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,

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
(No. 19-cv-163-PB, Hon. Paul Barbadoro)

BRIEF OF *AMICUS CURIAE* iDEVELOPMENT AND ECONOMIC ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND SUPPORTING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), iDevelopment and Economic Association submits the following disclosure statement: iDevelopment and Economic Association is a non-for-profit corporation with no parent corporation, and no publicly held corporation holds 10% of more of the iDevelopment and Economic Association's stock.

Date: March 4, 2020

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STATEMENT OF INTEREST OF AMICUS CURIAE

The iDevelopment and Economic Association ("iDEA") is a Washington, D.C.-based trade association that represents the interests of the online interactive entertainment ("iGaming") industry. iDEA was formed in 2016 and currently represents approximately two dozen member-organizations from virtually every sector of the iGaming community, including operations, development, technology, supply, marketing, and payment processing. Among the iGaming businesses that iDEA member-organizations operate and support are games such as online poker, online casinos, online bingo, and online lottery ("iLottery") in States whose laws permit these activities. iDEA's members have deep and broad experience in iGaming, regulating it to protect participants, and experimenting with the approaches of different jurisdictions.

Like Plaintiffs-Appellees New Hampshire Lottery Commission ("NHLC") and NeoPollard Interactive, LLC/Pollard BankNote Limited ("NeoPollard") (collectively, "Plaintiffs-Appellees"), iDEA and its member-organizations have relied in good faith on the Department of Justice's ("DOJ" or "Department") longstanding interpretation of the Wire Act that it applies *only* to sports betting. Indeed, this understanding was formalized in 2011 when the Office of the Legal Counsel ("OLC") of the DOJ issued an opinion confirming that the Wire Act applies *only* to gambling on sporting events and not to other forms of betting and

wagering; it reasoned that the Wire Act "does not reach interstate transmissions of wire communications that do not relate to a 'sporting event or contest.'"[1] Following the 2011 Opinion, several States enacted legislation legalizing iGaming activities consistent with the OLC's direction, which led to many iDEA member-organizations investing significant sums to develop products to offer in compliance with state law and the 2011 Opinion.

After being acknowledged to be safely outside the Wire Act's prohibitions, however, iDEA and its members now suddenly find themselves on the wrong side of the DOJ and its pointed threat of prosecution based on the DOJ's new interpretation that certain aspects of the Wire Act actually apply to all forms of betting activity.[2] Thus, despite having relied in good faith on the DOJ's earlier, longstanding interpretation of the Wire Act and, as a result of that reliance, having poured millions of dollars into technology and infrastructure to establish legally compliant, state-licensed iGaming operations, iDEA and its members now face

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[1] *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*, Office of Legal Counsel, 35 Op. O.L.C. 1 (Sept. 20, 2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf (last visited Feb. 17, 2020) ("2011 Opinion").

[2] *See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, Office of Legal Counsel, 42 Op. O.L.C. 1 (Nov. 2, 2018), *available at* https://www.justice.gov/olc/file/1121531/download (last visited Feb. 17, 2020) ("2018 Opinion").

grave legal peril should the DOJ's new interpretation of the Wire Act take effect. As discussed in more detail herein, the historical federal approach to federal gambling legislation is to assist the States in the enforcement of their own laws, as opposed to restricting in-state activity made legal and licensed by state governments. The DOJ's new approach to the Wire Act would radically depart from that historical precedent and subject iDEA member-organizations, which operate and support businesses involved in online poker, online casino, and online lottery—to federal enforcement to which they were never previously subject and to which they were assured in 2011 they were not subject. Accordingly, iDEA respectfully submits this amicus curiae brief in support of Plaintiffs-Appellees and affirmance, to protect its member-organizations' distinct interests.

Pursuant to Fed. R. App. P. 29(a)(8), and in light of the District Court's permission to iDEA to participate at oral argument below, iDEA requests that the Court grant it ten minutes of oral argument. *See* Transcript of Oral Argument Before the Honorable Paul J. Barbadoro, Morning Session at 52-54, 67-68 & Afternoon Session at 49-50, April 11, 2019.

All parties have consented to the filing of this brief, which is the source of iDEA's authority to file. *See* Fed. R. App. P. 29 (a)(2).

No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief, and

no person other than iDEA or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. iDEA MEMBER-ORGANIZATIONS INVESTED SIGNIFICANT SUMS IN RELIANCE ON STATE LAWS PASSED IN THE WAKE OF THE 2011 OPINION

The Wire Act was passed in 1961 and provides, in relevant part:

> 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). In 2011, the OLC published an opinion concluding that the Wire Act applies only to sports betting. *See* 2011 Opinion. That is, the Wire Act did *not*, according to the OLC, apply to any other form of betting or wagering.

