Technology Innovation & Gaming Law

Federal Laws

The Federal Wire Act

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The Federal Wire Act

Introduction

The federal government and federal laws have generally not played a central role in regulating gambling activity. In general, gambling laws, enforcement and regulation have been the domain of the states, with few exceptions. Those exceptions include sports wagering, Native American gaming, and interstate horse race wagering.

For the purposes of this class, we will focus on the core federal statutes, and related court opinions, that regulate gambling.

Background

The Federal Wire Act, along with several other laws, was a part of the 1961 federal legislative package designed to cut off those activities that profited organized crime and to assist the states in enforcing their gambling laws. The Federal Wire Act, codified as 18 U.S.C. §1084, generally prohibits the use of interstate electronic communications facilities for conducting gambling. There is some difference of opinion as to the types of gambling regulated by the Federal Wire Act, as the case materials and other resource materials will illustrate.

The following summary from Robert F. Kennedy's office provides a general overview of he background of the Federal Wire Act:

P.L. 87-216, SPORTING EVENTS-- TRANSMISSION OF BETS, WAGERS, AND RELATED INFORMATION

Senate Report No. 87-588,

July 14, 1961 (To accompany S. 1656)

House Report No. 87-967,

Aug. 17, 1961 (To accompany S. 1656)

The House Report is set out.

House Report No. 87-967

Aug. 17, 1961

THE Committee on the Judiciary, to whom was referred the bill (S. 1656) to amend chapter 50 of title 18, United States Code, with respect to the transmission of bets, wagers, and related information, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

PURPOSE OF THE AMENDMENTS

The first amendment is purely technical in order to correct a typographical error.

Amendment No. 2 adds the Commonwealth of Puerto Rico, which is not encompassed by the wording in subsection (c) since it is neither a State, territory, nor possession, in order to insure that it will be included within the scope of that subsection, the purpose of which makes certain that the area encompassed by the bill is not preempted by the Federal Government.

PURPOSE OF THE BILL

The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and 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.

BACKGROUND

H.R. 7039 was introduced by the chairman of the Committee on the Judiciary on May 15, 1961, after a communication from the Attorney General dated April 6, 1961. H.R. 7039 is identical to S. 1656 as introduced in the Senate. S. 1656, with amendments, passed the Senate on July 28, 1961, and was referred to the Committee on the Judiciary. Your committee considered S. 1656 as passed by the Senate and, with two amendments, recommends that it do pass.

STATEMENT

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.

The bill does not include within its provisions radio and television stations. The Attorney General is of the opinion, and the Federal Communications Commission agrees, that the Commission has adequate authority under existing law to prevent the transmission of gambling information over the radio and television facilities. It is evident that this power to act to revoke a station's license when that station is not operated in the public interest (47 U.S.C. 312) is preventing the misuse of these means of communication.

SECTIONAL ANALYSIS

The first section of the bill amends section 1081 of title 18, United States Code, by adding to that section of the chapter on gambling a new definition. The definition is that of 'wire communication facility' and as defined is

similar to the definition of 'wire communication' or 'communication by wire' as defined in section 153 of title 47, United States Code-- the Communications Act.

Section 2 of the bill amends chapter 50 of title 18, United States Code, by adding a new section designated 'Section 1084. Transmission of wagering information; penalties.'

Subsection (a) of the new section prohibits those persons who are engaged in the business of betting or wagering from knowingly using a wire communication facility for the transmission of bets or wagers or information assisting in the placing of bets or waters in interstate or foreign commerce on any sporting event or contest. It also prohibits the transmission of a wire communication which entitles the recipient to receive money or credit as a result of a bet or wager or for information assisting in the placing of bets or wagers. A penalty of $10,000 or imprisonment not more than 2 years, or both, is placed upon such transmission.

Subsection (b) contains an exemption from the prohibitions of subsection (a) for bona fide news reporting of sporting events or contests. A further exemption is contained in subsection (b) which would exempt 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. Phrased differently, the transmission of gambling information on a horserace from a State where betting on that horserace is legal to a state where betting on the same horserace is legal is not within the prohibitions of the bill. Since Nevada is the only State which has legalized offtrack betting, this exemption will only be applicable to it. For example, in New York State parimutuel betting at a racetrack is authorized by State law. Only in Nevada is it lawful to make and accept bets on the race held in the State of New York where parimutuel betting at a racetrack is authorized by law. Therefore, the exemption will permit the transmission of information assisting in the placing of bets and wagers from New York to Nevada. On the other hand, it is unlawful to make and accept bets in New York State on a race being run in Nevada. Therefore, the transmission of information assisting in the placing of bets and wagers from Nevada to New York would be contrary to the provisions of the bill. Nothing in the exemption, however, will permit the transmission of bets and wagers or money by wire as a result of a bet or wager from or to any State whether betting is legal in that State or not.

Subsection (c) would make certain that the Federal Government is not preempting the area encompassed by the bill. Thus, the right of a State to prosecute for a violation of its penal laws is preserved by this subsection

which is a disclaimer of any possible preemption by the Federal Government.

Subsection (d) provides that any common carrier, subject to the jurisdiction of the Federal Communications Commission, which is notified in writing by a Federal, State, or local law enforcement agency acting within its jurisdiction that any facility furnished by the common carrier is being used or will be used for the purpose of transmitting or receiving gambling information which is in violation of Federal, State, or local law shall discontinue or refuse to furnish its wire facility. However, before removal or refusal by the common carrier it must give reasonable notice to the subscriber of the facility. It further provides that the common carrier would be immunized from any damages, penalties, or forfeitures, either civil or criminal, for the acts done in compliance with the notice it received from a law enforcement agency.

This subsection also provides that nothing in this section shall prejudice the right of any person affected by this section to obtain an appropriate determination as otherwise provided by Federal, State, or local law in a Federal or State court or before a local tribunal or agency that the facility should not be removed or discontinued or that it should be restored.

Attached hereto and made a part of this report is a communication from the Attorney General to the Speaker of the House of Representatives dated August 6, 1961.

OFFICE OF THE ATTORNEY GENERAL,

Washington, D.C. April 6, 1961.

The SPEAKER,

House of Representatives,

Washington, D.C.

DEAR MR. SPEAKER: There is attached for your consideration and appropriate action a legislative proposal to amend chapter 50 of title 18, United States Code, with respect to the transmission of bets, wagers, and related information.

The purpose of this legislation is 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 to aid in the suppression of organized gambling activities by prohibiting the use of or the leasing, furnishing, or maintaining of wire communication facilities which are or will be used for

the transmission of certain gambling information in interstate and foreign commerce. Radio and television stations have not been included since we believe that the Federal Communications Commission has ample authority to control transmission of gambling information by such facilities.

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 the results of a horserace permits a bettor to place a wager on a succeeding 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 and wagers, and the exchange of related information almost to the very minute that a particular sporting event begins.

The enclosed proposal would prohibit the leasing, furnishing, or maintaining of wire communication facilities, as defined therein, with intent that they be used for the transmission of bets or wagers or information assisting in the placing of bets or wagers, and would prohibit the use of such facilities for the transmission of gambling information. A criminal sanction of $10,000 or imprisonment for not more than 2 years or both is prescribed for violations of the act.

It should be noted that the news broadcasting of sporting events or contests will not be affected by this legislation.

Accordingly, I urge the early introduction and enactment of this legislative proposal.

The Bureau of the Budget has advised that there is no objection to the submission of this recommendation.

Sincerely,

ROBERT F. KENNEDY, Attorney General.

(Note: 1. PORTIONS OF THE SENATE, HOUSE AND CONFERENCE REPORTS, WHICH ARE DUPLICATIVE OR ARE DEEMED TO BE UNNECESSARY TO THE INTERPRETATION OF THE LAWS, ARE OMITTED. OMITTED MATERIAL IS INDICATED BY FIVE ASTERISKS: *****. 2. TO RETRIEVE REPORTS ON A

PUBLIC LAW, RUN A TOPIC FIELD SEARCH USING THE PUBLIC LAW NUMBER, e.g., TO(99-495))

The Statutory Text

18 U.S.C. §1084 Transmission of wagering information; penalties

(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, 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.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(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, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(e) As used in this section, the term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

The Business of Betting or Wagering

The first part of the Federal Wire Act identifies the scope of application of the prohibition as follows:

18 U.S.C. §1084 Transmission of wagering information; penalties

(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, 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.

The courts have addressed what it means to be in the business of betting or wagering. The following opinion from the Federal District Court in Rhode Island addresses this very topic.

528 F.Supp. 324, 9 Fed. R. Evid. Serv. 964

United States District Court, D. Rhode Island.

UNITED STATES of America

v.

Robert BABORIAN and Anthony Lauro.

C.R. No. 80-0018.

Nov. 25, 1981.

A bettor and a bookmaker were charged with the use of a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers. Though a jury was impanelled, it was subsequently excused, and the case was tried to the court by agreement of the parties. The District Court, Pettine, Chief Judge, held that: (1) the statute providing that whoever being engaged in business of betting or wagering knowingly uses wire communication facilities for transmission in interstate commerce of bets shall be fined not more than $10,000 or imprisoned not more than two years, or both, does not cover an individual bettor, even if the bettor wagered substantial sums and displayed

sophistication of an expert in his knowledge of odds making, and (2) the bookmaker could be convicted under the statute after it was established that he had knowledge that certain telephone calls were being placed from Connecticut to Rhode Island.

Ordered accordingly.

OPINION

PETTINE, Chief Judge.

The defendants are accused of violating 18 U.S.C. ss 2 and 1084. [FN1] Though a jury was impanelled, it was subsequently excused, and the case was tried to the Court by agreement of the parties.

FN1. These defendants were charged in one count of a multicount indictment. This case was severed.

The major question presented is whether or not the activities of the defendant Baborian constituted the "business of betting or wagering." 18 U.S.C. s 1084(a) reads as follows:

> (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, 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 not more than $10,000 or imprisoned not more than two years, or both.

The evidence in the case consisted of bookmaking records seized from defendant Anthony Lauro's apartment in Rhode Island, and intercepted telephone conversations between these defendants and others. Baborian is a lavish gambler; since at least the first week of March 1977 through December 1977 he wagered, with Lauro alone, an average of $800 to $1,000 a day, three to four times per week, on professional baseball, basketball, and football. In addition to betting, the intercepted phone conversations reveal that he received the line [FN2] on games, made up his own line, and gave Lauro his opinion on the best games on which to wager.

> *FN2. The "line" is simply the points added to an underdog, or subtracted from the favorite, to balance more evenly the teams for wagering purpose.*

In all, there were eight telephone conversations. Since they are the basis of the indictment, the substance of each conversation is set forth. The government accurately summarizes them in its memorandum as follows:

On December 9, 1977 at 6:58 p. m., Baborian placed six bets for a total of $800. He received the line on professional basketball, had already made up his own line, and gave Anthony Lauro his opinion on the best games to wager on.

On the following day at 11:13 a. m., he opened and closed a teaser,[FN3] mentioned that he was in a rush, asked for the afternoon games, asked Lauro if he had gotten him "three with Cincinnati," gave his opinion to Lauro on the best games to bet and asked what time Lauro would get the line on the college games.

FN3. A "teaser" is a single wager on two or more teams, all of which must win in order to collect. The bettor receives a more favorable point-spread than under the actual line, but collects a lesser payoff if he wins.

On December 11, 1977 at 11:50 a. m., Baborian told Falk that he played the whole card, that is, 23 games.

On the same day at 1:45 p. m., Baborian asked Falk to get him a line on a professional basketball game. (Falk is a defendant in other counts of the indictment.)

On December 12, 1977 at 6:35 p. m., Robert Baborian mentioned his own line, received the college line from Lauro, made four bets for a total of $600 and asked for the football line.

On December 17, 1977 at 6:20 p. m., Baborian placed 12 bets with Lauro for a total of $1,700.

On December 14, 1977 at 5:55 p. m., Robert Baborian called his father (in Rhode Island) from New York City. The conversation shows that Baborian came out of a Christmas party to get the line from his father and to place wagers... Baborian asked his father to relay the wagers to Anthony Lauro. The wagers totaled $800.

On December 16, 1977, there were a series of phone calls from Robert Baborian in Connecticut to (his father) in Providence who in turn relayed wagers to Anthony Lauro. At 6:15 p. m., Robert Baborian called his father, received the line from him and asked his father to place five bets for Baborian with Anthony Lauro. These wagers totaled $1,550.... (T)his call was placed from Fairfield, Connecticut. Twenty minutes later, (his father) relayed these wagers to Anthony Lauro and told Lauro that (his son) called him from New Haven and that "He's driving in." Fifteen minutes later, Robert Baborian again called his father, stated that he had just talked to "Pooch," made a mistake on one of his wagers and wanted to raise a $100 bet to $250. At 6:55 p. m., (the father) called Lauro and after Lauro confirmed that he had just spoken to Robert Baborian, (the father) relayed the wager made from Connecticut by (his son) to Anthony Lauro.... (T)his second call from Robert Baborian to (his father) was made from Milford, Connecticut.

The government concedes that Baborian only placed bets with Lauro and did so only for himself. It further concedes that all these calls, except those of December 14 and 16, were intrastate. The only other evidence presented was the records seized from Lauro's apartment which show that he was servicing a number of customers in addition to Baborian.

"Business" of Betting or Wagering-Defendant Baborian

The sine-qua non of conviction under this statute is proof that the defendant was in the "business" of betting or wagering. **When such a business exists is not easy to determine. There are no sharp contours in a general term such as "business," and the present state of the law is indeed amorphous.**

The legislative history does not help solve the problem at hand. I do not believe the legislators were thinking of a situation such as exists in this case when they enacted section 1084. They used words interchangeably, thus obfuscating the meaning of their various statements. Referring to "professional" gamblers, the legislative history of the Act contains the following observation:

Law enforcement is not interested in the casual dissemination of information with respect to football, baseball, or other sporting events between acquaintances. That is not the purpose of this legislation. However, it would not make sense for Congress to pass this bill and permit the professional gambler to frustrate any prosecution by saying, as one of the largest layoff bettors in the country has said, "I just like to bet. I just make social wagers." This man, incidentally, makes a profit in excess of a half-million dollars a year from layoff betting. Therefore, there is a broad prohibition in the bill against the use of wire communications for gambling purposes.

S.Rep.No.588, 87th Cong., 1st Sess. (1961) (emphasis added).

It is not too difficult to say from this legislative history that the bill does not encompass discussions between friends as to their opinions on the outcome of sporting events. On the other hand, one cannot say with certainty what was intended by the term "professional gambler." However, "professional gambler" was used in connection with layoff betting, which has a clear meaning in the gambling world-it is nothing more than the process whereby a gambler accepts bets from bettors and then in turn places a portion of these bets with another gambler to balance his books. In other words, he bets with another gambler to minimize potential losses.[FN4] Whatever meaning the Congress had in mind, it certainly did not appear to include a mere bettor.

FN4. More precisely, a "lay off" is a bet placed by one bookmaker with another bookmaker in order to achieve a more favorable ratio of wagers and in order to reduce his financial risk when one bookmaker holds excess wagers on one team.

The Court notes that an additional term applicable to the business of gambling is "vigorish," the percentage a bettor must pay the bookmaker on a losing wager. The parties agreed to the incorporation and meaning of this word.

Other legislative history likewise is of little help. For example, when section 1084 was proposed, Senator Kefauver asked during the hearings, "What are you going to do about private social betting ... (,) any individual at home calling up to see how a horse race went.(?)" It was then suggested that the proposed bill be amended to have it apply to gambling activities in furtherance of a business enterprise. From this it may be argued that the Senator intended that a mere social bettor not be included within the provisions of the bill. The reader, however, can only wonder at what the Senator would have said if he were asked to define "social" betting.

Representative Celler said, "This bill only gets after the bookmaker, the gambler who makes it his business to take bets or to lay off bets." From this statement one could conclude that Representative Celler intended to cover only the typical bookmaker. However, he qualified his statement by adding, "It does not go after the casual gambler who bets $2 on a race. That type of transaction is not within the purvue of the statute." 107 Cong.Rec. 16,534 (1961) (emphasis added). What would Representative Celler have said of one who gambled approximately $200,000 a year with one other gambler?

Further review of the legislative history casts no clearer light on the meaning of "engaged in the business of betting or wagering." The House Report on the bill reads:

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 horse race 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 communications facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a sporting event begins.

H.R.Rep.No.967, 87th Cong., 1st Sess. (1961), reprinted in (1961) U.S.Code Cong. & Ad.News 2631, 2631-32, (emphasis added).

This last quote does indicate that the business of gambling is a bookmaking operation entailing the acceptance of bets and laying off of bets. I conclude, after considering all of the foregoing legislative history, that Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets, and not mere betting. The provocative question is whether this is still the proper definition when the bettor wagers substantial sums and displays the sophistication of an expert in his knowledge of odds making. I conclude the statute simply does not cover such a situation. I find that Congress never intended to include a social bettor within the prohibition of the statute and that Congress did not contemplate prohibiting the activities of mere bettors, even where, as with Mr. Baborian, they bet large sums of money with a great deal of sophistication. Indeed, I do not see how the statute could be read otherwise. The government's interpretation of the statute would make the implication of criminality turn on the expertise of the bettor and the quantum of money wagered. I submit that these factors are not determinative of what constitutes a business.

As I see it, the legislative language indicates that “being engaged in the business of betting or wagering” requires the sale of a product or service for a fee involving third parties, i.e., customers and clients, or the performance of “a function which is an integral part of such business.” The defendant need not be exclusively engaged in such business. If he is an agent or employee of the business he need not share in the profits or losses of the business or receive compensation for his services, but “the function he performs must provide a regular and essential contribution to the (overall operation of) that business. If an individual performs only an occasional or nonessential service or is a mere bettor or customer, (regardless of the amount bet,) he cannot properly be said to engage in the business.” There must be a “continuing course of conduct,” and if associated with another, their joint conduct must be to achieve a common objective and purpose. U. S. v. Scavo, 593 F.2d 837, 842-43 (8th Cir. 1979).

The various decisions in this area are not to the contrary, but I could find no case truly on point. The government cites Sagansky v. United States, 358 F.2d 195, 200 (1st Cir.), cert. denied, 385 U.S. 816, 87 S.Ct. 36, 17 L.Ed.2d 55 (1966), for the proposition that section 1084 applies to a “bettor who is a professional gambler.” This statement is circular; neither does it not tell us when a bettor is a professional gambler, nor does it define “professional gambler.” Moreover, the government fails to note that, in Sagansky, the defendants were bookmakers, that is, they accepted bets and were clearly “engaged in the business.” As the court said,

s 1084(a) does not punish the mere transmission of bets or wagers, but rather the “use” of interstate wire communication facilities for their transmission. When a person holds himself out as being willing to make bets or wagers over interstate telephone facilities, and does in fact accept offers of bets or wagers over the telephone as part of his business, we think it is consistent with both the language and the purpose of the statute that he has “used” the facility for the transmission of bets or wagers. Id. at 200. (emphasis added).

Finally, the remainder of the opinion does not clarify the problem at stake in this case. The Court hypothesized:

Suppose a professional gambler used interstate wires on ten different days, but never to place more than one bet on a single day. Would he have never violated the statute? ... If a defendant is professionally engaged in making bets and wagers, one single use of interstate facilities is an offense. Id. at 201. (emphasis added).

In this last passage the meaning of the phrase "professionally engaged" is not discussed. It is not at all clear from this case whether a mere bettor is or is not excluded under section 1084(a).

Another decision in this area, United States v. Anderson, 542 F.2d 428 (7th Cir. 1976), describes certain betting activities as follows:

Their conversations involved in depth discussions of the merits of betting one side of a particular game or the other and the comparison of line information. Crews placed substantial bets with Anderson when these discussions ended. Also, Crews had on occasion used Anderson's phone to collect line information. When asked to characterize the Anderson-Crews relationship, the expert witness ... stated it was "in the nature of a partnership, a cooperating relationship where they were valuing one another's opinions and more or less working together." Id. at 435. (footnote omitted).

The government argued that this was enough to establish that they were partners. The court ruled to the contrary; it reversed Crews' conviction under 1084(a). It stated that, "In the instant case there was no evidence that Crews was in the 'business of betting or wagering.' " Id. at 436. Crews, the defendant in this case, seems to be on a comparable footing with Baborian.

In United States v. Marder, 474 F.2d 1192 (5th Cir. 1973), witnesses testified, inter alia, that they had made numerous bets and wagers with the appellant over an extended period of time. The Fifth Circuit affirmed a s 1084 conviction with language that included the following:

There was sufficient evidence introduced by the government to prove that (appellant) committed the first element of the offense charged which forbids the use of a wire communication facility for the transmission in interstate commerce of wagering information. In addition the burden was on the government to establish that (appellant) was in the business of gambling or in common parlance, was a "bookie." Id. at 1194. (emphasis added).

Finally, in a similar manner, while addressing the meaning of the term "transmission" under s 1084(a), the Tenth Circuit noted that "the statute deals with bookmakers-'persons engaged in the business of betting or wagering.' " United States v. Tomeo, 459 F.2d 445, 447 (10th Cir.), cert. denied, 409 U.S. 914, 93 S.Ct. 232, 34 L.Ed.2d 175 (1972).

It must be acknowledged that these courts spoke in conclusory terms as to the "business" of gambling. However, the language does tend to indicate how they would address the issue in this case.

In United States v. Scavo, 593 F.2d 837 (8th Cir. 1979), the appellant was charged with a violation of s 1084(a). As proof that he was not in the gambling "business", he relied on cases interpreting 18 U.S.C. s 1955, which provides in pertinent part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section-

(1) “illegal gambling business” means a gambling business which-

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

The court rejected such an analogy stating:

We find appellant's argument unpersuasive. The issue in the cases decided under s 1955 is whether the person providing line information has such a close, ongoing, and substantial relationship to the person receiving the information as to make them both participants in a single gambling business. In enacting s 1955, Congress did not intend to make all gambling businesses subject to federal prosecution; rather the statute was ‘intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and substantial as to be of national concern.'

In regard to s 1084(a), however, there is nothing to indicate that Congress intended only to punish large-scale gambling businesses. The basis of federal jurisdiction underlying s 1084(a) is the use of interstate communications facilities, which is wholly distinct from the connection between large-scale gambling businesses and the flow of commerce, which provides the jurisdictional basis for s 1955. See United States v. Sacco, 491 F.2d 995, 999 (9th Cir. 1974). Thus, the necessary showing of interdependence between individuals involved in an illegal gambling business under s 1955 is not required under s 1084(a). Moreover, s 1084(a) is not limited to persons who are exclusively engaged in the business of betting or wagering and the statute does not distinguish between persons engaged in such business on their own behalf and those engaged in the business on behalf of others. See Truchinski v. United States, 393 F.2d 627, 630 (8th Cir.), cert. denied, 393 U.S. 831, 89 S.Ct. 104, 21 L.Ed.2d 103 (1968).

In Scavo, among the factors the court found pertinent to its conclusion that Scavo was engaged in the business of betting were the facts that Scavo furnished the bookmaker with line information on a regular basis; that such information was critical to the bookmaker's operation; and that there was a financial arrangement between the two. Id. at 842. Such facts are absent in the Baborian-Lauro relationship. (While Baborian discussed line information with Lauro, there was no evidence presented that showed Lauro ever relied upon Baborian to supply it.) Baborian was not a part of Lauro's business; rather, he was in the posture of a customer. Finally, I also note that the Scavo court, in its instructions to the jury defining the “business” of betting or wagering, pointed out that “a mere bettor or customer” cannot be said to be engaged in the business of betting or wagering. Id. at 842-843.

The government finds no greater support in the other cases it cites. Katz v. United States, 369 F.2d 130, 132 (9th Cir. 1966), rev'd on other grounds, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), involved a defendant who placed bets on behalf of other bettors and who was a handicapper as well. United

States v. Swank, 441 F.2d 264, 265 (9th Cir. 1971), involved a defendant who worked closely with the bookmakers in “laying off” bets to avoid an adverse effect on the horse track odds. Nothing in that opinion addresses the issue in this case.

In short, s 1084 does not sweep within its prohibition a mere bettor. Congress never intended that the federal government should thus invade the criminal jurisdiction that properly belongs to the states. I adopt defense counsels' argument that the interpretation of s 1084(a) proferred by the government would upset this balance between state and federal law enforcement functions by drastically expanding federal criminal jurisdiction. Section 1084(a) by reaching the customer of the business would become an anomaly in the federal matrix, intruding into an area that the individual states are perfectly able to fill. As a general rule, criminal statutes must be narrowly construed. Bell v. United States, 349 U.S. 81 (75 S.Ct. 620, 99 L.Ed. 905) (1955); United States v. Box, (530 F.2d 1258, 1266 (5th Cir. 1976)); United States v. Bergland, 209 F.Supp. 547 (D.Wis.1962), rev'd on other grounds, 318 F.2d 158 (159) (7th Cir.), cert. den., sub nom, Cantrell v. United States, 375 U.S. 861 (84 S.Ct. 129, 11 L.Ed.2d 88) (1963). This general rule applies with particular force where a broad construction would serve to push federal criminal jurisdiction into areas previously reserved to the states. Post Trial memorandum, p. 6.

Thus, I find that, on the record of this case, the defendant Robert Baborian was not engaged in the business of betting or wagering and, therefore, is not guilty of violating 18 U.S.C. s 1084.

Defendant Lauro and 18 U.S.C. s 1084(a)

There is no question that defendant Lauro accepted wagers from Baborian as a bookmaker during the period in question, and therefore was in the business of betting or wagering. The only issue as to him is whether he knowingly used or caused to be used a telephone for the transmission in interstate commerce of bets or wagers as stated in the statute. The Court need not decide whether knowledge by the defendant of the interstate nature of a betting communication is required for a conviction under s 1084(a). See United States v. Feola, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975). The Court is persuaded beyond a reasonable doubt that Lauro knew that the bets he accepted from Baborian on December 16 originated from out of state.

A conviction of Lauro must rest on the events of December 16, 1977. An evaluation of the December 16th phone calls begins with a monitored call between Baborian and his father on December 14 at 5:55 p. m. In this conversation, Baborian, who was out of state, called his father in Rhode Island and asked him to place certain wagers with Lauro who was also in Rhode Island. At 6:34 p. m. of the same date, the father phoned Lauro and placed the bets. Unquestionably Lauro knew these wagers were being placed for Baborian; in the course of the conversation Lauro said “Well, I'm gonna call him back anyway. I might change. Those are the games he likes.” The government argues from this last statement that it may be inferred that Lauro knew at that time that Baborian was out of state. I agree.

On December 16 the following four telephone calls were monitored. First, there was a 6:15 p. m. monitored conversation between father (Brian) and son (Baborian). There is no question that this call was placed by Baborian, who was out of state, to his father in Rhode Island. Baborian clearly told his father he was 10 or 15 minutes from New Haven, Connecticut. He asked his father to phone Lauro in Rhode Island and place certain bets.

Second, there was a 6:36 p. m. monitored conversation between father and Lauro. The father placed his son's bets with Lauro and, in the course of the conversation, told Lauro that his son had called him from New Haven. Lauro knew the bets placed were from Baborian.

Third, there was a 6:51 p. m. monitored conversation between father and son Baborian. Baborian told his father that he had just talked to Lauro (about bets) and had made a mistake. He asked his father to call Lauro back to verify his wagers.

Fourth, there was a 6:55 p. m. monitored conversation between father and Lauro. Lauro verified that Baborian had phoned him.

The 6:15 p. m. call clearly was from Baborian in Connecticut to his father in Rhode Island. The 6:36 p. m. call certainly alerted Lauro that the bets came from Baborian while he was out of state, i.e., in New Haven. The 6:51 p. m. call shows that, between 6:36 p. m. and 6:51 p. m., Baborian had called Lauro to place certain wagers. At this time, Lauro knew Baborian had been in New Haven at 6:36 p. m. Thus, he certainly knew that Baborian was out of state between 6:36 and 6:51 p. m. when Baborian phoned him. The 6:51 p. m. call verifies that Baborian had phoned Lauro; in the 6:55 p. m. call Lauro acknowledges as much. The interstate nature of these calls is further established by the telephone records. (Government exhibit 6).

Notes I need not dwell on whether or not the indirect relay of Baborian's out-of-state bets through his father are violative of s 1084(a), because I am convinced beyond a reasonable doubt that Lauro knew his conversation on December 16 with Baborian was interstate. In my opinion, to interpret the evidence in any other way is to strain to a fragile, meaningless filament the factual premise of this case. I take judicial notice that no one could possibly drive from New Haven, Connecticut to the Rhode Island line in the 15-minute interval between the telephone calls of 6:36 p. m. and 6:51 p. m. See Fed.R.Evid. 201.

