



U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

July 28, 2017

The Honorable Ron Paul
Chairman
Campaign for Liberty
5211 Port Royal Road, Suite 310
Springfield, VA 22151

Dear Mr. Paul:

Thank you for writing to the Attorney General regarding the 2011 opinion by the Office of Legal Counsel (“OLC”) entitled “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.” In your letter on behalf of Campaign for Liberty, you asked that the Attorney General uphold the 2011 OLC opinion and reject “claims that the 1961 Wire Act authorizes a federal ban on online gaming.” We have been asked to respond to you on his behalf to let you know that he appreciates the time you took to share your views with him.

It should be noted that the 2011 OLC opinion took the position that the scope of the Wire Act, 18 U.S.C. § 1084, is limited to sports wagering. That opinion, however, did not take the position that the Wire Act was in any way limited with respect to its application to sports wagering.

Those of us who are involved in criminal justice and law enforcement benefit greatly from the active involvement of citizens, such as yourself, who express their thoughts on important issues in these fields.

Again, thank you for expressing your views regarding the 2011 OLC opinion and for writing the Attorney General.

Sincerely,

Correspondence Management Staff
Office of Administration

Reference Number: KM300612548

For further correspondence please email criminal.division@usdoj.gov. Should you wish to speak to a representative please call (202) 353-4641 and provide the reference number.



RECLAIM *the* REPUBLIC.
RESTORE *the* CONSTITUTION.

5211 PORT ROYAL ROAD, SUITE 310, SPOTSWOOD, VA 22151

June 15, 2017

The Honorable Donald J. Trump
President of the United States of America
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

The Honorable Jefferson Sessions
Attorney General of the United States of America
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear President Trump and Attorney General Sessions,

On behalf of Campaign for Liberty's almost half-a-million members, I am writing to urge the administration to uphold the 2011 Justice Department Memo rejecting claims that the 1961 Wire Act authorizes a federal ban on online gaming.

The claim that the Wire Act authorizes a federal ban on online gaming does not survive serious scrutiny for a number of reasons. First, the law was passed more than three decades before the Internet was widely used. In fact, when the Wire Act was debated, the idea that average Americans would someday carry devices more powerful than the era's super computers was too fanciful even for Science Fiction.

Furthermore, numerous statements show that Congress' sole intention in passing the Wire Act was "**to assist the various States in enforcement of their laws pertaining to gambling and bookmaking.**" In other words, this law does not create any new federal crimes; instead, it authorizes the federal government to assist states in enforcing state laws. The use of the Wire Act to create new federal crimes is the type of "creative" interpretation of the law that you, I, and others have properly criticized when done by other federal agencies and federal courts.

Restoring the flawed pre-2011 interpretation of the Wire Act will overturn laws in the three states -- New Jersey, Nevada, and Delaware -- that have chosen to legalize online gaming, as well as the many states that allow their citizens to purchase lottery tickets online.

Some argue the federal government has a duty to criminalize online gaming to ensure state laws outlawing online gaming are not undermined by laws in other states legalizing online

gaming. But that does not justify nationalizing the issue. The United States Constitution does not give the federal government any authority to ban Internet (or any other form of) gaming.

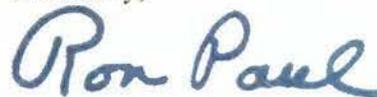
Furthermore, using federalism to justify new federal power turns the Tenth Amendment on its head. The argument also sets a precedent that could be used to undermine other state laws, such as those protecting the right to keep and bear arms or the right to work without paying union dues.

A federal ban on online gaming will not stop people from gambling online. Instead, it will ensure that the online gaming marketplace will be dominated by criminals and even terrorists. In contrast, allowing the states to decide for themselves makes it more likely that individuals wishing to gamble online will patronize legal casinos that comply with all relevant state laws and regulations.

Outlawing Internet gaming not only usurps states' rights, it also usurps the role of churches, families, and other voluntary institutions in promoting moral values. Trusting any part of government -- especially the federal government -- instead of voluntary community-based institutions to provide moral guidance and help people avoid the harms associated with excessive gambling is a strange position for a conservative administration, especially one elected on a promise to drain the swamp and not to give D.C. more power over our lives.

In conclusion, I urge the Department of Justice to continue adherence to the 2011 memorandum that the Wire Act does not authorize federal criminalization of online gaming. Overturning this memo would put the Justice Department in the position of ignoring clear Congressional intent and would authorize the federal government to usurp state authority and violate individual rights in a futile attempt to outlaw online gaming.

In Liberty,

A handwritten signature in blue ink that reads "Ron Paul". The signature is written in a cursive, flowing style.

Ron Paul
Chairman

cc: The Honorable Robert Goodlatte, Chairman, House Committee on the Judiciary
The Honorable John Conyers, Ranking Member, House Committee on the Judiciary
The Honorable Charles Grassley, Chairman, Senate Committee on the Judiciary
The Honorable Dianne Feinstein, Ranking Member, Senate Committee on the Judiciary



U.S. Department of Justice

Criminal Division

Organized Crime and Gang Section

Washington, D.C. 20530

Mr. Jon Bruning
Bruning Law Group
1201 Lincoln Mall
Lincoln, NE 68508-2822

SEP 5 2017

Dear Mr. Bruning:

Thank you for writing to the Deputy Attorney General regarding the 2011 opinion by the Office of Legal Counsel ("OLC") entitled "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." In your letter, you asked the Deputy Attorney General to honor the prior request sent by eleven state attorneys general to then-Vice President-Elect Pence and to "reinstate the rule of law by restoring the original interpretation of the Wire Act to ban online gambling." We have been asked to respond to you on his behalf to let you know that he appreciates the time you took to share your views with him.

