No. 19-1835

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellees,

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, No. 19-cv-163-PB
District Judge Paul Barbadoro

BRIEF OF NEW JERSEY IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE

The State of New Jersey respectfully submits this brief *amicus curiae* in support of the Appellees. Like the Appellees, New Jersey asks the Court to affirm the District Court's opinion declaring unlawful the Department of Justice's ("DOJ") 2018 Opinion changing its interpretation of the Wire Act, 18 U.S.C. § 1084 ("the Act" or "the Statute"). The DOJ's 2018 Opinion reversed its 2011 Opinion, which stated the Wire Act applies solely to the use of the wires for sports-related gambling.

New Jersey submits this brief pursuant to FRAP 29(a)(2) so that this Court can more fully consider the tremendous impact that its decision will have on States, businesses, and people both inside and outside of New Hampshire. In New Jersey's case, in addition to having invested in a lottery as New Hampshire has done, New Jersey also developed a thriving non-sports-related legal Internet gaming industry ("iGaming") in response to the DOJ's 2011 express authorization of such Internet gambling. This burgeoning iGaming industry annually yields hundreds of millions of dollars in private revenue and tens of millions of dollars to New Jersey's economy in State taxes and fees. The District Court's correct interpretation of the Wire Act has allowed New Jersey's iGaming industry to continue, staving off the potential loss of significant revenue for the State and thousands of jobs for its residents.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's holding that the Wire Act's prohibitions on interstate gambling apply only to sports-related betting and contests. The District Court's analysis of the statutory text and legislative history of the Wire Act provides reason alone for this Court to affirm. However, there is an additional reason why this Court should affirm the well-reasoned decision below. The Department of Justice's 2018 Opinion reinterpreting the Wire Act can be struck down because the DOJ failed adequately to consider the very significant reliance interests that resulted from the decisions of multiple States that developed and built well-regulated, state-sanctioned gambling industries in reliance on DOJ's previous 2011 Opinion.

New Jersey's Internet gaming industry, in particular, has generated hundreds of millions of dollars in wages and thousands of new jobs in the State. Over a three-year period, iGaming has produced over $100 million in revenue for the State, and the industry is growing at a 27 percent annual rate. All of this was accomplished only after New Jersey invested heavily in creating iGaming operations in reliance on the 2011 Opinion. The DOJ's reinterpretation of the Wire Act should be rejected not only because its statutory arguments are flawed, but also because its change of position ignores the harms that would result from reasonable actions taken by the States in reliance on DOJ's 2011 Opinion.

ARGUMENT

The DOJ's Reinterpretation Of The Wire Act Failed Adequately To Account For The Interests Of New Jersey And Other States That Created Well-Regulated Internet Gambling Industries In Reliance On The 2011 Opinion.

The District Court analyzed the plain language of the Wire Act, as well as its legislative history and other contextual evidence, and concluded that the DOJ's 2011 Opinion correctly held that the prohibitions on interstate betting contained in the Wire Act apply only to bets or wagers on a sporting event or contest. The District Court's statutory analysis of the Wire Act is doubtless correct and is reason enough for this Court to affirm the decision below.

However, there is an additional argument, which the District Court discussed only briefly, that provides an important additional basis to affirm. Even if the Wire Act could plausibly be read as applying beyond sports betting, which it cannot, the DOJ's change of position should nevertheless be reversed because of the significant reliance interests that have arisen throughout the States and their legal gambling industries as a result of the 2011 Opinion.[1] This Court may affirm the District's Court's opinion for any reason supported by the record below. *Puerto Rico Ports*

[1] The District Court acknowledged the Appellees' reliance interests, but that was not a focus of its legal analysis. *See New Hampshire Lottery Commission v. Barr*, 386 F.Supp.3d 132, 142 (D.N.H. 2019) ("After 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.").

Authority v. Umpierre-Solares, 456 F.3d 220, 224 (1st Cir. 2006); *Doe v. Anrig*, 728 F.2d 30, 32 (1st Cir. 1984).