I find that the government has proved Mr. Lauro's guilt beyond a reasonable doubt. It has shown that Lauro accepted wagers knowing that such wagers originated outside of Rhode Island, and that he was in the business of betting or wagering, as proven by the records seized from his apartment as well as by the intercepted phone conversations. Thus, I find the defendant Anthony Lauro guilty as charged.

So Ordered.

Knowingly Using a Wire Communication Facility in Interstate or Foreign Commerce

The second part of the first prohibition in the Federal Wire Act identifies the applicability of the statute to communications.

18 U.S.C. §1084 Transmission of wagering information; penalties

(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, 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.

While it might seem self-evident from the language or the summary by Robert F. Kennedy, at least one court took a vary broad application of the statutory language as follows:

204 F. Supp. 276

UNITED STATES of America, Plaintiff, v. Carl YAQUINTA, Philip Joseph Hankish, Howard Oscar Allen, Albert Downing, Nick Vukovich, and Louis Gresko, Defendants.

No. 7340.

United States District Court N. D. West Virginia, at Wheeling.

May 1, 1962.

Robert E. Maxwell, U. S. Atty., John H. Kamlowsky, Asst. U. S. Atty., John P. Diuguid, Sp. Counsel, Department of Justice, for plaintiff.

[204 F. Supp. 277]

Gilbert S. Bachmann, Wheeling, W. Va., for defendants Vukovich and Gresko.

Arch W. Riley, Riley & Riley, James A. Byrum, Wheeling, W. Va., for defendants Yaquinta, Hankish, Allen and Downing.

CHARLES F. PAUL, District Judge.

Count One of the indictment charges all six defendants with conspiracy to violate Title 18, United States Code § 1084. Counts Two and Three of the indictment charge all of the defendants, as principals and accessories, with the substantive offenses of violating said § 1084 on December 4, 1961, and December 6, 1961, respectively. All defendants have moved to dismiss the indictment with respect to the charged offenses.

Language contained in the indictment, supplemented by the bills of particulars filed by the Government, reveals the following claimed state of facts:

The defendants Allen and Downing conducted a book-making shop for off-track wagering on horse races, in Wheeling, West Virginia. The defendants Vukovich and Gresko conducted a similar and related book-making shop in Weirton, West Virginia. Part of the business of the two shops was taking bets and wagers on the results of horse races run at Waterford Park, near Chester, West Virginia. The defendant Hankish attended the races at the track, and, by means of a portable radio transmitter or walkie-talkie, broadcast the results of the races. The defendant Yaquinta was stationed in a housetrailer at Arroyo, West Virginia, a short distance from the track, where he received the information broadcast by Hankish on a radio receiving set. Immediately after reception of the information, Yaquinta relayed the information, by long-distance telephone, to the bookie shops in Weirton and Wheeling. To the knowledge of all defendants, the lines of the Telephone Company crossed the river, which is the border between West Virginia and Ohio, to the East Liverpool, Ohio, exchange of the Telephone Company. On the calls, the connection with the receiving ends was made by the operator at East Liverpool, through circuits connecting with Weirton and Wheeling.

The pertinent portions of § 1084, which was enacted September 13, 1961, are as follows:

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate * * * commerce of * * * information assisting in the placing of bets or wagers on any sporting event * * *, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

The defendants contend that the congressional intent expressed in

the statute was not to make criminal the use of an interstate wire transmission facility to carry messages emanating from a point in West Virginia to receiving points, also in West Virginia, no matter how many other States the electrical impulses, carried by the wires, traversed.

Parimutuel betting at licensed race tracks, of which Waterford Park is one, is legal in West Virginia; off-track betting is not. The statute, as far as is known, has not yet been construed. The "purpose" of the statute is succinctly stated in Report No. 588 of the Senate Judiciary Committee of the 87th Congress, on July 24, 1961, as "* * * to assist the several States in the enforcement of their laws pertaining to gambling and to aid in the suppression of organized gambling activities by restricting the use of wire communication facilities." Both in oral argument and on brief, defendants' counsel have stated that "unquestionably Congress has the power to regulate all traffic in interstate commerce, and in recent years has shown little hesitancy to exercise such power. Thus, defendants concede that Congress could, if it wished, enact legislation sufficiently broad to cover the facts of the instant case. The question is whether § 1084 is so designed." The problem then is that often encountered but still

[204 F. Supp. 278]

esoteric one of "discovering" the congressional intent.

Counsel have endeavored to be helpful by drawing analogies between the question presented by § 1084 and other Acts of Congress in cases both criminal and civil, where transportation, travel or transmission between two points in the same State crossed, enroute, the borders of another State, including the following:

(1) The provisions of Title 18 § 1951, in which, in sub-section (b) (3), the Hobbs Act defines commerce, for the purposes of the anti-racketeering objectives of the Act, to include "all commerce between points within the same State through any place outside such State * * *."

(2) United States v. Winkler, W.D. Tex.1924, 299 F. 832 (interstate transportation of stolen vehicle).

(3) United States v. Erie R. Co., N.J. 1909, 166 F. 352 (penalties of the Safety Appliance Act).

(4) Western Union Telegraph Co. v. Speight, 254 U.S. 17, 41 S.Ct. 11, 65 L.Ed. 104 (telegram from point to point in the same State, passing through another). To the same effect a long list of decisions of State courts

under The Communications Act (Title 47 U.S.C.A.) are cited, beginning with Western Union Telegraph Co. v. Mahone, 1917, 120 Va. 422, 91 S.E. 157.**1**

(5) Cornell Steamboat Co. v. United States, 1944, 321 U.S. 634, 64 S.Ct. 768, 88 L.Ed. 978 (water transportation between points in a single State, passing through territorial waters of another).

(6) Yohn v. United States, 2 Cir., 1922, 280 F. 511 (theft from interstate railroad shipment).

(7) Michael v. United States, 7 Cir., 1925, 7 F.2d 865 (rail shipment).

(8) United States v. Delaware Lackawanna R. Co., S.D.N.Y.1907, 152 F. 269 (rebates on rail shipments).

Although § 1084 does not attempt federal preemption of the crime of gambling, some analogies can be drawn from the following cases which deny State jurisdiction where the State lines have been crossed: Roundtree v. Terrell, N.D.Tex. 1938, 22 F.Supp. 297; Central Greyhound Lines v. Mealey, 1948, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633; Missouri Pacific R. R. Co. v. Stroud, 1925, 267 U.S. 404, 45 S.Ct. 243, 69 L.Ed. 683.

As against the above cases, defense counsel have cited United States v. Wilson, D.C.Tenn.1920, 266 F. 712. This case involved a Mann Act charge in which the transportation was from Nashville to another point in Tennessee, on a train which passed through a portion of the State of Alabama. The District Court sustained a motion to dismiss the indictment, pointing out that the Act defined interstate commerce by the words "shall `include transportation from any State or Territory * * * to any other State or Territory.'" and held that that definition did not fit the charge in the indictment. No such restrictive definition applies to § 1084.

While the cases, construing different statutes and under differing circumstances, are not particularly helpful, they do make it abundantly clear that the intermediate crossing of a State line provides enough of a peg of interstate commerce to serve as a resting place for the congressional hat, if that will serve the congressional purpose. The congressional purpose here is very frankly elucidated in the Attorney General's letter to the branches of the Congress, dated April 6, 1961, in which he says,

"The purpose of this legislation is to assist the various States * * * in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and 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 certain gambling information in interstate * * * commerce. * * *"

"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 the results of a horserace permits a bettor to place a wager on a succeeding race."

Both the congressional committees which reported this legislation favorably and the Attorney General's office which sponsored it have made it abundantly clear that the evil under attack is illegal gambling, and that the legislative purpose is to assist the States in the enforcement of their laws. The use of the commerce clause is the occasion rather than the reason for invoking federal jurisdiction. West Virginia needs just as much help in the enforcement of its anti-gambling statutes when the information which assists their violation comes from another point in West Virginia, as it does when that information comes from an adjoining or distant State. Admittedly, the federal government is without power to render such assistance unless an instrumentality of interstate commerce is employed, but, also admittedly, it has the power when such an instrumentality is employed. I find no evidence of the spirit of abnegation on the part of the Congress in the legislative history surrounding this enactment. The defendants urge that the evil attacked is "multi-state" organizational and professional gambling, but I cannot read into the Act a limitation which would so restrict its effect.

Defendants' counsel call attention to the following paragraph in the House Judiciary Report, explaining the exemption in sub-section (b) with regard to the transmission of gambling information from a State where the placing of bets and wagers on a sport is legal, to a State where betting (such as off-track betting) on the event is legal:

"For example, in New York State parimutuel betting at a racetrack is authorized by State law. Only in Nevada is it lawful to make and accept bets on the race held in the State of New York where parimutuel betting at a racetrack is authorized by law. Therefore, the exemption will permit the transmission of information assisting in the placing of bets and wagers from New York to Nevada. On the other hand, it is unlawful to make and accept bets in New York State on a race being run in Nevada. Therefore, the transmission of information assisting in the placing of bets and wagers from Nevada to New York would be contrary to the provisions of the bill."

Defendants' counsel argue that since, in the transmission of the messages from New York to Nevada, the transmission lines traverse many States where off-track betting is illegal, and must pass through telephone exchanges in those States, the framers of the Act did not intend to make the incident of the locations of the telephone exchanges of legal significance. The argument loses sight of the fact that the objective of the Act is not to assist in enforcing the laws of the States through which the electrical impulses traversing the telephone wires pass, but the laws of the State where the communication is received. To mix a metaphor, the telephone wire may seem a slender thread on which to hang the federal crime, but it is a substantial part of the web in which these defendants seem to be caught.

The motions to dismiss are denied.

Notes:

1 These cases, while civil in nature, have some pertinency because they make use of the definition of "wire communication" or "communication by wire", as contained in § 153 of Title 47, U.S.C.A. — The Communications Act. In referring to the amendment of § 1081 of Title 18, defining "wire communication facility", as used in § 1084, Report No. 967 of the House Judiciary Committee of the 87th Congress, dated August 17, 1961, in the "Sectional Analysis". is as follows:

"The first section of the bill amends § 1081 of Title 18, United States Code, by adding to that section of the chapter on gambling a new definition. The definition is that of `wire communication facility', and as defined, is similar to the definition of `wire communication' or `communication by wire', as defined in § 153 of Title 47, United States Code 47 U.S. C.A. § 153 — The Communications Act."

WAGERING SUBJECT MATTER

The next part of the prohibition in the Federal Wire Act identifies the type of wagering that is the subject of the act.

18 U.S.C. §1084 Transmission of wagering information; penalties

(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**, 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.

This has been the most hotly debated issue related to interpreting the Federal Wire Act.

The Original Department of Justice Interpretation

The U.S. Department of justice from 1961 through September 2011 held a fairly consistent view of its interpretation of the type of activity subject to the prohibitions in the Federal Wire Act. The following expression is an example of that view:

Statement of

John G. Malcolm

Deputy Assistant Attorney General

Criminal Division

United States Department of Justice

At

Special Briefing: Money Laundering and Payment Systems in Online Gambling
Sponsored

By World Online Gambling Law Report

London, England

It is a pleasure to speak to you today about some of the many issues involved with on-line gambling. Let me state at the outset that when I refer to on-line gambling, I am including within that definition gambling and gaming of all types, be it casino-type games or sporting events, and I am also including gambling by other technologies, such as through interactive television. For purposes of United States law, these distinctions are not as significant as they are under the laws of other countries.

As you all know, the number of Internet gambling sites has increased substantially in recent years. While there were approximately 700 Internet gambling sites in 1999, it is estimated that by 2003, there will be approximately 1,800 such sites generating around $4.2 billion. In addition to on-line casino-style gambling sites, there are also numerous off-shore sports books operating telephone betting services. These developments are of great concern to the United States Department of Justice, particularly because many of these operations are currently accepting bets from United States citizens, when we believe that it is illegal to do so. The United States has other concerns too, some of which I would like to talk about today.

…

In the United States, both federal and state laws apply to on-line gambling. Historically, the individual states were left to determine what forms of gambling could be offered within an individual state's borders and to regulate such gambling. Not surprisingly, different states have different laws about gambling. For example, the State of Nevada permits and regulates casinos and sports bookmaking operations; while the neighboring State of Utah, on the other hand, does not permit any gambling. This poses a particular problem in the on-line world because, as I previously stated, the person placing a bet may not be located in the same state or even the same country as the person receiving the bet.

The Department of Justice views a gambling transaction as occurring in both the jurisdiction where the bet is placed by the bettor and in the jurisdiction where the gambling business that receives the bet is located. Thus, if Internet gambling were regulated in the United States, it would be subject to, and would need to be in

compliance with, fifty differing sets of gambling laws, which would pose certain unique problems.

While the prosecution of individual bettors and intra-state gambling crimes are largely left to the individual states, there are numerous federal gambling statutes that the Department of Justice has employed against large-scale gambling businesses that operate interstate or internationally.

One such statute is the so-called Wire Act, which is codified at Section 1084 of Title 18 of the United States Code. This statute makes it a crime, punishable up to two years in prison, to knowingly transmit in interstate or foreign commerce bets on any sporting event or contest. It is the Department of Justice's position that this prohibition applies to both sporting events and other forms of gambling, and that it also applies to those who send or receive bets in interstate or foreign commerce even if it is legal to place or receive such a bet in both the sending jurisdiction and the receiving jurisdiction. This view was upheld by the Second Circuit Court of Appeals in the recent successful federal prosecution of Jay Cohen, who was the President of World Sports Exchange, a company which was based in Antigua but which accepted bets via the telephone and the Internet from citizens in the United States, who was the President of World Sports Exchange, a company which was based in Antigua but which accepted bets via the telephone and the Internet from citizens in the United States.

The 5th Circuit Interpretation

With the rise of online gambling it was only a matter of time before law suits arose to address the losses players were incurring by engaging in the activity. Unfortunately, most online gambling operators were located outside of U.S. states and territories which made enforcing civil suits and brining criminal actions against operators nearly impossible. Creative attorney's realized that even though online gaming site operators were essentially impossible to serve and it was impossible to enforce a judgment even if service could be effectuated, the credit card companies that facilitated the funds transfers could be sued. These attorneys used the RICO (racketeering) statutes designed to go after organized crime to sue credit card companies. In essence, RICO statutes allow for civil and criminal actions against those who are part of a

criminal activity identified in any of thirty five crimes, including violating the Federal Wire Act. The attorneys filed actions claiming that the Federal Wire Act criminalizes online gambling, the site operators were engaged in such criminal activity, and the credit card companies were part of the conspiracy by profiting (taking a service fee) from each gambling deposit transaction.

The following are the Federal District Court and 5th Circuit Court of appeals opinions regarding this creative action:

In re: MasterCard - District Court Opinion

132 F.Supp.2d 468,

United States District Court,E.D. Louisiana.

In re MASTERCARD INTERNATIONAL INC., INTERNET GAMBLING LITIGATION, and Visa International Service Association Internet Gambling Litigation

This Document Relates to All Actions

Nos. CIV. A. MDL1321, CIV. A. MDL1322.

Feb. 23, 2001.

Gamblers filed class action complaints on behalf of themselves and others similarly situated against certain credit card companies and issuing banks based on defendants' alleged illegal involvement with the internet gambling industry. Upon defendants' motions to dismiss Racketeer Influenced and Corrupt Organizations Act (RICO) claims, the District Court , Duval, J., held that: (1) gamblers failed to plead violation of state law as predicate act; (2) since Wire Act did not prohibit internet casino gambling or credit card companies' and issuing banks' association therewith, there could be no mail or wire fraud serving as predicate acts under RICO; (3) gamblers failed to allege a RICO enterprise consisting of internet gambling casinos and defendant credit card companies and issuing banks; (4) gamblers failed to allege that defendant credit card companies and issuing banks satisfied the operation or management test for liability under RICO;

and (5) gamblers could not pursue civil remedies under RICO due to their inability to plead proximate causation.

Motions granted.

ORDER AND REASONS

DUVAL, District Judge.

…

Presently before the Court are Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted and Rule 19 motions for joinder or dismissal for non-joinder filed by MasterCard International Inc. (record documents 19 & 20), Fleet Bank and Fleet Credit Card Services (record document 21), Visa International Services Association (record documents 17 & 18), and Travelers Bank (record document 16). These motions have been filed in accordance with the Court's multidistrict litigation management order entered June 14, 2000 and are limited to defendants' liability under federal law, namely the Racketeer Influenced and Corrupt Organizations Act ("RICO"), found at 18 U.S.C. § 1961 et seq. The Court heard oral argument on the motions on September 13, 2000 and has considered the pleadings, memoranda and relevant law and finds that the motions to dismiss shall be granted for the reasons that follow.

The Court will analyze the Rule 12(b)(6) motions as follows:

I. Background

II. Standard for Motion to Dismiss

III. The Racketeer Influenced and Corrupt Organizations Act ("RICO"), Generally

IV. Elements Common to All RICO claims

A. The Existence of a RICO Person

B. The Alleged Pattern of Racketeering Activity

1. Alleged Predicate Acts Under State Law

a. New Hampshire Law

b. Kansas Law

2. The Wire Act, 18 U.S.C. § 1084

3. Mail Fraud, 18 U.S.C. § 1341 and Wire Fraud, 18 U.S.C. § 1343

4. Other Federal Laws

5. Collection of Unlawful Debt

C. Enterprise

1. Generally

2. Existence Separate and Apart From the Pattern of Racketeering Activity

3. An Ongoing Organization with a Hierarchical or Consensual Decision Making Structure

V. Additional Elements Discrete to 18 U.S.C. § 1962(c)

A. Conduct

B. Person/Enterprise Distinctness

VI. Aiding and Abetting Liability under 18 U.S.C. § 1962(c)

VII. Standing to Assert a Civil RICO Claim under 18 U.S.C. § 1964 for Violations of 18 U.S.C. § 1962(c)

The Rule 12(b)(6) Motions

I. Background

The factual and legal allegations by plaintiffs in each of the two actions before the Court are nearly identical; therefore, the Court will set out the factual background in the form of a single narrative and indicate where the factual allegations or legal theories diverge. For purposes of this motion, the following are taken as true.

Larry Thompson ("Thompson") and Lawrence Bradley ("Bradley") (together referred to as "plaintiffs") filed class action complaints on behalf of themselves and others similarly situated against certain credit card companies and issuing banks for those entities alleged illegal involvement with the internet gambling industry. Named as defendants by Thompson are MasterCard International, Inc. ("MasterCard"), Fleet Bank and Fleet Credit Card Services ("Fleet"). Those named as defendants by Bradley are Visa International Service Association ("Visa") and Travelers Bank USA Corp ("Travelers").

Plaintiffs' class action complaints allege that defendants have violated several federal and state laws with respect to defendants' involvement with internet casinos. Plaintiffs argue that defendants' actions constitute a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act, found at 18 U.S.C. §§ 1961 - 1968.

As the internet breaks down the geographic and temporal walls that once restricted the flow of information and commerce, plaintiffs argue that several illegitimate businesses have used the medium to further their illegal industries….

…

In support of these accusations, plaintiffs contend that the defendants' services support "the internet casinos... in foreign countries where their presence may be legal" but that they also "actively directed, participated in and aided and abetted [the casinos] bookmaking activities in the United States where they are not legal." Bradley Complaint at ¶ 39, Thompson Complaint at ¶ 35. Thompson supports this accusation by alleging that employees of MasterCard attended an on-line gaming seminar and gave an impromptu presentation explaining MasterCard's role in the internet gambling system. Thompson Complaint at ¶ 40. Bradley supports his claim by alleging that Visa had detailed procedures in place to handle internet gambling transactions. Bradley Complaint at ¶¶ 45-49. It is plaintiffs' contention that the credit card companies know the exact nature of each transaction processed through their international payment system and continue to allow internet gamblers to use their credit cards when defendants knew that internet gambling debts were allegedly illegal. Bradley Complaint at ¶¶ 41-42, Thompson Complaint at ¶¶ 36-37. Plaintiffs do not allege that the defendants received or transmitted any bets or that they have an ownership interest in the online casinos.

Plaintiffs bring their suits under 18 U.S.C. § 1964(c) arguing that the defendants have violated 18 U.S.C. § 1962(c) as well as state law. Plaintiffs support these causes of action with several claims that depend upon a finding that internet gambling is illegal under state and/or federal law, as well as causes of action for mail fraud and wire fraud. With these facts in mind the Court turns to the relevant legal standards.

II. Standard for Motion to Dismiss

…

III. RICO Generally

…

IV. Elements Common to All RICO Claims

…

B. Pattern of Racketeering Activity

As stated above, a prerequisite to the RICO action is that there be a pattern of racketeering activity…

In this case, plaintiffs' allegations arise under sections 1961(1)(A) and 1961(1)(B). Plaintiffs' (1)(A) allegations are that the defendants violated gambling laws that are chargeable under state law and punishable by imprisonment of more than one year. In plaintiff Thompson's case, he alleges violations of Kan. Stat. Ann. §§ 60-1704 , 21-4302 , 21-4304 and 21-3104. In plaintiff Bradley's case, he alleges violations of N.H.Rev.Stat. Ann. §§ 491:22 , 338:1 , 338:2 and 338:4. As to their claims under § 1961(1)(B) , plaintiffs claim violations of 18 U.S.C. § 1084(a) ("The Wire Act"); 18 U.S.C. § 1952 ("The Travel Act"); 18 U.S.C. § 1955 (Prohibition of Illegal Gambling Business); 18 U.S.C. § 1957 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity); and 18 U.S.C. § 1960 (Prohibition of Illegal Money Transmitting Business). There are currently no federal statutes addressing Internet gambling.

It is the defendants' argument that both plaintiffs failed to sufficiently allege a violation of any predicate act listed in the complaint. As such they argue that plaintiffs cannot satisfy a RICO prerequisite and that plaintiffs' case should be dismissed accordingly. Plaintiffs' response is that internet gambling violates the several federal and state statutes as alleged in the complaint. Thus, in order to establish that plaintiffs' have established a crucial RICO prerequisite, the Court turns to the alleged underlying offenses.

1. State Law Claims…

2. The Wire Act

When interpreting a statute, a court looks first to the language of the statute. Richardson v. United States, 526 U.S. 813, 818, 119 S.Ct. 1707, 1710, 143 L.Ed.2d 985 (1999). "Courts in applying criminal laws generally must follow the plain and unambiguous*480 meaning of the statutory language." Salinas v. United States, 522 U.S. 52, 57, 118 S.Ct. 469, 474, 139 L.Ed.2d 352 (1997). "[O]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." Id.

The Wire Act, found at 18 U.S.C. § 1084 provides in pertinent part as follows,

(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, 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 his title or imprisoned....

18 U.S.C. § 1084(a) (emphasis added). Section (b) of the statute carves out an exception to the rule, instructing that the Wire Act shall not "be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests" from a state or country where betting on the sporting event or contest is legal to another state or country where "such betting is legal." 18 U.S.C. § 1084(b) (emphasis added).

The defendants argue that plaintiffs' failure to allege sports gambling is a fatal defect with respect to their Wire Act claims, while plaintiffs strenuously argue that the Wire Act does not require sporting events or contests to be the object of gambling. However, a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest. 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." See 18 U.S.C. §§ 1084(a) & (b). A reading of the caselaw leads to the same conclusion. See United States v. Kaczowski, 114 F.Supp.2d 143, 153 (W.D.N.Y.2000) (Wire Act "prohibits use of 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"); United States v. Sellers, 483 F.2d 37, 45 (5th Cir.1973)(overruled on other grounds in United States v. McKeever, 905 F.2d 829 (5th Cir.1990))("the statute deals with bookmakers)"; U.S. v. Marder, 474 F.2d 1192, 1194 (5th Cir.1973) (first element of statute satisfied when government proves wagering information "relative to sporting events").

As the plain language of the statute and case law interpreting the statute are clear, there is no need to look to the legislative history of the Act as argued by plaintiffs. See In re Abbott Laboratories, 51 F.3d 524, 528 (5th Cir.1995). However, even a summary

glance at the recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084. Recent legislative attempts have sought to amend the Wire Act to encompass "contest[s] of chance or a future contingent event not under the control or influence of [the bettor]" while exempting from the reach of the statute data transmitted "for use in the new reporting of any activity, event or contest upon which bets or wagers are based." See S.474, 105th Congress (1997). Similar legislation was introduced the 106th Congress in the form of the "Internet Gambling Prohibition Act of 1999." See, S. 692, 106th Congress (1999). That act sought to amend Title 18 to prohibit the use of the internet to place a bet or wager upon "a contest of others, a sporting event, or a game of chance..." Id. As to the legislative intent at the time the Wire Act was enacted, the House Judiciary Committed Chairman explained that "this particular bill involves the transmission of wagers or bets and layoffs on horse *481 racing and other sporting events." See 107 Cong. Rec. 16533 (Aug. 21, 1961). Comparing the face of the Wire Act and the history surrounding its enactment with the recently proposed legislation, it becomes more certain that the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests. Plaintiffs' argument flies in the face of the clear wording of the Wire Act and is more appropriately directed to the legislative branch than this Court.

In the context of a Rule 12(b)(6) motion, then, the Court must look to the allegations in the complaints to determine if "the complaint lacks an allegation regarding a required element necessary for relief." Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir.1995) citing 2A Moore's Federal Practice, ¶ 12.07[2.-5] at 12-91; Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). The parties make several allegations that they placed bets at internet casino sites. See e.g., Thompson complaint at ¶¶ 24, 25, 54, Bradley complaint at ¶¶ 24, 26. Plaintiffs fail to allege the identity of the games that they played, i.e. games of chance or sports related games. Pleading such matters is critical when their right to relief hinges upon the determination of whether Internet casino gambling is legal. That being said, the Court cannot simply assume that plaintiffs bet on sporting events or contests when they make no such allegation in their otherwise extremely thorough complaints.

The sole reference to "sports betting" is a conclusory allegation that the alleged enterprise engaged in sports betting. See Bradley petition at ¶ 88, Thompson petition at ¶ 77. However, nowhere does either plaintiff allege personal participation in sports gambling. Such an allegation is not enough to survive a motion to dismiss where there is no claim that plaintiffs themselves, or the defendants they have sued, participated in sports gambling. Since plaintiffs have failed to allege that they engaged in sports gambling, and internet gambling in connection with activities other than sports betting is not illegal under federal law, plaintiffs have no cause of action against the credit card companies or the banks under the Wire Act.

3. Mail and Wire Fraud

Plaintiffs also allege violations of the federal mail and wire fraud statutes…

…

Since the Court finds that the Wire Act does not prohibit internet casino gambling or defendants' association therewith, there can be no mail or wire fraud. Plaintiffs' fraud claims depend upon a finding that the gambling activities and debts were in violation of U.S. and state law and that the defendants therefore misrepresented the debts as legal, as explained in the previous sections. However, plaintiffs' attempt to advance this theory fails because the debts themselves are not illegal. Moreover, even if the debts were illegal, defendants' representations with respect to those debts do not provide a basis for a mail or wire fraud claim because "[i]t is the general rule that fraud cannot be cannot be predicated upon misrepresentations of law." See Meacham v. Halley, 103 F.2d 967, 971 (5th Cir.1939); see also Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40 (2d Cir.1991).

….

VI. Aiding and Abetting a § 1962(c) violation FN9

In a subheading of his complaint, plaintiff Bradley cites the applicable statute as § 1964(a). However, in his factual allegations plaintiff clearly refers to defendants' as aiders and abettors to a § 1962(c) violation. The Court will accordingly analyze plaintiffs' claim as one for aiding and abetting a § 1962(c) violation.

Plaintiffs also assert a cause of action premised on aiding and abetting liability. They state that "[b]ecause Defendants have formed an illegal Internet gambling enterprise, conducted and/or facilitated Internet casino betting and collected unlawful debt, they have participated as a principal within the meaning of 18 U.S.C. § 2 and are liable as an aider and abettor to the violation of 18 U.S.C. § 1962(c)." Bradley Complaint at ¶ 113; see also Thompson Complaint at ¶ 35.

This argument fails as plaintiffs' underlying § 1962(c) claim is meritless. Without a violation of the underlying substantive offense, there can be no aiding and abetting liability. That being said, it is doubtful that an aiding and abetting liability cause of action exists under § 1962(c).

…

Accordingly,

IT IS ORDERED that the motions to dismiss of MasterCard, Visa, Travelers and Fleet are GRANTED.

In re Mastercard - The Court of Appeals Opinion

313 F.3d 257, (portions redacted)

United States Court of Appeals, Fifth Circuit.

In Re: MASTERCARD INTERNATIONAL INC. Internet Gambling Litigation.

…

Nov. 20, 2002.