Following the 2011 Opinion, many States, including New Hampshire, Kentucky, Illinois, Georgia, Michigan, and Pennsylvania, legalized the in-state online sale of lottery tickets. Several other States, including Delaware, Pennsylvania, New Jersey, and Nevada, enacted various iGaming legislation legalizing some form of either online casino gaming, online poker, or both. Each State that has adopted iGaming legislation has developed a tight statutory

framework to regulate iGaming operations and activities that occur within its boundaries or between States that have authorized that activity. For example, the laws of each State require internet gambling providers to be licensed by the State and to limit gambling activity to the geographic confines of the State.[3]

Collectively, Delaware, Pennsylvania, New Jersey, and Nevada have issued a significant number of licenses to various iGaming businesses, including to iDEA member-organizations that now operate pursuant to state regulations.[4] As a result, the iGaming industry has experienced exponential growth in recent years. Today,

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[3] *See, e.g.*, Letter from Gurbir S. Grewal, Att'y Gen. of N.J., & Josh Shapiro, Att'y Gen. of Pa., to Hon. Matthew G. Whitaker, Acting Att'y Gen., U.S. Dep't of Justice, at 2 (Feb. 5, 2019), https://www.nj.gov/oag/newsreleases19/WireActLetter.pdf (last visited February 17, 2020) ("Since 2013, New Jersey has worked hard to keep its online betting in state, where it is lawful, and to prevent it from occurring in other states, where it is not.").

[4] *See, e.g.*, Nevada Gaming Commission Approved and Licensed Operators of Interactive Gaming, State of Nev. Gaming Control Bd., *available at* https://gaming.nv.gov/index.aspx?page=265 (last visited Feb. 17, 2020); Internet Gaming Permit Holders, New Jersey Division of Gaming Enforcement, *available at* https://www.nj.gov/oag/ge/docs/InternetGaming/internetgamingpermitholders.pdf (last visited Feb. 17, 2020); Licensed Interactive Gaming Certificateholders and Operators, Pennsylvania Gaming Control Board, *available at* https://gamingcontrolboard.pa.gov/files/licensure/reports/Online_Operator_Master_List.pdf (last visited Feb. 17, 2020). Because the State controls all licensed gaming agents, Delaware does not license private entities to operate internet gambling in the same manner as the other three States. *See* DEL. CODE ANN. tit. 29, § 4826(a) (2012) (under section 4826(a), only the operation of an "Internet Lottery" is authorized, which by definition must be operated by the State Lottery Office).

iGaming is a multi-billion-dollar industry offering customers dozens of safe, well-developed, and highly-regulated gaming options.

Like the various States that have enacted iGaming legislation, some of which provide direct iGaming or iLottery products to their residents, iDEA's member-organizations have relied in good faith on the 2011 Opinion and have, collectively, invested millions of dollars to develop markets and create iGaming products that comply with state laws and are offered pursuant to licenses issued by States. For example, iDEA member-organizations provide online poker services subject to a shared liquidity agreement involving the States of New Jersey, Delaware, and Nevada. As part of the shared liquidity agreement, online poker players in those States can all play in games together. Importantly, this service utilizes geolocation technology to ensure that players utilizing the service are physically within the borders of those three States when playing. For this type of poker play, the gaming activity still begins and ends in a State where the underlying activity is legal. Even so, certain data necessarily travels via the internet among the three States subject to the agreement. The software necessary for the shared liquidity agreement was tested and approved by state regulators.[5]

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[5] *See* Richard N. Velotta, *Nevada Pokers Players Can Now Play Online Against New Jersey Players*, Las Vegas Review Journal (May 1, 2018), *available at*

iGaming has generated significant revenue, jobs, and tax revenue in States in which it has been legalized. For example, starting at its inception in New Jersey in 2013, iGaming directly and indirectly generated 6,600 new jobs and $259 million in tax revenue, in New Jersey alone.[6] In just 2019 in New Jersey, internet gaming generated approximately $482.7 million in revenue, and approximately $72.5 million in tax revenue.[7] In Pennsylvania, where online casinos and online poker only first launched in July 2019, online casino and poker revenue was approximately $33.6 million, with tax revenue of approximately $13.3 million, in approximately six months of 2019 operation.[8] And in the 2018-19 fiscal year, the

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https://www.reviewjournal.com/business/casinos-gaming/nevada-pokers-players-can-now-play-online-against-new-jersey-players/ (last visited Feb. 17, 2020).