The Supreme Court has repeatedly held that an agency's statutory interpretation must be rejected under the APA if it reverses a prior interpretation by the same agency without adequately accounting for reasonable reliance interests that have accrued in the interim. *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) (holding that an agency must "provide a more detailed justification" for a reversal "when its prior policy has engendered serious reliance interests that must be taken into account," adding "[i]t would be arbitrary and capricious to ignore such matters"); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996) ("Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion") (citation and quotation marks omitted); *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2120 (2016) (vacating agency interpretation of statute which reversed prior position because, "[i]n light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision"). As outlined in the remainder of this subsection, the DOJ's 2018 Reinterpretation, however, falls far short of adequately taking reliance interests into account.

A. New Jersey Has Made A Substantial Investment In Its State-Sanctioned And Regulated iGaming Industry In Direct Reliance Upon The DOJ's Prior Authorization.

In December 2011, in response to a request for guidance from two States, DOJ's Office of Legal Counsel ("OLC") undertook a thorough and persuasive analysis of the Wire Act, examining its text and legislative history and concluding that it prohibits only sports-related Internet gambling. *See 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"). As a result, the OLC determined that regulation of non-sports-related Internet gambling was a matter that Congress left to each State in that State's sovereign capacity.

As of 2011, New Jersey was one of many states that already had their own lotteries, including multistate games like Powerball and Mega Millions. But after 2011, and as a direct result of the 2011 Opinion, some states began to legalize, regulate, and invest heavily in internet gambling. New Jersey entered this market in 2013, at which time it began permitting non-sports-related games that were played in Atlantic City's casinos, such as poker, roulette, and craps, to be offered via iGaming websites. *See* P.L.2013, c. 27, § 1, eff. Feb. 26, 2013, operative Nov. 21, 2013.

Ensuring that legalized iGaming would be operated safely and consistently with sound public policy required a major investment of time and resources. In New Jersey, the State's Division of Gaming Enforcement ("DGE") was tasked with developing and implementing regulations, technical standards, software, testing apparatuses, geolocation technology to ensure that those participating in wagering are physically in the State, Social Security number and address verification systems to prevent underage gaming, and numerous other policies and procedures. To construct this regulatory and technical framework, DGE assembled a team of accountants, investigators, engineers, and attorneys; contracted the services of a firm with pertinent regulatory experience; and consulted with regulators, operators, and content providers from other countries and States with iGaming industries. DGE thus promulgated a comprehensive and stringent regulatory framework for the new industry. *See* N.J.A.C 13:69O-1.1 to -3.1.

New Jersey also worked closely with private operators, their ancillary partners, and other vendors. New Jersey undertook extensive background checks of such industry participants to ensure that those involved in iGaming do not have disqualifying criminal histories and that they have appropriate financial security. DGE then inspected and authorized appropriate private and public Internet platforms for launch. In addition, New Jersey also made significant investments to develop and deploy systems to prevent fraud. Thus, for example, DGE created and implemented

protocols for continuous monitoring of iGaming systems, operators, and platform providers, including technical monitoring tools that enable it to track every iGaming transaction and wager and to identify anomalies indicative of online cheating or player fraud. New Jersey also developed and installed mechanisms to help find and control problem-gaming. This entailed working with vendors and operators to develop systems to identify and report potential problem gamblers, as well as ensuring that all iGaming sites allow players to set deposit limits, loss limits, and time limits on their sessions, as well as provide an option for a minimum 72-hour "cooling off" period or self-exclusion for up to five years from iGaming.

Because of these and other safeguards, the implementation of iGaming required significant upfront capital investments in facilities, equipment, and technology by the State, operators, and ancillary companies, as well as immense time, effort, and resources, requiring countless hours of work. Capital investments, although not comprehensively computed, are estimated to be in the tens of millions of dollars.

New Jersey's iGaming industry has proven to be enormously successful. Approximately 59 companies have applied as casino service industry enterprises to conduct Internet gaming, 48 companies have applied for licenses to conduct iGaming as ancillary casino service industry enterprises, and approximately 573 vendors have filed with the State to conduct iGaming-related business. Many of

these enterprises and vendors have established places of business in New Jersey specifically to take part in this new industry, thus providing employment to many New Jerseyans. All told, since its inception in 2013, iGaming is estimated to have directly and indirectly created 3,374 jobs and paid $218.9 million in wages to employees in New Jersey.

The industry has also brought significant resources to private companies and public entities, generating approximately $998.3 million in total sales from 2013 through 2016. Over the same three-year period, iGaming produced $124.4 million in tax revenue to the State and local governments. And from November 2013 to the present, DGE has collected a total of $35 million in licensing and other fees. Moreover, it appears that New Jersey's iGaming industry has not yet reached its full potential, as revenue has grown at the rate of 27% annually since 2013.

Legalized iGaming also provides a safe and secure form of entertainment. These games are carefully regulated and offered with the assurance of trusted brands and strong player protections, as noted above. This stands in stark contrast to the risks and dangers of off-shore Internet gambling sites that proliferated before 2013 and remain problematic today. Indeed, U.S. citizens spent an estimated $5.9 billion on such unregulated sites in 2008 alone. In short, New Jersey recognized that people are going to gamble via the Internet and made the reasoned policy decision that, by legalizing and regulating the practice, it could protect players against fraud and theft

while redirecting the proceeds towards legitimate in-State industries and State and local governments, to the ultimate benefit of New Jersey's residents.

If the District Court's judgment is reversed, the 2018 Reinterpretation, and the DOJ Memo which adopts it for enforcement of the Wire Act nationwide, has the potential to end New Jersey's iGaming industry.[2] Some aspects of the industry are specifically designed to operate in multiple states. For example, New Jersey, Delaware, and Nevada have entered into a multi-state agreement to provide for and regulate Internet poker among people in each State. This may be unlawful under the 2018 Reinterpretation. In addition, other aspects of New Jersey's iGaming industry involve interstate use of the wires, notwithstanding the best efforts of the regulators, operators, and participants. It is simply the nature of the Internet that even purely intrastate transactions may travel through channels that cross state lines. For example, when an individual in New Jersey plays an Internet casino game hosted by an Atlantic City casino, the information transmitted for gameplay or payment, whether from a bank or credit card company, may well travel through servers in

[2] The day after the OLC published its 2018 Reinterpretation, the Deputy Attorney General issued a memorandum to all United States Attorneys, Assistant Attorneys General, and the Director of the Federal Bureau of Investigation, decreeing that the 2018 Reinterpretation was the DOJ's official position on the meaning of the Wire Act, and directing federal law enforcement authorities to adhere to that interpretation in their investigative and prosecutorial capacities. *See* Memo to U.S. Attorneys, from Rod A. Rosenstein, Dep. Att'y Gen., *Re: Applicability of the Wire Act to Non-Sports Gambling* (Jan. 15, 2019) ("DOJ Memo").

States other than New Jersey, as the Internet is designed to route such information by the fastest method possible, without regard to geographical boundaries. There is every reason to believe that the DOJ will attempt to prosecute those involved in such transactions in light of the 2018 Reinterpretation and the DOJ Memo. And that threat alone, regardless of the merit of such a prosecution, will devastate New Jersey's iGaming industry, as most, if not all, operators and vendors could and would not risk criminal prosecution.

As a result, the 2018 Reinterpretation, if upheld, could force New Jersey to shutter its iGaming industry, lest the operators and supporting partners risk federal felony prosecution, as well as civil liability. If that were to transpire, the financial loss to the State would be substantial. New Jersey's State government would lose an estimated $60 million in tax revenue a year; New Jersey's DGE would lose an estimated $6.7 million in fees annually; at least 300 jobs would disappear; companies that have established offices in New Jersey for the operation of online gaming would shut down, with additional job losses resulting; and the in-State private sector would lose their iGaming business to illegal offshore sites. This is in addition to the immense waste of time and resources that went into building the industry, which would have been for naught. Both the actual and the opportunity costs of this wasted effort, taken in good faith reliance upon DOJ's earlier position, would be staggering. In sum, if the 2018 Reinterpretation and DOJ Memo are

permitted to stand and these things come to pass, it would mean a tremendous public and private loss and a true injustice.

B. In Reversing Itself, The DOJ Did Not Properly Weigh The Reliance Interests That Resulted From The 2011 Opinion.

There can be no question but that the 2011 Opinion gave rise to reliance interests, exemplified by New Jersey's efforts to develop and maintain its iGaming industry.[3] As detailed above, the State's institution of iGaming after 2011 entailed the creation of regulatory standards, new software and technology, and oversight policies and procedures. These efforts were necessary to satisfy multiple objectives, including ensuring lawfulness under the Wire Act and other federal statutes;[4] providing player protection against problem gaming, theft and fraud; and promoting technical workability, ease of use, and profitability. Accordingly, New Jersey learned about and mastered the regulation of an entire industry, and hired and trained

[3] New Jersey also reasonably relied on Congress' rejection of proposed amendments to the Wire Act in 2015 and 2016. As previously noted, *supra*, those amendments were brought by opponents of Internet gambling for the express purpose of reversing the 2011 Opinion. That Congress declined to do so signaled support for the 2011 Opinion, which New Jersey properly understood to also support the lawfulness of its iGaming industry.