Credit card holders filed class action complaints against credit card companies and issuing banks, alleging that they violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by aiding and abetting illegal internet gambling. The United States District Court for the Eastern District of Louisiana , Stanwood R. Duval, Jr. , J., 132 F.Supp.2d 468, granted motions to dismiss, and plaintiffs appealed. The Court of Appeals , Dennis, Circuit Judge, held that plaintiffs failed to sufficiently allege that defendants engaged in a pattern of racketeering activity or the collection of unlawful debt, and thus dismissal for failure to state a claim was proper.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before DeMOSS , STEWART and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

In this lawsuit, Larry Thompson and Lawrence Bradley ("Thompson," "Bradley," or collectively "Plaintiffs") attempt to use the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § § 1961 -1968, to avoid debts they incurred when they used their credit cards to purchase "chips" with which they gambled at on-line casinos and to recover for injuries they allegedly sustained by reason of the RICO violations of MasterCard International, Visa International, and banks that issue MasterCard and Visa credit cards (collectively "Defendants"). FN1 The district court granted the Defendants' motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We AFFIRM.

Thompson and Bradley allege that the Defendants, along with unnamed Internet casinos, created and operate a "worldwide gambling enterprise" that facilitates illegal gambling on the Internet through the use of credit cards. Internet gambling works as follows. A gambler directs his browser to a casino website. There he is informed that he will receive a gambling "credit" for each dollar he deposits and is instructed to enter his billing information. He can use a credit card to purchase the credits.[1] His credit card is subsequently charged for his purchase of the credits. Once he has purchased the credits, he may place wagers. Losses are debited from, and winnings credited to, his account. Any net winnings a gambler might accrue are not credited to his card but are paid by alternate mechanisms, such as wire transfers.

Under this arrangement, Thompson and Bradley contend, "[t]he availability of credit and the ability to gamble are inseparable."[2] The credit card companies facilitate the enterprise, they say, by authorizing the casinos to accept credit cards, by making credit available to gamblers, by encouraging the use of that credit through the placement of their logos on the websites, and by processing the "gambling debts" resulting from the extension of credit. The banks that issued the gamblers' credit cards participate in the enterprise, they say, by collecting those "gambling debts."

Thompson holds a MasterCard credit card issued by Fleet Bank (Rhode Island) NA. He used his credit card to purchase $1510 in gambling credits at two Internet gambling sites. Bradley holds a Visa credit card issued by Travelers Bank USA Corporation. He used his credit card to purchase $16,445 in gambling credits at seven Internet gambling sites. Thompson and Bradley each used his credits to place wagers. Thompson lost everything, and his subsequent credit card billing statements reflected purchases of $1510 at the casinos. Bradley's winning percentage was higher, but he fared worse in the end. He states his monthly credit card billing statements included $7048 in purchases at the casinos.

[1] Gamblers can purchase the credits through online transactions or by authorizing a purchase via a telephone call. Gamblers also can purchase the credits via personal check or money order using the mails.

[2] The Plaintiffs state that 95% of Internet gambling business involves the use of credit cards.

Thompson and Bradley filed class action complaints against the Defendants on behalf of themselves and others similarly situated. They state that the Defendants participated in and aided and abetted conduct that violated various federal and state criminal laws applicable to Internet gambling. Through their association with the Internet casinos, the Defendants allegedly "directed, guided, conducted, or participated, directly or indirectly, in the conduct of an enterprise through a pattern of racketeering and/or the unlawful collection of unlawful debt," in violation of 18 U.S.C. § 1962(c). They seek damages under RICO's civil remedies provision, claiming that they were injured by the Defendants' RICO violations. They also seek declaratory judgment that their gambling debts are unenforceable because they are illegal.

Upon motions by the Defendants, the district court dismissed the Plaintiffs' complaints.
…

II.

We review a district court's grant of a Rule 12(b)(6) motion de novo, applying the same standard used below. "In so doing, we accept the facts alleged in the complaint as true and construe the allegations in the light most favorable to the plaintiffs." But "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."

III.

…

"A pattern of racketeering activity requires two or more predicate acts and a demonstration that the racketeering predicates are related and amount to or pose a threat of continued criminal activity." The predicate acts can be either state or federal crimes. Thompson and Bradley allege both types of predicate acts.

…

Thompson and Bradley both identify three substantive federal crimes as predicates-violation of the Wire Act, mail fraud, and wire fraud. The district court concluded that the Wire Act concerns gambling on sporting events or contests and that the Plaintiffs had failed to allege that they had engaged in internet sports gambling.[3] We agree with the district court's statutory interpretation, its reading of the relevant case law, its

[3] In re MasterCard, 132 F.Supp.2d at 480 ("[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.").

> summary of the relevant legislative history, and its conclusion. The Plaintiffs may not rely on the Wire Act as a predicate offense here.
>
> The district court next articulated several reasons why the Plaintiffs may not rely on federal mail or wire fraud as predicates. Of these reasons, two are particularly compelling. First, Thompson and Bradley cannot show that the Defendants made a false or fraudulent misrepresentation. Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal. Hence, the Defendants could not have fraudulently represented the Plaintiffs' related debt as legal because it was, in fact, legal. We agree that "the allegations that the issuing banks represented the credit charges as legal debts is not a scheme to defraud." Second, Thompson and Bradley fail to allege that they relied upon the Defendants' representations in deciding to gamble. The district court correctly stated that although reliance is not an element of statutory mail or wire fraud, we have required its showing when mail or wire fraud is alleged as a RICO predicate. Accordingly, we conclude that Thompson and Bradley cannot rely on the federal mail or wire fraud statutes to show RICO predicate acts.
>
> …
>
> We need not analyze the validity or merit of Plaintiffs' claim based on aiding and abetting liability because (assuming it is valid) it necessarily falls along with the underlying RICO claim. Likewise, we need not consider the merits of the Defendants' motions to join the Internet casinos pursuant to Rule 19 of the Federal Rules of Civil Procedure. We agree with the district court that those motions are moot.
>
> …

For the foregoing reasons, we AFFIRM the judgment of the district court.

Please note that the U.S. Department of Justice did not participate in this litigation. As such, the prior statement in the materials from the U.S. Department of Justice illustrates that the Department of Justice believed that the District Court of Louisiana and the Fifth Circuit Court of Appeals were wrong.

The 2011 Christmas Surprise

In 2010, efforts were made to enact a federal law that would permit cross border wagering on internet poker so long as (1) the poker operator was licensed by a state or tribal authority to conduct such activity and the players using that site, (2) players were from states that permitted online poker play, (3) taxes would be collected and paid for both operations and for wagers placed in other states. The effort died in 2011 due to the efforts of the then Senate Minority Leader and his desire to prevent any legislation other than necessary budgetary legislation from being heard.

However, on December 23, 2011 the United States Department of Justice issued an opinion regarding the Federal Wire Act. For context, it should be noted, that in 2001 Nevada sought to regulate online gambling on casino games (not race and sports) and legislation was enacted in the state. In 2002, the U.S. Department of Justice sent a threatening letter to the Nevada Gaming Commission and Nevada Gaming Control Board warning the state that the U.S. Department of Justice viewed regulating such activity as prohibited under the Federal Wire Act. In 2009, the states of Illinois and New York sent a letter of request to the U.S. Department of Justice to ask if the department had any objection to the lotteries of these states from selling lottery subscriptions to their own state residents online and to having payments processed outside their states. The letter also indicated that the states would move forward unless they received a timely objection. The U.S. Department of Justice did not initially respond to the letter and both Illinois and New York proceeded with their plans. On December 23, 2011, the U.S. Department of Justice released their response to Illinois and New York.

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).

With the 2011 opinion, slot manufacturers began offering interstate wide area progressive products, server assisted slot machines, server based slot machines, and remotely served electronic table games. Technological implementation of internet technologies in gaming devices soared.

The 2019 Surprise

If there is one relative constant of the first Trump administration, it is that it took a dim view of anything accomplished by the prior Obama administration. This extended to the Obama era opinion of the U.S. Department of Justice regarding the Federal Wire Act. Thus, during a time of when the federal government was shut down for all but essential services the U.S. Department of Justice in January of 2019 published a new opinion to supersede the 2011 opinion.

(Slip Opinion)

Reconsidering Whether the Wire Act

Applies to Non-Sports Gambling

This Office concluded in 2011 that the prohibitions of the Wire Act in 18 U.S.C. § 1084(a) are limited to sports gambling. Having been asked to reconsider, we now conclude that the statutory prohibitions are not uniformly limited to gambling on sporting events or contests. Only the second prohibition of the first clause of section 1084(a), which criminalizes transmitting "information assisting in the placing of bets or wagers on any sporting event or contest," is so limited. The other prohibitions apply to non-sports- related betting or wagering that satisfy the other elements of section 1084(a).

The 2006 enactment of the Unlawful Internet Gambling Enforcement Act did not alter the scope of section 1084(a).

November 2, 2018

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL CRIMINAL DIVISION

In 2010, the Criminal Division asked whether the Wire Act, 18 U.S.C. § 1084, prohibits New York and Illinois from using the Internet and out- of-state transaction processors to sell lottery tickets to in-state adults. That request arose from a potential conflict between the Wire Act and the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–5367 ("UIGEA"). In the Criminal Division's

view, the Wire Act prohibits such transactions, but UIGEA might permit the interstate routing of certain state lottery transactions.

We answered that request by challenging its underlying premise: that the Wire Act prohibits transmissions unrelated to sports gambling. Instead of analyzing the interplay between the Wire Act and UIGEA, we conclud- ed, more broadly, that the prohibitions of the Wire Act are limited to sports gambling and thus do not apply to state lotteries at all. *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"). Our opinion departed from the position of the Department of Justice, which had suc- cessfully brought Wire Act prosecutions for offenses not involving sports gambling.

The Criminal Division has asked us to reconsider the 2011 Opinion's conclusion that the Wire Act is limited to sports gambling. *See* Memoran-

dum for Curtis E. Gannon, Acting Assistant Attorney General, Office of Legal Counsel, from Kenneth A. Blanco, Acting Assistant Attorney General, Criminal Division (May 26, 2017).[1] We do not lightly depart from our precedents, and we have given the views expressed in our prior opinion careful and respectful consideration. Based upon the plain lan- guage of the statute, however, we reach a different result. While the Wire Act is not a model of artful drafting, we conclude that the words of the statute are sufficiently clear and that all but one of its prohibitions sweep beyond sports gambling. We further conclude that that the 2006 enactment of UIGEA did not alter the scope of the Wire Act.

I.

The Wire Act prohibits persons involved in the gambling business from transmitting several types of wagering-related communications over the wires. The prohibitions, located at 18 U.S.C. § 1084, were originally enacted in 1961.[2] Section 1084(a) sets them out:

> 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 enti- tles the recipient to receive money or credit as a result of bets or wa- gers, or for information assisting in the placing of bets or wagers,

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[1] We address this opinion to John Cronan, as the Acting Assistant Attorney General for the Criminal Division, because Assistant Attorney General Brian Benczkowski is recused from this matter.

[2] Pub. L. No. 87-216, § 2, 75 Stat. 491. The provision has been amended three times, although none of those amendments is material to our analysis. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7024, 102 Stat. 4181, 4397 (adding section 1084(e), which defines "State"; making conforming amendments; and adding the term "foreign country" to section 1084(b), so that the Wire Act now includes an exception for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest *from* a state or "foreign country" where such betting is legal *into* a state or "foreign country" in which such betting is also legal); Crime Control Act of 1990, Pub. L. No. 101-647, § 1205(g), 104 Stat. 4789, 4831 (amending the definition of "State" in section 1084(e)); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No.

103-322, § 330016(1)(L), 108 Stat. 1796, 2147 (altering the statutory penalty in section

1084).

shall be fined under this title or imprisoned not more than two years, or both.

Section 1084(a) consists of two general clauses, each of which prohibits two kinds of wire transmissions, creating four prohibitions in total. The first clause bars anyone in the gambling business from knowingly using a wire communication facility to transmit "bets or wagers" or "information assisting in the placing of bets or wagers on any sporting event or con- test." *Id*.[3] The second clause bars any such person from transmitting wire 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*.[4]

The Wire Act's interpretive difficulties arise from the phrase "on any sporting event or contest," which appears immediately after the second prohibition in the first clause. Those words narrow the prohibition on transmitting "information assisting in the placing of bets or wagers" to bets or wagers "on a sporting event or contest." That phrase is not other- wise repeated in section 1084(a). The other three prohibitions thus appear to be naturally read to apply to wire transmissions involving all forms of gambling, not just "bets or wagers on any sporting event or contest." But if that reading is correct, our 2011 Opinion asked, then why would Con- gress, "having forbidden the transmission of *all* kinds of bets or wagers

. . . prohibit only the transmission of information assisting in bets or wagers concerning sports"? 35 Op. O.L.C. __, at *5. Why permit trans- missions of information that assists gambling on non-sporting events, but then prohibit transmissions "entitling the recipient to receive money" for

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[3] The phrase "wire communication facility" is defined to include "any and all instru- mentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pic- tures, 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.

[4] As our 2011 Opinion explained, the second clause prohibits "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."

35 Op. O.L.C. __, at *4 n.5 (emphases and alterations in original). Reading the second

clause to prohibit "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers" or "the transmission of a wire communication . . . for information assisting in the placing of bets or wagers" would be awkward and would duplicate the second prohibition, which covers "information assisting in the placing of bets or wagers on any sporting event or contest."

providing information that assists "in the placing of those lawfully- transmitted bets"? *Id*. at *8. In short, why would Congress have limited just one of the four prohibitions to sports gambling?

Absent any obvious answer to these questions, our 2011 Opinion con- cluded that the statutory text was ambiguous, and that the "more logical result" was to read section 1084(a)'s prohibitions as parallel in scope and therefore as all limited to sports gambling. *Id*. at *5. In so doing, we recognized that our reading of the statute departed from that of the Crimi- nal Division and of some courts that had addressed the statute. *See id*. at *3. Several district courts had upheld prosecutions involving non-sports gambling, reasoning that the limitation to "sporting event or contest" did not apply to all of section 1084(a)'s prohibitions.[5] On the other hand, the Fifth Circuit had affirmed a district court opinion that found that the "plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest." *In re Mastercard Int'l, Inc., Internet Gambling Litig*., 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff'd,*

313 F.3d 257 (5th Cir. 2001).[6]

Those prosecutions, of course, were brought by the Department of Jus- tice. In requesting our opinion, the Criminal Division had advised 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 inter- state gambling[.]" Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, from Lanny A. Breuer, Assistant Attorney General, Criminal Division, De- partment of Justice (July 12, 2010). In the years before our opinion, the

[5] *See United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah. 2007) (holding that the "sporting event or contest" qualifier does not apply to section 1084(a)'s second clause; noting that this conclusion "aligns with the Tenth Circuit's *Criminal Pattern Jury Instructions*"); Report and Recommendation of United States Magistrate Judge Regarding Gary Kaplan's Motion to Dismiss Counts 3–12, at 4–7, *United States v. Kaplan*, No. 06- CR-337CEJ-2 (E.D. Mo. Mar. 20, 2008) (concluding that the "sporting event or contest" qualifier applies only to the second prohibition in section 1084(a)'s first clause); *see also United States v. Ross*, No. 98 CR. 1174-1 (KMV), 1999 WL 782749, at *2 (S.D.N.Y. Sept. 16, 1999) (suggesting that the term "sporting event or contest" modifies only the second prohibition in section 1084(a)'s first clause); *Vacco v. World Interactive Gaming Corp*., 714 N.Y.S.2d 844, 847, 851–52 (N.Y. Sup. Ct. 1999) (suggesting same).

[6] Since our 2011 Opinion, the First Circuit has observed in dictum that the Wire Act is limited to betting and wagering on "any sporting event or context." *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014).

Department had advanced that position in court and before Congress.[7]

And on several prior occasions, the Criminal Division had prosecuted defendants whose wire communications involved non-sports gambling, including a 1971 prosecution of "a business enterprise involving gambling in the form of numbers writing." *United States v. Manetti*, 323 F. Supp.

683, 687 (D. Del. 1971); *see also United States v. Vinaithong*, No. 97-

6328, 1999 WL 561531, at *1 (10th Cir. Apr. 9, 1999) (order and judg- ment affirming the sentences of defendants who pleaded guilty under the Wire Act for transmission of "gambling information" related to a "gambling enterprise which has been referred to as a mirror lottery").[8] In two congressional hearings in 1998 and 2000, the Criminal Division had acknowledged some uncertainty concerning the scope of the Wire Act and urged Congress to amend the statute to confirm its application to non- sports gambling.[9] But our 2011 Opinion represented a marked shift in

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[7] *See* Letter for Dennis K. Neilander, Chairman, Nevada Gaming Control Board, from Michael Chertoff, Acting Assistant Attorney General, Criminal Division (Aug. 23, 2002) ("[T]he Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style gambling."); *Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 70 (2003) (response of John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, to questions for written submission from Rep. Goodlatte) ("The Department of Justice has long held, and continues to hold, the position that 18 U.S.C. § 1084 applies to all types of gambling, including casino-style gambling, not just sports betting."); Letter for Carolyn Adams, Superintendent, Illinois Lottery, from Laura H. Parsky, Deputy Assistant Attorney General, Criminal Division (May 13, 2005) (explaining that if Illinois permitted online purchase of state lottery tickets it would be in violation of federal law—so long as the "transmission [were] routed outside of the state"); *Establishing Consistent Enforcement Policies in the Context of Online Wagers: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 13 (2007) (statement of Catherine Hanaway, U.S. Attorney) ("It is the Department's view, and that of at least one federal court (the E.D. Mo.), that [the Wire Act] applies to both sporting events and other forms of gambling, and that it also applies to those who send or receive bets in interstate or foreign commerce, even if it is legal to place or receive bets in both the sending jurisdic- tion and the receiving jurisdiction.").

[8] The Criminal Division advises that the Department secured at least seventeen Wire

Act convictions between Fiscal Years 2005 and 2011 that involved non-sports betting.

[9] *Compare, e.g.*, *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) (statement of Kevin DiGregory, Deputy Assistant Attorney General, Criminal Division) ("That being said, [section 1084] currently prohibits someone in the business of betting and wagering from using a wire communication facility for the transmission in interstate

how the Department interpreted the statute, including with respect to some successful prosecutions.

II.

The Criminal Division has asked us to reconsider our 2011 Opinion. We do not lightly depart from our precedent. But having reconsidered our conclusion, we now reach a different result. The 2011 Opinion, in our view, incorrectly interpreted the limitation "on any sporting event or contest" (the "sports-gambling modifier") to apply beyond the second prohibition that it directly follows: the prohibition on transmitting "infor- mation assisting in the placing of bets or wagers."

A.

Section 1084(a)'s first clause makes it a crime to use the wires "for the transmission in interstate or foreign commerce of bets or wagers or infor- mation assisting in the placing of bets or wagers on any sporting event or contest." Our 2011 Opinion concluded that this clause was ambiguous on whether the sports-gambling modifier applies to both prohibitions in the first clause. 35 Op. O.L.C. __, at *5. We reasoned that "[t]he text itself

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or foreign commerce of bets or wagers on any sporting event or contest. . . . [T]he statute may relate only to sports betting and not to the type of real-time, interactive gambling that the Internet now makes possible for the first time. Therefore, we generally support the idea of amending the Federal gambling statutes by clarifying that the Wire Communica- tions Act applies to interactive casino betting[.]"); *Internet Gambling Prohibition Act of*

1999: Hearing Before the Subcomm on Telecommunications, Trade, & Consumer Protec- tion of the H. Comm. on Commerce, 106th Cong. 35 (2000) (statement of Kevin DiGrego- ry, Deputy Assistant Attorney General, Criminal Division) ("We urge you to consider a proposal that we have made, and I will highlight what that proposal would do. It would clarify that [section] 1084 applies to all betting and not just betting on sporting events or contests. . . . Our proposed amendment, Mr. Chairman and members of the committee, would not prohibit any gambling currently permitted nor would our proposal permit anything that is currently prohibited."), *with id*. at 88 (answering question from Rep. Tauzin and explaining that "[s]ection 1084 applies to sports betting but not to contests like a lottery"). In a 1962 speech shortly following the passage of the Wire Act, then- Assistant Attorney General for the Office of Legal Counsel Nicholas deB. Katzenbach explained that, under the Wire Act, "gamblers, bookies and related members of their fraternity are barred from using the phones for the interstate transmission of wagers on sporting events or contests," without addressing whether the statute was limited to such wagering. Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Coun- sel, Address on Federal and Local Cooperation in Fighting Crime (Jan. 25, 1962).

can be read either way" because section 1084(a) lacks "a comma after the first reference to 'bets or wagers'"; we thought that such a comma would have made it "plausible" that the first prohibition in the first clause was not limited to sports-based gambling. *Id*. "By the same token," we contin- ued, "the text does not contain commas after *each* reference to 'bets or wagers,'" which we would have considered evidence that the sports- gambling modifier qualified each prohibition in the first clause. In light of this perceived ambiguity, we interpreted both prohibitions in the first clause as confined to sports gambling because that reading "produce[d] the more logical result" and was supported by the legislative history. *Id*. at

*5–7.

We do not believe that the first clause is ambiguous, however. "It is well established that 'when the statute's language is plain, the sole func- tion of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. U.S. Trus- tee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)); *see also Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (same). There was no need for Congress to add a comma to clarify that the sports-gambling modifier applies only to the second prohibition in the first clause, because the grammar of the provision itself accomplishes that task. The sports-gambling modifier comes at the end of a complex modifier that defines the type of "infor- mation" reached by section 1084(a)'s second prohibition: "information *assisting in the placing of bets or wagers on any sporting event or con- test*." 18 U.S.C. § 1084(a) (emphasis added). Since "assisting in the plac- ing of bets or wagers" modifies only the prohibition on transmitting information, it follows that "on any sporting event or contest"—a compo- nent of the same modifier—is similarly limited.

Traditional canons of statutory construction confirm that conclusion. In construing the reach of modifiers like "on any sporting event or contest," the default rule is that "'a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately fol- lows.'" *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)); *see also Barnhart*, 540 U.S. at 26 ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent") (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.33, at 369 (6th rev. ed.

2000)); *United States v. Loyd*, 886 F.3d 686, 688 (8th Cir. 2018) (describ- ing the rule as "a rebuttable presumption in statutory interpretation"); *In*

re Sanders, 551 F.3d 397, 399 (6th Cir. 2008) (similar). That rule, the "last-antecedent rule," "reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Lockhart*, 136 S. Ct. at 963; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012) ("Scalia & Garner").[10]

In *Lockhart*, for example, the Court applied this rule to a statute that subjected a criminal defendant to increased penalties if the defendant had "'a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.'" 136 S. Ct. at 962 (quoting 18 U.S.C. § 2252(b)(2)). The Court held that the phrase "involving a minor or ward" modified only the one item on this list that immediately preceded it. *Id*. at 961. Similarly, in *Barnhart*, the Court considered the meaning of a statutory reference to circumstances in which someone "'is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.'" 540 U.S. at 23 (quoting 42 U.S.C. § 423(d)(2)(A)). The Court applied the rule of the last antecedent to conclude that the qualifier "which exists in the national economy" could reasonably be read to modify only its closest referent: "any other kind of substantial gainful work." *Id*. at 26. And in *Loyd*, the Eighth Circuit applied the last- antecedent rule to a statute that made a mandatory minimum sentence applicable to anyone with a prior conviction under enumerated federal laws "'or under the laws of any State relating to'" certain types of sexual misconduct. 886 F.3d at 687 (quoting 18 U.S.C. § 2251(e)). The court held that the sexual misconduct language "modifies only the phrase that immediately precedes it: 'the laws of any State.'" *Id*. at 688 (quoting 18

U.S.C. § 2251(e)). As in the examples discussed in those cases, the Wire

Act's reference to gambling "on any sporting event or contest" modifies only the phrase it immediately follows: "information assisting in the placing of bets or wagers."

We have considered whether the series-qualifier rule might rebut the last-antecedent presumption. The series-qualifier rule provides that a modifying phrase used to qualify one element of a list of nouns or verbs

[10] Courts commonly refer to this canon as the "last-antecedent rule," although the more precise term where, as here, the modifier is an adjectival or adverbial phrase is the "nearest reasonable referent" canon. Scalia & Garner at 152–53.

may sweep beyond the nearest referent if the list "contain[s] items that readers are used to seeing listed together or a concluding modifier that readers are accustomed to applying to each of them." *Lockhart*, 136 S. Ct. at 963. Importantly, that principle is generally limited to lists of items that are "simple and parallel without unexpected internal modifiers or struc- ture." *Id*.; *see* Scalia & Garner at 147 (canon applies where "there is a straightforward, parallel construction that involves all nouns or verbs in a series"). The series-qualifier rule thus may support applying a modifier beyond its nearest referent and across multiple, simple, parallel phrases.

But the structure of section 1084(a)'s first clause is not straightforward. The sports-gambling modifier is embedded within a longer modifier: "assisting in the placing of bets or wagers on any sporting event or contest." Reading "on any sporting event or contest" alone to carry backward to modify the prohibition on "bets or wagers" would "take[] more than a little mental energy" and be a "heavy lift." *Lockhart*, 136 S. Ct. at 963 (rejecting the applicability of the series-qualifier rule to the phrase "ag- gravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"). Nor is there any other textual evidence that would justify departing from the usual presumption that modifiers apply only to their closest referents. *See United States v. Hayes*, 555 U.S. 415, 425 (2009) (declining to apply that rule because it would introduce superfluity and would require accepting the ungrammatical premises "that Congress employed the singular 'element' to encompass two distinct concepts, and that it adopted the awkward construction 'commi[t]' a 'use'"); *see also Paroline v. United States*, 572 U.S. 434, 447 (2014) (declining to apply the rule of the last antecedent because it was overcome by other indicia of meaning). We therefore do not believe that the series-qualifier rule war- rants extending the sport-gambling modifier across both prohibitions in the first clause.

This conclusion is confirmed by comparing the structure of the sports- gambling modifier with other phrases in section 1084(a)'s first clause that do apply across multiple phrases. For instance, in speaking of "information assisting in the placing of *bets or wagers* on any sporting event or contest" (emphasis added), Congress employed a structure making clear that both "bets" and "wagers" were modified by the phrases that come before and after those items. "Bets" and "wagers" are two like items in the series, and it is straightforward to modify them with the phrases that immediately precede ("information assisting in the placing of") and follow ("on any sporting event or contest") those terms. Applying the last-

antecedent rule so that the prohibition would instead cover "information assisting in the placement of bets" and "wagers on sporting events or contests" would also introduce superfluity, since section 1084(a)'s first prohibition already extends to wire transmissions of "bets or wagers." To take another example, the phrase "sporting event or contest" is a textbook example of a simple, parallel structure where "sporting" modifies both "event" and "contest." *See* Scalia & Garner at 147–48 (providing similar examples and citing authorities); *cf.* 2011 Opinion, 35 Op. O.L.C. __, at

*12 n.11 (concluding the same, although for different reasons). In contrast with such simple constructions, the sports-gambling modifier is embedded in a more complex structure that does not easily allow that modifier to extend beyond its immediate referent.

Section 1084(a) similarly limits both prohibitions in the first clause to interstate wire transmissions. Congress prefaced both prohibitions with the phrase "*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." 18 U.S.C. § 1084(a) (emphasis added). In context, the "transmission" must be "of" what is mentioned in the follow- ing phrase. By placing the interstate-commerce requirement before the word "of," Congress made clear that the entire phrase preceding "of"— "the transmission in interstate or foreign commerce"—would apply to the first two prohibitions. Otherwise, the second prohibition would be missing a preposition: "for the transmission . . . information assisting in the plac- ing of bets or wagers on any sporting event or contest." But there are no similar indicators that would support rebutting the last-antecedent pre- sumption and applying the sports-gambling modifier to the first prohibi- tion.

The road not taken is also illuminating. Simply by adding two commas, Congress could have unambiguously extended both prohibitions in the first clause to sports-related gambling: "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." *See* 2011

Opinion, 35 Op. O.L.C. __, at *5 (recognizing that if the text contained

"commas after *each* reference to 'bets or wagers,'" it would have made the opinion's interpretation "much more certain"). Congress "could have easily" crafted text that would have carried that meaning, but did not. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013). The absence of these commas is particularly significant because it leaves "nothing in the statute to rebut the last-antecedent presumption." *In re Sanders*, 551 F.3d

at 400. Because "Congress no doubt could have worked around this grammatical rule had it wished . . . we see nothing in the section to justify dispensing with this default rule of interpretation." *Id*. The sports- gambling modifier therefore does not limit the first prohibition of section

1084(a)'s first clause, which makes it a crime to transmit "bets or wa-

gers," including those unrelated to sports gambling.

B.

We likewise conclude that section 1084(a)'s second clause is not lim- ited to sports gambling. The second clause prohibits 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, or for information assisting in the placing of bets or wagers."

18 U.S.C. § 1084(a). That clause, on its face, applies to bets or wagers of

any kind, even those unrelated to sports.

We do not think it tenable to read into the second clause the qualifier "on any sporting event or contest" that appears in the first clause. Carry- ing that qualifier forward to the second clause is even less textually plau- sible than carrying it backward to the first prohibition of the first clause. As a matter of basic grammar, section 1084(a)'s first clause is distinct from the second clause; the two clauses are separated not only by a com- ma, but also by an introductory determiner that repeats the beginning of the first clause ("for the transmission of"). There is no reference to "any sporting event or contest" in that clause and no apparent textual reason why the modifier in the first clause would extend to the second clause.

Nor does any canon of construction support reading the sports- gambling modifier transitively across the two clauses. As our analysis of the first clause demonstrates, the series-qualifier principle would appear the most natural candidate to justify such a reading. But here, the sports- gambling modifier appears after the second of four statutory prohibitions. It would take a considerable leap for the reader to carry that modifier both backward to the first prohibition of the first clause, then forward across the entire second clause. *See, e.g.*, *United States v. Lockhart*, 749 F.3d

148, 152–53 (2d Cir. 2014) ("[T]his is not the prototypical situation in

which the series qualifier canon is applied, since . . . the modifier does not end the list in its entirety."), *aff'd*, 136 S. Ct. 958 (2016); *Wong v. Minn. Dep't of Human Servs*., 820 F.3d 922, 928 (8th Cir. 2016) ("[T]he series-qualifier canon generally applies when a modifier precedes or follows a

list, not when the modifier appears in the middle."); *cf. Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 61–62 (2004) (applying a quali- fier at the end of the second item on a list to the first item as well, based in part on specific textual evidence that the second item modified the first item).

Other portions of the Wire Act support this reading. Section 1084(b) uses the phrase "sporting event[s] or contest[s]" three times to define the scope of exceptions to section 1084(a)'s prohibitions. Subsection (b) exempts the transmission "of information for use in news reporting of *sporting events or contests*," then exempts "the transmission of infor- mation assisting in the placing of bets or wagers on *a sporting event or contest* from a State or foreign country where betting on that *sporting event or contest* is legal into a State or foreign country in which such betting is legal" (emphases added). That language illustrates that Con- gress repeated the sports-gambling modifier when applying that term beyond its nearest, and most natural, referent. "When Congress includes particular language in one section of a statute but omits it in another," we presume "that Congress intended a difference in meaning." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (quoting *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (internal quotation marks and alteration omitted)); *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816,

826 (2018) (rejecting a proposed reading of a statutory provision on the ground that if Congress wanted the provision to have the claimed effect "it knew how to say so").

By contrast, section 1084(d) creates a notice-and-disconnect regime for common carriers, which must discontinue services to subscribers upon notice that the subscribers are using, or will use, their facilities "for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law." Section

1084(d), however, contains none of the sports-gambling qualifiers that

appear in section 1084(a) or (b), and section 1084(d) contains no indica- tion that it is limited to gambling information involving sporting events or contests. The absence of that modifier in section 1084(d) was presumably intentional. We thus cannot regard Congress's decision to omit the modi- fier from the second clause of section 1084(a) as an accident.

Our 2011 Opinion concluded that the sports-gambling modifier applied to section 1084(a)'s second clause, reasoning that Congress had used "shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause." 35 Op. O.L.C. __, at *7. We ob-

served that the first clause prohibits the use of a wire communication facility for "the transmission *in interstate or foreign commerce*" of the prohibited bets or information, but that the second clause prohibits the use of the facility just for "the transmission of a wire communication" without repeating again the words "in interstate or foreign commerce." *Id*. Citing the views of the Criminal Division and the legislative history, we con- cluded that 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." *Id*. Because the interstate-commerce qualifier could apply to both clauses, we con- cluded that the second clause used the phrase "for the transmission of a wire communication" as shorthand for both the interstate-commerce modifier and the sports-gambling modifier. *Id*.

We disagree with this inference, however, because the interstate- commerce modifier and the sports-gambling modifier are not parallel phrases. Within the grammar of the statute, the interstate-commerce element reaches beyond its nearest referent to modify at least the second prohibition as well as the first. *See* 18 U.S.C. § 1084(a) ("for the trans- mission *in interstate or foreign commerce of* bets or wagers *or* infor- mation assisting in the placing of bets or wagers") (emphases added). Both prohibitions are tied by prepositional phrases to the "transmission in interstate or foreign commerce." By contrast, there is no similar textual indication that the sports-gambling modifier ranges beyond its nearest referent: "information assisting in the placing of bets or wagers." In addition, the interstate-commerce modifier appears at the beginning of a list of four prohibitions, and so there is precedent to support carrying the modifier forward to modify the prohibitions in the second clause. *See United States v. Bass*, 404 U.S. 336, 339–40 (1971) ("Since 'in commerce or affecting commerce' undeniably applies to at least one antecedent, and since it makes sense with all three, the more plausible construction here is that it in fact applies to all three."). By contrast, the sports-gambling modifier appears midway through the list, which does not support the shorthand reference suggested by our 2011 Opinion. In view of these textual differences, we do not believe that the interstate-commerce modi- fier helps us to interpret the sports-gambling modifier. If anything, the textual differences underscore why the sports-gambling modifier does not apply across the statute.

In sum, the linguistic maneuvers that are necessary to conclude that the sports-gambling modifier sweeps both backwards and forwards to reach

all four of section 1084(a)'s prohibitions are too much for the statutory text to bear. *See Lockhart*, 749 F.3d at 152–53; *Wong*, 820 F.3d at 928. For these reasons, we conclude that the phrase "on any sporting event or contest" does not extend beyond the second prohibition in section

1084(a)'s first clause to qualify section 1084(a)'s second clause.

C.

Having concluded the text was ambiguous, our 2011 Opinion reasoned that reading the Wire Act's prohibitions as limited to sports gambling "produce[d] the more logical result." 35 Op. O.L.C. __, at *5; *see also id*. at *7 (applying the sports-gambling modifier across all four prohibitions "made[] functional sense of the statute"). We found it "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 infor- mation assisting in bets or wagers concerning sports." *Id*. at *5. There is a logic to this reasoning, but unlike the 2011 Opinion, we view the statutory language as plain, and, absent a patent absurdity, we must apply the statute as written. *See Dunn v. CFTC*, 519 U.S. 465, 470 (1997).

We do not think that applying the Wire Act as written would result in an interpretation "where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be most obvious to most anyone." *Pub. Citizen v. U.S. Dep't of Justice*, 491

U.S. 440, 470–71 (1989) (Kennedy, J., concurring in judgment); *see* Scalia & Garner at 237 ("The absurdity must consist of a disposition that no reasonable person could intend."). Congress may well have had rea- sons to target the transmission of information assisting in sports gambling. Unlike lotteries, numbers games, or other kinds of non-sports gambling, sports gambling has long depended on the real-time transmission of information like point spreads, odds, or the results of horse races. Indeed, in concluding that the Wire Act was limited to sports gambling, our 2011

Opinion quoted the legislative history in which Senator Eastland, the

Chairman of the Judiciary Committee, emphasized that illegal bookmak- ing required the use of the wires, because bookmakers and betters needed real-time results of horse "races at about 20 major racetracks throughout the country." 35 Op. O.L.C. __, at *9 (quoting 107 Cong. Rec. 13,901 (1961)). Moreover, Congress might have been worried that an unfocused prohibition on transmitting any information that "assisted" in any sort of gambling whatsoever would criminalize a range of speech-related con-

duct—concerns that Congress evidently had in mind when it narrowed section 1084(a)'s prohibitions by excepting transmissions made "for use in news reporting of sporting events or contests." 18 U.S.C. § 1084(b). We need not speculate further. It is sufficient that Congress targeted the transmission of information assisting in sports gambling in the text, and that applying the Wire Act as written does not produce an obviously absurd result.

In our 2011 Opinion, we found it improbable that Congress would have failed to prohibit "the transmission of information assisting in the placing of bets or wagers on non-sporting events," but then, in section 1084(a)'s second clause, prohibited transmissions "entitling the recipient to receive money or credit for the provision of information assisting in the placing of those lawfully-transmitted bets." 35 Op. O.L.C. __, at *8.[11] But improbable is not absurd, and that anomaly largely falls away if, as we have concluded, transmitting bets or wagers of any kind is indeed unlawful under section 1084(a)'s first clause. *See supra* Part II.A. It was not absurd for Congress to supplement a broad prohibition on transmitting infor- mation that assists sports gambling in the first clause with another prohi- bition on a particular species of transmissions concerning all forms of gambling: those that entitle a recipient to money or credit for information that assists in the placing of unlawfully transmitted bets and wagers. Even if these prohibitions were anomalous, however, that result would simply reflect the statutory text. It is the job of the Executive to faithfully execute those words, and that of Congress to fix or improve those laws as it sees fit. *See Exxon Mobil Corp. v. Allapattah Servs*., 545 U.S. 546, 565 (2005) (If there is an "unintentional drafting gap," "it is up to Congress rather than the courts to fix it. The omission may seem odd, but it is not ab- surd.").

Our 2011 Opinion also relied heavily upon the legislative history of the

1961 Wire Act. Citing the many references in the legislative history to sports gambling and the dearth of references to other forms of gambling,

[11] Similar results would follow even if section 1084(a) were limited to sports gam- bling. If it were so limited, section 1084(a)'s first clause would allow people to relay sports bets and wagers so long as they did not use the wires to do so—yet the second clause would prohibit wire transmissions entitling the recipients to receive money or credit for those bets and wagers. The primary conduct of betting would not be prohibited under the Wire Act, yet the wire transmission entitling the bettor to payment would be a criminal offense under that statute.

the opinion concluded that "Congress's overriding goal in the Act was to stop the use of wire communications for sports gambling in particular." 35

Op. O.L.C. __, at *8; *see id*. at *8–10. That may well have been true. But "statutory prohibitions often go beyond the principal evil to cover rea- sonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v*. *Sundowner Offshore Servs., Inc*., 523 U.S. 75, 79 (1998); *see also Encino Motorcars, LLC v*. *Navarro*, 138 S. Ct. 1134,

1142, 1143 (2018) (declining to attach significance to the fact that the legislative history of the Fair Labor Standards Act "discusses 'automobile salesmen, partsmen, and mechanics' but never discusses service advi- sors," because "[e]ven if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair read- ing").

Our 2011 Opinion also emphasized the drafting history of the Wire Act. As we explained it, an earlier draft of the bill was unequivocally limited to sports gambling. When the Senate Judiciary Committee substantially redrafted the provision to change it to its current form, the Committee removed the commas that had so clearly limited the initial prohibitions to sporting events and contests. Our 2011 Opinion could not identify evi- dence in the legislative history that when Congress reworked the provi- sion, it intended "to expand dramatically the scope of prohibited transmis- sions 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" different prohibitions. 35 Op. , at
O.L.C. *6.
The

committee reports, for instance, did not suggest that these changes dra- matically expanded the Wire Act's coverage. Given that such substantial changes "would have significantly altered the scope of the statute," our

2011 Opinion read the "absence of comment" to be significant. *Id*. at *7.

But we do not share the 2011 Opinion's confidence that silence in the legislative history on those revisions is so probative. As the Supreme Court recently observed, "if the text is ambiguous, silence in the legisla- tive history cannot lend any clarity," and "if the text is clear, it needs no repetition in the legislative history." *Encino Motorcars*, 138 S. Ct. at

1143; *see also Avco Corp*. *v*. *U.S*. *Dep't of Justice*, 884 F.2d 621, 625 (D.C. Cir. 1989) ("[S]ilence in legislative history is almost invariably ambiguous. If a statute is plain in its words, the silence may simply mean that no one in Congress saw any reason to restate the obvious."). Here, the text is clear, and thus, even if so inclined, we would not have a justifica-

tion for delving into the Congressional Record to ascertain what individu- al Members of Congress may have thought at the time. It is the words of the statute that the President signs into law, and in so doing, "it is not to be supposed that . . . the President endorses the whole Congressional Record." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384,

396 (1951) (Jackson, J., concurring). As the Supreme Court recently emphasized, "'[i]t is the business of Congress to sum up its own debates in its legislation,' and once it enacts a statute, 'we do not inquire what the legislature meant; we ask only what the statute means.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (quoting *Schwegmann Bros.*, 341

U.S. at 396 (Jackson, J., concurring) (some internal quotation marks

omitted)). Congress left the authoritative record of its deliberations in the text of the statute, and we rely solely upon its plain meaning to govern our interpretation here.[12]

III.

In view of our conclusion that the Wire Act applies to non-sports gam- bling, the Criminal Division has asked us to revisit the question that our

2011 Opinion did not need to answer, namely whether the 2006 enactment

[12] Even if we were to consider the legislative history, there are multiple inferences one could reasonably draw from the progression of the legislation through Congress. The

2011 Opinion quoted concerns expressed by Senator Kefauver (the leader of the Senate's

1950s investigation into organized crime), who pressed a Department of Justice witness on why the draft Wire Act did not reach numbers games and other forms of non-sports- based gambling. 35 Op. O.L.C. __, at *10 n.7. Shortly after that hearing, the Judiciary Committee added the new language to change the prohibitions of the bill to their enacted form; in so doing, it removed the commas that had limited the draft prohibitions to sporting events and contests. Our 2011 Opinion concluded from this chain of events that Congress did not intend that change to extend the Wire Act's prohibitions to non-sports gambling. *Id.* at *6–7. But one might just as well speculate that the Judiciary Committee made such changes to respond to Senator Kefauver's urging that the Wire Act reach non- sports gambling. Here then, as in other instances, the legislative record provides grounds for alternative interpretations of what the Members may have intended. *See Exxon Mobil*,

545 U.S. at 568 (The "investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" (quoting Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983)); *see also* Scalia & Garner at 377 ("With major legislation, the legislative history has something for everyone."). Rather than relying upon suppositions concerning Members' intent, however, we view the relevant record to be the unambiguous words of the statute.

of UIGEA modifies the scope of the Wire Act. *See* Memorandum for John P. Cronan, Principal Deputy Assistant Attorney General, Criminal Divi- sion, from David C. Rybicki, Deputy Assistant Attorney General, Crimi- nal Division, *Re: The Interaction Between UIGEA and the Wire Act* at 2 (Aug. 28, 2018). Specifically, the Criminal Division has asked whether, in excluding certain activities from UIGEA's definition of "unlawful Inter- net gambling," UIGEA excludes those same activities from the prohibi- tions under other federal gambling laws. *Id*. We conclude that it does not.

Congress enacted UIGEA to strengthen the enforcement of existing prohibitions against illegal gambling on the Internet. 31 U.S.C. § 5361(4). UIGEA prohibits anyone "engaged in the business of betting or wagering" from "knowingly accept[ing]" various kinds of payments "in connection with the participation of another person in unlawful Internet gambling." *Id*. § 5363. UIGEA defines "unlawful Internet gambling" as follows:

> IN GENERAL.—The term "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 where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is ini- tiated, received, or otherwise made.

Id. § 5362(10)(A). That term, however, "does not include" certain enu- merated activities. *Id*. § 5362 (10)(B)–(D). For instance, UIGEA excludes from coverage certain bets or wagers that are "initiated and received or otherwise made exclusively within a single State" and done so in accord- ance with the laws of such State, even if the routing of those wire trans- missions was done in a manner that involved interstate commerce. *Id*.

§ 5362(10)(B).

UIGEA's definition of "unlawful Internet gambling" simply does not affect what activities are lawful under the Wire Act. This definition ap- plies only to the "subchapter" in which UIGEA is contained, 31 U.S.C.

§ 5362, and the Wire Act does not use the term "unlawful Internet gam-

bling" in any event. Our conclusion follows from the plain meaning of the statutory definition, and Congress has confirmed it with a reservation clause stating that "[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." *Id*. § 5361(b). UIGEA therefore in no way "alter[s], limit[s], or extend[s]" the existing prohibitions under the Wire Act.

IV.

For the reasons explained, we conclude that our 2011 Opinion conflicts with the plain language of the Wire Act. We emphasize, however, that we employ considerable caution in departing from our prior opinions, and we therefore think it appropriate to explain in detail why reconsideration is warranted here. This Office, exercising authority delegated by the Attor- ney General, provides binding legal advice within the Executive Branch. *See* 28 U.S.C. § 511; 28 C.F.R. § 0.25(a); Memorandum for the Attorneys of the Office, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Best Practices for OLC Legal Advice and Written Opinions* at 1 (July 16, 2010) ("2010 Best Practices Memo"), https://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/ olc-best-practices-2010.pdf; Memorandum for the Attorneys of the Office, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Best Practices for OLC Opinions* at 1 (May

16, 2005) ("2005 Best Practices Memo"), https://www.justice.gov/sites/

default/files/pages/attachments/2014/07/11/olc-best-practices-2005.pdf. Although the Judicial Branch's doctrine of stare decisis does not itself apply to the Executive Branch, we embrace the long tradition of general adherence to executive branch legal precedent, reflecting strong interests in efficiency, institutional credibility, and the reasonable expectations of those who have relied on our prior advice. This tradition of respect for Department precedent predates the establishment of this Office and re- flects the longstanding practice of Attorneys General in providing legal advice.[13]

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[13] *See, e.g.*, *Import Duties—Warehoused Goods*, 21 Op. Att'y Gen. 23, 24 (1894) ("A [definitional] question once definitely answered by one of my predecessors and left at rest for a long term of years should be reconsidered by me only in a very exceptional case," and "reconsideration" would only be appropriate if predicate assumptions on which the past advice relied were no longer correct); *Camel's Hair Noils—Drawback*, 24 Op. Att'y Gen. 53, 55 (1902) ("[Attorney General] Olney's opinion, although brief, is evidently based on careful consideration of all aspects of the case. It is not perhaps accurate, . . . but I concur in the principle of my predecessor's ruling, and perceive no sufficient reason to revise the same. A question once definitely answered by one of my predecessors and left at rest for a long term of years should be reconsidered by me only in a very exceptional case." (internal citations omitted)); *see also* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1471–74 (2010) (discussing the historical practice of stare decisis within the Department of Justice).

Reconsidering past opinions without considering these interests "could easily lead to requests for reconsideration of earlier Opinions on other subjects," thereby undermining the value of our legal advice. Memoran- dum for the Attorney General, from Malcolm R. Wilkey, Assistant Attor- ney General, Office of Legal Counsel, *Re: Gifts from Foreign Govern- ments, CP-58-80 of May 14, 1958*, at 3 (May 15, 1958). Accordingly, we "should not lightly depart from such past decisions, particularly where they directly address and decide a point in question." 2010 Best Practices Memo at 2; *accord* 2005 Best Practices Memo at 2.

We nevertheless have recognized that, "as with any system of prece- dent, past decisions" of our Office "may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes." 2010

Best Practices Memo at 2. We have departed from our prior advice for a range of reasons. In many instances, we have withdrawn precedents when intervening developments in the law appear to cast doubt upon our con- clusions.[14] We have also modified earlier advice where the factual predi- cates have shifted or we have come to a better understanding of them. *See, e.g.*, *Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service*, 19 Op. O.L.C. 238, 238,

243, 244 (1995) (upon being asked to "reconsider and rescind" a 1993 opinion, we "reaffirmed and clarified" that opinion but, after gathering information from the agencies and learning that one agency was not operating in the manner anticipated by the statute or by us, we modified one of its conclusions).

In other instances, however, we have reconsidered our advice after identifying errors in the supporting legal reasoning.[15] We have, for exam-

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[14] *See, e.g.*, Memorandum for the Files, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*, at 2 (Jan. 15, 2009) ("Bradbury Memo on

9/11 Opinions") (withdrawing certain post-9/11 opinions because, among other things, their legal reasoning had "been overtaken by subsequent decisions of the Supreme Court and by legislation passed by Congress and supported by the President"); *Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church*, 27 Op. O.L.C. 91, 117 (2003) ("Perhaps more important, recent Supreme Court decisions have brought the demise of the 'pervasively sectarian' doctrine that comprised the basis . . . the 1995 Opinion of this Office.").

[15] *See, e.g.*, *Application of Anti-Nepotism Statute to Presidential Appointment in White House*, 41 Op. O.L.C. __, at *9–14 (Jan. 20, 2017) (describing our past opinions as legally erroneous as an initial matter and overtaken by subsequent developments in the law);

ple, modified our position regarding whether the Appointments Clause applies to private entities who perform functions on behalf of the federal government.[16] And we have revisited precedents that themselves had reversed established positions of the Executive Branch.[17]

Several factors justify reconsideration here. Although the 2011 Opinion directly addressed the question now before us, we believe that the 2011

Opinion devoted insufficient attention to the statutory text and applicable canons of construction, which we believe compel the conclusion that the prohibitions of the Wire Act are not uniformly limited to sports gambling. Furthermore, the 2011 Opinion is of relatively recent vintage and departed

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Definition of Torture under 18 U.S.C. §§ 2340–2340A, 28 Op. O.L.C. 297, 304 n.17 (2004) ("We do not believe [these statutory sources] provide a proper guide for interpret- ing 'severe pain' in the very different context of the prohibition against torture in sections

2340–2340A."); *Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities*, 18 Op. O.L.C. 109 (1994) (reversing the conclusions reached in *Applicability of the Davis-Bacon Act to the Veterans Administra- tion's Lease of Medical Facilities*, 12 Op. O.L.C. 89 (1988)); *Authority of the Federal Bureau of Investigation To Override International Law In Extraterritorial Law Enforce- ment Activities*, 13 Op. O.L.C. 163 (1989) (disapproving the conclusion reached in *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. O.L.C. 543 (1980), that the FBI lacked authority to apprehend a fugitive in a foreign state in a manner contrary to customary international law).

[16] *Compare The Constitutional Separation of Powers Between the President and Con- gress*, 20 Op. O.L.C. 124, 146 n.65 (1996) ("disapprov[ing of] the Appointments Clause analysis and conclusion of an earlier opinion of this Office," and finding that the Appointments Clause does not apply to private entities), *with Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 121 (2007) (reversing the 1996 opinion's conclusion that the Appointments Clause does not apply to private entities).

[17] *See, e.g.*, *Validity of Statutory Rollbacks as a Means of Complying with the Ineligi- bility Clause*, 33 Op. O.L.C. __, at *1 (May 20, 2009) (reconsidering 1987 OLC opinion that "was not in accord with the prior interpretations of this Clause by the Department of Justice and has not consistently guided subsequent practice of the Executive Branch" and did not "reflect[] the best reading of the Ineligibility Clause" of the Constitution); Memo- randum for the Files, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities* at 2 (Oct. 6, 2008) (over- turning post-9/11 precedent that had departed from "the longstanding interpretation of the Executive Branch," under which "any particular application of the Insurrection Act to authorize the use of the military for law enforcement purposes would require the presence of an actual obstruction of the execution of federal law or a breakdown in the ability of state authorities to protect federal rights").

from established Department practice, which included successful prosecu- tions under a broader understanding of the Wire Act and repeated repre- sentations to Congress about the Department's views. *See supra* Part I. The Department's position prior to our 2011 Opinion, indeed, may have informed Congress's action in 2006 in enacting the UIGEA, which pro- hibited the acceptance of payment in connection with "unlawful Internet gambling," but expressly declined to alter, limit, or extend any federal laws "prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b).

Reaching a contrary conclusion from our prior opinion will also make it more likely that the Executive Branch's view of the law will be tested in the courts. We have sometimes relied on that likelihood in considering whether the Executive should decline to enforce or defend unconstitution- al statutes. *See Presidential Authority to Decline to Execute Unconstitu- tional Statutes*, 18 Op. O.L.C. 199, 201 (1994); *Recommendation that the Department of Justice Not Defend the Constitutionality of Certain Provi- sions of the Bankruptcy Amendments and Federalist Judgeship Act of*

1984, 8 Op. O.L.C. 183, 193–94 (1984). We likewise believe it relevant in

determining whether to depart from our precedent. Under our 2011 Opin- ion, the Department of Justice may not pursue non-sports-gambling- related prosecutions under the Wire Act. But under the conclusion we adopt today, such prosecutions may proceed where appropriate, and courts may entertain challenges to the government's view of the statute's scope in such proceedings. While the possibility of judicial review cannot sub- stitute for the Department's independent obligation to interpret and faith- fully execute the law, that possibility does provide a one-way check on the correctness of today's opinion, which weighs in favor of our change in position.

We acknowledge that some may have relied on the views expressed in our 2011 Opinion about what federal law permits. Some States, for exam- ple, began selling lottery tickets via the Internet after the issuance of our

2011 Opinion.[18] But in light of our conclusion about the plain language of

[18] *See, e.g.*, John Byrne, *Quinn Says Online Lottery Sales Could Start in Spring*, Chi. Tribune (Dec. 27, 2011), http://www.chicagotribune.com/news/local/politics/chi-quinn- says-online-lottery-sales-could-start-in-spring-20111227-story.html (explaining that "following a U.S. Justice Department ruling that the Internet sales [of state lottery tickets] are legal," the Governor of Illinois planned to move forward with plans to sell lottery tickets on the Internet); State of Illinois, Office of Management and Budget, Illinois

the statute, we do not believe that such reliance interests are sufficient to justify continued adherence to the 2011 opinion.[19] Moreover, if Congress finds it appropriate to protect those interests, it retains ultimate authority over the scope of the statute and may amend the statute at any time, either to broaden or narrow its prohibitions.

V.

We conclude that the prohibitions of 18 U.S.C. § 1084(a) are not uni- formly limited to gambling on sporting events or contests. Only the sec- ond prohibition of the first clause of section 1084(a), which criminalizes transmitting "information assisting in the placing of bets or wagers on any sporting event or contest," is so limited. The other prohibitions apply to non-sports-related betting or wagering that satisfy the other elements of section 1084(a). We also conclude that section 1084(a) is not modified by UIGEA. This opinion supersedes and replaces our 2011 Opinion on the subject.

STEVEN A. ENGEL *Assistant Attorney General Office of Legal Counsel*

Performance Reporting System, Agency Performance Metric Reports FY18 Quarter 4 (Aug. 14, 2018 3:53 PM), https://www.illinois.gov/gov/budget/IPRS%20Reports/458_ Department_of_the_Lottery.pdf ("Internet sales" of Illinois lottery tickets were about $20 million in FY 2017 and in FY 2018).

[19] An individual who reasonably relied upon our 2011 Opinion may have a defense for acts taken in violation of the Wire Act after the publication of that opinion and prior to the publication of this one. *See, e.g.*, *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655,

673–74 (1973); *Cox v. Louisiana*, 379 U.S. 559, 568–69 (1965). The reliance interest

implicit in any such defense, however, does not bear upon our reconsideration of the 2011

To say the new opinion caused concern in the industry would be an understatement. Since 2011, significant investments had been made to gaming technologies that supported what the new U.S. Department of Justice opinion now viewed as activity prohibited by the Federal Wire Act. The lottery of New Hampshire in particular took issue with the opinion and filed suit to clarify whether the U.S. Department of Justice could engage in enforcement actions against it or its vendors based on this new opinion. The following is the opinion of the Federal District Court from New Hampshire:

New Hampshire v. Bar

United States District Court, D. New Hampshire.

NEW HAMPSHIRE LOTTERY COMMISSION, et al.

v.

William BARR, in his official capacity as Attorney General of the United States of America, et al.

Consolidated Case No. 19-cv-163-PB

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Signed June 3, 2019

MEMORANDUM AND ORDER

Paul Barbadoro, United States District Judge

***136** The **Wire Act** of 1961 criminalizes certain gambling activities that use interstate wires. In 2011, the Justice Department's Office of Legal Counsel ("OLC") issued a formal opinion declaring that the **Wire Act** only punishes activities associated with sports gambling. Last year, the OLC changed its mind. It now asserts that the Act also covers lotteries and other forms of gambling that do not involve sports.

The New Hampshire Lottery Commission has long offered lottery games such as Powerball that necessarily use interstate wires. Fearing that these games, which produce substantial revenue for the State, will be deemed to be criminal activities under the OLC's current interpretation of the **Wire Act**, the Commission filed a complaint in this court seeking both a declaratory judgment that the Act is limited to sports gambling and an order under the Administrative Procedure Act setting aside the OLC's new interpretation. One of the Commission's vendors also filed a complaint that has been joined with the current action, seeking declaratory relief.

Before me are the Government's motion to dismiss for lack of standing and the parties' cross-motions for summary judgment. As I explain below, I agree with the plaintiffs that they have standing to sue. Based on the text, context, and structure of the **Wire Act**, I also conclude that the Act is limited to sports gambling. Accordingly, I deny the Government's motions and grant the plaintiffs' motions for summary judgment.

I. BACKGROUND

A. The Wire Act

The relevant portion of the **Wire Act** 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).

Section 1084(a) consists of two clauses. The first clause makes it a crime for anyone engaged in the business of gambling to use 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 clause 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." Id.

The key question this case presents is whether the limiting phrase "on any sporting event or contest" in § 1084(a)'s first clause modifies all references to "bets or wagers" in both clauses or only the single reference it directly follows in the first clause. If, as the OLC concluded in 2011, the sports-gambling modifier limits each reference to "bets or wagers," then both clauses apply only to sports gambling. On the other hand, if the OLC's current interpretation is correct, then § 1084(a)'s first ***137** clause prohibits the interstate transmission of both sports and non-sports bets or wagers but punishes the interstate transmission of information only if the information assists in the placing of bets or wagers on sports. It also follows from the OLC's current interpretation that § 1084(a)'s second clause is unconstrained by the sports-gambling modifier.

B. The OLC Opinions

The path that leads to both OLC opinions begins in 2009, when New York and Illinois asked the Department of Justice whether in-state sales of lottery tickets via the internet would violate the **Wire Act** if those sales caused information to be transmitted across state lines. The Department referred the matter to the OLC for a formal opinion. In 2011, the OLC responded by concluding 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**." See Virginia A. Seitz, *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**, Memorandum Opinion for the Assistant Attorney General, Criminal Division*, U.S. Dept. Just. 1 (Sept. 20, 2011) ("2011 OLC Opinion" or "2011 Opinion"), Doc. No. 2-4.

The OLC arrived at this conclusion by first determining that the phrase "on any sporting event or contest" in the first clause of § 1084(a) applies to the transmissions of both "bets or wagers" and "information assisting in the placing of bets or wagers." 2011 OLC Opinion at 5. Noting that the statutory text could be read either way, the OLC explained that it was "difficult to discern" why Congress would forbid the interstate transmission of all types of bets or wagers but only prohibit the transmission of information assisting in the placing of bets or wagers that concern sports. Id. The more reasonable inference, according to the OLC, was that Congress intended that the prohibitions "be parallel in scope." Id.

Next, the OLC concluded that the phrase "on any sporting event or contest" also modifies the references to "bets or wagers" in § 1084(a)'s second clause. Id. at 7. The OLC explained that the references to "bets or wagers" in the second clause are best understood as shorthand references to "bets or wagers on any sporting event or contest" as described in the first clause. Id. The 2011 Opinion also relied heavily on the Act's legislative history to confirm its interpretation of the section's limited scope. See id. at 6-10.

In 2018, the OLC reversed course and released a new opinion concluding that "the prohibitions of 18 U.S.C. § 1084(a) are not uniformly limited to gambling on sporting events or contests." See Steven A. Engel, *Reconsidering Whether the **Wire Act** Applies to Non-Sports Gambling, Memorandum Opinion for the Acting Assistant Attorney General, Criminal Division*, U.S. Dept. Just. 23 (Nov. 2, 2018) ("2018 OLC Opinion" or "2018 Opinion"), Doc. No. 2-5. The OLC now reasoned that the plain text of § 1084(a) unambiguously requires that all but one of the section's prohibitions apply to gambling generally. See id. at 7, 11.

The OLC based its new reading on the syntactic structure of § 1084(a). Relying heavily on a canon of statutory construction commonly referred to as the "rule of the last antecedent," the OLC concluded that the use of the sports-gambling modifier in the section's first clause applies only to the prohibition on the interstate

transmission of "information assisting in the placing of bets or wagers" and not the ***138** transmission of "bets or wagers" themselves. Id. at 7-8.

The OLC then concluded that the use of the sports-gambling modifier in § 1084(a)'s first clause should not be carried forward into the section's second clause. Id. at 11. The two clauses are distinct "[a]s a matter of basic grammar" and "[i]t would take a considerable leap for the reader to carry that modifier both backward to the first prohibition of the first clause, then forward across the entire second clause," the OLC reasoned. Id.

The OLC acknowledged its earlier concern that this reading of § 1084(a) would produce anomalous results. Id. at 14-15. It concluded, however, that it was obligated to give the section the meaning suggested by its syntactic structure because the anomalies identified in the 2011 Opinion did not rise to the level of "patent absurdity." Id.

On January 15, 2019, the Deputy Attorney General instructed federal prosecutors to adhere to the OLC's 2018 Opinion. See *Applicability of the **Wire Act**, 18 U.S.C. § 1084, to Non-Sports Gambling*, U.S. Dept. Just. (Jan. 15, 2019) ("Enforcement Directive"), Doc. No. 2-6. As an exercise of prosecutorial discretion, however, they "should 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." Id. The grace period was intended to allow time for businesses "to bring their operations into compliance with federal law." Id. On February 28, the Deputy Attorney General extended that window through June 14, 2019. See *Additional Directive Regarding the Applicability of the **Wire Act**, 18 U.S.C. § 1084, to Non-Sports Gambling*, U.S. Dept. Just. (Feb. 28, 2019), Doc. No. 23-1.

C. New Hampshire Lottery System

The Lottery Commission offers multiple types of lottery games. Those games include instant ticket and draw games that offer tickets for sale at brick-and-mortar retailers, multi-jurisdictional games such as Powerball and Mega Millions that permit tickets to be purchased either in stores or through the internet, and "iLottery" games that sell tickets exclusively through the internet. Each game involves the use of interstate wire transmissions.

The Lottery Commission contracts with a vendor, Intralot, Inc., to provide a computer gaming system ("CGS") to manage the games and a back-office system ("BOS") to manage inventory and sales data. Its CGS and BOS servers for traditional retailer-based lottery games are located in Barre, Vermont, with a disaster recovery location in Strongsville, Ohio.

Brick-and-mortar retailers employ lottery terminals that connect the retailer to the CGS and BOS systems via the internet, a cellular network, or a satellite connection. The terminals send and receive different types of data based on the type of game. For example, in an instant ticket game, a player purchases a pre-printed ticket and scratches it to reveal the result. The lottery terminal then communicates with the CGS to activate the ticket, validate the result, and record the sale and payment of prizes. Draw games require players to purchase sets of numbers for a future draw. The retailer requests a wager transaction from the CGS through the terminal. The CGS generates a wager in the system and sends the information to the terminal. In both types

of transactions, the data travels between a lottery terminal in New Hampshire and CGS servers in Vermont and Ohio.

The Lottery Commission also offers a variety of multi-jurisdictional games, including ***139** Powerball, Mega Millions, Tri-State Lotto, and Lucky for Life. Like the in-state games, ticket sales for these games typically occur through communications between lottery terminals in New Hampshire and CGS servers in Vermont and Ohio.[1] For verification purposes, bets for multi-state games are then sent from those CGS locations to two independent control system servers in New Hampshire over the internet. The Lottery Commission also shares sales and transaction data with member states over the internet. Finally, once a jackpot is won, the participating lotteries transfer their portions of the jackpot to the jurisdiction that sold the winning ticket. This is typically done via a wire transfer or an automated clearing house process.

In September 2018, the Lottery Commission also began to offer e-instant and draw games, including Powerball and Mega Millions, via its internet platform or "iLottery." NeoPollard Interactive LLC, its vendor, operates a separate CGS with servers located in New Hampshire. The system uses geo-location data from a player's computer or mobile device to ensure the player can only make a bet or wager while physically located in New Hampshire. Although all financial transactions and bets must begin and end in New Hampshire, the Commission states that it cannot guarantee that intermediate routing of data or information ancillary to a transaction does not cross state lines.

Given the way in which these systems operate, the Lottery Commission contends that the implementation of the 2018 OLC Opinion may result in the suspension of all lottery sales by the Commission, resulting in an annual loss of over $ 90 million in state revenue.

D. Lottery Systems and "iGaming" in Amici States

The State of New Jersey, the Commonwealth of Pennsylvania, and the Michigan Bureau of State Lottery[2] have filed amicus briefs in support of the plaintiffs.[3] They describe the impact the 2018 OLC Opinion would have on their respective state-run lotteries. The lottery systems in those states are substantially similar to New Hampshire's, including the types of games offered and their reliance on interstate wires.

In addition, New Jersey and Pennsylvania have legalized some forms of online gambling or "iGaming." Those states permit state-licensed private companies to offer online casino and poker games to players within the state. New Jersey also has a shared agreement with Delaware and Nevada allowing online poker players from those states to play together.

E. Procedural History

The Lottery Commission filed its complaint and a concurrent motion for summary judgment on February 15, 2019. The ***140** Commission seeks both a declaratory judgment that the **Wire Act** does not extend to state-conducted lottery activities and an order setting aside the 2018 OLC Opinion pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. Later that day, NeoPollard Interactive LLC, the vendor that

supports New Hampshire's iLottery system, and its 50% owner, Pollard Banknote LTD (collectively "NeoPollard") filed a complaint and a concurrent motion for summary judgment. NeoPollard seeks a judgment declaring that the **Wire Act** is limited to gambling on sporting events. I consolidated the NeoPollard action with the Lottery Commission action on February 22, 2019.

The Government responded by filing a motion to dismiss the complaints pursuant to Rule 12(b)(1), because the plaintiffs lack standing to sue, and Rule 12(b)(6), because the complaints fail to state viable claims for relief. With the parties' consent, I converted the Government's request for relief pursuant to Rule 12(b)(6) into a Rule 56 motion for summary judgment.

II. ANALYSIS

The Government has challenged the plaintiffs' standing to sue. I address the Government's standing argument first because a court lacks subject matter jurisdiction unless the plaintiffs have Article III standing. See Pollard v. Law Office of Mandy L. Spaulding, 766 F.3d 98, 101 (1st Cir. 2014). I then turn to the parties' cross-motions for summary judgment, which raise two issues: (1) whether the Lottery Commission's APA claim fails because the 2018 OLC Opinion is not "final agency action," and (2) whether the **Wire Act** is limited to sports gambling. I conclude by considering the scope of the remedy.

A. Standing

[1]The Government argues that the plaintiffs lack standing because they do not face an imminent threat of prosecution. I disagree.

The plaintiffs, as the parties invoking the court's jurisdiction, bear the burden of establishing standing. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). The level of proof required to meet this burden depends on the stage of the proceedings. Lujan v. Defs. of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). At summary judgment, the plaintiffs must support their standing with specific evidence in the record. Id.; accord Clapper v. Amnesty Int'l USA, 568 U.S. 398, 412, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013). Because the jurisdictional facts are not in dispute in this case, the plaintiffs' standing turns on a pure question of law.

[2]Rooted in Article III's case-or-controversy requirement, the constitutional core of standing requires a showing that a plaintiff "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, —— U.S. ——, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016).[4] An injury in fact must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks and citations omitted). "The imminence requirement is met 'if the threatened injury is "certainly impending" or there is a "substantial ***141** risk" that the harm will occur.' " Massachusetts v. U.S. Dep't of Health & Human Servs., 923 F.3d 209, 222 (1st Cir. 2019) (quoting Driehaus, 573 U.S. at 158, 134 S.Ct. 2334).

[3] [4] [5] [6]To establish an imminent injury in the context of a pre-enforcement challenge to a criminal statute, a plaintiff must demonstrate that he faces a threat of prosecution because of his present or intended conduct. "[J]ust how clear the threat of prosecution needs to be turns very much on the facts of the case and on a sliding-scale judgment that is very hard to calibrate." N.H. Hemp Council, Inc. v. Marshall, 203 F.3d 1, 5 (1st Cir. 2000). Courts have variably described the requisite likelihood of enforcement as "sufficiently imminent," "credible," "substantial," and "realistic." See Driehaus, 573 U.S. at 159, 164, 134 S.Ct. 2334 ("sufficiently imminent," "credible," and "substantial"); Holder v. Humanitarian Law Project, 561 U.S. 1, 15, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010) ("credible"); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) ("credible" and "realistic"); Hemp Council, 203 F.3d at 5 ("realistic").[5]

Caselaw demonstrates where different types of pre-enforcement claims fall on the imminence spectrum. At the "clearly credible threat" end of the spectrum are pre-enforcement claims brought after an enforcer has actually threatened the plaintiff with arrest or prosecution. See, e.g., Steffel v. Thompson, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (protester had standing to bring pre-enforcement claim challenging constitutionality of state criminal trespass law after being warned to stop handbilling and threatened with arrest and prosecution). Further along the spectrum, but still satisfying the imminence requirement, are cases where a plaintiff has engaged in behavior that a statute arguably makes unlawful, the plaintiff intends to continue to engage in the allegedly unlawful behavior, and though the enforcement process has not yet begun, the risk of future prosecution is substantial. See Driehaus, 573 U.S. at 161-66, 134 S.Ct. 2334; see also Humanitarian Law Project, 561 U.S. at 15-16, 130 S.Ct. 2705 (plaintiffs faced credible threat of prosecution where there was history of prosecution under challenged law and "Government ha[d] not argued ... that plaintiffs will not be prosecuted if they do what they say they wish to do"); Babbitt, 442 U.S. at 302, 99 S.Ct. 2301 (plaintiffs' fear of prosecution credible where, inter alia, "State ha[d] not disavowed any intention of invoking the criminal penalty provision" against entities that violate the statute). At the far end of the spectrum, where a threat of prosecution cannot be considered imminent, are cases in which "an unambiguous disclaimer of coverage by the prosecutor" would likely eliminate the threat of prosecution. Hemp Council, 203 F.3d at 5.

The plaintiffs in this case easily satisfy the imminence requirement. First, they have openly engaged for many years in conduct that the 2018 OLC Opinion now brands as criminal, and they intend to continue their activities unless they are forced to stop because of a reasonable fear ***142** that prosecutions will otherwise ensue. Second, the risk of prosecution is substantial. 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. Even worse, they face a directive from the Deputy Attorney General to his prosecutors that they should begin enforcing the OLC's new interpretation of the Act after the expiration of a specified grace period. Given these unusual circumstances, the plaintiffs have met their burden to establish their standing to sue.

The Government challenges this conclusion by arguing that the likelihood that the plaintiffs will face prosecution under the **Wire Act** is low, because the 2018 OLC Opinion does not explicitly conclude that state agencies, state employees, and state vendors are subject to prosecution under the Act. I reject this argument because the record tells a different story.

It is worth remembering that the 2011 OLC Opinion responded to a request from two states for an opinion as to whether they could sell lottery tickets online without violating the **Wire Act**. In concluding that the **Wire Act** did not apply to non-sports gambling such as lotteries, the 2011 Opinion did not even hint at the possibility that states would be exempt from the Act's proscriptions. Had the OLC believed that states were excluded from the Act's coverage, it could have responded to the states' request by simply informing them

that they were not subject to the Act. 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. This is especially true 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**. See Letter from Laura H. Parsky, Deputy Assistant Attorney General, to Carolyn Adams, Illinois Lottery Superintendent (May 13, 2005), Doc. No. 57-2.

Any remaining doubt about the OLC's view on the issue is dispelled by both the 2018 OLC Opinion itself and the Government's actions after its issuance. In defending its decision to reinterpret the **Wire Act**, the OLC noted that "[s]ome States ... began selling lottery tickets via the Internet after the issuance of our 2011 Opinion." See 2018 OLC Opinion at 22. The OLC deemed these reliance interests insufficient to warrant continued adherence to the 2011 Opinion. See id. at 22-23. After the 2018 OLC Opinion issued, the Deputy Attorney General issued the Enforcement Directive informing federal prosecutors that ensuing prosecutions should be deferred for a 90-day grace period to give entities that "relied on the 2011 OLC Opinion time to bring their operations into compliance with federal law." See Enforcement Directive, Doc. No. 2-6. That guidance did not suggest that state entities that had relied on the 2011 Opinion would be exempt from prosecution after the grace period expired. Accordingly, nothing the Department of Justice said or did before the plaintiffs filed their complaints gave states like New Hampshire any reason to believe that state actors would not be prosecuted under the OLC's new interpretation of the **Wire Act**. When the complaints were filed, therefore, the plaintiffs faced a sufficiently imminent threat of prosecution to give them standing to sue.

Hemp Council supports this conclusion. There, in a hearing before the New Hampshire legislature, a representative of the Drug Enforcement Administration ("DEA") asserted that cultivating hemp plants violated federal law. See ***143** Hemp Council, 203 F.3d at 3. The First Circuit reasoned that the DEA had made its position clear and there was no "reason to doubt the government's zeal" in enforcing its position. Id. at 5. That position established that the plaintiffs, who were deterred from farming hemp, faced a "realistic" threat of prosecution. See id. So too here.

In resisting this assessment, the Government relies heavily on an April 8, 2019 memorandum issued by the Deputy Attorney General. That memorandum, which was issued after this case was well underway, states that the Department of Justice is currently reviewing whether the **Wire Act** applies to state lotteries and their vendors. See *Notice Regarding Applicability of the **Wire Act**, 18 U.S.C. § 1084, to State Lotteries and Their Vendors*, U.S. Dept. Just. (April 8, 2019) ("State Actor Directive"), Doc. No. 61-1 at 4. All federal prosecutors are directed to "refrain from applying section 1084(a)" to such entities during the pendency of the Department's review and for 90 days thereafter. Id. Because the State Actor Directive declares that the Department has not yet determined whether state lotteries and their vendors can be prosecuted under the **Wire Act**, the Government argues that the plaintiffs do not face a realistic threat of prosecution under the Act. I am unpersuaded by the Government's argument.

[7]In a case such as this, where the defendant argues that its actions after a complaint is filed eliminate the threatened injury upon which the plaintiffs' claim to standing is based, the defendant bears the "heavy burden" of persuading the court 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, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)); accord Already, LLC v. Nike, Inc., 568 U.S. 85, 92, 133 S.Ct. 721, 184 L.Ed.2d 553 (2013); Ramírez v. Sánchez Ramos, 438 F.3d 92, 100 (1st Cir. 2006).

The Government cannot satisfy this burden for two related reasons. First, at present, the State Actor Directive is nothing more than a temporary moratorium that cannot sustain a mootness claim. See City of Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (temporary moratorium on use of challenged policy did not moot the case). Second, to the extent that the Government holds out the possibility that the temporary moratorium might become permanent at a later date, its argument is purely speculative. The Government has rejected the only argument put forward by the Lottery Commission that states are not covered by the Act, and it has otherwise failed to identify any alternative legal theory as to why state actors might be exempt. See Doc. No. 70. Speculation that such a viable theory may exist cannot provide a sufficient foundation to moot a live controversy.

The Government's remaining standing argument is less conventional, but it too fails to persuade. It is based on the mistaken premise that a plaintiff has standing to seek pre-enforcement review only when challenging a criminal statute on constitutional grounds. The Supreme Court cases the Government cites for this proposition merely hold that constitutional challenges are susceptible to pre-enforcement review. See, e.g., Driehaus, 573 U.S. at 159, 134 S.Ct. 2334; Humanitarian Law Project, 561 U.S. at 15-16, 130 S.Ct. 2705; Babbitt, 442 U.S. at 298, 99 S.Ct. 2301. They do not imply that a constitutional challenge is necessary. In fact, the Supreme Court has suggested that constitutional challenges are only an "example" of permissible pre-enforcement ***144** review when the Government issues a threat. See MedImmune, 549 U.S. at 128-29, 127 S.Ct. 764.

This case also differs from the cases the Government cites because it involves a claim that the 2018 Opinion is an unlawful final agency action that must be set aside pursuant to the APA. In addressing a similar APA pre-enforcement claim that lacked an alleged constitutional violation, the Supreme Court held in Abbott Labs that the plaintiffs had standing to seek pre-enforcement review. See 387 U.S. at 154, 87 S.Ct. 1507. The Court reasoned that the challenged agency action "is directed at [the plaintiffs] in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the [agency's] rule they are quite clearly exposed to the imposition of strong sanctions." Id. The plaintiffs thus suffered an injury in fact that satisfied Article III, although they did not present a constitutional claim. See id. The same circumstances are present here and the same conclusion follows.

[8]As recently as 2016, the Supreme Court reiterated that "[a]s we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.' " U.S. Army Corps of Eng'rs v. Hawkes Co., —— U.S. ——, 136 S. Ct. 1807, 1815, 195 L.Ed.2d 77 (2016) (quoting Abbott Labs., 387 U.S. at 153, 87 S.Ct. 1507). Although Hawkes did not address standing, only the finality of agency action, the Court's observation supports the view that Driehaus did not engraft a constitutional requirement for pre-enforcement review of APA claims that is absent in Abbott Labs.

In any event, the Government concedes that its position is at odds with the First Circuit's decision in Hemp Council, which entertained a statutory challenge to the DEA's interpretation of a federal criminal statute. See 203 F.3d at 5. Because I am bound to follow First Circuit precedent, Hemp Council alone forecloses the argument that a constitutional challenge is needed to meet the imminence requirement.

In sum, this is no hypothetical case: The plaintiffs have demonstrated with specific record evidence that they had standing when they filed suit because a sufficiently imminent threat of enforcement loomed. The plaintiffs faced the choice between risking criminal prosecution, winding down their operations, or taking significant and costly compliance measures that may not even eliminate the threat. This choice "between

abandoning [their] 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, 127 S.Ct. 764 (quoting Abbott Labs., 387 U.S. at 152, 87 S.Ct. 1507).

B. Cross-Motions for Summary Judgment

The parties' cross-motions for summary judgment raise two legal questions: (1) whether the 2018 OLC Opinion is subject to review under the APA as final agency action, and (2) whether the **Wire Act** applies to non-sports gambling.[6] I analyze each question in turn.

***145 a. Final Agency Action**

[9]The APA entitles an aggrieved party to judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. An action is final if "the agency has completed its decisionmaking process ... [and] the result of that process is one that will directly affect the parties." Franklin v. Massachusetts, 505 U.S. 788, 797, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992); Trafalgar Capital Assocs., Inc. v. Cuomo, 159 F.3d 21, 35 (1st Cir. 1998). The Supreme Court has emphasized that the APA "creates a 'basic presumption of judicial review [for] one suffering legal wrong because of agency action.' " Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., —— U.S. ——, 139 S. Ct. 361, 370, 202 L.Ed.2d 269 (2018) (quoting Abbott Labs., 387 U.S. at 140, 87 S.Ct. 1507).

[10] [11]The finality requirement for an APA claim is satisfied if "a decision is a 'definitive statement of the agency's position and [has] a direct and immediate effect on the day-to-day business' of the complaining parties." Sig Sauer, Inc. v. Brandon, 826 F.3d 598, 600 n.1 (1st Cir. 2016) (quoting FTC v. Standard Oil Co., 449 U.S. 232, 241, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980)) (internal alterations omitted); cf. Hawkes, 136 S. Ct. at 1813. The Government does not challenge the Lottery Commission's contentions that the 2018 OLC Opinion represents the culmination of the Justice Department's review of the **Wire Act** and is a "definitive statement of [the agency's] position." See Standard Oil, 449 U.S. at 241, 101 S.Ct. 488. Thus, the sole issue I must address is whether the 2018 Opinion and the accompanying Enforcement Directive will also "directly affect the parties." See Trafalgar Capital, 159 F.3d at 35.

The Government argues that the 2018 OLC Opinion and the Enforcement Directive will not have a direct effect on the Lottery Commission unless and until it is indicted. I disagree. The State derives substantial revenue from its lottery operations. The final agency action requirement has not been construed to require litigants in the Commission's position to choose between abandoning an otherwise lawful and productive activity and facing a credible threat of "serious criminal and civil penalties." Hawkes, 136 S. Ct. at 1815 (quoting Abbott Labs., 387 U.S. at 153, 87 S.Ct. 1507). Here, because the threat of prosecution the plaintiffs face is substantial, that threat alone satisfies the direct effect component of the final agency action test.

The 2018 OLC Opinion will also have an immediate adverse effect on the Commission even if no indictment issues. The 2011 OLC Opinion explicitly gave businesses engaged in non-sports gambling a "reasonable reliance" defense to prosecution under the **Wire Act**. See 2018 OLC Opinion at 23 n.19 ("An individual who reasonably relied upon our 2011 Opinion may have a defense for acts taken in violation of the **Wire Act** after the publication of that opinion and prior to the publication of this one.") (citing United States v. Pa. Indus.

Chem. Corp., 411 U.S. 655, 673-74, 93 S.Ct. 1804, 36 L.Ed.2d 567 (1973)); cf. United States v. Ledee, 772 F.3d 21, 31 (1st Cir. 2014) (observing that "criminal prosecution may be barred [where] government misled defendant on whether charged conduct was criminal") (citing Pa. Indus., 411 U.S. at 674, 93 S.Ct. 1804). That defense will no longer be available to the Commission once the Department of Justice begins to enforce ***146** the 2018 Opinion against entities engaged in non-sports gambling. Thus, even if the Commission is not immediately indicted, its position will become far more perilous if the 2018 OLC Opinion is allowed to stand. Cf. Hawkes, 136 S. Ct. at 1815 (finding final agency action because, inter alia, it "deprive[d] respondents of a five-year safe harbor from liability under the [statute]").

Finally, the 2018 OLC Opinion also has an adverse effect on the Commission that does not depend upon any effort by the Department of Justice to enforce the opinion. Section 1084(d) of the **Wire Act** provides:

> 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 ....

18 U.S.C. § 1084(d). In other words, once the 2018 OLC Opinion was published, any law enforcement agency could notify in writing a common carrier (such as a telephone or internet service provider) that it was providing services "used for the purpose of transmitting or receiving gambling information" in violation of the **Wire Act**. Upon receipt of such notice, the provider would be compelled to "discontinue or refuse" that service to the offending subscriber.

The Government has not represented that it will forebear from enforcing § 1084(d). The Enforcement Directive, which instructs Department of Justice attorneys to "adhere to OLC's [2018] interpretation," announces that they "should 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." See Enforcement Directive, Doc. No. 2-6. It extends no such "internal exercise of prosecutorial discretion" to § 1084(d). See id. Before the 2018 Opinion, federal law enforcement could not invoke the **Wire Act** to disconnect the Lottery Commission from the internet. Now it can. And that is a legal consequence.

The 2018 OLC Opinion is a definitive statement concerning the Justice Department's interpretation of the **Wire Act**, and the opinion has a direct and immediate impact on the Commission's operations. See Sig Sauer, 826 F.3d at 600 n.1; see also Standard Oil, 449 U.S. at 242, 101 S.Ct. 488 (explaining that regulations in Abbott Labs had sufficient legal effect because they forced manufacturers to choose between risking criminal and civil penalties for noncompliance and drastically altering their business and investment practices) (citing Abbott Labs., 387 U.S. at 152-53, 87 S.Ct. 1507). Accordingly, the opinion constitutes final agency action without an adequate alternative to APA review.[7]

***147 b. The Wire Act**

[12]The plaintiffs argue that the OLC got it right when it concluded in the 2011 Opinion that the Act applies only to sports gambling. The Government defends the 2018 Opinion and claims that all but one of the Act's

prohibitions apply to any form of gambling. Each side maintains that its interpretation is compelled by the plain language of § 1084(a). I examine these arguments after first addressing the plaintiffs' contention that controlling First Circuit precedent has already resolved the dispute.

1. First Circuit Caselaw

The plaintiffs argue that the First Circuit has authoritatively ruled that the **Wire Act** applies only to sports gambling. It has not. The plaintiffs confuse the court's dictum in United States v. Lyons, 740 F.3d 702 (1st Cir. 2014), with binding precedent.

The defendants in Lyons were convicted of two **Wire Act** violations in 2012. See id. at 712. At trial, the court admitted evidence suggesting that the defendants had accepted sports bets, and it instructed the jury that the **Wire Act** applied only to sports gambling. See id. at 718. The defendants nevertheless argued on appeal that the Government had produced insufficient evidence to support the convictions because "some evidence at trial showed that [the defendants' business] also accepted bets on casino games and other forms of gambling not covered by the **Wire Act**." Id. In rejecting this argument, the court of appeals began by declaring that "[t]he **Wire Act** applies only to 'wagers on any sporting event or contest,' that is sports betting." Id. (quoting 18 U.S.C. § 1084(a)). But the court did not uphold the convictions on that basis. Instead, it reasoned that because the **Wire Act** applied to sports gambling and the record included sufficient evidence to support a finding that the defendants had accepted sports bets, it did not matter that they had also accepted non-sports bets. See id.

The logical structure on which the court's ruling on this point is based is self-evident. It begins with two legal propositions: (1) the **Wire Act** applies to sports gambling; and (2) the convictions stand if sufficient evidence was produced at trial to support a conclusion that the defendants accepted sports bets, even if they also accepted non-sports bets. See id. The court examined the record and concluded that the evidence permitted a conclusion that the defendants had accepted sports bets. See id. The court's additional statement that the **Wire Act** applied only to sports gambling played no role in its decision. Therefore, that statement is mere dictum, not a holding that binds lower courts. See Rossiter v. Potter, 357 F.3d 26, 31 (1st Cir. 2004).

Although the First Circuit has explained that "considered dicta" is also ordinarily binding, at least where it "is of recent vintage and not enfeebled by any subsequent statement," McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991), the First Circuit's dictum in Lyons does not qualify as "considered." First, the trial court instructed the jury that the **Wire Act** applied only to sports gambling. And the Government, constrained by the 2011 OLC Opinion, did not contest the trial court's instruction at trial or on appeal. As a result, the court of appeals did not receive the benefit of briefing on the issue.

Second, because the trial court's instruction went unchallenged, and the circuit court's statement that the **Wire Act** applies only to sports gambling was not necessary to its decision, the court understandably did not attempt to explain how its statement resulted from the text of the **Wire Act**. Instead, it merely cited to the only circuit court decision to address the issue, ***148** which supported the trial court's instruction. See Lyons, 740 F.3d at 718 (citing In re MasterCard Int'l Inc., 313 F.3d 257, 263 (5th Cir. 2002)). Under these circumstances, I cannot defer to the circuit court's unconsidered dictum in Lyons without first undertaking my own independent analysis of the issue.

2. Ambiguity

Most statutory text can be readily understood by a careful reader. In such cases, the court's mission is clear: It must give the statute its plain meaning. See Schindler Elevator Corp. v. U.S. ex rel. Kirk, 563 U.S. 401, 412, 131 S.Ct. 1885, 179 L.Ed.2d 825 (2011). Sometimes, however, words have multiple meanings even when read in context, and legislators fail to achieve syntactic precision. See, e.g., Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 545 U.S. 409, 417, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005); Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 377, 124 S.Ct. 1836, 158 L.Ed.2d 645 (2004). Even proper syntax can produce ambiguous text when it leaves a statute as a whole internally incoherent. See, e.g., Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 624, 627, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) (treating as ambiguous statute containing terms "inconsistent with each other on any reading"); Harvey v. Veneman, 396 F.3d 28, 40 (1st Cir. 2005) (statute "lacks coherence and consistency, creating ambiguity concerning Congress' intent"). In such cases, a court cannot blind itself to permissible sources of meaning. It must instead undertake a nuanced and comprehensive review of all relevant evidence in an attempt to give the statute as a whole a fair reading. See Graham, 545 U.S. at 417-22, 125 S.Ct. 2444; Jones, 541 U.S. at 377-83, 124 S.Ct. 1836; see also Bond v. United States, 572 U.S. 844, 134 S. Ct. 2077, 2088, 189 L.Ed.2d 1 (2014) (employing "background principles" to construe ambiguous text). Bearing these lessons in mind, I begin by determining whether § 1084(a) is ambiguous.

Although the 2011 and 2018 OLC opinions end up in very different places, they proceed from common ground. Both agree that § 1084(a) includes two general clauses that each, in turn, prohibit two types of wire transmissions. See 18 U.S.C. § 1084(a). The first clause bars anyone engaged in the business of gambling from knowingly using the wires "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 clause prohibits any such person from using the wires "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." Id.[8]

The limiting phrase "on any sporting event or contest" immediately follows and plainly modifies the second prohibition in ***149** the first clause, which prohibits the transmission of "information assisting in the placing of bets or wagers." The question is whether this sports-gambling modifier also applies to the other three prohibitions. Should each reference to "bets or wagers" be interpreted to mean "bets or wagers on any sporting event or contest"? Or is the phrase "bets or wagers" in the first, third, and fourth prohibitions untethered to the sports-gambling modifier, such that those prohibitions apply to all forms of gambling? Each party contends that the plain language of § 1084(a) mandates its position. I conclude that the text does not provide an unambiguous answer to this question.

Starting with the first clause, the Government contends that the syntactic structure of the clause and the rule of the last antecedent make it plain that the sports-gambling modifier does not apply to the first prohibition ("the transmission ... of bets or wagers"). The canon of statutory construction known as the rule of the last antecedent counsels that when a qualifying phrase has multiple antecedents, the phrase ordinarily qualifies only the final antecedent, here the second prohibition.[9] See Lockhart v. United States, —— U.S. ——, 136 S. Ct. 958, 962, 194 L.Ed.2d 48 (2016); 2A Norman J. Singer & J.D. Shambie Singer, Sutherland on Statutes and Statutory Construction § 47:33 (7th ed. 2014); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 144 (2012). Although applying the rule is "quite sensible as a matter of grammar," it "is not an absolute and can assuredly be overcome by other indicia of meaning." Barnhart v. Thomas, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003) (internal quotation marks omitted). Nor does the rule apply "in a mechanical way where it would require accepting 'unlikely premises.' " Paroline v.

United States, 572 U.S. 434, 447, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014) (quoting United States v. Hayes, 555 U.S. 415, 425, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009)).

The plaintiffs respond with their own canon of construction. Relying on the series-qualifier canon, they argue that the sports-gambling modifier clearly applies to both prohibitions in the first clause. This canon provides that a modifier appearing at the beginning or end of a series of terms modifies the entire series where "the natural construction of the language demands that the clause be read as applicable to all." Paroline, 572 U.S. at 447, 134 S.Ct. 1710 (quoting P.R. Railway, Light & Power Co. v. Mor, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920)); see United States v. Bass, 404 U.S. 336, 339–40, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (applying series-qualifier canon where modifier "undeniably applies to at least one antecedent" and "makes sense with all").

I am not persuaded that the language and syntactic structure of § 1084(a)'s first clause compels the use of either canon, because § 1084(a) lacks punctuation that would clearly signal which canon applies. See Scalia & Garner, Reading Law at 161 ("Punctuation in a legal text ... will often ***150** determine whether a modifying phrase or clause applies to all that preceded it or only to a part."); see also 1A Sutherland on Statutory Construction § 21:15 (similar). For instance, a comma before the conjunction "or" separating the phrases "bets or wagers" and "information assisting in the placing of bets or wagers" would demonstrate that the rule of the last antecedent applies. See 1A Sutherland on Statutory Construction § 21:15 (comma separating two members of a list indicates they are to be treated separately rather than as a whole); cf. Lockhart, 136 S. Ct. at 962 (applying rule of last antecedent to statute that had commas separating each antecedent). Without it, the appropriateness of the last antecedent canon is unclear.

Conversely, a comma placed directly before the phrase "on any sporting event or contest" would confirm that the series-qualifier canon applies. See 2A Sutherland on Statutory Construction § 47:33 ("A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one."); Am. Int'l Grp., Inc. v. Bank of Am. Corp., 712 F.3d 775, 782 (2d Cir. 2013). In that instance, the sports-gambling modifier would plainly apply to both prohibitions in the first clause.

The absence of clarifying punctuation prevents the first clause from being a textbook application of either canon. Either reading is consistent with the syntax of the first clause, even if neither creates a perfectly wrought text. The OLC came to the same conclusion in 2011, noting that the first clause "can be read either way" because it lacks punctuation that would have made only one interpretation plausible. See 2011 OLC Opinion at 5. The phrase "on any sporting event or contest" may modify one prohibition, or both. Accordingly, the clause is ambiguous. cf. Graham, 545 U.S. at 419 n.2, 125 S.Ct. 2444 ("[The statute] is ambiguous because its text, literally read, admits of two plausible interpretations.").

Consistent with the 2018 OLC Opinion, the Government also argues that § 1084(a)'s second clause is plainly unconstrained by the sports-gambling modifier because "[b]asic grammar compels the conclusion that [it] ... does not travel forwards to modify either prohibition of the second clause." Doc. No. 61 at 15; accord 2018 OLC Opinion at 11. As the Government sees it, because the sports-gambling modifier does not appear anywhere in the second clause, neither of the clause's prohibitions can possibly be subject to it.

The plaintiffs respond by pointing to an example in § 1084(a) itself that defies the "basic grammar" on which the Government's argument is based. Section 1084(a)'s first clause is expressly limited to transmissions "in interstate or foreign commerce" but the transmissions prohibited by the second clause do not contain this limitation. Nevertheless, both OLC opinions agree that the interstate-commerce modifier is borrowed from the first clause and applied to the transmissions prohibited by the second clause. See 2011 OLC Opinion at 7; 2018 OLC Opinion at 13. Indeed, the Supreme Court has suggested as much. See Bass, 404 U.S. at 341 & n.8, 92 S.Ct. 515 (citing **Wire Act** for proposition that, consistent with approach in other federal statutes, "in commerce or affecting commerce" applies to all three parts of preceding phrase "receives, possesses, or transports" in Title VII of Omnibus Crime Control and Safe Streets Act). Otherwise, the second clause would sweep in purely intrastate wire communications, giving the statute "a curious reach." See id. at 340, 92 S.Ct. 515. As the OLC concluded in 2011, the omission of the interstate-commerce ***151** modifier from the second clause "suggests that Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause." 2011 OLC Opinion at 7. I agree with the 2011 OLC Opinion that this instance of borrowing by the drafters of § 1084(a) gives textual support for similarly importing the sports-gambling modifier into the second clause.

The Government's arguments for discounting the interpretive force of the interstate-commerce modifier fall short. According to the 2018 Opinion, the interstate-commerce modifier is different because, unlike the sports-gambling modifier, which appears "midway through the list" of the **Wire Act's** prohibitions, the interstate-commerce modifier appears at the beginning of the Act's four prohibitions. See 2018 OLC Opinion at 13. This argument is flawed. The fact that the modifier precedes the four references to "bets or wagers" is irrelevant because it does not modify "bets or wagers." Instead, the interstate-commerce modifier immediately limits the term "transmission" in the first clause. Viewed properly, the use of the interstate-commerce modifier supports the plaintiffs' argument. Like the statute's use of the sports-gambling modifier, the interstate-commerce modifier follows the term it modifies in the first clause ("transmission") and is borrowed to modify the same term in the second clause. This consistent pattern of borrowing indicates that Congress used shorthand in the second clause to refer to terms delineated "more completely in the first clause." See 2011 OLC Opinion at 7.[10]

The Government also contends that the constitutional avoidance doctrine strengthens the rationale for applying the interstate-commerce modifier across the entire statute to avoid doubts about Congress's regulatory authority. The same is obviously not the case with the sports-gambling modifier. But the doctrine of constitutional avoidance is not the only reason to import the modifier into the second clause. The text and context provide sufficient indicia that the second clause borrows that term from the first clause. cf. Bass, 404 U.S. at 338-47, 92 S.Ct. 515 (applying traditional canons of constructions, including coherency, to extend interstate-commerce modifier to all three statutory prohibitions while disclaiming reliance on constitutional avoidance). Thus, § 1084(a)'s second clause is ambiguous because both of its prohibitions can be read either to apply only to sports gambling or to apply broadly to all forms of gambling.

The principal problem with the 2018 OLC Opinion is that it assigns nearly controlling weight to a reading of § 1084(a) that is suggested, but not required, by the rule of the last antecedent and a general conception of what the OLC calls "basic grammar." Other potentially relevant sources of meaning are then dismissed as inconsequential because they do not result in "patent absurdity." 2018 OLC Opinion at 14. This is not the approach to statutory construction that Supreme Court precedent requires. See, e.g., Lockhart, 136 S. Ct. at 965 ("This court has long acknowledged that structural or contextual evidence may 'rebut the last antecedent inference.' ") (quoting Jama v. Immigration & Customs Enf't, 543 U.S. 335, 344 n.4, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005)); ***152** Paroline, 572 U.S. at 447, 134 S.Ct. 1710 (rule of last antecedent not followed because it would require acceptance of "unlikely premises") (quoting Hayes, 555 U.S. at 425, 129 S.Ct. 1079). Instead, where, as here, a statute is ambiguous, a court must look at more than grammar to determine its meaning. Therefore, I now turn to the significant contextual evidence that calls the OLC's current interpretation into question.

3. Context, Structure, and Coherence

In determining whether § 1084(a) is limited to sports gambling, I am guided by the rule of construction that "[s]tatutes should be interpreted 'as a symmetrical and coherent regulatory scheme.' " Mellouli v. Lynch, – — U.S. ——, 135 S. Ct. 1980, 1989, 192 L.Ed.2d 60 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)). Limiting the **Wire Act** to sports gambling conforms to this rule. It avoids significant coherence problems that result from the OLC's current interpretation and it construes the **Wire Act** in harmony with another gambling statute that Congress enacted the same day as the **Wire Act**.

The OLC's 2018 Opinion, by contrast, produces an unlikely reading of § 1084(a) that the 2011 OLC Opinion avoids. Under the current interpretation, the section's 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. The incongruous results that follow from this interpretation are problematic because, as the OLC explained in 2011 when it rejected this construction, "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." See 2011 OLC Opinion at 5. Even in its current opinion, the OLC continues to recognize that "[t]here is a logic to this reasoning." See 2018 OLC Opinion at 14. This logic, however, did not persuade the OLC in 2018 for two reasons: first, because Congress might have wanted to specifically target transmissions of information on sports bets or wagers given the special importance of such information to this form of gambling; and second, because "Congress might have been worried that an unfocused prohibition on transmitting any information that 'assisted' in any sort of gambling whatsoever would criminalize a range of speech-related conduct." Id. at 14-15. These arguments are unpersuasive. Such speculation may show that the OLC's 2018 interpretation is not patently absurd. But it does not establish that its reading is a better construction of an ambiguous text.

The OLC's current construction of the second clause gives rise to an even more serious coherence problem. If, as the OLC now contends, the clause is read without the sports-gambling modifier, the two clauses of § 1084(a) cannot easily be reconciled: 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. 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.

The Government's only explanation for this inconsistency is that Congress might have had a special interest in preventing gambling-related payouts via the wires, regardless of whether the money was for lawful or unlawful activities. This rationale ***153** is inadequate. It does not explain why a rational legislator would have designed a statute that prevents a lawful gambling business from sending or receiving payment for a business activity that the statute does not prohibit. It is bizarre to authorize an activity but prohibit getting paid for doing it.

Consider a vendor who contracts with an online casino to solicit players. The contract guarantees the vendor payment for every new player who bets $ 100 at the site. The **Wire Act** permits the vendor to send emails to players enticing them and explaining the site's games. But, under the OLC's current interpretation, the Act

prohibits the vendor from receiving (and the casino from sending) money transfers for supplying that information. That makes little sense. The incoherence that plagues the statute when the sports-gambling modifier is not imported into the second clause significantly undermines the OLC's current construction of § 1084(a). Limiting the entire section to sports gambling renders the statute coherent and makes the 2011 Opinion the better reading of the text.

Reading § 1084(a) to apply only to sports gambling also finds support in another gambling statute passed the same day as the **Wire Act**. cf. United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 277, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975) (looking to Federal Trade Commission Act to define term used in Clayton Act, in part because both statutes were passed by the same Congress and designed to deal with closely related aspects of the same problem); Kokoszka v. Belford, 417 U.S. 642, 650, 94 S.Ct. 2431, 41 L.Ed.2d 374 (1974) (noting that it is relevant to consider related statutes when interpreting ambiguous text). Like the **Wire Act**, the Interstate Transportation of Wagering Paraphernalia Act was passed by Congress on August 31, 1961. See 107 Cong. Rec. 17,694 (1961). The Paraphernalia Act prohibits carrying paraphernalia in interstate commerce that is to be used in "(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).[11] On the same day the Paraphernalia Act outlawed carrying equipment for use in "numbers, policy, bolita or similar game," Congress passed the **Wire Act** with no such reference to lottery-style games.

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, —— U.S. ——, 138 S. Ct. 816, 826, —— L.Ed.2d —— (2018). The absence of similar language in the accompanying **Wire Act** supports the plaintiffs' position that the **Wire Act** is limited to sports gambling. cf. United States v. Fabrizio, 385 U.S. 263, 266–67, 87 S.Ct. 457, 17 L.Ed.2d 351 (1966) (interpreting scope of Paraphernalia Act by citing **Wire Act** for proposition that "[i]n companion legislation where Congress wished to restrict the applicability of a provision to a given set of individuals, it did so with clear language").

***154** The Government presents its own contextual arguments based on other sections of the **Wire Act**. Those arguments do not withstand scrutiny. Section 1084(b) creates a safe harbor for interstate wire communications transmitting (1) "information for use in news reporting of sporting events or contests," and (2) "information assisting in the placing of bets or wagers on a sporting event or contest" between two states where "betting on that sporting event or contest" is legal. 18 U.S.C. § 1084(b). The Government maintains that § 1084(b) supports its contention that Congress repeated the phrase "sporting event or contest" when it wanted to apply it beyond its nearest referent. I am unpersuaded by the Government's argument. Section 1084(a) repeats the same phrase ("bets or wagers") four times, so the question is whether Congress used that phrase as a shorthand for "bets or wagers on a sporting event or contest." By contrast, § 1084(b) has varied formulations of phrases followed by the sports-gambling modifier. See id. ("news reporting of sporting events or contests," "bets or wagers on a sporting event or contest," and "betting on that sporting event or contest") (emphasis added). Unlike the recurrent "bets or wagers," those diverse phrases are not susceptible to an abridged reference. As a result, § 1084(b) requires that the modifier be repeated.

The Government also contends that because § 1084(d) is not limited to sports gambling, neither is § 1084(a). That reading misunderstands the role of § 1084(d). Section 1084(d) requires a common carrier to discontinue the operation of a wire facility if it is notified that the facility is being used "for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law." 18 U.S.C. § 1084(d). The provision thus incorporates federal, state, and local gambling laws that go

beyond the scope of § 1084(a). That § 1084(d) is broader in this regard tells us nothing about the scope of the prohibitions in § 1084(a).

In summary, although § 1084(a) reasonably can be read either to apply only to sports gambling, as the OLC concluded in 2011, or to apply to both sports and non-sports gambling, as the OLC concluded in 2018, a careful contextual reading of the statute supports the view that § 1084(a) applies only to sports gambling.

4. Legislative History

The Government's amici argue that the **Wire Act's** legislative history supports the OLC's current interpretation of the **Wire Act**. If anything, the legislative history supports the plaintiffs' position.

The original version of § 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, or knowingly uses such facility for any such transmission." S. 1656, 87th Cong. § 2 (1961) (as introduced) (emphasis added) (excerpt appended to this opinion as Appendix A).[12] It is undisputed ***155** that the original text was unequivocally limited to sports gambling. See 2018 OLC Opinion at 16; 2011 OLC Opinion at 6.

After conducting hearings in June 1961, the Senate Judiciary Committee, in collaboration with the Department of Justice, proposed an amendment to the bill. See S. Rep. No. 87-588, at 1-2S. Rep. No. 87-588, at 1-2 (1961); Report of Proceedings: Hearing Before the S. Comm. on the Judiciary, Exec. Sess., 87th Cong. 54-55 (1961). Reflected in the enacted text, the amendment made three modifications to § 1084(a): (1) it changed the class of covered persons to those who are "engaged in the business of betting or wagering," (2) it added a second clause prohibiting payment-related transmissions, and (3) it removed the commas before and after the phrase "or information assisting in the placing of bets or wagers" in the first clause. See S. 1656, 87th Cong. (as reported in Senate, July 24, 1961) (excerpt appended to this opinion as Appendix B). As I have explained, without those commas, it is not clear whether both prohibitions in the first clause are limited to sports gambling.

The Government's amici contend that the legislative history shows that the removal of the commas was intended to expand the scope of § 1084(a) to cover all gambling. They principally rely on three pages from the transcript of the hearing before the Senate Committee on the Judiciary on June 20, 1961. See 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. 277-79 (1961). Those pages reflect an exchange between Senator Carey Kefauver and Herbert Miller, the Assistant Attorney General in charge of the Department's Criminal Division. See id. According to the Government's amici, Senator Kefauver suggested three changes to the original text during the exchange: (1) changing the covered persons to those engaged in the business of gambling; (2) adding prohibitions to cover transmissions of money; and (3) expanding the scope of the bill from sports gambling to all forms of gambling. See id. The Committee's subsequent amendment, discussed above, was intended to incorporate all three changes, the argument goes. Whereas the changed wording of the bill reflected the first two changes, punctuation purportedly accomplished the third. According to the Government's amici, the deletion of the two commas

"was an efficient way" to accommodate Senator Kefauver's proposal for the **Wire Act** to encompass all bets and wagers, not just sports-related ones. See Doc. No. 68 at 130.

The idea that this change in punctuation was intended to broaden the scope of § 1084(a) is too speculative to carry any weight. First, the legislative record suggests, if anything, that the omission of the second comma (appearing directly before the phrase "on any sporting event or contest") was inadvertent. In the original version of the bill, this comma carried the weight of signaling that the proposed law ***156** prohibited only transmissions related to sports gambling. See supra at 149–50. The amendment, as reported in the Senate, contained a redline version showing what was stricken from the original text. See Appendix B. That redline, however, incorrectly reports that the second comma was never a part of the original text, suggesting that its omission from the amended version of the bill was not an intentional act. Compare Appendix A, with Appendix B.

Second, in reporting on the amendment, the Senate Judiciary Committee explained that it was offered to alter the class of covered persons and expand its prohibitions to include "money or credit" communications. See S. Rep. No. 87-588, at 2S. Rep. No. 87-588, at 2 (1961). 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 from "bets or wagers ... on any sporting event or contest" to all "bets or wagers." See id. Adopting the argument of the Government's amici on this point requires a speculative leap that I am unwilling to make. cf. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (recognizing in different context that Congress does not "hide elephants in mouseholes").

Third, rather than guess whether the amendment's omission of a single comma was intended to radically expand the proposed law's scope, it makes more sense to focus on the description of the amendment that the Department of Justice provided to the Judiciary Committee while it was under consideration. In that description, Deputy Attorney General Byron White explained that, as amended:

> [The **Wire Act**] is aimed now at those who use the wire communication facility for the transmission of bets or wagers in connection with a sporting event and also who use the facility for the transmission of the winnings, as suggested by Senator Kefauver.

Report of Proceedings: Hearing Before the S. Comm. on the Judiciary, Exec. Sess., 87th Cong. 55 (1961) (emphasis added). Consistent with the Committee's report, White confirmed that the amendment incorporated Senator Kefauver's first two proposals and suggested that, even as amended, the bill continued to be limited to sports gambling.[13] Compare id., with S. Rep. No. 87-588, at 2S. Rep. No. 87-588, at 2 (1961).[14] If the legislative history of § 1084(a) has any relevance, it tends to subvert rather than support ***157** the Government's interpretation of the statute.

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In sum, while the syntax employed by the **Wire Act's** drafters does not suffice to answer whether § 1084(a) is limited to sports gambling, a careful contextual reading of the **Wire Act** as a whole reveals that the narrower construction proposed by the 2011 OLC Opinion represents the better reading. The Act's legislative history, if anything, confirms this conclusion. Accordingly, I construe all four prohibitions in § 1084(a) to apply only to bets or wagers on a sporting event or contest.

C. Remedy

The Lottery Commission requests relief under both the APA and the Declaratory Judgment Act, whereas NeoPollard seeks only a declaratory judgment. The plaintiffs' amici also urge me to order nationwide injunctive relief. I briefly address the scope of the remedy available to the plaintiffs under each theory.

a. Declaratory Relief

[13] [14]The Declaratory Judgment Act provides that I "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). It is "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." Wilton v. Seven Falls Co., 515 U.S. 277, 287, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995) (internal quotation marks and citation omitted). Here, declaratory relief is appropriate because the plaintiffs face a credible threat of prosecution, their interests are sufficiently affected, and a judgment will resolve the dispute. See Verizon New Eng., Inc. v. Int'l Bhd. of Elec. Workers, Local No. 2322, 651 F.3d 176, 188-90 (1st Cir. 2011). As the First Circuit has explained, where an agency has made a definitive interpretation of a criminal law, the Declaratory Judgment Act provides "a way to resolve the legal correctness of [the] position without subjecting an honest businessman to criminal penalties." See Hemp Council, 203 F.3d at 5 (citation omitted).

[15]The parties nevertheless disagree as to whether a declaratory judgment should be limited to the parties or have universal effect.[15] The plaintiffs maintain that declaratory relief "necessarily extends beyond the [Commission] itself." Doc. No. 58 at 21. The Government contends that any declaratory relief must apply only to the parties to the case. I agree with the Government.

[16]Declaratory judgments do not bind non-parties. The Act allows me to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). It thus limits me to declaring the rights and legal relations of the plaintiffs seeking the declaration. It "does not ***158** contain any provisions indicating that declaratory judgments are authoritative vis-à-vis nonparties to the litigation." Mass. Delivery Ass'n v. Coakley, 671 F.3d 33, 48 n.12 (1st Cir. 2012). The idea that a declaration necessarily binds non-parties finds no support in the statute or in caselaw.[16] Accordingly, I decline to give my declaratory judgment the broader scope that the plaintiffs seek.

It is clear, however, that the judgment binds the parties beyond the geographic boundaries of my district. See Restatement of Judgments § 1 (1942). And such an effect is necessary here. NeoPollard's iLottery system is currently used in Michigan and New Hampshire, and its system "has been configured according to state specifications for deployment" in Virginia. See Siver Decl., Doc. No. 10-2 at 2-3. The Lottery Commission's operations similarly extend beyond the State. Its servers are located in Vermont, with a disaster recovery location in Ohio.

The State sells multi-jurisdictional games as a member of the Tri-State Lotto Compact along with Maine and Vermont, sells Powerball and Mega Millions through the Multi-State Lottery Association, and is a member of a consortium of 25 states and the District of Columbia that sells Lucky for Life. See McIntyre Decl., Doc.

No. 2-2 at 5. The multi-jurisdictional games "involve up to 48 states and territories." Id. at 6. My declaration thus binds the United States vis-à-vis NeoPollard and the Lottery Commission everywhere the plaintiffs operate or would be otherwise subject to prosecution.

Michigan, as an amicus, presents a somewhat more novel theory for extending the declaratory judgment to non-parties on behalf of the Lottery Commission. The argument goes like this: New Hampshire, as a member of the Multi-State Lottery Association, benefits financially from the large scale of multi-jurisdictional games such as Powerball. If another state, such as Michigan, shuttered its state lottery, then the overall revenues of Powerball would decline. If the revenues of Powerball decline, then the share of Powerball revenue that New Hampshire receives would decrease. Therefore, because I should ensure that New Hampshire not suffer any adverse financial effect, "anything short of nationwide equitable relief is hollow." See Doc. No. 37 at 11.

New Hampshire has not advocated for this theory in its pleadings or at oral argument, and the issue is insufficiently developed factually and legally. For instance, no party has addressed whether extending relief to the Multi-State Lottery Association members would be relief for an "interested party seeking such declaration" as the Declaratory Judgment Act requires. See 28 U.S.C. § 2201(a). The Association is not a party to this litigation, and the Lottery Commission did not bring this case as a member of the Association. See Compl., Doc. No. 1. Finally, although the factual record specifies that the Commission recorded operating revenue of $ 337.8 million ***159** for the 2018 fiscal year, see McIntyre Decl., Doc. No. 2-2 at 2, it is bereft of information detailing the sources of that revenue, much less how another state's cessation of operations would affect its bottom line. In such a situation, granting relief on the Powerball-as-joint-venture theory would risk going "beyond the bounds of the complaint and the evidence in this case." Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 40 (1st Cir. 2006). I decline to take up Michigan's argument on the present record.[17]

b. APA Relief

[17]The APA directs that a "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law." 5 U.S.C. § 706(2)(A). Notwithstanding the mandatory "shall," the First Circuit has explained that a reviewing court "is not required automatically to set aside [an] inadequately explained order." Cent. Me. Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001) (citation omitted). "Whether to do so rests in the sound discretion of the reviewing court; and it depends inter alia on the severity of the errors, the likelihood that they can be mended without altering the order, and on the balance of equities and public interest considerations." Id. (citation omitted).

[18]When a court does not set aside an improper agency action, the typical alternative response is an order remanding the case for reconsideration by the agency in light of the court's decision. It is not clear, however, that I have the discretion to remand instead of set aside an agency action where, as here, the defect is substantive. See Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 127 (1st Cir. 2002) (Lynch, J., dissenting) ("It is in the reviewing court's sound discretion to remand a rule to an agency to mend procedural defects without overturning it in its entirety.") (emphasis added) (citations omitted). In any event, this is an inappropriate case for remand. The agency has not disregarded procedural requirements or inadequately explained its conclusions. Cf. Harrington v. Chao, 280 F.3d 50, 60 (1st Cir. 2002) (remanding to provide agency "an opportunity to better explain [its] position"). It has produced a capable, but mistaken, legal opinion that no additional process can cure. The proper remedy is to "set aside" the 2018 OLC Opinion.

c. Injunctive Relief

The Lottery Commission initially requested injunctive relief in its complaint and motion for summary judgment. In its summary judgment briefing, however, the Commission "reserved the right in its pleading to seek injunctive relief" in the event the defendants did not comply with this order. See Doc. No. 58 at 21. The fact that no party currently requests injunctive relief resolves the matter. See Town of Chester v. Laroe Estates, Inc., —— U.S. ——, 137 S. Ct. 1645, 1651, 198 L.Ed.2d 64 (2017).

[19]Injunctive relief would also be unnecessary. An injunction is "an extraordinary remedy never awarded as of right." Sindi v. El-Moslimany, 896 F.3d 1, 29 (1st Cir. 2018) (quoting Winter v. Nat. Res. Def. Council, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). And it is not appropriate where a party's interests will be adequately protected by a declaratory judgment. See Wooley v. Maynard, 430 U.S. 705, 711, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). I have no reason to believe that ***160** the Government will fail to respect my ruling that the **Wire Act** is limited to sports gambling. The judgment provides the Lottery Commission and NeoPollard complete relief. No more is needed.

III. CONCLUSION

In summary, I deny the Government's motion to dismiss for lack of jurisdiction (Doc. No. 45) because the plaintiffs have established standing, and the Government has not met its burden to show that the case is moot. I grant the plaintiffs' motions for summary judgment (Doc. Nos. 2 & 10) and deny the Government's cross-motion for summary judgment (Doc. No. 45).

I hereby declare that § 1084(a) of the **Wire Act**, 18 U.S.C. § 1084(a), applies only to transmissions related to bets or wagers on a sporting event or contest. The 2018 OLC Opinion is set aside.

SO ORDERED.

New Hampshire Lottery – First Circuit Court of Appeals Opinion 2021

NEW HAMPSHIRE LOTTERY COMMISSION LLC v. ROSEN (2021)

United States Court of Appeals, First Circuit.

NEW HAMPSHIRE LOTTERY COMMISSION; NeoPollard Interactive LLC; Pollard Banknote Limited, Plaintiffs, Appellees, v. Jeffrey ROSEN, Acting U.S. Attorney General;* United States Department of Justice; United States, Defendants, Appellants.

No. 19-1835

Decided: January 20, 2021

Before Lynch and Kayatta, Circuit Judges.**

Jeffrey E. Sandberg, Attorney, Appellate Staff, Civil Division, U.S. Department of Justice, with whom Ethan P. Davis, Principal Deputy Assistant Attorney General, Hashim M. Mooppan, Deputy Assistant Attorney General, and Scott R. McIntosh, Attorney, Appellate Staff, Civil Division, were on brief, for appellants. Anthony J. Galdieri, Senior Assistant Attorney General, Civil Bureau, with whom Gordon J. MacDonald, Attorney General, was on brief, for appellee New Hampshire Lottery Commission. Matthew D. McGill, with whom Theodore B. Olson, Lochlan F. Shelfer, Washington, DC, Joshua M. Wesneski, Debra Wong Yang, Los Angeles, CA, and Gibson, Dunn & Crutcher LLP were on brief, for appellees NeoPollard Interactive LLC and Pollard Banknote Limited. Charles J. Cooper, David H. Thompson, Brian W. Barnes, J. Joel Alicea, Washington, DC, Nicole Frazer Reaves, and Cooper & Kirk, PLLC on brief for Coalition to Stop Internet Gambling

and National Association of Convenience Stores, amici curiae. Jonathan F. Cohn, Peter D. Keisler, Joshua J. Fougere, Daniel J. Hay, Derek A. Webb, Washington, DC, and Sidley Austin LLP on brief for International Game Technology PLC, amicus curiae. A. Jeff Ifrah, Andrew J. Silver, Washington, DC, and Ifrah PLLC on brief for iDevelopment and Economic Association, amicus curiae. Kevin F. King, Rafael Reyneri, Washington, DC, and Covington & Burling LLP, on brief for Association of Gaming Equipment Manufacturers, amicus curiae. A. Michael Pratt, Philadelphia, PA, Elliot H. Scherker, Miami, FL, Nicole Leonard Cordoba, Austin, TX, Greenberg Traurig, LLP and Greenberg Traurig, P.A. on brief for The Commonwealth of Pennsylvania, amicus curiae. Glenn J. Moramarco, Assistant Attorney General, John T. Passante, Deputy Attorney General, and Gurbir S. Grewal, Attorney General of New Jersey, on brief for the State of New Jersey, amicus curiae. Dana Nessel, Michigan Attorney General, Fadwa A. Hammoud, Solicitor General, Melinda A. Leonard, Mark G. Sands, Donald S. McGehee, Assistant Attorneys General, Jason Ravnsborg, Attorney General, State of South Dakota, Dave Yost, Attorney General, State of Ohio, Kathleen Jennings, Attorney General, State of Delaware, Joshua H. Stein, Attorney General, State of North Carolina, Mark R. Herring, Attorney General of Virginia, T.J. Donovan, Attorney General, State of Vermont, Kevin G. Clarkson, Attorney General, State of Alaska, Josh Kaul, Attorney General, State of Wisconsin, Mary R. Harville, Senior Vice President, General Counsel & Corporate Secretary, Kentucky Lottery Corporation, Phil Weiser, Attorney General, State of Colorado, Keith Ellison, Attorney General, State of Minnesota, Lawrence G. Wasden, Attorney General of Idaho, Valerie Morozov, Legal Counsel, Rhode Island Dept. of Revenue, Division of Lottery, William Tong, Attorney

General of Connecticut, Karl A. Racine, Attorney General for the District of Columbia, Brian E. Frosh, Attorney General of Maryland, Alonda W. McCutcheon, General Counsel, Tennessee Education Lottery Corporation, on brief for the State of Michigan, Michigan Bureau of State Lottery, and South Dakota, Ohio, Delaware, North Carolina, Virginia, Vermont, Alaska, Wisconsin, Colorado, Minnesota, Idaho, Connecticut, District of Columbia, Maryland, the Rhode Island Department of Revenue, Division of Lottery, the Kentucky Lottery Corporation, and the Tennessee Education Lottery Corporation, amici curiae.

In 2018, the Office of Legal Counsel ("OLC") of the U.S. Department of Justice ("DOJ") issued a legal opinion, adopted by DOJ, that all prohibitions in the Wire Act of 1961, save one, apply to all forms of bets or wagers (the "2018 Opinion"). The 2018 Opinion superseded an OLC opinion from 2011 concluding that the Wire Act's prohibitions were uniformly limited to sports gambling (the "2011 Opinion"). Suffice it to say, the more expansive construction of the Wire Act adopted in 2018 caused great consternation among the many states and their vendors who, as the 2018 Opinion acknowledged, had "beg[u]n selling lottery tickets via the Internet after the issuance of [the] 2011 Opinion." Not eager to scrap or shrink its lottery, the New Hampshire Lottery Commission and one of its vendors, NeoPollard,[1] commenced this action in February 2019, seeking relief under the Declaratory Judgment Act and the Administrative Procedure Act. The district court granted both requests, ruling that the Wire Act is limited to sports gambling, as OLC initially opined.

The Attorney General, DOJ, and the United States (collectively "the government") appealed the district court's judgment. For the following reasons, we hold that the controversy before us is justiciable and that the Wire Act's prohibitions are limited to bets or wagers on sporting events or contests. We depart from the district court only by deciding that relief under the Declaratory Judgment Act alone is sufficient.

I.

A.

In 1961, Congress passed the Wire Act. See 18 U.S.C. § 1084 (codifying Pub. L. No. 87-216, § 2, 75 Stat. 491, 491 (1961)). The subsection relevant for our purposes, section 1084(a), reads:

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.

The question the parties present to us is whether the phrase "on any sporting event or contest" (the "sports-gambling qualifier") qualifies the term "bets or wagers" as used throughout section 1084(a).

Although Congress enacted the Wire Act in 1961, this question seems not to have raised its head until after a substantial amount of commerce had moved to the internet four decades later. In 2002, the Fifth Circuit opined in a private civil suit 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) (second alteration in original) (quoting In re MasterCard Int'l Inc., Internet Gambling Litig., 132 F. Supp. 2d 468, 480 (E.D. La. 2001)). In May 2005, the Deputy Assistant Attorney General of DOJ's Criminal Division begged to differ, issuing a letter to inform the Illinois Lottery Superintendent that DOJ believed that prospective legislation pending in the Illinois Senate to create a website where people could purchase lottery tickets over the internet would violate section 1084. DOJ explained its view that, although the purchase of lottery tickets might be lawful in Illinois, "the acceptance of wagers through the use of a wire communication facility by a gambling business, including [one] operated by . a state, from individuals located . within the borders of the state (but where transmission is routed outside of the state) would violate federal law." The letter equated the sale of lottery tickets with the acceptance of wagers and deemed the interstate transmission of such wagers violative of the Wire Act regardless of whether they were placed on sporting events or contests.

Four years later, in December 2009, authorities from New York and Illinois requested the views of DOJ's Criminal Division on the legality of the states' plans to use the internet and out-of-state transaction processing systems to sell lottery tickets to adults within their states. The states pointed out that their proposals had been designed to

comport with the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §§ 5361-5367, and argued that the Wire Act did not bar their proposed systems because section 1084(a) was limited to sports-related gambling. In response, and in keeping with its 2005 letter to Illinois, the Criminal Division opined that section 1084(a) was not so limited and that the Act would prohibit the use of the internet to transmit bets or wagers of any kind, even if the transactions originated and ended within a single state. The Criminal Division nevertheless noted the tension that this reading of the statute created with the UIGEA, which explicitly excludes from its prohibition of "unlawful Internet gambling" the "placing, receiving, or otherwise transmitting a bet or wager where . the bet or wager is initiated and received or otherwise made exclusively within a single State," 31 U.S.C. § 5362(10)(B), despite "[t]he intermediate routing of electronic data" through other states, id. § 5362(10)(E). The Criminal Division noted the "potential oddity" whereby the Wire Act's reference to "the use of interstate commerce" would criminalize otherwise lawful state-run, in-state lottery transactions. For these reasons, the Criminal Division sought guidance from OLC on whether the use of the internet for in-state lottery sales with out-of-state processing violated the Wire Act.

In its 2011 Opinion, OLC agreed with the Fifth Circuit, concluding that "the Wire Act does not reach interstate transmissions of wire communications that do not relate to a 'sporting event or contest' " and ultimately concluded that the states' lottery-related proposals did not violate the Wire Act. See Whether the Wire Act Applies to Non-Sports Gambling, 35 Op. O.L.C. 134, 151 (2011) ("2011 Opinion").

So matters stood until 2017, when the Criminal Division asked OLC to reconsider its position, which OLC did in a formal opinion published in November 2018, superseding and replacing the 2011 Opinion. See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 42 Op. O.L.C. ——, at *23, 2018 WL 7080165, at *14 (Nov. 2, 2018) ("2018 Opinion").[2] In the 2018 Opinion, OLC found the statutory language in section 1084(a) unambiguous and its prohibitions plainly not limited to sports gambling, save for the second prohibition contained in the first clause, which bars "us[ing] a wire communication facility for the transmission in interstate or foreign commerce of . information assisting in the placing of bets or wagers on any sporting event or contest." Id. at *2, *14, 2018 WL 7080165, at *1, *9 (quoting 18 U.S.C. § 1084(a)).[3] OLC justified its reversal on the grounds that the 2011 Opinion did not devote adequate attention to either the text of the statute or the canons of statutory construction, was "of relatively recent vintage," and departed from DOJ's former position. Id. at *21–22, 2018 WL 7080165, at *13. The 2018 Opinion noted that some reliance interests would be affected: "Some States, for example, began selling lottery tickets via the Internet after the issuance of our 2011 Opinion." Id. at *22, 2018 WL 7080165, at *14. But OLC concluded that "such reliance interests [we]re [in]sufficient to justify continued adherence to the 2011 opinion." Id. at *23, 2018 WL 7080165, at *14.

In a subsequently issued memorandum, the Deputy Attorney General instructed DOJ attorneys to "adhere to OLC's interpretation, which represents the Department's position on the meaning of the Wire Act." Rod Rosenstein, U.S. Dep't of Just.,

Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling (2019) ("January 2019 Memo"). Addressing the reliance interests, the memo stated:

As an exercise of discretion, Department of Justice attorneys should 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. A 90-day window will give businesses that relied on the 2011 OLC opinion time to bring their operations into compliance with federal law. This is an internal exercise of prosecutorial discretion; it is not a safe harbor for violations of the Wire Act.

Id. DOJ subsequently extended the forbearance period several times, most recently until December 1, 2020.

After this lawsuit commenced, the Deputy Attorney General issued yet another memorandum, this time stating that the 2018 Opinion in fact "did not address whether the Wire Act applies to State lotteries and their vendors" but that DOJ was "now reviewing that question." Rod Rosenstein, U.S. Dep't of Just., Notice Regarding Applicability of the Wire Act, 18 U.S.C. § 1084, to State Lotteries and Their Vendors (2019) ("April 2019 Memo"). Accordingly, DOJ granted a separate ninety-day forbearance period specific to state lotteries and their vendors, which will begin when DOJ publicly announces its position on the applicability of the Wire Act to them. DOJ has not yet made such an announcement.

B.

Government-run lotteries apparently harken at least as far back as colonial America, where the lottery "flourished as a substitute for conventional methods of public and private finance." Nat'l Inst. of L. Enf't & Crim. Just., U.S. Dep't of Justice, The Development of the Law of Gambling: 1776–1976, at 660 (1977). Forty-eight states or territories currently operate lotteries. New Hampshire is among them. Through its Lottery Commission ("NHLC"), it runs a traditional retailer-based lottery at 1,400 sites across the state. Its business does not involve placing bets or wagers on sporting events or contests. The NHLC's profits are earmarked for the state's Education Trust Fund. See N.H. Const. pt. 2, art. 6-b; N.H. Rev. Stat. Ann. § 284:21-j. In the 2018 fiscal year, the NHLC contributed $87.2 million to this fund.[4] All of the NHLC's lottery-related activities use the internet or interstate wires. For its brick-and-mortar operations, the state lottery relies on computer gaming and back-office systems that manage lottery inventory and sales, which in turn depend on out-of-state backup servers. Via its website and various social media platforms, the NHLC communicates draw results, advertises lottery games, and provides general information.

After OLC issued the 2011 Opinion, New Hampshire began operating its iLottery system, developed by NeoPollard. The system allows players to engage in various types of games online. Players pay for their wagers through an online account into which they can deposit funds only when they are within the state's borders. While the players themselves must be physically located in New Hampshire for the entirety of the transaction, intermediate routing of data or information ancillary to the transaction may cross state lines.

The iLottery system is projected to generate six to eight million dollars in revenue for New Hampshire in fiscal year 2021. The NHLC predicts sales would drop precipitously if it could not rely on the internet for its operations. It estimates its withdrawal from multi-jurisdictional games like "Powerball" alone would cost the state forty million dollars per year in education funding. Without further guidance from DOJ, the NHLC expects banks to become unwilling to accept and process iLottery transactions.

For its part, NeoPollard has invested tens of millions of dollars into building its iLottery system, which it has also configured for deployment in Michigan and Virginia.[5] NeoPollard claims that "the only way to ensure full compliance with the interpretation of the Wire Act outlined in the . [2018 Opinion] is to suspend the entirety of its iLottery operations in New Hampshire, costing NeoPollard millions of dollars in investment-backed expectations and player goodwill." If it continues to operate iLottery in New Hampshire, "NeoPollard believes . it faces imminent prosecution."

C.

On February 15, 2019, the NHLC filed its complaint against the government along with a motion for summary judgment. The NHLC requested a declaratory judgment that the Wire Act does not extend to state-conducted lottery activities, an order setting aside the 2018 Opinion pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), and injunctive relief. The NHLC advanced two basic arguments: (1) the prohibitions of section 1084(a) do not even apply to states; and (2) section 1084 is limited to sports gambling and thus does not extend to state-conducted lottery activity.

On the same day the NHLC filed suit, NeoPollard also filed a complaint and a concurrent motion for summary judgment. NeoPollard sought a judgment declaring that the Wire Act is limited to gambling on sporting events. The district court consolidated the cases.[6]

The government moved to dismiss the complaint for lack of standing and for failure to state a claim. See Fed. R. Civ. P. 12(b)(1), (6). With the parties' consent, the district court converted the motion into one for summary judgment. The government, however, did not address the NHLC's argument that the Wire Act does not even apply to states. Rather, in its reply memorandum before the district court, the government attached the Deputy Attorney General's April 2019 Memo, penned that same day, which stated that the "[2018] OLC Opinion did not address whether the Wire Act applies to State lotteries and their vendors" and that DOJ was "now reviewing that question." April 2019 Memo.[7] The April 2019 Memo also instructed DOJ attorneys to "refrain from applying Section 1084(a) to State lotteries and their vendors . until the Department concludes its review," following which states would have ninety days to conform their operations to federal law. Id. Nevertheless, upon inquiry by the district court, the government argued orally that states are subject to the prohibitions of the Wire Act.

The district court denied the government's motion, instead granting summary judgment to the plaintiffs. After concluding that the plaintiffs had Article III standing, the court determined that the 2018 Opinion "constitute[d] final agency action without an adequate alternative to APA review." N.H. Lottery Comm'n v. Barr, 386 F. Supp. 3d 132, 146 (D.N.H. 2019). The court also found that section 1084(a) applies only to bets or

wagers on sporting events or contests. Id. at 157. The court did not address the NHLC's alternative argument that the Wire Act does not apply to states. As for the remedy, the district court granted the plaintiffs' request for declaratory relief and declared that "§ 1084(a) of the Wire Act applies only to transmissions related to bets or wagers on a sporting event or contest." Id. at 160. It proceeded to "set aside" the erroneous 2018 Opinion under section 706(2)(A) of the APA, as requested by the NHLC (and several amici). Id. at 158–59. Finally, the court denied injunctive relief. Id. at 159–60.

The government timely appealed. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

II.

A.

We first consider whether this case presents a justiciable case or controversy. See U.S. Const. art. III, § 2. Pre-enforcement review of a criminal statute implicates doctrines of standing, ripeness, and (sometimes) mootness. This court reviews these threshold questions de novo. Mangual v. Rotger-Sabat, 317 F.3d 45, 56 (1st Cir. 2003).

1.

"The doctrine of standing gives meaning to the[ ] constitutional limits [of Article III] by 'identify[ing] those disputes which are appropriately resolved through the judicial process.' " Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157, 134 S.Ct. 2334, 189

L.Ed.2d 246 (2014) ("SBA List") (third alteration in original) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

The burden lies with the plaintiff to show an injury in fact that is "fairly traceable to the challenged action" and that likely "will be redressed by a favorable decision." Massachusetts v. U.S. Dep't of Health & Hum. Servs., 923 F.3d 209, 221–22 (1st Cir. 2019) (quoting Lujan, 504 U.S. at 560, 112 S.Ct. 2130). This case primarily concerns the injury-in-fact requirement, there being no question that injury, if any, can be traced directly to the government's threatened enforcement of the Wire Act and can be redressed in this action. See, e.g., SBA List, 573 U.S. at 158, 134 S.Ct. 2334. To satisfy standing, the injury in fact "must be concrete and particularized and actual or imminent, not conjectural or hypothetical." Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017) (internal quotation marks omitted) (quoting SBA List, 573 U.S. at 158, 134 S.Ct. 2334). "[A] future injury" is imminent "if the threatened injury is certainly impending, or [if] there is a substantial risk that the harm will occur." Id. (second alteration in original) (internal quotation marks omitted) (quoting SBA List, 573 U.S. at 158, 134 S.Ct. 2334).

"In certain circumstances, 'the threatened enforcement of a law' may suffice as an 'imminent' Article III injury in fact." Id. (quoting SBA List, 573 U.S. at 158–59, 134 S.Ct. 2334). "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." SBA List, 573 U.S. at 158, 134 S.Ct. 2334 (first citing Steffel v. Thompson, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); and then citing MedImmune, Inc. v. Genentech, Inc., 549 U.S.

118, 128–29, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007)). We do not "require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." MedImmune, 549 U.S. at 129, 127 S.Ct. 764. Although a plaintiff must demonstrate a "specific threat of prosecution . , just how clear the threat of prosecution needs to be turns very much on the facts of the case and on a sliding-scale judgment that is very hard to calibrate." N.H. Hemp Council, Inc. v. Marshall, 203 F.3d 1, 4–5 (1st Cir. 2000).

The plaintiffs here satisfy the injury-in-fact requirement. It is uncontested that the plaintiffs use wire communication facilities for the interstate transmission of bets and wagers in the running of the New Hampshire lottery and iLottery platform. The 2018 Opinion, which adopted a broad reading of activities prohibited by section 1084(a), expressly mentions such lotteries, suggesting that Congress need amend the statute if it wishes to protect reliance interests, including those of the states. Removing any doubt regarding the enforcement of its new view, DOJ's subsequent memoranda made clear that DOJ attorneys must "adhere" to that view, and that any discretionary forbearance was limited to a brief window of time.

We know, too, that when DOJ attorneys last held the view expressed in the 2018 Opinion (between 2005 and 2011), DOJ had prosecuted seventeen cases involving non-sports betting under the Wire Act. That history of past enforcement against the same conduct supports a finding of injury in fact for pre-enforcement standing. See SBA List, 573 U.S. at 164, 134 S.Ct. 2334 (finding that history of "past enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical' " and

therefore reflects a substantial risk of harm (quoting Steffel, 415 U.S. at 459, 94 S.Ct. 1209)). While the government points out that none of those pre-2011 enforcement actions were brought against state lotteries, the government has not articulated any reason why this is a distinction that makes a difference. As NeoPollard puts it, 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 [DOJ] has given no reason to think that being a [lottery] vendor is any more useful a defense" against enforcement under the government's reading of the statute.

In any event, the lack of current prosecutions against state lotteries is not dispositive. See R.I. Ass'n of Realtors v. Whitehouse, 199 F.3d 26, 32 (1st Cir. 1999). As evidenced by DOJ's other prosecutions of non-sports betting, "the record contains no realistic basis for a suggestion that the statutory provision . has fallen into desuetude." Id. Here, DOJ affirmatively warned a state that it believed selling lottery tickets over the internet violated the Wire Act and, in the lead-up to the 2011 Opinion, provided similar advice to inquiring authorities from two states.

The government alternatively argues that even if DOJ had effectively announced that the Wire Act applies to state lotteries, that would not lead to a credible threat of prosecution against New Hampshire's lottery specifically. We disagree, and our prior decision in Hemp Council offers a helpful illustration.

There, Derek Owen, a New Hampshire state legislator, had sought to pass a bill that would allow cultivation of "industrial hemp" from the cannabis sativa plant. Hemp

Council, 203 F.3d at 3. An official from the U.S. Drug Enforcement Administration ("DEA") testified during a hearing on the bill that the DEA viewed the cultivation of cannabis sativa plants, regardless of the grower's purpose, as the illegal manufacture of marijuana under federal law. Id. After the bill was defeated, Owen and the New Hampshire Hemp Council sought a declaratory judgment that interpreted the Controlled Substances Act, 21 U.S.C. § 841(a)(1), as not criminalizing "non-psychoactive" cannabis sativa. Id. at 3–4. This court found pre-enforcement standing because the DEA had expressed its view that the conduct Owen sought to engage in violated federal law. Id. at 5; accord Monson v. U.S. Drug Enf't Admin., 589 F.3d 952, 958 (8th Cir. 2009).

The government attempts to distinguish Hemp Council because here there is no history of prosecuting state lotteries. But this court did not require the Hemp Council plaintiffs to prove that Owen or industrial hemp producers more generally had been previously prosecuted. 203 F.3d at 5; see also Blum v. Holder, 744 F.3d 790, 798 n.11 (1st Cir. 2014) (noting "the assumption that the state will enforce its own non-moribund criminal laws, absent evidence to the contrary"). Accordingly, we find the situation before us analogous to Hemp Council, except that, unlike in Hemp Council, the plaintiffs here have been openly engaging in the conduct deemed criminal by OLC. The plaintiffs already have it all on the line, so to speak. See MedImmune, 549 U.S. at 134, 127 S.Ct. 764 ("The rule that a plaintiff must destroy a large building, bet the farm, or . risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III.").

In a similar vein, the government argues that the plaintiffs cannot prove standing (or ripeness) because, according to it, the April 2019 Memo clarifies that DOJ has no position on whether section 1084(a) applies to state lotteries and that DOJ making up its mind on this question is an unsatisfied precondition to enforcement. See Reddy, 845 F.3d at 502 (finding a precondition to enforcement -- a third party demarcating a buffer zone -- was a "contingent future event[ ] that might not occur as anticipated, or indeed may not occur at all" (alteration in original) (quoting Texas v. United States, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998))). The government attempts to equate its newly professed uncertainty about the Wire Act's application with an "unambiguous disclaimer of coverage," which can undermine standing in pre-enforcement cases. Hemp Council, 203 F.3d at 5; see also, e.g., Blum, 744 F.3d at 799 ("For its part, the Government has disavowed any intention to prosecute plaintiffs for their stated intended conduct because, in its view, that conduct is not covered by [the statute].").

The April 2019 Memo does not undermine the plaintiffs' claim of standing. The April 2019 Memo leaves in place all provisions of the 2018 Opinion and the January 2019 Memo, but grants a separate forbearance period to the enforcement of section 1084(a) against state lotteries, "until [DOJ] concludes its review," from which date the plaintiffs will have only ninety days within which to comply. The government vaguely alludes to the additional questions that would arise from enforcing the Wire Act against state lotteries instead of a wholly private business. Yet, in the district court, the government "rejected the only argument put forward by the Lottery Commission that states are not covered by the [Wire] Act, and it . otherwise failed to identify any alternative legal

theory as to why state actors might be exempt." N.H. Lottery Comm'n, 386 F. Supp. 3d at 143. Most notably, the government sticks to its position that the Wire Act is unambiguous in its application to non-sports betting, and offers no hint as to why that supposedly unambiguous text would not apply to, for example, a private actor such as NeoPollard.

The government exacerbates the threat posed by its prolonged coyness by limiting its professed forbearance to ninety days from whatever date it decides to opine. A state-wide operation integrating over a thousand retailers and multi-state relationships to produce almost 100 million dollars in net revenue does not strike us as an operation that can be easily wound-up in ninety days. Nor can a state legislature plan sensibly if such a relied-upon revenue stream finds itself suddenly subject to a three-month closure notice. On such a record, the government "must proffer more than a conclusory assertion of inapplicability to convince us that the [plaintiffs] no longer face[ ] a credible threat of prosecution." R.I. Ass'n of Realtors, 199 F.3d at 35.

2.

We next turn to ripeness. While standing is concerned with "who" is bringing the challenge, ripeness is concerned with "when" the challenge is brought. See McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 69–70 (1st Cir. 2003). In the pre-enforcement context, however, the doctrines of standing and ripeness tend to overlap, so the preceding discussion largely applies here too. See SBA List, 573 U.S. at 157 n.5, 134 S.Ct. 2334; R.I. Ass'n of Realtors, 199 F.3d at 33.

Ripeness analysis requires consideration of "fitness" and "hardship."[8] See Reddy, 845 F.3d at 501 (citing Texas v. United States, 523 U.S. at 300–01, 118 S.Ct. 1257). Fitness involves issues of "finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed," while hardship "typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties." R.I. Ass'n of Realtors, 199 F.3d at 33 (quoting Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 535 (1st Cir. 1995)). In the pre-enforcement context, a party's "concrete plans to engage immediately (or nearly so) in an arguably proscribed activity" gives a "precise shape to disobedience" and provides a "specific legal question fit for judicial review," and a showing that a "challenged statute, fairly read, thwarts" those plans can demonstrate hardship. Id.

Having maintained in its January memorandum that its temporary discretionary forbearance is not "a safe harbor for violations of the Wire Act," the government now argues that this case was unripe when filed and that the April 2019 Memo confirmed it. We disagree. As we have explained above, there is a "substantial controversy" over the meaning of the Wire Act, as it applies to the plaintiffs, "of sufficient immediacy and reality" -- prompted by DOJ's decision to seek reversal of OLC's 2011 position on the Wire Act and to adopt in full the 2018 Opinion -- "to warrant the issuance of the judicial relief sought." Reddy, 845 F.3d at 500 (internal quotation marks omitted) (quoting Lab. Rels. Div. of Constr. Indus. of Mass., Inc. v. Healey, 844 F.3d 318, 326 (1st Cir. 2016)).

New Hampshire and its vendors should not have to operate under a dangling sword of indictment while DOJ purports to deliberate without end the purely legal question it had apparently already answered and concerning which it offers no reason to expect an answer favorable to the plaintiffs. According to NeoPollard's affidavit, it would be impossible for it to comply with the plain language of the 2018 Opinion without entirely shutting down the NHLC's iLottery platform. Given the unequivocal position in the 2018 Opinion, and the pre-2011 response given by DOJ to inquiring states, we cannot see why the plaintiffs should be forced to sit like Damocles while the government draws out its reconsideration. See Hemp Council, 203 F.3d at 5–6.