[6] *See NJ Economic Impact*, iDEA Growth, *available at* https://ideagrowth.org/nj-economic-impact/ (last visited Feb. 17, 2020).

[7] *See* DGE Announces December 2019 Total Gaming Revenue Results, New Jersey Division of Gaming Enforcement, *available at* https://www.nj.gov/oag/ge/docs/Financials/PressRel2019/December2019.pdf (last visited Feb. 17, 2020).

[8] *See* Gaming Control Board Reports Total Revenue Up 4.5% In Calendar Year 2019, Pennsylvania Gaming Control Board, *available at* https://gamingcontrolboard.pa.gov/?pr=892 (last visited Feb. 17, 2020).

first full year of iLottery operation in Pennsylvania, the Commonwealth generated an estimated $31.3 million in profit from iLottery.[9]

On January 14, 2019, the DOJ published a new opinion (dated November 2, 2018) reversing its position from the 2011 Opinion and concluding that certain aspects of the Wire Act do, in fact, reach beyond sports wagering to all forms of bets or wagers. *See* 2018 Opinion. The following day, the Deputy Attorney General issued a memorandum to all U.S. Attorneys, Assistant Attorneys General, and the Director of the Federal Bureau of Investigation informing them of the 2018 Opinion.[10] The Rosenstein Memo instructed federal prosecutors not to apply the new interpretation of the Wire Act for a period of 90 days; in doing so, it emphasized that the 90-day period was "not a safe harbor for violations of the Wire Act," but, rather, "an internal exercise of prosecutorial discretion." *Id.* As a result, any present conduct that does not conform to the 2018 Opinion is, according to the

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[9] *See* Pennsylvania Lottery Sales and Profits Hit New Record, Pennsylvania Lottery, *available at* https://www.palottery.state.pa.us/About-PA-Lottery/News-Events-Media/News/2019/August/Pennsylvania-Lottery-Sales-and-Profits-Hit-New-Rec.aspx (last visited Feb. 17, 2020).

[10] *See* Memorandum from Rod Rosenstein, Deputy Attorney General (January 15, 2019), *available at* https://www.justice.gov/file/1124286/download (last visited Feb. 18, 2020) ("Rosenstein Memo").

Department's interpretation, in violation of the Wire Act and subject to prosecution.[11]

The DOJ's abrupt about-face regarding the Wire Act's scope presents a serious threat to iGaming operators which have invested significant sums to develop products in reliance on new state laws enacted following the DOJ's 2011 Opinion and consistent with its confirmation that the Wire Act does not apply beyond sports wagering. Indeed, within days of the DOJ's release of the 2018 Opinion, the Pennsylvania Gaming Control Board ("PGCB") wrote to all state-licensed casino operators stating that the 2018 Opinion placed "significant restrictions on the future conduct of internet-based gambling." The letter further declared that—in light of the new opinion—the PGCB would be forced to rescind relevant parts of Pennsylvania Title 58, Regulation 809.3, which had allowed certain interactive gaming devices and associated equipment to be located across state lines, provided that the jurisdiction where the equipment was located met

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[11] Following entry of judgment by the District Court, the DOJ extended the forbearance period and reiterated that its forbearance "does not create a safe harbor for violations of the Wire Act." *See* Memorandum from Deputy Attorney General Jeffrey A. Rosen (June 12, 2019), *available at* https://www.justice.gov/opa/press-release/file/1172726/download (last visited Feb. 18, 2020). The DOJ most recently extended the forbearance period once more, now until June 30, 2020, in light of the instant appeal. *See* Memorandum from Deputy Attorney General Jeffrey A. Rosen (Dec. 18, 2019), *available at* https://www.justice.gov/opa/press-release/file/1227681/download (last visited Feb. 18, 2020) ("Rosen Memo").

specified criteria. The PGCB said that it understood that this change would likely "alter the plans of licensees in implementing expanded gaming offerings," but that the change was "commanded by the changing interpretation by federal law enforcement authorities."[12] Thus, in addition to the threat to the shared poker liquidity agreement discussed above, the effects of the 2018 Opinion are already being experienced by iGaming operators.

II. OTHER FEDERAL GAMING STATUTES, ALONG WITH FAILED LEGISLATIVE EFFORTS TO AMEND THE WIRE ACT, INDICATE THAT THE WIRE ACT IS LIMITED TO SPORTS WAGERING

A. The Federal Government's Historical Approach To Regulating Gambling Has Been To Respect Decisions Made By The States

Since our Nation's founding, "the regulation of gambling has been largely left to the state legislatures." *U.S. v. King*, 834 F.2d 109, 111 (6th Cir. 1988).[13] When the colonies and States passed legislation and engaged in prosecutions surrounding gambling, "these anti-gambling enactments and prosecutions were

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[12] Letter from Kevin O'Toole, Executive Director of the Pennsylvania Gaming Control Board, to All Casino Managers and Counsel (Jan. 18, 2019), *available at* https://www.onlinepokerreport.com/wp-content/uploads/2019/01/KFO-Ltr-to-Casino-GMs-re-DOJ-Wire-Act-Opinion-REDACTED-1-18-19.pdf (last visited Feb. 18, 2020).