Those of us who are involved in criminal justice and law enforcement benefit greatly from the active involvement of citizens, such as yourself, who express their thoughts on important issues in these fields.

Again, thank you for expressing your views regarding the 2011 OLC opinion and for writing the Deputy Attorney General.

Sincerely,

(b)(6), (b)(7)(C) per CRM

Douglas E. Crow
Deputy Chief



July 28, 2017

By First Class Mail

Rob Rosenstein
Deputy Attorney General
United States Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530-0001

RECEIVED
FEDERAL BUREAU OF INVESTIGATION
2017 AUG 14 AM 9:30

RE: Reinstatement of the Wire Act

Dear Deputy Attorney General Rosenstein:

I am sending this letter to you today as a father and the former Nebraska Attorney General. I served as Nebraska's top law enforcement officer for twelve years. During that time I observed first-hand the threats to our children and most vulnerable citizens lurking on the internet and was a strong advocate for protecting my citizens from illegal activities prevalent online. Which is why I was extremely troubled when President Obama's Department of Justice reversed a long-standing interpretation of the Wire Act to permit online gambling.

For years, the federal government interpreted the Wire Act, 19 U.S.C. § 1084 to prohibit all forms of gambling involving interstate wire transmissions, including the internet. In late 2011, the United States Department of Justice Office of Legal Council issued a legal opinion concluding the Wire Act only banned sports betting, and not other forms of internet gambling.

Since 2011, my state attorney general colleagues have observed our most vulnerable citizenry suffer the consequences of expanded online gambling. Further, without enforcement at the federal level, the inherent interstate nature of online gambling has made enforcement of gambling prohibitions in states particularly difficult and costly.

In November 2016, eleven state attorneys general sent the enclosed letter to Vice President-Elect Mike Pence asking the Trump Administration to restore the Wire Act. As Deputy Attorney General, we ask your office to honor this request and reinstate the rule of law by restoring the original interpretation of the Wire Act to ban online gambling.

Sincerely,

BRUNING LAW GROUP, LLC

A handwritten signature in black ink, appearing to read 'Jon Bruning', written over a white background.

Jon Bruning
402.525.0789 (mobile)

Congress of the United States
Washington, DC 20515

February 7, 2019

The Honorable Lee J. Lofthus
Assistant Attorney General for Administration
and Designated Agency Ethics Officer
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Assistant Attorney General Lofthus:

We are writing to request documents regarding whether Acting Attorney General Matthew Whitaker recused himself or played a role in the decision by the Department of Justice (DOJ) to reverse its previous position on online gambling after Mr. Whitaker received highly unusual campaign donations from casino executives.

According to press reports, lobbyists working for casino magnate Sheldon Adelson sent a memo to DOJ leaders in 2017 criticizing a 2011 opinion from the Office of Legal Counsel (OLC). That 2011 opinion concluded that the Wire Act, 18 U.S.C. § 1084, prohibited only online sports gambling. Officials in DOJ's Criminal Division reportedly forwarded this memo to OLC with a request that they "re-examine their stance that a law on the books for decades didn't prohibit online gambling."¹

On January 29, 2018, and February 2, 2018, the Chairman/Founder and the Vice Chairman of Wild Rose Casino & Resorts, a casino in Iowa, each donated \$2,600 to Mr. Whitaker's 2014 Senate campaign. These donations were strange because they came more than three years after Mr. Whitaker's campaign had concluded. Mr. Whitaker's campaign received these donations while he was serving as Chief of Staff to then Attorney General Jeff Sessions.²

¹ *Justice Department's Reversal on Online Gambling Tracked Memo from Adelson Lobbyists*, Wall Street Journal (Jan. 18, 2019) (online at www.wsj.com/articles/justice-departments-reversal-on-online-gambling-tracked-memo-from-adelson-lobbyists-11547854137).

² Federal Election Commission, *Individual Contributions to Whitaker for U.S. Senate Inc.* (Jan. 1, 2017- Dec. 31, 2018) (online at www.fec.gov/data/individual-contributions/?+two_year_transaction_period=2014&two_year_transaction_period=2018&committee_id=C00544924&min_date=01%2F01%2F2017&max_date=12%2F31%2F2018) (accessed Feb. 6, 2019).

On January 14, 2019, OLC issued a new opinion reversing its 2011 memo and benefiting land-based casinos. OLC concluded that the Wire Act prohibits all forms of gambling transmitted interstate by wire—effectively concluding that online gambling is illegal.³

DOJ's ethics rules on political activity require compliance with the Hatch Act, 5 U.S.C. §§ 7323(a) and 7324(a). These rules provide that non-career appointees may not "solicit, accept, or receive a political contribution."⁴ In addition, DOJ's ethics rules on personal conflicts of interest state: "Generally, an employee should seek advice from an ethics official before participating in any matter in which her impartiality could be questioned."⁵

The Office of Special Counsel has reportedly opened an investigation into whether Mr. Whitaker's acceptance of political contributions violated the Hatch Act.⁶

In light of the fact that Mr. Whitaker's campaign received contributions from casino executives while he was serving as Chief of Staff—for his campaign that concluded three years earlier—we are requesting information about whether Mr. Whitaker recused himself from DOJ actions relating to the Wire Act.

To assist with our Committees' investigation, we request that you provide the following documents by February 21, 2019:

1. All documents referring or relating to Mr. Whitaker's involvement in DOJ policies or positions on gambling, gaming, or casinos, including DOJ's decision to reverse its position on the Wire Act; and
2. All documents referring or relating to ethics advice sought by or provided to Mr. Whitaker regarding the 2018 campaign donations, including any advice regarding recusal.