3.

Finally, we agree with the district court that the April 2019 Memo did not moot the case. See N.H. Lottery Comm'n, 386 F. Supp. 3d at 143. The April 2019 Memo does not rescind the government's adoption of the 2018 Opinion, nor does it offer the plaintiffs solace that the credible threat of prosecution has subsided.[9] DOJ is explicit that the forbearance period is not a "safe harbor for violations of the Wire Act," but merely an "internal exercise of prosecutorial discretion." January 2019 Memo; see also City of Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); R.I. Ass'n of Realtors, 199 F.3d at 36 ("[T]he only thing standing in the way of a criminal prosecution is the State's litigation position that it will voluntarily refrain from enforcing the statute according to its plain language." (quoting N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 711 (4th Cir. 1999))); id. ("[T]he only practical way for the Attorney General to assuage a

reasonable fear of prosecution would be to disclaim, in categorical terms, any intent to enforce the prohibition . ”). The government refuses to disavow prosecuting state lotteries and their vendors for the conduct they currently engage in.

For the foregoing reasons, we find the plaintiffs' pre-enforcement challenge justiciable and turn next to the merits and the relief granted.

B.

Both NHLC and NeoPollard brought claims under the Declaratory Judgment Act and the APA. Because we conclude that the plaintiffs are entitled to declaratory relief, we focus first on that claim before briefly addressing the disposition of the APA claim.

1.

The Declaratory Judgment Act provides that “[i]n a case of actual controversy within its jurisdiction, . any court of the United States . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201. “In Declaratory Judgment Act cases where jurisdiction is exercised based on a threat of future injury,” as here, “the potential injury is typically legal liability on a set of already defined facts, so that the Act merely ‘defin[es] procedure’ to enable judicial resolution of a case or controversy that might otherwise be adjudicated at a different time or in a slightly different form.” In re Fin. Oversight & Mgmt. Bd. for P.R., 916 F.3d 98, 112 (1st Cir. 2019) (alteration in original) (quoting Aetna Life Ins. Co. of Hartford v. Haworth, 300 U.S. 227, 240, 57 S.Ct. 461, 81

L.Ed. 617 (1937)). Having already explained why the current controversy is justiciable, we see no abuse of discretion in the district court's willingness to entertain and resolve this controversy. So we pivot to the merits of that controversy, which turn entirely on a question of statutory interpretation, calling for our de novo review. See Hernández-Miranda v. Empresas Díaz Massó, Inc., 651 F.3d 167, 170 (1st Cir. 2011).

2.

The parties invite us to view the text of the Wire Act as having two key clauses, each defining two prohibited uses of wire communication facilities:

Clause One

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 (emphasis added).

Clause Two

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.

The parties' disagreement trains on how broadly to apply the prepositional phrase “on any sporting event or contest” that appears at the end of Clause One. The government argues that the phrase qualifies only the second use of “bets or wagers” in Clause One. The plaintiffs contend that the phrase qualifies both uses of “bets or wagers” in Clause

One, and that the term “bets or wagers” as used in Clause Two is shorthand for that qualified meaning in Clause One.

“[T]he plain meaning of a statute's text must be given effect,” though “[w]e focus on ‘the plain meaning of the whole statute, not of isolated sentences’ ” or phrases. Colón-Marrero v. Vélez, 813 F.3d 1, 11 (1st Cir. 2016) (quoting Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 858 (1st Cir. 1998)). Words in a statute are not islands but “must be read in their context and with a view to their place in the overall statutory scheme.” Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)).

Each party argues that application of its preferred canon of construction requires its desired result. The government supports its position for a limited application of the sports-gambling qualifier by reference to the “rule of the last antecedent.” “The rule provides that ‘a limiting clause or phrase . should ordinarily be read as modifying only the noun or phrase that it immediately follows.’ ” Lockhart v. United States, 577 U.S. 347, 136 S. Ct. 958, 962, 194 L.Ed.2d 48 (2016) (quoting Barnhart v. Thomas, 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003)); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 144 (2012); Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 342–43, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) (invoking the last antecedent rule to prevent “stretch[ing] the modifier too far” to apply to other numbered clauses within a subparagraph). But see 2A Norman Singer & Shambie Singer,

Sutherland on Statutes and Statutory Construction § 47:33 (7th ed. 2020) ("[W]here the sense of an entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the qualifying word or phrase is not restricted to its immediate antecedent."). According to the government, because the sports-gambling qualifier only appears in Clause One, and even then only once, after the words "information assisting in the placing of bets or wagers," it is limited to qualifying "bets or wagers" in that one instance.

This is certainly a plausible proposition in the abstract. But it does not end our inquiry. The last antecedent rule is "not an absolute and can assuredly be overcome by other indicia of meaning." Paroline v. United States, 572 U.S. 434, 447, 134 S.Ct. 1710, 188 L.Ed.2d 714 (2014) (quoting Barnhart, 540 U.S. at 26, 124 S.Ct. 376); see also Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, —— U.S. ——, 138 S. Ct. 1061, 1076–77, 200 L.Ed.2d 332 (2018) ("[W]e have not applied the rule when the modifier directly follows a concise and 'integrated' clause." (quoting Jama, 543 U.S. at 344 n.4, 125 S.Ct. 694)); Buscaglia v. Bowie, 139 F.2d 294, 296 (1st Cir. 1943) (declining to apply the last antecedent rule where doing so would result in a construction "contrary to the natural or common sense meaning of the statute"). Indeed, even the government's position implicitly accepts the proposition that we should not apply the rule "in a mechanical way where it would require accepting 'unlikely premises.' " Paroline, 572 U.S. at 447, 134 S.Ct. 1710 (quoting United States v. Hayes, 555 U.S. 415, 425, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009)). Thus, for example, even the government concedes that, in the phrase "bets or wagers on any

sporting event or contest," the sports-gambling qualifier applies not just to "wagers" (the actual last antecedent) but also to "bets."

For their part, the plaintiffs put forth the series-qualifier canon to argue that "on any sporting event or contest" should not be read as so confined and instead applies to both prohibited transmissions in the first clause: "bets or wagers" and "information assisting in the placing of bets or wagers." § 1084(a). According to the plaintiffs, a natural reading suggests that "on any sporting event or contest" is as applicable to the first reference to "bets or wagers" as it is to the second. See Paroline, 572 U.S. at 447, 134 S.Ct. 1710 ("When 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." (quoting Porto Rico Ry., Light & Power Co. v. Mor, 253 U.S. 345, 348, 40 S.Ct. 516, 64 L.Ed. 944 (1920))).[10] From there, the plaintiffs posit that the statute's structure confirms that the term "bets or wagers" as used throughout section 1084 means the same thing, i.e., "bets or wagers on any sporting event or contest."

As the district court correctly concluded, the language and syntax of section 1084(a) "prevents the first clause from being a textbook application of either canon," and a third canon -- the punctuation canon -- fails to save the day. N.H. Lottery Comm'n, 386 F. Supp. 3d at 150; see also id. at 149–50 ("Punctuation in a legal text . will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part." (quoting Scalia & Garner, supra, at 161)). The district court explained:

[A] comma before the conjunction “or” separating the phrases “bets or wagers” and “information assisting in the placing of bets or wagers” would demonstrate that the rule of the last antecedent applies. See 1A Sutherland on Statutory Construction § 21:15 (comma separating two members of a list indicates they are to be treated separately rather than as a whole); cf. Lockhart, 136 S. Ct. at 962 (applying rule of last antecedent to statute that had commas separating each antecedent). Without it, the appropriateness of the last antecedent canon is unclear. Conversely, a comma placed directly before the phrase “on any sporting event or contest” would confirm that the series-qualifier canon applies. See 2A Sutherland on Statutory Construction § 47:33 (“A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one.”).

Id. at 150; see Hayes, 555 U.S. at 423, 129 S.Ct. 1079 (explaining that imprecise punctuation did not counsel against the Court's decision to eschew the last antecedent rule).

The fact that the text of Clause One accommodates several possible readings does not mean that the statute entirely lacks clarity on the issue at hand. To affirm the district court's reading of the statute, we would need to find, among other things, that Clause Two also can be read as limited to betting on sporting events or contests.

Clause Two prohibits the transmission of a wire communication that 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). The government argues that even if the sports-gambling qualifier can be construed to apply to both prohibitions in Clause One, Clause Two is safe from the qualifier's reach because there is no reference to sporting events or contests within it and because Clause Two is "grammatically independent of the first clause."

We have, however, what appears to be a clear example in this very statute of Congress using shorthand to carry over a phrase from Clause One to Clause Two, which may suggest a broader pattern of borrowing by shorthand. The phrase "in interstate or foreign commerce" qualifies "transmission" in Clause One but is omitted from the text of Clause Two:

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 .

Id. (emphases added). Few though -- and certainly not this court -- would hesitate to find that Clause Two's "transmission" is shorthand for "transmission in interstate or foreign commerce." To read the statute otherwise would be to presume that Congress understandably did not seek to prohibit use of the wires for intrastate bets yet inexplicably sought to prohibit intrastate activities necessary to such betting.

The government's only counter to this conclusion is that Congress may have eliminated the interstate commerce qualifier in Clause Two since that clause "more clearly" relates to economic activity, making the phrase unnecessary to ensure the statute's constitutionality. This argument, to put it mildly, gives the statute a "curious reach." United States v. Bass, 404 U.S. 336, 340, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (finding the phrase "in commerce or affecting commerce" to apply beyond its nearest antecedent to all versions of the offenses listed). Accepting it would require us to think that Congress doubted that placing a bet was commerce that it could regulate, yet was certain that an intrastate communication entitling a bettor to be paid was commerce that Congress could regulate. We think it much more likely, indeed obvious, that Congress intended the term "transmission" in Clause Two to be shorthand for the "transmission in interstate or foreign commerce" described in Clause One. And that makes it more plausible that the same drafters could have intended "bets or wagers" in Clause Two to be a reference to the "bets or wagers on any sporting event or contest" described in Clause One.

The government nevertheless maintains that, even if Congress intended the interstate-commerce qualifier to apply throughout section 1084(a), that intention is of limited relevance to the sports-gambling qualifier because the two are "not parallel phrases." The government emphasizes that, even assuming the interstate-commerce qualifier is jurisdictional, the sports-gambling qualifier is not and therefore the rationale for carrying over that phrase is weaker. But our point here does not turn on the particular rationale for finding that Congress must have intended Clause Two to apply only to

interstate transmissions. The point instead is that Congress implemented that intent with language that relies on an understanding of at least one Clause Two term as a shorthand reference to a more fully described and qualified Clause One term. In short, Congress's consistent syntactic approach anticipated that a term, which is explicitly qualified in one instance, could be read as similarly qualified in other instances, at least where necessary to avoid odd and unlikely results. Cf. Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409, 418, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005) (finding evidence that Congress used a term "imprecisely" in one subsection to reflect term's meaning in another).

So we turn next to another principle of statutory construction: We do indeed prefer "the most natural reading" of a statute, one that "harmonizes the various provisions in [it] and avoids the oddities that [a contrary] interpretation would create." Republic of Sudan v. Harrison, —— U.S. ——, 139 S. Ct. 1048, 1057, 1060, 203 L.Ed.2d 433 (2019); see also Lockhart, 136 S. Ct. at 965 ("This Court has long acknowledged that structural or contextual evidence may 'rebut the last antecedent inference.' " (quoting Jama, 543 U.S. at 344 n.4, 125 S.Ct. 694)). Indeed, we have previously noted section 1084(a)'s use of "somewhat imprecise, conversational, language" and rejected a construction of it that "would lead to totally impractical results." Sagansky v. United States, 358 F.2d 195, 201 (1st Cir. 1966). Here, the government's impractical interpretation of section 1084 must give way to the plaintiffs' more natural reading.

The government's reading poses unharmonious oddities at two levels. Take first Clause One. Under the government's reading, anyone can transmit over the wires information assisting someone in placing a bet or wager over the wires on a non-sporting event, but the person receiving the assistance commits a crime if he then places the bet or wager. In short, there is no congruity between the two prohibitions in Clause One under the government's reading. Conversely, if we read "on any sporting event or contest" as qualifying both antecedents, harmony is restored: You cannot use the wires to place a bet or wager on a sporting event, and you cannot use the wires to send information assisting in placing that bet or wager.

The government struggles to imagine some reason why Congress would have opted for the asymmetry of broadly barring the placing of bets or wagers while only narrowly barring assistance in placing bets or wagers. The government goes so far as to hazard that maybe information on how to place a bet or wager on a sporting event is more important to placing the bet or wager. How that is so (e.g., how one needs more assistance to bet on an NFL game than on the Oscars) the government does not say. Instead, it rather obscurely references "speech-related" concerns, implicitly suggesting that gambling on a basketball game raises fewer "speech-related" issues than gambling on whether it will snow on Christmas. That the government posits such strained explanations in order to make sense out of its reading tells much.

But, says the government, even if it would strain common sense not to apply the sports-gambling qualifier to both antecedents in Clause One, there is no reason to carry it

down to Clause Two. That brings us to the second level of oddity posed by the government's reading of the statute: a lack of parallelism between Clause One and Clause Two. If Clause One is limited to sports betting (i.e., if it does not prohibit placing a bet on a lottery outcome), why in the world would Congress in the very next clause outlaw telling the winning lottery participant that he is entitled to payment? Or to pay someone to assist lottery bettors? The plaintiffs' reading (and the 2011 OLC reading) avoids any need to answer such questions. Rather, reading the entire subsection as related to sports gambling, each prohibition "serve[s] the same end, forbidding wagering, information, and winnings transmissions of the same scope." 2011 Opinion at 144. The sensible result is:

No person may send a wire communication that places a bet on a sporting event or entitles the sender to 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.

Id.

The lack of coherence in the government's proposed reading becomes even more apparent when we return to the text and consider the rest of section 1084. Section 1084(b) exempts from liability transmissions "for use in news reporting of sporting events or contests," and "transmission[s] of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting

on that sporting event or contest is legal into [one] in which such betting is [also] legal." 18 U.S.C. § 1084(b). Were the government correct, this exemption's exclusive focus on sporting events would seem odd. Why, for example, is there no exception for news reporting on other events upon which people might bet? The government offers no reason to explain such a distinction. Conversely, this question does not even arise if one reads section 1084(a) as limited to wagers and bets on sporting events and contests.

The government instead argues that section 1084(b) supports its position because Congress repeated a sports-gambling qualifier three times in section 1084(b), but only included the qualifier once in section 1084(a). Thus, reasons the government, Congress clearly intended a difference in meaning. See id. (excluding "transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal" (emphases added)). Furthermore, the government argues, had the scope of section 1084(a) been restricted to sports gambling, the inclusion of the sports-gambling qualifiers in section 1084(b) would have been superfluous.

We agree with the government's premise that we should "presume[ ] that Congress intended a difference in meaning" when it "includes particular language in one section of a statute but omits it in another." Digit. Realty Tr., Inc. v. Somers, —— U.S. ——, 138 S. Ct. 767, 777, 200 L.Ed.2d 15 (2018) (quoting Loughrin v. United States, 573 U.S. 351,

358, 134 S.Ct. 2384, 189 L.Ed.2d 411 (2014)). But that presumption carries little force when the text itself offers a ready syntactic explanation for using different language in different sections. As the district court explained, unlike the consistent use of a single term ("bets or wagers") in section 1084(a), section 1084(b) employs "diverse phrases [that] are not susceptible to an abridged reference," thereby "requir[ing] that the modifier be repeated." N.H. Lottery Comm'n, 386 F. Supp. 3d at 154. Section 1084(b) refers to "news reporting of sporting events or contests," "bets or wagers on a sporting event or contest," and "betting on that sporting event or contest." § 1084(b) (emphases added). "[T]he varied syntax of each item in the list makes it hard for the reader to carry the . modifying clause across all three." Lockhart, 136 S. Ct. at 963.

Even less convincing is the government's broader argument that if the sports-gambling qualifier truly applied to all prohibitions of section 1084(a), then any reference to sports gambling in section 1084(b) would be superfluous. The government does not explain how one could avoid reference to sports gambling in section 1084(b) altogether. We struggle to imagine a way ourselves. Such a task seems especially difficult when part of section 1084(b) permits the transmission of information which assists betting on a sporting event or contest but only where "betting on that sporting event or contest" is legal. § 1084(b) (emphasis added). In any event, while avoiding surplusage is definitely preferred, "avoid[ing] surplusage at all costs" is not, particularly where, as is the case here, syntax offers a good reason for why the qualifier was repeated in section 1084(b) (and we can't say we mind the added clarity). See Lockhart, 136 S. Ct. at 966 (quoting

United States v. Atl. Rsch. Corp., 551 U.S. 128, 137, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007)).

The government offers a couple of other reasons why we should prefer its reading over the plaintiffs'. Neither is persuasive. The government states that it is "difficult to credit" that Congress employed a shorthand when referring to "bets or wagers." It proposes obvious alternatives Congress might have used to more clearly express that "on any sporting event or contest" applied to each reference to "bets or wagers." Of course, we agree that there are many ways to improve the clarity of section 1084(a), but that is true of most statutes. Bass, 404 U.S. at 344, 92 S.Ct. 515 ("[W]e cannot pretend that all statutes are model statutes.").

Finally, the government points to Kellogg Brown & Root Services, Inc. v. United States, 575 U.S. 650, 135 S. Ct. 1970, 191 L.Ed.2d 899 (2015), as support for rejecting a consistent reading of "bets or wagers" throughout section 1084(a). There, the Court rejected the petitioners' argument to depart from the ordinary meaning of the term "pending" as used in the False Claims Act, and to instead construe the word as shorthand for "first-filed." Kellogg Brown & Root Servs., 135 S. Ct. at 1978–79; see also 31 U.S.C. § 3730(b)(5) ("When a person brings an action . no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." (emphasis added)). The Court pointed out that a shorthand term typically provides an expedient way to express "a lengthy or complex formulation" and "first-filed" is "neither lengthy nor complex." Kellogg Brown & Root Servs., 135 S. Ct. at

1979. Presaging our focus on avoiding odd and unlikely readings, the Court found that a reading applying the shorthand "would lead to strange results that Congress is unlikely to have wanted" and that the proposed definition "d[id] not comport with any known usage of the term 'pending.' " Id. Here, by contrast, "bets or wagers on any sporting event or contest" is a lengthier term more readily calling for use of a shorthand reference. And, more importantly, reading section 1084(a) as employing such a reference avoids, rather than creates, "strange results that Congress is unlikely to have wanted." Id.

3.

As the foregoing discussion explains, we find the text of section 1084 not entirely clear on the matter at hand, and we find that the government's resolution of the Wire Act's ambiguity would lead to odd and seemingly inexplicable results. Under the government's view, either Congress outlawed lottery betting over the wires while simultaneously allowing lotteries to provide assistance over the wires in placing lottery bets, or Congress allowed lottery betting over the wires while outlawing use of the wires to tell the winner the results of his bet. Of course, if Congress clearly enacted such an oddly designed statute, we would have a different case. But the ambiguity we have discussed does not provide sufficient comfort that Congress intended such a dubious result.

The legislative history provides further support for our judgment that Congress likely did not intend the strange results inherent in the government's reading. In fact, the

legislative history contains strong indications that Congress did indeed train its efforts solely on sports gambling. The statute as originally presented to Congress plainly aimed only at sports gambling. The language then contained only one clause, and it used commas to clearly indicate its focus on sports gambling. See S. 1656, 87th Cong. § 2 (Apr. 18, 1961) ("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"); 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. 277-79 (1961) (statement of Herbert Miller, Assistant Att'y Gen., Crim. Div.) ("This bill, of course, would not cover [gambling on other than a sporting event or contest] because it is limited to sporting events or contests."); see also 2011 Opinion at 141–47. The government argues that Congress broadened its aim beyond sports gambling when the original draft was amended, most particularly when the commas bracketing the words "or information assisting in the placing of bets or wages" disappeared. But as the district court explained, the absence of both commas merely created an ambiguity. N.H. Lottery Comm'n, 386 F. Supp. 3d at 150. The Senate report describing the amendments offered no hint that a major change was made or intended. See S. Rep. No. 87-588, at 1-2 (1961); cf. City of Chicago v. Fulton, No. 19-357, —— U.S. ——, 141 S.Ct. 585, 591–92, 208 L.Ed.2d 384 (U.S. Jan. 14, 2021) (stating that "it would have been odd for Congress to accomplish [an important change to a statute] by simply adding" a short phrase that did "not naturally comprehend" the suggested new meaning); Kellogg Brown & Root Servs., 135 S. Ct. at

1977 (“Fundamental changes in the scope of a statute are not typically accomplished with so subtle a move.”). And there is nothing in any of the committee reports to suggest any reason at all for the inconsistent scope of the prohibitions that the government's present position would require us to assume. Such “silence in the legislative history . cannot defeat the better reading of the text and statutory context.” Encino Motorcars, LLC v. Navarro, —— U.S. ——, 138 S. Ct. 1134, 1143, 200 L.Ed.2d 433 (2018).

4.

We come to the end of our analysis. The text of the Wire Act is not so clear as to dictate in favor of either party's view. The government's reading of the statute, however, would most certainly create an odd and unharmonious piece of criminal legislation. Neither common sense nor the legislative history suggests that Congress likely intended such a result. Like the Fifth Circuit, and the district court in this case, we therefore hold that the prohibitions of section 1084(a) apply only to the interstate transmission of wire communications related to any “sporting event or contest.”

C.

We now turn to the relief granted by the district court. By way of the Declaratory Judgment Act, the district court declared “that § 1084(a) of the Wire Act, 18 U.S.C. § 1084(a), applies only to transmissions related to bets or wagers on a sporting event or contest.” N.H. Lottery Comm'n, 386 F. Supp. 3d at 160. The district court specified that the declaration “binds the United States vis-à-vis NeoPollard and the [NHLC] everywhere

the plaintiffs operate or would be otherwise subject to prosecution." Id. at 158. Neither party contests the scope of the district court's declaration, and we agree that it is "responsive to the pleadings and issues presented." Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 42 (1st Cir. 2006) (quoting St. Paul Fire & Marine Ins. Co. v. Lawson Bros. Iron Works, 428 F.2d 929, 931 (10th Cir. 1970)).

The government urges the court to exercise its discretion to withhold declaratory relief for many of the same reasons it argues the case is non-justiciable. Having already rejected these arguments above, we decline to do so. See MedImmune, 549 U.S. at 129, 127 S.Ct. 764 ("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.' " (quoting Abbott Lab'ys v. Gardner, 387 U.S. 136, 152, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967))).

The district court also granted the plaintiffs relief under the APA. While actions under the Declaratory Judgment Act and the APA can be maintained together, see Abbott Lab'ys, 387 U.S. at 153, 87 S.Ct. 1507; Bos. Redev. Auth. v. Nat'l Park Serv., 838 F.3d 42, 48 (1st Cir. 2016), we find it unnecessary here to determine whether to "hold unlawful and set aside [an] agency action," 5 U.S.C. § 706(2), where the remedy provided by the Declaratory Judgment Act is adequate under the circumstances, see id. § 704 (providing for judicial review of "final agency action for which there is no other adequate remedy in a court" (emphasis added)).[11] Therefore, we vacate the district court's order only to the extent that it grants relief under the APA.

III.

In conclusion, we find that the plaintiffs' claims are justiciable and that the Wire Act applies only to interstate wire communications related to sporting events or contests. Therefore, we affirm the district court's grant of the plaintiffs' motions for summary judgment and its denial of the government's motion to dismiss and motion for summary judgment, but, given that declaratory relief under the Declaratory Judgment Act is sufficient, we vacate the district court's grant of relief under the APA. Costs are awarded in favor of the appellees.

FOOTNOTES

1. We refer to both Plaintiffs NeoPollard Interactive LLC and its fifty-percent owner, Pollard Banknote Limited, collectively as “NeoPollard.”

2. Unlike in the 2011 Opinion, the Criminal Division's reasons for requesting OLC's advice are not detailed in the 2018 OLC Opinion itself. See 2018 Opinion at *1-2, 2018 WL 7080165, at *1. NeoPollard's complaint states that news sources had reported that OLC's 2018 Opinion came on the heels of lobbying efforts by the Coalition to Stop Internet Gambling, an organization participating as amicus curiae on behalf of the government in this case. See Byron Tau & Alexandra Berzon, Justice Department's Reversal on Online Gambling Tracked Memo from Adelson Lobbyists, Wall St. J. (Jan. 18, 2019), https://www.wsj.com/articles/justice-departments-reversal-on-online-gambling-tracked-memo-from-adelson-lobbyists-11547854137.

3. The 2018 Opinion also found that the UIGEA, which Congress enacted in 2006, did not modify or otherwise alter section 1084(a). 2018 Opinion at *18, 2018 WL 7080165, at *12.

4. Many other states, represented as amici in this case, rely on substantial profits earned from lotteries that operate like New Hampshire's. The Michigan Bureau of State Lottery along with forty-six other government-operated lotteries collectively generated more than eighty billion dollars in gross revenues in 2017, which went to fund a myriad of state programs.

5. Other states, appearing before us as amici, have expanded their online platforms further, legalizing and licensing additional forms of online gambling. New Jersey, for example, has rolled out the online gambling platform, iGaming. New Jersey notes that from 2013 through 2016 the iGaming platform generated $998.3 million in sales and $124.4 million in tax revenue. Meanwhile, Pennsylvania represents that, because of the 2018 Opinion, it scaled back its online gaming infrastructure, leading to an estimated one billion dollars in lost revenue for the state.

6. The district court denied motions from the iDevelopment and Economic Association and the Commonwealth of Pennsylvania to intervene as plaintiffs, as well as from the Coalition to Stop Internet Gambling and the National Association of Convenience Stores which sought to intervene as defendants, though the district court allowed them to participate as amici curiae, along with the State of New Jersey and the Michigan Bureau of State Lottery.The Kentucky Lottery Corporation, the Tennessee

Education Lottery Corporation, the Virginia Lottery, the Rhode Island Lottery, the Colorado State Lottery Division, the North Carolina Education Lottery, the State of Delaware, the State of Idaho, the State of Vermont, the State of Mississippi, the State of Alaska, and the District of Columbia supported the Michigan Bureau of State Lottery's memorandum of law, which in turn supported the plaintiffs' motions for summary judgment.

7. Twenty months later, the DOJ has not yet completed its review, explaining at oral argument that it has had other priorities.

8. The fitness prong has both jurisdictional and prudential components, while the hardship prong is solely prudential. Reddy, 845 F.3d at 501 (citing Roman Cath. Bishop of Springfield v. City of Springfield, 724 F.3d 78, 89–90 (1st Cir. 2013)). The Supreme Court has expressed doubt about whether the doctrine of prudential ripeness is consistent with the settled principle that a federal court has a "virtually unflagging" obligation to hear and decide cases within its jurisdiction. SBA List, 573 U.S. at 167, 134 S.Ct. 2334 (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125–26, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)). We need not weigh in on this issue though, because, as we will explain, the plaintiffs here have satisfied the fitness and hardship prongs. See id.

9. Citing Anderson v. Green, 513 U.S. 557, 559, 115 S.Ct. 1059, 130 L.Ed.2d 1050 (1995) (per curiam), the government frames the issue as one primarily about ripeness as opposed to mootness. The government argues that the district court only considered

the April 2019 Memo as to mootness and not as to ripeness, which the government says was improper since it maintains that there was never a credible threat of enforcement of section 1084(a) against the plaintiffs (and therefore nothing to moot). Whatever one makes of this argument, the district court did consider the April 2019 Memo as to standing, which it noted overlaps with ripeness in the pre-enforcement context. N.H. Lottery Comm'n, 386 F. Supp. 3d at 141 n.5, 143. We have made similar observations, and, having already detailed why there was a credible threat of prosecution against the plaintiffs, we see no need to entertain this argument further.

10. The government's opening brief concedes that the series-qualifier rule operates elsewhere in the statute:[I]n the phrase "sporting event or contest," the word " 'sporting' modifies both 'event' and 'contest.' " Likewise, within Offense 2, the phrase "on any sporting event or contest" modifies both "bets" and "wagers" within the phrase: "assisting in the placing of bets or wagers on any sporting event or contest."See also 2011 Opinion at 150 n.11 (examining whether "sporting" modifies only "event" and not "contest" and concluding that it modifies both).

11. Recognizing that relief under the Declaratory Judgment Act is discretionary, we make no comment on whether the statute would provide an "other adequate remedy" if the district court had declined to grant relief under it.