[4] *See, e.g.*, N.J.A.C. 13:69O-1.2(l)(14)(ix) (requiring the patron protection page to contain "Notification of Federal prohibitions and restrictions regarding Internet gaming, specifically, any limitations upon Internet gaming as set forth in 18 U.S.C. §§ 1084 et seq. (The Wire Act) and 31 U.S.C. §§ 3163 through 3167 (UIEGA).").

the requisite staff and/or private vendors. Such efforts entailed many millions of dollars' worth of capital and person-power expenditures over a multi-year period.

As a result, New Jersey has a reasonable, investment-backed expectations in its iGaming industry. And, as previously discussed, those expectations have been met: iGaming now generates hundreds of millions of dollars annually, with these funds contributing to the public coffer and employee wages, in addition to private revenues. Over the past several years, New Jersey has budgeted and planned for a continuing return on its investment, as have operators, vendors, and new employees of iGaming. Thus, were the iGaming industry to close abruptly, New Jersey would suffer a devastating setback. The State would lose: funding from taxes and fees; hundreds of jobs for its citizens; the secondary gains to its economy from the development of new in-state businesses and jobs; and, of course, years' worth of public and private resources that could have been expended on any number of other projects.

Under these circumstances, DOJ was required to "take account of [New Jersey's and other states'] legitimate reliance on [its] prior interpretation," *Smiley*, 517 U.S. at 741, and "provide a more detailed justification" for the 2018 Reinterpretation than the 2011 Opinion, *Fox Television*, 556 U.S. at 515-16. As then-Judge Kavanaugh wrote in *Mingo Logan Coal Co. v. E.P.A.*, an agency seeking to reverse a prior decision in the face of reliance-related losses "must determine that

the benefits of its desired action outweigh those costs." 829 F.3d 710, 736 (D.C. Cir. 2016) (Kavanaugh, J. dissenting) (citation, quotation marks, and modification omitted). In the 2018 Reinterpretation, DOJ did none of that. Instead, the 2018 Reinterpretation acknowledged only the reliance interests of States that began selling lottery tickets via the Internet after the 2011 Opinion, and it did that only in passing. *See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. (2018) ("2018 Reinterpretation") at 22. DOJ thus failed to recognize, in any way, the interests of New Jersey or any other states with Internet gambling industries, which are different both in scope and in kind from Internet lottery sales. DOJ's failure to even recognize the magnitude of this reliance interest and the threat its 2018 Reinterpretation poses to entire industries not only bespeaks arbitrary governance, but, under these principles, establishes the invalidity of its decision.

Further, DOJ's treatment of even the incomplete reliance interest that it recognized – "in light of our conclusion about the plain language of the statute, we do not believe that such reliance interests are sufficient to justify continued adherence to the 2011 opinion," 2018 Reinterpretation at 22-23 – is inadequately reasoned. Far from weighing the costs of its reversal, or explaining any purported inadequacy with its 2011 policy, DOJ summarily rejected the reliance interests at stake as "not . . . sufficient." But that, of course, is precisely the sort of "conclusory statement[]" that the Supreme Court held inadequate in *Encino Motorcars*. 136 S.Ct.

at 2120 ("[i]n light of the serious reliance interests at stake, the Department's conclusory statements do not suffice to explain its decision. This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law.") (citation omitted). Nor is the DOJ's bare claim in 2018 that the Statute's text is so clear as to merit reversal of the 2011 Opinion sufficiently credible or persuasive to overcome the reliance interests at stake, particularly given its own contrary interpretation just a few years earlier. Therefore, in addition to the reasons supplied by the District Court, and the arguments raised in Appellees' Brief, the 2018 OLC Reinterpretation was properly rejected by the District Court because it failed to adequately consider the reliance interests engendered by the 2011 Opinion.

CONCLUSION

This Court should affirm the judgment of the District Court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(l), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5):

1. This brief contains 3,279 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type, which complies with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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