[13] Although *King* involved a prosecution under the Illegal Gambling Business Act, 18 U.S.C. § 1955 ("IGBA"), in which the Court reached its decision on grounds not germane to this case, the Sixth Circuit opinion provided a helpful overview of the history of gambling regulation in the United States.

sporadic and were usually directed more at the threats to public welfare that attended gambling than at gambling itself." *Id.* The first federal gambling legislation was enacted in the 1890s when Congress passed two separate laws banning the carriage of lottery paraphernalia in interstate commerce. *See* 18 U.S.C. §§ 1301, 1302; *see also King*, 834 F.2d at 111 (discussing same). These federal lottery statutes were later amended, however, to exempt state lottery operations conducted pursuant to state law. *See, e.g.*, 2011 Opinion at 11 n.9.

In the first half of the 1900s, especially after the repeal of Prohibition eliminated a reliable source of income for criminal organizations, gambling was largely promoted via organized crime syndicates. *King*, 834 F.2d at 111–12. Congress did not address gambling again until it enacted several organized crime statutes in 1961: the Wire Act, 18 U.S.C. § 1084; the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprise Act, 18 U.S.C. § 1952 ("Travel Act"); and the Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953 ("Paraphernalia Act"). *See* I. Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Bets*, 45 Conn. L. Rev. 653, 659 (citing I. Nelson Rose & Martin D. Owens, Jr.,

Internet Gaming Law 116 (2d ed. 2009)) (stating that Wire Act was first direct federal regulation on gambling since lottery statutes).[14]

The Travel Act does not prohibit specific gambling conduct; instead, it applies to gambling offenses that violate either state or federal law. 18 U.S.C. § 1952(b)(1); *see also, e.g.*, *U.S. v. Bertman*, 686 F.2d 772, 774 (9th Cir. 1982) ("The government thus must prove as part of the Travel Act charge that the defendant has or could have violated the underlying state law . . ."); *U.S. v. Loucas*, 629 F.2d. 989, 991 (4th Cir. 1980) ("It is generally recognized that 'the existence of a state law violation is an element of the violation of the Travel Act and that the court must make a determination of whether the underlying state law has been or could have been violated.'") (quoting *United States v. Hiatt*, 527 F.2d 1048, 1051 (9th Cir. 1976)). Similarly, the Paraphernalia Act prohibits transporting gambling paraphernalia across state lines but exempts shipments to jurisdictions that permit gambling. 18 U.S.C. § 1953(b)(2), (4) & (6). In other words, the Paraphernalia Act permits transportation of gambling paraphernalia through States that prohibit

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[14] These organized crime statutes preceded the passage of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, which likewise targeted organized crime, by nine years. *See, e.g.*, Andrew St. Laurent, *Reconstituting* United States v. Lopez*: Another Look at Federal Criminal Law*, 31 Colum. J.L. & Soc. Probs. 61, 73-74 (1997) (discussing organized crime purpose of Travel Act, which led to passage of RICO for similar purposes).

gambling so long as the paraphernalia is finally delivered in a State where gambling is legal.[15]

Courts have all but held that the same exception for legalized state activity applies to cases brought under the Wire Act. *See United States v. Lyons*, 740 F.3d 702, 714 (1st Cir. 2014) ("[T]he Wire Act prohibits interstate gambling without criminalizing lawful intrastate gambling or prohibiting the transmission of data needed to enable intrastate gambling on events held in other states if gambling in both states on such events is lawful."); *United States v. Yaquinta*, 204 F. Supp. 276, 279 (N.D. W. Va. 1962) ("[T]he objective of the [Wire] Act is not to assist in enforcing the laws of the States through which the electrical impulse traversing the telephone wires pass, but the laws of the State where the communication is received.").

Consistent with venerable precedent and practice, at the joint signing ceremony for the Wire Act, Travel Act and Paraphernalia Act, President Kennedy stated that "[i]t is a pleasure to sign these three important bills which we hope will

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[15] Similarly, the Gambling Devices Transportation Act, 15 U.S.C. § 1171 *et seq.*, carves out the transportation of gambling devices to States where the device is designed to be used at establishment licensed under state laws, or where the device is made specifically lawful by a State. *Id.* § 1171(a).

aid the United States Government and the people of this country in the *fight against organized crime*," quite different from conduct legalized by the States.[16]

Gambling laws passed subsequent to the Wire Act likewise consistently have been attentive to state laws and prerogatives. In 1970, Congress IGBA "in an attempt to attack sophisticated, large-scale illegal gambling operations which Congress thought to be a major source of income for organized crime." *King*, 834 F.2d at 112. IGBA's text of the statute defines an "illegal gambling business" as one that operates in "violation of the law of a State or political subdivision in which it is conducted," thus explicitly exempting conduct made legal by the States. 18 U.S.C. § 1955(b)(1)(i); *see also, e.g.*, *U.S. v. Matya*, 541 F.2d 741, 748 (8th Cir. 1976) (recognizing that violation of a state law is element of IGBA offense). Likewise, in the Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 *et seq.*, Congress declared in its statutory "findings and policy" pronouncement that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1); *see also, e.g.*, *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 294 F.

[16] *See* Public Papers of the Presidents of the United States, John F. Kennedy: Containing the Public Messages, Speeches, and Statements of the President, January 20 to December 31, 1961, at 600 (1962) (emphasis added).

Supp. 2d 1291, 1302 (M.D. Fla. 2003) ("Section 3001(a) indicates that the states have primary responsibility in regulating gambling occurring in their state.").

In short, the historical federal approach to gambling enforcement has been simply to support States' enforcement of their own laws governing gambling, without outlawing conduct that States have opted to legalize. Consistent with this underlying history, the Supreme Court in *Murphy v. National Collegiate Athletic Association*—which recently found that the Professional and Amateur Sports Protection Act ("PASPA") was unconstitutional on anti-commandeering principles—summarized the "general federal approach to gambling" in a paragraph referencing IGBA, the Paraphernalia Act, the Wire Act, and the Travel Act. 138 S. Ct. 1461, 1483 (2018). In that discussion, the Court observed that consistent with the historical approach—as embodied by those four statutes—the Wire Act both (i) only "outlaws the interstate transmission of information that assists in the placing of a bet *on a sporting event*," *and* (ii) only applies "if the underlying gambling is *illegal* under state law." *Id.* (emphasis added).

Defying a host of contrary indicators, and what *Murphy* most recently recognized as the "general federal approach to gambling," *id.*, the DOJ's new interpretation would jeopardize iDEA member-organizations' activities conducted pursuant to state law. This includes, but is not limited to, the shared liquidity agreement for poker in Delaware, New Jersey, and Nevada—three States with

robust regulatory structures allowing for such activity—along with activities conducted by iGaming businesses in Pennsylvania under state law permitting them to locate specified equipment outside the State. Beyond departing from settled legal authorities, DOJ is breaking from a longstanding, deeply rooted federal policy not to regulate gambling directly and instead to leave policymaking to the States while assisting States in the enforcement of their own laws against *illegal* gambling. As such, the 2018 Opinion amounts to both an improper expansion of the Wire Act's narrow scope and a departure from Congress's well-considered, well-expressed intent with respect to gaming regulation.

B. Other Federal Gaming Statutes Indicate That The Wire Act's Scope Is Limited To Sports Wagering

Beyond the historical federal approach to generally allow States to determine whether gambling is illegal, the terms of the Wire Act limit the statute's application solely to sports gambling, as discussed at length by Appellees. *See* NHLC Brief at 40-51; NeoPollard Brief at 36-54. This reading is resoundingly confirmed when the text of the Wire Act is compared to that of other federal statutes that relate to gambling.

As discussed above, the Paraphernalia Act was not just enacted closely in time to the Wire Act; indeed, it was enacted on the same day. Yet the Paraphernalia Act, in addition to criminalizing conduct related to "bookmaking" or "wagering pools with respect to a sporting event," explicitly restricts paraphernalia

used "in a numbers, policy, bolita, or similar game." 18 U.S.C. § 1953(a). This language is far more inclusive than the "bets or wagers on any sporting event or contest" language found in the Wire Act. 18 U.S.C. § 1084(a). Thus, had Congress intended for the Wire Act to cover anything beyond sports gambling, it could have utilized the *exact same language* that the Paraphernalia Act—which was signed into law on the *exact same day*—utilized to reach such non-sports gambling activity. Congress's decision *not* to include such language in the Wire Act should not be seen as a mistake; clearly, Congress's intent was to limit the Wire Act to sports gambling activity, while crafting the Paraphernalia Act to extend more broadly. And, of course, the legislative history—discussed more fully by NeoPollard, *see* NeoPollard Brief at 55-59—is strongly supportive of a sports-only reading of the Wire Act. *See, e.g.*, 107 Cong. Rec. 16,533 (1961) (statement of Rep. Celler, Chairman, H. Judiciary Comm.) ("[T]his particular bill involves the transmission of wagers or bets and layoffs *on horse racing and other sporting events*.") (emphasis added).

The District Court recognized the differences between the Wire Act and the Paraphernalia Act in its analysis that the Wire Act was confined to sports wagering:

> That these two gambling statutes were passed the same day sends a strong contextual signal concerning the Wire Act's scope. The Paraphernalia Act demonstrates that when Congress intended to target non-sports gambling it used clear and specific language to accomplish

> its goal. In other words, when Congress wished to achieve a specific result, 'it knew how to say so.' *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018). The absence of similar language in the accompanying Wire Act supports the plaintiffs' position that the Wire Act is limited to sports gambling.

Mem. and Order, ECF No. 81 (June 3, 2019), at 45, reported at *NHLC v. Barr*, 386 F. Supp. 3d 132, 153 (D.N.H. 2019).

The 1970 IGBA—also discussed in the preceding section—likewise provides far more detail than the Wire Act, so as to reach beyond just sports gambling. Indeed, IGBA explicitly provides an expansive definition of "gambling," stating that the term "includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." 18 U.S.C. § 1955(b)(4). The Wire Act, by contrast, neither delineates any specific gambling activity beyond sports gambling, nor does it utilize expansive "includ[ing] but [] not limit[ed] to"-type language as that which is found in IGBA. Again, given Congress's explicit targeting of non-sports wagering activity elsewhere—such as in IGBA and the Paraphernalia Act—its failure to do so in the Wire Act counsels against the DOJ's new interpretation.

Notably, *DOJ's own amici*, the Coalition to Stop Internet Gambling ("CSIG") and the National Association of Convenience Stores ("NACS"), agree that it is appropriate to consider the language of related statutes—especially those

enacted closely in time to one another—when evaluating the meaning of the statute at issue.[17] CSIG and NACS invoked these very same laws to argue that the words "person" and "whoever" include state governments and their vendors.[18] If examining those statutes is appropriate for that purpose, the only consistent approach would be for the Court to deem it equally appropriate to look to these statutes as it undertakes its review of whether or not the Wire Act applies beyond sports wagering. The Wire Act's omission of the expansive language in those other statutes should not be seen as a simple oversight but as an expression of Congressional intent to confine the Wire Act to a narrower compass than its contemporaneous cousin, the Paraphernalia Act, in addition to IGBA.

C. Failed Legislative Efforts To Broaden The Wire Act's Scope Further Demonstrate The Wire Act's Sports Wagering Limitation

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *U.S. v. Brissette*, 913 F.3d 670, 677 (2019) (same). Here, the statutory scheme and the legislative history of the Wire Act are clear: Congress intended to

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[17] *See* Doc. No. 00117531221, at 15-20.

[18] *Id.* at 18-20.

limit the Wire Act's reach to combating sports betting that is illegal in the State in which it occurs. *See* NeoPollard Brief at 45-51, 55-59. This intent is informed by Congress's historical reluctance to enact gaming legislation directed toward conduct that is legal under state law. *See* Section II.A, *supra*.

Congress's intent to limit the scope of the Wire Act is further evidenced by the fact that, since its passage, members of Congress have ***repeatedly*** tried to expand or amend the Wire Act's scope to include non-sports gambling activity within its strictures. If, as the Department claims, the Wire Act has always applied to non-sports gambling activity, members of Congress would have perceived no need to consider expanding its scope to reach that very activity. But that is precisely what members of Congress have repeatedly sought to do. In 1995, for example, Senator Jon Kyl (R-Ariz.), introduced the Crime Prevention Act, which included an amendment to the Wire Act that would have broadened the activities covered by the law. *See* Crime Prevention Act of 1995, S. 1495, 104th Congress (1996) 1st Session. Similarly, the following year, Representative Tim Johnson (D-S.D.) again attempted to amend the Wire Act with the Computer Gambling Prevention Act. *See* Computer Gambling Prevention Act of 1996, H.R. 3526, 104th Cong. (1996) 2nd Sess. Both bills attempted to excise the phrase "on any sporting event or contest," but neither bill was enacted.

In 1997, Senator Kyl tried again to amend the scope of the Wire Act. This time he introduced the Internet Gambling Prohibition Act, which would have added a definition of "bets and wagers" that included contests, sports, and games of chance. *See* The Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997) 1st Sess. Senator Kyl stated that this bill was necessary because it "dispels any ambiguity by making it clear that all betting, including sports betting, is illegal."[19] As with previous attempts to amend the scope of the Wire Act, this effort, too, was not enacted.

Several years later, in 2002, Representative Bob Goodlatte (R-Va.) introduced the Combating Illegal Gambling Reform and Modernization Act, which, like Senator Kyl's 1995 bill, would have added a definition of "bets and wagers" to the Wire Act that broadened it to all forms of interstate gambling activities, including games of chance. *See* Combating Legal Gambling Reform and Modernization Act, H.R. 3215, 107th Congress (2001) 2nd Session. Again, this bill was not enacted. Most recently, Senator Lindsey Graham (R-SC) and Representative Jason Chaffetz (R-UT) introduced the Restoration of America's Wire Act ("RAWA"), which, again, attempted to broaden the definition of

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[19] Senator Kyl (AZ), Congressional Record 143:36, p. S2560, *available at* https://www.congress.gov/crec/1997/03/19/CREC-1997-03-19-pt1-PgS2553.pdf (last visited Feb. 17, 2020).

"sporting event or contest." *See* Restoration of America's Wire Act, S. 1668, 114th Congress (2015) 1st Session. RAWA likewise did not pass.

If the Wire Act has always applied to non-sports gambling, as DOJ now claims, there is no good explanation for why Congress has repeatedly considered but ***declined*** opportunities to extend its scope to accomplish that purpose. In short, what DOJ has attempted to do through the 2018 Opinion is to enact the very legislative revision of the Wire Act that Congress could not be persuaded to pass. The Court should not countenance usurpation by the Executive Branch of legislative powers reserved exclusively for Congress. *See* U.S. Const., art. I, § 1. Nor would it be appropriate for the Court to permit the Executive Branch to obtain, by judicial edict, that which it was otherwise unable to obtain legislatively, and that which is expressly foreclosed by the text, context, and legislative history of the Wire Act and related anti-gambling legislation. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 10 (1st Cir. 1999) (finding fact that "Congress has repeatedly rejected legislation [proposed following enactment of Title VII of Civil Rights Act] that would explicitly bar mandatory agreements to arbitrate employment discrimination claims" relevant to determination that Title VII does not bar such agreements); *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018) (considering fact that "Congress has frequently considered and thus far rejected legislation" allowing action taken in executive

order relevant to find that executive order exceeded authority by taking action without Congressional authorization); *United Food & Commercial Workers Union-Employer Pension Fund v. Rubber Assocs., Inc.*, 812 F.3d 521, 528 (6th Cir. 2016) (recognizing that it is not the court's "role to create law in situations where Congress has declined to act").

III. THE RULE OF LENITY FURTHER BARS THE 2018 OPINION'S INTERPRETATION OF THE WIRE ACT

The DOJ's new interpretation of the Wire Act is also precluded by the rule of lenity. The rule of lenity requires that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221–22 (1952); *see also id.* at 222 ("We should not derive criminal outlawry from some ambiguous implication.").

"[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 560 U.S. 474, 488 (2010). To the extent the Court finds the Wire Act ambiguous as to whether it applies beyond sports wagering, such an ambiguity would trigger application of the rule of lenity and commend the conclusion that the Wire Act applies only to sports wagering, because "the rule of lenity obliges the

court to select the least-harsh interpretation consistent with the statutory language." *See United States v. Lillard*, 935 F.3d 827, 834 (9th Cir. 2019); *see also United States v. Smith*, 939 F.3d 612, 618 (4th Cir. 2019) (rejecting government's attempt to resolve ambiguity in favor of purported "punitive purpose" of federal law at issue, finding that government's argument is "exactly backwards" because rule of lenity requires less punitive interpretation).

As discussed, following the 2011 Opinion, iGaming and iLottery businesses, including iDEA member-organizations, relied in good faith on the DOJ's conclusion that the Wire Act applied only to sports betting. Indeed, in reliance on the 2011 Opinion, as well as the case law and legislative history upon which that opinion relied, iGaming businesses invested hundreds of millions of dollars to develop markets and create online gaming products compliant with state law, including in technology related to the shared poker liquidity agreement involving New Jersey, Delaware, and Nevada, and in infrastructure related to maintaining equipment outside of Pennsylvania, as allowed by Pennsylvania regulations. As a result, the iGaming industry has quickly mushroomed and emerged as one of the fastest growing segments of the entire gaming industry.[20] The 2018 Opinion,

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[20] *See, e.g.*, Online Gambling Market 2019-2025, MarketWatch (Sept. 18, 2019), *available at* https://www.marketwatch.com/press-release/online-gambling-market-2019-2025-platform-type-exponential-growth-industry-statistics-growth-strategies-

however, has now imperiled these iGaming and iLottery organizations' established businesses, notwithstanding their good-faith reliance on the 2011 Opinion and their assiduous compliance with governing state law.