An attachment to this letter provides additional instructions for responding to the Committees' request. If you have any questions regarding this request, please contact the Committee on Oversight and Reform staff at (202) 225-5051.

³ Department of Justice, Memorandum Opinion from the Office of Legal Counsel to the Acting Assistant Attorney General, Criminal Division, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling* (Nov. 2, 2018) (released Jan. 14, 2019) (online at www.justice.gov/olc/file/1121531/download).

⁴ Memorandum from Sally Q. Yates, Deputy Attorney General, Department of Justice, to Non-Career Employees, Restrictions on Political Activities/Election Year Reminders (Mar. 10, 2016) (online at www.justice.gov/jmd/file/834496/download); Department of Justice, Departmental Ethics Office, *Political Activities* (online at www.justice.gov/jmd/political-activities) (accessed Feb. 6, 2019).

⁵ Department of Justice, Departmental Ethics Office, *Conflicts* (online at www.justice.gov/jmd/conflicts) (accessed Feb. 6, 2019).

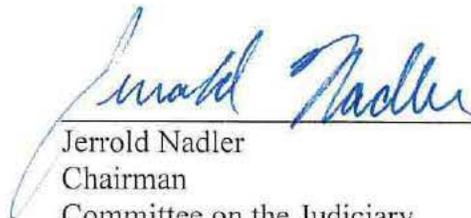
⁶ *US Agency Opens Case File on Potential Whitaker Hatch Act Violations*, CNN (Nov. 21, 2018) (online at www.cnn.com/2018/11/21/politics/matt-whitaker-2014-senate-campaign-donations/index.html).

Thank you for your prompt attention to this matter.

Sincerely,



Elijah E. Cummings
Chairman
Committee on Oversight and Reform



Jerrold Nadler
Chairman
Committee on the Judiciary



Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce



Adam Schiff
Chairman
Permanent Select Committee
on Intelligence

cc: The Honorable Jim Jordan, Ranking Member
Committee on Oversight and Reform

The Honorable Doug Collins, Ranking Member
Committee on the Judiciary

The Honorable Greg Walden, Ranking Member
Committee on Energy and Commerce

The Honorable Devin Nunes, Ranking Member
Permanent Select Committee on Intelligence

Hanrahan, Peggi (OAG)

From: Hanrahan, Peggi (OAG)
Sent: Wednesday, March 08, 2017 5:52 PM
To: Hunt, Jody
Subject: FW: letter to AG Sessions on internet gambling opinion
Attachments: 2017 SPG letter to AG Sessions.docx.pdf

I have no idea what to do with this if anything so sharing with you. This is my friend that works at Samford!

From: Brown, Kim [mailto:kbrown7@samford.edu]
Sent: Wednesday, March 8, 2017 2:01 PM
To: peggi.hanrahan@usdoj.gov
Subject: letter to AG Sessions on internet gambling opinion

Peggi, I was asked to transmit this letter to your office on behalf of Joe Godfrey, Alabama Citizens Action Program (ALCAP). Mission accomplished! Thank you, have a great day.

Kim Brown



March 1, 2017

U.S. Attorney General Jeff Sessions
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Sessions:

I am writing to you on behalf of Stop Predatory Gambling, a national, bipartisan, government reform network of more than one million individuals and groups. Our mission is to improve the lives of the American people, freeing us of the dishonesty, exploitation, addiction and lower standard of living that commercialized gambling spreads.

We are strongly urging you to act swiftly to restore the Wire Act's protections by withdrawing a 2011 DOJ Office of Legal Counsel memorandum. The memorandum gutted the Wire Act, re interpreting it to open the door for casinos and lotteries to put slot machines and similar extreme forms of gambling on mobile devices and laptops in every bedroom, office, schoolhouse, and smart phone in a state.

The Office of Legal Counsel's opinion reversed fifty years of settled precedent and practice. The opinion claimed the Wire Act's prohibitions only applied to sports gambling and not to the many other forms of online gambling. The error of the OLC opinion is conclusively established by the carefully researched, well reasoned law review article "Understanding the Wire Act: Why the Department of Justice Missed the Mark When It Overturned Fifty Years of Interpretation of the Act."¹

The dubious reasoning of the OLC opinion was not issued until the afternoon of Friday, December 23, 2011, the eve of Christmas weekend, an obvious attempt to bury news of a major policy change resulting not from a vote of the people nor of Congress, but from closed door dealing and bureaucratic fiat.

One reason why the prior administration may have wanted to bury their misreading of the Wire Act is because national and state level polling consistently highlight how the American people oppose the legalization of internet gambling.² Families have a right to keep slot machines and other extreme forms of gambling out of their homes and off of their kids' mobile devices.

A second reason why is because the significant harm to citizens caused by internet gambling is real and extensive. Internet gambling is financially destructive, highly addictive, leads to higher rates of underage gambling, increases financial fraud and invites money laundering and terrorist financing opportunities, to name just a few of its harms.

Third, these serious harms are compounded by government's inability, as a practical matter, to provide resources even remotely approaching those needed to enforce laws, administer regulations, and preclude collusion in online non sports gambling. Millions of state border crossing electronic bets per day simply cannot be policed effectively without a massive, expensive, unprecedented, and unrealistic expansion of federal authority. None of the states have the resources to properly investigate gambling related financial transactions outside their borders, and it is these kinds of transactions that organized crime, fraudsters, money launderers, and terrorist financiers will employ in using online gambling as components of their interstate and international schemes.

President Trump has pledged on "Day One" to cancel every unconstitutional executive action, memorandum and order issued by President Obama. The 2011 Office of Legal Counsel memorandum dismantling the Wire Act should belong near the top of that list.

The situation is urgent because some states like California, Florida, New York, Pennsylvania are being lobbied heavily by commercialized gambling interests to allow online casinos. If that happens, it will become more challenging to reverse the severe impacts of internet gambling.

Please act swiftly to withdraw the OLC memorandum on the Wire Act and reinstate the DOJ's longtime proper interpretation of the Act. If the mobile phones, laptops, and tablets of American children are to be turned into online casinos 24 hours a day, seven days a week, that should be for Congress to decide.

Thank you for your attention to this serious issue.

Sincerely,

A handwritten signature in blue ink that reads "Joe Bernal".

National Director
Stop Predatory Gambling

¹ Nirenberg, Darryl, David Fialkov, and Ryan McClafferty. "Understanding the Wire Act: Why the Department of Justice Missed the Mark When It Overturned Fifty Years of Interpretation of the Act." *Gaming Law Review and Economics* 20.3 (2016): 254-266

² Farleigh Dickinson's National Polling Center "PublicMind," May 8, 2014 <http://publicmind.fdu.edu/2014/vices/>



NATIONAL FOOTBALL LEAGUE

Jeffrey Pash
July 17, 2018

July 17, 2018

The Honorable Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Mr. Attorney General:

On behalf of the National Football League, please accept my thanks for meeting with us and the NCAA yesterday to discuss issues arising out of the Supreme Court's decision authorizing sports betting. We deeply appreciate the time and attention that you and your staff gave to these issues, particularly given the number of significant matters that you are currently addressing. We believe that uniform federal standards will be of great value in this area, both for the protection of consumers and to safeguard the integrity of sporting events, and that this is an opportune time to put those standards into place. It will also be important, as we discussed, to ensure that legitimate, regulated gambling conducted in accordance with state and federal law is not undercut by illegal online gambling operations.

As the legislative process moves forward, we will stay in touch with your office and will be most grateful for the Department's support of this effort. Again, thank you for your time and courtesy yesterday. Needless to say, if we can provide you or your staff with any assistance as you consider these issues, we would be pleased to do so.

With best wishes.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey Pash".

Jeffrey Pash

Whitaker, Matthew (OAG)

From: Whitaker, Matthew (OAG)
Sent: Thursday, May 24, 2018 6:17 PM
To: Bryant, Errical (OAG)
Cc: Barnett, Gary E. (OAG)
Subject: Fwd: NFL, NCAA Letter to the U.S. Department of Justice on Sports Betting
Attachments: image002.jpg; ATT00001.htm; image004.png; ATT00002.htm; NFL NCAA letter to DOJ.PDF; ATT00003.htm

Please arrange a meeting in the next several weeks. Highest level officials from nfl and ncaa.

Begin forwarded message:

From: "Moore, Jocelyn" <Jocelyn.Moore@nfl.com>
Date: May 24, 2018 at 11:39:34 PM GMT+2
To: "Matthew.whitaker@usdoj.gov"
<Matthew.whitaker@usdoj.gov>, "Gary.E.Barnett@usdoj.gov"
<Gary.E.Barnett@usdoj.gov>, "Zachary.Terwilliger2@usdoj.gov"
<Zachary.Terwilliger2@usdoj.gov>, "sujit.raman2@usdoj.gov" <sujit.raman2@usdoj.gov>
Cc: 'Abe Frank' <afrank@ncaa.org>, "Nabavi, Jonathan" <Jonathan.Nabavi@nfl.com>
Subject: NFL, NCAA Letter to the U.S. Department of Justice on Sports Betting

Mr. Whitaker, Mr. Barnett, Mr. Terwilliger and Mr. Raman:

Attached, please find a letter from the National Football League and the National Collegiate Athletic Association to Attorney General Sessions and Deputy Attorney General Rosenstein on the topic of sports betting. At your convenience, we would welcome the opportunity to discuss our concerns.

Thank you for your consideration of this request. I have included my full contact information and that of Abe Frank with the NCAA below for your reference.

Sincerely,
Jocelyn Moore

JOCELYN MOORE

Senior Vice President

Public Policy and Government Affairs

NATIONAL FOOTBALL LEAGUE

P: 202-971-9005

C: (b)(6)

E: Jocelyn.Moore@NFL.com

Abe L. Frank

Managing Director of Government Relations

w: 202-293-3050 | **f:** 202-293-3075 | afrank@ncaa.org

One Dupont Circle NW, Suite 310 | Washington, D.C. 20036



May 24, 2018

The Honorable Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20530-0001

The Honorable Rod J. Rosenstein
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20530-0001

Dear Attorney General Sessions and Deputy Attorney General Rosenstein:

Last week, in the case *Murphy v. NCAA et. al*, the Supreme Court of the United States struck down the Professional and Amateur Sports Protection Act of 1992 (PASPA). We are grateful for the engagement of the Solicitor General in encouraging the Supreme Court to let appellate court rulings stand, and then for his defense of the law once the Court decided to hear the case. While we respect the Court's ruling, the absence of a clear and enforceable legal standard for sports betting threatens the integrity of our nation's professional and amateur sporting contests – something both Congress and the U.S. Department of Justice have sought to protect for the last 50 years. To protect the integrity of our games in a post-PASPA environment, we urge the U.S. Department of Justice to immediately act, in concert with Congress, to create statutory and regulatory standards for legalized sports betting in the United States.

Historically, the federal government has left authorization and regulation of non-sports gambling to the States. In the case of sports betting, however, because of the substantial public interest in combating threats to the integrity of sporting contests, the federal government has long maintained a distinction between sports betting and other forms of gambling. Senator Bill Bradley, one of PASPA's four original authors, said this during a 1992 floor debate on the bill:

I am sensitive to arguments in favor of deferring to the States, and I believe that the Federal Government should be careful to preempt state authority only when an issue is of national importance. But, based on what I know about the dangers of sports betting, I contend that its dangers are of national importance. Such dangers and the interstate effects of sports betting justify this Federal action.

NFL, NCAA Sports Betting Letter to DOJ
May 24, 2018

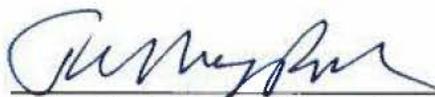
The serious threats posed by sports betting to the integrity of athletics cannot be confined within state borders. PASPA has been a central pillar of the federal government's efforts to curtail legalized sports betting for more than a quarter-century. In the wake of the Supreme Court's decision, we are calling upon Congress and the Department of Justice to establish core standards for state regulators that will protect consumers, guard against problem gambling and gambling by our nation's youth, and uphold the integrity of sporting contests.

While state regulators have an important role to play in a post-PASPA environment, the federal government has primary authority regarding interstate commerce, interstate law enforcement, and international sanctions against corruption and money-laundering. The federal government is uniquely able to: 1) ensure that the policy choices of individual states to allow or disallow sports betting within their borders are respected and 2) facilitate crucial information-sharing between state and federal regulators, sports leagues, and international law enforcement agencies to help prevent the corruption that has been seen in some parts of the world where sports betting is legal.

It is important to acknowledge that PASPA was only one of several interrelated federal laws enacted to address sports betting. These include the Wire Act (1961), the Travel Act (1961), the Interstate Transportation of Paraphernalia Act (1961), the Sports Bribery Act (1964), the Illegal Gambling and Business Act (1970), federal barriers to state-sanctioned sports lotteries (1974), and the Unlawful Internet Gambling Enforcement Act (2006)ⁱ. The Department of Justice has been instrumental in enforcing and defending these federal statutes. In a post-PASPA environment, we believe it is imperative for the Department of Justice, in consultation with Congress, to clarify how proposed state regulatory efforts may or may not violate other federal laws regarding sports betting. Without such guidance, we are concerned that consumers, states, and private entities may inadvertently violate federal law. This is especially true for the Wire Act, which was enacted decades before the Internet was created, which has been the subject of conflicting Department of Justice guidance, and which may now be reconsidered in light of the Supreme Court's ruling.

Without continued federal guidance and oversight, we worry that we will not be able to guard against the harms long associated with sports betting. We appreciate the ongoing concern that the Department has shown regarding the integrity of American sports, and we look forward to working with you and your staff on this important and timely issue.

Sincerely,



Jeffrey Pash, General Counsel
National Football League



Donald M. Remy
NCAA Chief Legal Officer

NFL, NCAA Sports Betting Letter to DOJ
May 24, 2018

Cc: The Honorable Orrin Hatch, Senate President Pro Tempore
The Honorable Chuck Grassley, Chairman, Senate Judiciary Committee
The Honorable Dianne Feinstein, Ranking Member, Senate Judiciary Committee
The Honorable Bob Goodlatte, Chairman, House Judiciary Committee
The Honorable Jerrold Nadler, Ranking Member, House Judiciary Committee

¹ The Unlawful Internet Gambling Enforcement Act (UIGEA) arose from concerns about sports betting on the Internet and the inability of state attorneys general to enforce state gambling laws.

Rosenstein, Rod (ODAG)

From: Rosenstein, Rod (ODAG)
Sent: Friday, March 15, 2019 8:48 PM
To: O'Callaghan, Edward C. (ODAG)
Subject: Fwd: OLCWire Act Opinion
Attachments: IGT White Paper - Final.pdf; ATT00001.htm

Begin forwarded message:

From: "Cole, James M." <jcole@sidley.com>
Date: March 15, 2019 at 8:36:05 PM EDT
To: Rod Rosenstein <Rod.Rosenstein5@usdoj.gov>
Cc: "Keisler, Peter" <pkeisler@sidley.com>, "Cohn, Jonathan" <jfcohn@sidley.com>
Subject: OLCWire Act Opinion

Rod

As a supplement to our letter of March 8, 2019, on behalf of our client IGT, please find a more detailed white paper on the topic. As with the initial letter, please pass a copy along to the AG.

Thank you for your attention to this. We do believe that it would be beneficial for both the Department and us to discuss this. Please let us know if we can schedule a time to do that.

Jim

JAMES M. COLE
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
+1 202 736 8246
jcole@sidley.com
www.sidley.com
SIDLEY

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INTERPRETATION AND ENFORCEMENT OF THE FEDERAL WIRE ACT
White Paper for the U.S. Department of Justice
On Behalf of International Game Technology PLC (IGT)

James M. Cole
Peter D. Keisler
Jonathan F. Cohn
SIDLEY AUSTIN LLP
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jfcohn@sidley.com

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Introduction

This White Paper expands upon our March 8, 2019, letter concerning a recent opinion of the Office of Legal Counsel (“OLC”) reinterpreting the Wire Act, 18 U.S.C. § 1084, to apply to non-sports betting.¹ In light of the pending litigation in federal court in New Hampshire, our goal here is to provide some additional perspective before DOJ submits its opening brief and to lay the groundwork for a more productive conversation going forward. We appreciate the government’s decision to forebear enforcement for another 60 days, and are hopeful that a dialogue may narrow or even eliminate many areas of potential disagreement.

The focus of this White Paper is twofold. First, we address some threshold concerns with the 2018 OLC opinion’s statutory interpretation. Second, we detail reasons why, as a matter of interpretation and enforcement, DOJ should make clear that the Wire Act does not criminalize vast swaths of state-regulated activities that have lawfully operated for decades.

On the first issue, although we strongly disagree with the opinion, we do not think that this is the place to comprehensively delineate our contrary arguments. We do believe, however, that the fragility of OLC’s statutory analysis should inform DOJ’s enforcement guidance and litigating positions. The OLC opinion rests entirely on the determination that the Wire Act’s text *unambiguously* applies to non-sports betting. That is a precarious starting position. The opinion itself concedes that the Wire Act is “not a model of artful drafting,” 2018 OLC Op. 2, and DOJ’s interpretation squarely conflicts with the Department’s prior statements to Congress, the weight of judicial precedent, and the legislative record. If OLC’s 2018 opinion were correct, then all of these prior statements and opinions would be not only wrong but wrong beyond peradventure. Further, the OLC opinion improperly reads the Wire Act in isolation, disregarding other federal statutes, including one that was enacted the very same day as the Wire Act. Thus, OLC’s textual analysis is incomplete, at best. This foundational weakness in OLC’s analysis is good reason for the Department to tread cautiously in enforcing it.

On the second issue, setting aside whether the Wire Act applies to *some* non-sports gambling, there are compelling reasons why the Department should clarify that certain state-regulated lottery and gaming activities do not come under the Act. For instance, the Wire Act does not apply to state lotteries because the Act does not reach sovereign governments or their contractors. Likewise, the Wire Act does not cover table or machine gaming at state-authorized, land-based casinos, because the incidental data transmissions that support such games are not the type of wire transmissions prohibited by the Wire Act. Even those who advocated for OLC’s reinterpretation of the Wire Act readily admit that the statute does not apply to traditional state lotteries, including multi-state lotteries.² By the same reasoning, state-regulated, brick-and-mortar casino gaming would also be outside of the scope of the Wire Act.

The Department should also decline to prosecute internet-based casino gaming that is legal under, and regulated by, state law, consistent with the “coherent federal policy” recognized by the Supreme Court just last term. *Murphy v. NCAA*, 138 S. Ct. 1461, 1483 (2018). All of

¹ *Reconsidering Whether the Wire Act Applies to Non Sports Gambling*, 42 Op. O.L.C. (2018) [hereinafter, 2018 OLC Op.]. The new opinion was not released until January 19, 2019.

² Memorandum from Charles J. Cooper to the Coalition to Stop Internet Gambling (Mar. 11, 2019).

these activities are entirely lawful under state law, and clarifying that DOJ is not seeking to federally criminalize them would go a long way towards eliminating uncertainty and aligning enforcement priorities with longstanding federal gaming policy, all while enabling the Department to prosecute unregulated, black-market gambling.

As the largest lottery services provider in the United States and the largest end-to-end gaming company in the world, IGT brings a unique perspective and experience to these issues. We want to share that perspective with the Department in order to help craft sensible enforcement guidance that protects state revenue sources and industry's investment-backed expectations while maintaining the Department's flexibility to police underground gambling. We appreciate your attention to this matter.

I. Background

A. The Wire Act

Congress passed the Wire Act in 1961 as part of a package of legislation designed to combat illegal gambling and organized crime. It provides that:

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).

There is no serious question that the statute's decades-old foundations centered on combatting "modern bookmaking" about sports. *See Prohibiting Transmission of Bets, Wagers, and Related Information by Wire Communications*, H.R. Rep. No. 87-967, at 2 (1961). Congress sought to limit the use of wires because "bookmakers are dependent upon telephone service for the placing of bets ... *on all sporting events*" and because "[t]he availability of wire communication facilities affords the opportunity for making bets ... to the very minute that a particular *sporting event* begins." *Id.* at 2 (emphases added); *see also Prohibiting Transmission of Bets by Wire Communications*, S. Rep. No. 87-588, at 4 (1961) (quoting Letter for Vice President from Robert F. Kennedy, Att'y Gen. (Apr. 6, 1961)). Testimony before both the House and Senate Judiciary Committees, moreover, targeted the spread of organized crime to sports betting. *See, e.g., Legislation Relating to Organized Crime Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. 5 (1961) (statement of Robert F. Kennedy, Att'y Gen., U.S. Dep't of Justice) ("In addition ... [to] commercialized horserace betting, the gamblers also have moved into large-scale betting operations of such amateur and professional sports events as baseball, basketball, football, and boxing."); *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1656, S. 1657, S. 1658, S. 1665 Before the S. Comm. on the Judiciary*, 87th Con. 277 (1961) (testimony of Herbert Miller,

Assistant Att’y Gen., Criminal Div., U.S. Dep’t of Justice) (“The type of gambling that a telephone is indispensable to is wagers on a sporting event or contest.”).

Consistent with these statements, the gaming industry grew up around a shared understanding that illegal sports betting was the Wire Act’s concern. In 2011, DOJ confirmed that understanding. Illinois and New York sent questions about the Wire Act’s implications for internet lottery, or iLottery, games, which are simply a twenty-first-century version of traditional lottery. In its submission, New York noted that the architecture of a traditional and internet-based lottery transaction were very similar, as traditional lottery transactions also used wire communications to transmit bets and wagers across state lines, through the establishment of data centers that serviced multiple state lotteries, an infrastructure that had existed for decades. In response, OLC held that Section 1084(a)’s single reference to “sporting event or contest” (like the single reference to “interstate or foreign commerce”) created a “shorthand reference[]” that limits each clause of the statute. 2011 OLC Op. 5-7.³ Despite recognizing that alternative readings were linguistically possible, this one made “functional” and “better sense of the statutory scheme.” *Id.* OLC therefore concluded that the proposed iLottery games would not contravene the Wire Act. *Id.* at 12.

The 2011 OLC opinion was consistent with two other OLC opinions that addressed state lotteries and recognized their long-standing lawfulness. In 1986, OLC opined on whether Congress had constitutional authority to create a national lottery to fund Social Security.⁴ In concluding that Congress lacked such authority, OLC noted that the Framers were well aware of lotteries as a source of local revenue, as colonies and states had offered lotteries in the earliest days of the Republic. *See* 1986 OLC Op. 43–45. OLC concluded that the Framers’ omission of any authority to raise revenue through a lottery (while affirmatively permitting Congress to (“lay and collect Taxes, Duties, Imposts and Excises”) may well have been intentional, given that lotteries were an important source of state revenue, and competition from a national lottery would depress such revenue. *Id.* In addition, OLC surmised that the Framers may well have chosen to leave the creation and regulation of state lotteries to local officials. *Id.* at 45.

Also, in 2008, OLC addressed whether services provided by third parties (such as IGT) to state lotteries come within statutes exempting lotteries “conducted by [a] State acting under the authority of State law” from general federal laws prohibiting the transmission of materials or broadcasts relating to an illegal lottery.⁵ *See* Pub. L. 93-583, 88 Stat. 1916 (Jan. 2, 1975) (amending 18 U.S.C. §§ 1301–04 & 1953, and adding § 1307). Like in its 1986 opinion, the 2008 opinion started with the observation that lotteries are critical sources of state revenue and have been since “the colonial period and the early years of the Republic.” 2008 OLC Op. 130. OLC further observed that exemptions for state-run lotteries reflected a policy of “accommodat[ing] the promotion of these state-run lotteries.” *Id.* Because it is often “necessary” for state lotteries to “contract with private firms to provide goods and services,”

³ *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) [hereinafter, 2011 OLC Op.].

⁴ *Congressional Authority to Adopt Legislation Establishing a National Lottery*, 10 Op. O.L.C. 40, 4042 (1986) [hereinafter, 1986 OLC Op.].

⁵ *Scope of Exemption Under Federal Lottery Statutes for Lotteries Conducted by a State Acting Under the Authority of State Law*, 32 Op. O.L.C. 129 (2008) [hereinafter, 2008 OLC Op.].

OLC concluded that private parties under contract to state lotteries come within the exemption for state-run lotteries, provided that the state lottery continues to exercise actual control and hold “all but a de minimis share of the equity interest in the profits and losses of the business.” *Id.* at 129, 144.

In 2018, however, OLC reversed course. It overturned the 2011 opinion and cast doubt, *sub silentio*, on the two other OLC opinions. The new opinion concludes that, although the Wire Act is “not a model of artful drafting,” the text of the statute is “sufficiently clear.” According to OLC, the phrase, “on any sporting event or contest,” should be construed as applying *only* to “information assisting in the placing of bets or wagers,” and not the other prohibitions in the statute. 2018 OLC Op. 2. That holding, which no Article III judge has ever adopted, effectively ended the statutory interpretation analysis.

On January 15, 2019, Deputy Attorney General Rod Rosenstein formally recognized the OLC opinion as DOJ’s official position on the Wire Act.⁶ In response to litigation, DOJ issued an additional 60-day global forbearance on enforcement of the new interpretation, further delaying enforcement until June 14, 2019.⁷

B. About IGT

IGT is the largest end-to-end gaming company in the world. It employs over 6,500 people in the United States, including at lottery headquarters in Rhode Island, gaming and manufacturing headquarters in Nevada, the Data Center of the Americas in Texas, and a state-of-the-art ticket printing facility in Florida. IGT’s customers include state lottery commissions, other state agencies (such as state police departments) with lottery and gaming oversight, and commercial and tribal casinos.

Lottery. IGT derives a significant portion of its revenue from providing products and services to state lotteries. IGT provides physical equipment (tickets, terminals, vending machines, etc.) and/or operational services for 37 of the 45 U.S. lotteries (which includes the District of Columbia).⁸ IGT’s lottery offerings include both instant win (often called “scratch off”) lottery games and draw-based games, such as Powerball and Mega Millions.

In addition to these traditional, retail lottery offerings, IGT has been a leader in the emerging iLottery sector. The two states (New York and Illinois) whose requests led to the 2011 OLC opinion initially contracted with IGT to launch their iLottery programs, *see* 2011 OLC Op. 2 3, and IGT today provides iLottery services for Georgia, Kentucky, New York, and Virginia. Like with traditional retail lottery tickets, iLottery games can only be sold in the state in which they are authorized; through geolocation technology, IGT ensures that every iLottery purchaser is physically present in the state offering the iLottery game.

⁶ See Memorandum from the Deputy Attorney General to United States Attorneys, Assistant Attorneys General, Director, Federal Bureau of Investigation (Jan. 15, 2019), <https://www.justice.gov/file/1124286/download>.

⁷ See Memorandum from the Deputy Attorney General to United States Attorneys, Assistant Attorneys General, Director, Federal Bureau of Investigation (Feb. 28, 2019)

⁸ International Game Technology PLC, Annual Report (Form 20 F), at 20 (Mar. 8, 2019).

Casino Gaming. IGT is also a leading manufacturer and operator of gaming machines. Based on local law and player preferences, IGT offers both centrally determined games, which are connected to a central server that determines the outcome of the game, and games that are randomly determined by the operation of the machine itself. In 2017, the Company became the first gaming supplier to achieve responsible gaming accreditation for its land-based casino and lottery segments from the Global Gambling Guidance Group.

As an outgrowth of its land-based gaming properties, IGT also enables its gaming partners to offer popular casino games over the internet to customers' computers or mobile devices. Through IGT's solutions, customers can play casino games for fun (social gaming) and, in states where it is legal, for money (interactive gaming, or iGaming). iGaming is currently legal and operational in four states (Delaware, New Jersey, Nevada, and Pennsylvania), and is either allowed (but not operational) or not expressly prohibited in another ten states. As with iLottery, IGT's iGaming products use geolocation technology to ensure that players are physically present in the state where the gaming is legal.

IGT's Perspective. These diverse business sectors and widespread product offerings give IGT a unique vantage point to describe the effect the 2018 OLC opinion will have on lotteries and regulated gaming. Working with state partners, IGT has built infrastructures that are regulated by and legal under state law. OLC's new opinion, however, injects enormous uncertainty into these long-established businesses. IGT's risks are exemplary of the risks felt by the entire gaming and lottery industry, and DOJ should understand those concerns fully as it moves forward.

II. The Wire Act Is At Best Ambiguous About Whether It Applies To Non-Sports Gambling.

We respect that OLC has rendered its opinion and will not belabor our disagreement with it point-by-point. We nevertheless believe that the opinion's facial vulnerabilities—in particular, OLC's central conclusion that the Wire Act *unambiguously* applies to non-sports betting—should inform the Department's approach to prosecution and counsel caution in extending the opinion to conduct that has long been lawful under state law. Every branch of government has cast doubt on this premise.

Start with DOJ itself. In OLC's own words, "the Wire Act is not a model of artful drafting." 2018 OLC Op. 2. We agree—and that observation is confirmed by the fact that OLC itself read the provision in opposite ways in opinions issued just seven years apart. Moreover, DOJ has twice told Congress either that the Wire Act applies only to sports betting or that it may apply only to sports betting. In 2000, DOJ stated that the Wire Act "applies to sports betting but not to contests like a lottery." *Internet Gambling Prohibition Act of 1999: Hearing Before the Subcomm on Telecommunications, Trade, & Consumer Protection of the H. Comm. on Commerce*, 106th Cong. 35, 88 (2000). Two years prior, DOJ testified that "the statute may relate only to sports betting," and thus asked Congress to "clarify[]" that the Wire Communications Act applies to interactive casino betting." *Internet Gambling Prohibition Act of 1997: Hearing Before the H. Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 167 (1998) (statement of Kevin DiGregory, Deputy Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice).

Judicial precedent reaffirms the infirmity in OLC's premise that the text of the Wire Act unambiguously applies beyond sports betting. Two unanimous circuit courts and a federal district court have held that the Wire Act applies only to sports betting. *See United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014); *In re MasterCard Int'l Inc.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff'd*, 313 F.3d 257, 262–63 (5th Cir. 2002). OLC's opinion cites other district court opinions as allegedly supporting its position, but none actually does. Only two even address whether the Wire Act applies to sports betting. Of these two, one affirmatively does *not* endorse OLC's interpretation.⁹ The other is a magistrate judge's report and recommendation that was never even adopted.¹⁰ OLC's remaining cases did not address the relevant question.¹¹ The citations are inappropriate and inapposite.

That leaves Congress, but DOJ has never disputed that the legislators who wrote and enacted the Wire Act intended that the statute would cover only sports betting. *Supra* at 2. As then-Deputy Attorney General (and future Justice) Byron White stated at the time, the Wire Act is “aimed [] at those who use the wire communication facility for the transmission of bets or wagers in connection with a sporting event.” *Report of Proceedings: Hearing Before the S. Comm. on the Judiciary*, Exec. Sess., 87th Cong. 55 (1961) (statement of Byron R. White, Deputy Att’y Gen.). The House Report similarly described the Wire Act as cracking down on “modern bookmaking” by limiting “[t]he availability of wire communication facilities [that] afford[] the opportunity for the making of bets and wagers ... to the very minute that a particular sporting event begins.” *See* H.R. Rep. No. 87-967, at 2 (emphasis added).

All of this fundamentally undermines OLC's premise that the statute is unambiguous. Eight federal judges, multiple senior Department officials, and several legislators all disagree with OLC's position. “In light of [these dissenting views], it would be difficult indeed to contend that [the Wire Act] is unambiguous.” *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996).

If more were needed, however, the interpretative exercise itself also makes clear why so many authorities have reached contradictory views. Grammatically, the statute is imprecise. As OLC noted in 2011, the addition of a single comma would have made clear that the Act applied to non-sports betting, while using two commas would have clarified that the Act was limited to sports betting. *See* 2011 OLC Op. 5. The omission of both commas leaves the Act ambiguous.

This is especially true, considering another statute that Congress enacted the same day as the Wire Act. In the Paraphernalia Act, 18 U.S.C. § 1953, Congress expressly and

⁹ *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007), concluded that the entire first clause of the Act applies only to sports betting and only the second clause applies beyond sports. *Lombardo* thus reached a hybrid conclusion, underscoring the ambiguity of the statutory text.

¹⁰ *See United States v. Kaplan*, No. 06 R 337CEJ 2 (E.D. Mo. Mar. 20, 2008). In addition, the magistrate judge never concluded that the Wire Act is unambiguous, but did conclude that the sports non sports issue was not even in issue because the indictment *did* charge the defendant with engaging in illegal sports betting. *See id.* at 9–10.

¹¹ *See United States v. Vinaithong*, No. 97 6328, 199 WL 561531, at *4 (10th Cir. Apr. 9, 1999) (affirming sentence of defendant whom pleaded guilty to Wire Act violation); *United States v. Ross*, No. 98 CR 1174 1(KMV), 1999 WL 782749, at *2 (S.D.N.Y. Sept. 16, 1999) (describing the Wire Act as containing three provisions); *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999).

unambiguously limited the “sporting event” qualifying phrase to one of three prohibitions by separating the three prohibitions with identifiers: “(a) ... (b) ... or (c).” The “sporting event” language appears only in (b). