084(b) does not refer to "gambling information"), *reprinted in* 1961 U.S.C.C.A.N. at 2632; House Hearings at 353-54 (referring, in discussing H.R. 7039, 87th Cong. (1961), to "[o]ur purpose [being] to prohibit the interstate transmission of gambling information which is essential to the gambling fraternity," even though H.R. 7039 did not refer to "gambling information" but would have prohibited the transmission of wagers and wagering information only with respect to a "sporting event or contest").

We further note that the Wire Act itself uses the term "gambling information" in subsection 1084(d). *See* 18 U.S.C. § 1084(d) ("When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving *gambling information* in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber . . . .") (emphasis added). We express no opinion about the scope of that term as it is used in that statutory provision.

[11] We also considered the possibility that, in the Wire Act's reference to "any sporting event or contest," 18 U.S.C. § 1084(a), the word "sporting" modifies only "event" and not "contest," such that the provision would bar the wire transmission of "wagers on any sporting event or [any] contest." This interpretation would give independent meaning to "event" and "contest," but it would also create redundancy of its own. If Congress had intended to cover *any* contest, it is unclear why it would have needed to mention sporting events separately. Moreover, as discussed above, the legislative history of the Wire Act makes clear that Congress was focused on preventing the use of wire communications for sports gambling in particular. And, legislative proposals from the 1950s in which the phrase "any sporting event or contest" originated further confirm that Congress intended to reach only "sporting contests." A key debate at that time concerned whether to regulate "any sporting event or contest" or "any horse or dog racing event or contest." *See, e.g.*, S. Rep. No. 81-1752, at 3, 22, 28 (1950) (explaining committee amendment to bill narrowing the definition of "gambling information" from covering "any sporting event or contest" to "any horse or dog racing event or contest"); *compare* S. 3358, 81st Cong. § 2(b) (1950) (as introduced), *with* S. 3358, 81st Cong. § 2(b) (1950) (as reported by the Interstate and Foreign Commerce Committee). If Congress had intended the Wire Act's predecessors to reach *any* "contest," however, the debate over which adjectival phrase to apply to "event" would have been meaningless.

[12] In addition, the Professional and Amateur Sports Protection Act ("PASPA") prohibits a governmental entity from sponsoring, operating, or authorizing by law "a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or

Criminal Division suggests that the New York or Illinois lottery plans involve sports wagering, rather than garden-variety lotteries. Accordingly, we conclude that the proposed lotteries are not within the prohibitions of the Wire Act.

Given that the Wire Act does not reach interstate transmissions of wire communications that do not relate to a "sporting event or contest," and that the state-run lotteries proposed by New York and Illinois do not involve sporting events or contests, we conclude that the Wire Act does not prohibit the lotteries described in these proposals. In light of that conclusion, we need not consider how to reconcile the Wire Act with UIGEA, because the Wire Act does not apply in this situation. Accordingly, we express no view about the proper interpretation or scope of UIGEA.

/s/

VIRGINIA A. SEITZ
Assistant Attorney General

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professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." 28 U.S.C. § 3702 (2006). While the statute grandfathers some established state gambling schemes, a new state lottery falling within the Act's prohibitions would not be exempt. *Id.* § 3704; *see, e.g.*, *OFC Comm Baseball v. Markell*, 579 F.3d 293, 300-04 (3d Cir. 2009) (PASPA preempted aspects of Delaware statute permitting wagering on athletic contests, which were not saved by any of the statutory exceptions).

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

June 12, 2019

TO: UNITED STATES ATTORNEYS
ASSISTANT ATTORNEYS GENERAL
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

FROM: THE DEPUTY ATTORNEY GENERAL

SUBJECT: Updated Directive Regarding Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling

On January 15, 2019, Deputy Attorney General Rosenstein issued a memorandum titled "Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling," directing you to refrain from applying Section 1084(a) in criminal or civil actions to persons who engaged in conduct violating the Wire Act in reliance on the 2011 opinion of the Office of Legal Counsel (OLC), and for 90 days after the publication of OLC's revised 2018 opinion. Deputy Attorney General Rosenstein's memorandum of February 28, 2019 extended the window until June 14, 2019. A separate memorandum of April 8, 2019 directed you to refrain from applying Section 1084(a) to State lotteries and their vendors operating as authorized by State law until you received further direction from the Department.

On June 3, 2019, a federal district court in New Hampshire issued an opinion holding, *inter alia*, that Section 1084(a) applies exclusively to sports gambling. The Department is evaluating its options in response to this opinion. Accordingly, the forbearance period announced in the Deputy Attorney General's February 28 memorandum is hereby extended from June 14, 2019 to December 31, 2019 or 60 days after entry of final judgment in the New Hampshire litigation, whichever is later.

Providing this extension of the forbearance period is an internal exercise of prosecutorial discretion and does not create a safe harbor for violations of the Wire Act. All other provisions of the January 15, February 28, and April 8, 2019 memoranda remain in effect.

Any Department attorney who has questions regarding implementation of the Wire Act should contact the Criminal Division's Organized Crime and Gang Section Deputy Chief Douglas Crow for further guidance.

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

December 18, 2019

TO: UNITED STATES ATTORNEYS
ASSISTANT ATTORNEYS GENERAL
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

FROM: THE DEPUTY ATTORNEY GENERAL

SUBJECT: Updated Directive Regarding Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling

On January 15, 2019, Deputy Attorney General Rosenstein issued a memorandum titled "Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling," directing you to refrain from applying Section 1084(a) in criminal or civil actions to persons who engaged in conduct violating the Wire Act in reliance on the 2011 opinion of the Office of Legal Counsel (OLC), and for 90 days after the publication of OLC's revised 2018 opinion. Deputy Attorney General Rosenstein's memorandum of February 28, 2019 extended the window until June 14, 2019. A separate memorandum of April 8, 2019 directed you to refrain from applying Section 1084(a) to State lotteries and their vendors, if they are operating as authorized by State law, until you received further direction from the Department.

On June 3, 2019, a federal district court in New Hampshire issued an opinion holding, *inter alia*, that Section 1084(a) applies exclusively to sports gambling. The Department has appealed that decision to the U.S. Court of Appeals for the First Circuit.

On June 12, 2019, I issued a memorandum extending the forbearance period announced in Deputy Attorney General Rosenstein's February 28 memorandum to December 31, 2019 or 60 days after entry of final judgment in the New Hampshire litigation, whichever was later. In light of the pending appeal, the forbearance period described in my June 12 memorandum is hereby extended until June 30, 2020.

All other provisions of the January 15, February 28, April 8, and June 12, 2019 memoranda remain in effect.

Any Department attorney who has questions regarding implementation of the Wire Act should contact the Criminal Division's Organized Crime and Gang Section Deputy Chief Douglas Crow for further guidance.