The impact of the Department's new reading of the Wire Act cannot be overstated. In short, the 2018 Opinion forces businesses to choose between risking criminal penalties or abandoning their established business practices that have been blessed and regulated by the States in which they operate. Moreover, the risk of criminal penalties is neither speculative nor insignificant. The Department has now repeatedly threatened criminal enforcement of the Wire Act, as now interpreted, upon the expiration of the forbearance period. *See* Rosenstein Memo; *see also* Rosen Memo. Against the backdrop of criminal prosecution, the Department's newly expansive interpretation of the Wire Act should be foreclosed and "resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971).

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key-vendors-business-opportunities-forecast---18-sep-2019-2019-09-18 (last visited Feb. 18, 2020) (discussing report projecting global only gaming market to exceed $80 billion annually by 2025); Online Gambling Market Worth $102.97 Billion by 2025, PR Newswire (Aug. 27, 2019), *available at* https://www.prnewswire.com/news-releases/online-gambling-market-worth-102-97-billion-by-2025--cagr-11-5-grand-view-research-inc-300907362.html (last visited Feb. 18, 2020) (discussing projected annual growth rate of over 11 percent).

IV. THE CANON OF CONSTITUTIONAL AVOIDANCE DISFAVORS THE DOJ'S NEW READING OF THE WIRE ACT

Finally, although the statutory text and legislative history of the Wire Act are clear, particularly when examined amidst the historical backdrop of federal deference to States in this realm, the canon of constitutional avoidance further compels limiting the Wire Act to sports gambling. The canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Thus, "when deciding which of two plausible statutory constructions to adopt, . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail." *Id.* at 380–81. Here, even if the Department's new interpretation were textually permissible (it is not), the constitutional doubts it raises would nonetheless preclude it.

Specifically, the Department's new interpretation of the Wire Act, if accepted, would raise, at the very least, serious concerns under the Tenth Amendment. *See, e.g.*, *Murphy*, 138 S. Ct. at 1480–81 (striking down federal law that prohibited States from "author[izing] sports gambling," finding that federal law did not preempt state regulation of gambling, and Tenth Amendment prohibited Congress from giving "direct commands" to the States as to whether or not to permit gambling); *Sauer v. U.S. Dep't of Educ.*, 668 F.3d 644, 652-53 (9th

Cir. 2012) (choosing to interpret statute in order to avoid conflict with Tenth Amendment, on constitutional avoidance grounds). As the Supreme Court recognized most recently in *Murphy*, regulation of gambling has long been reserved to the States under the Tenth Amendment. *See, e.g.*, *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 720 (4th Cir. 1999) ("The regulation of gambling enterprises lies at the heart of the state's police power."); *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 399 F.3d 1276, 1278 (11th Cir. 2005) ("The regulation of gambling lies at the 'heart of the state's police power.'") (quoting *Johnson*); *United States v. Washington*, 879 F.2d 1400, 1401 (6th Cir. 1989) ("The enactment of gambling laws is clearly a proper exercise of the state's police power in an effort to promote the public welfare."); *King*, 834 at 111 (discussing historical federal practice of leaving gambling regulation to state legislatures); Congressional Authority to Adopt Legislation Establishing a National Lottery, 10 Op. O.L.C. 40, 44–45 (1986) (concluding that the Framers of the Constitution reserved the power to conduct lotteries to the States under the Tenth Amendment); *see also* Section II.A, *supra* (discussing historical federal legislative carve-outs for gambling activity permitted by States); *Medina v. Rudman*, 545 F.2d 244, 251 (1st Cir. 1976) ("We think the state, under its police powers, is entitled, if it elects, to issue racetrack licenses, and to regulate participation thereunder, on a discretionary basis as it has chosen to do here.").

Consistent with the historical approach to leaving gambling regulation to the States, in passing the Wire Act, Congress stated that its purpose was to "assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses," and not to thwart them in adopting gaming policies suitable to their citizenry. *See* H.R. Rep. 87-967, *reprinted in* 1961 U.S.C.C.A.N., at 2633. The Department's new interpretation in the 2018 Opinion impermissibly treads on the States' rights to regulate gambling activity conducted by iDEA member-organizations pursuant to, and in accordance with, State law.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Appellees' briefs, the judgment of the District Court should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,408 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word's Times New Roman 14-point font.

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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 by using the appellate CM/ECF system.

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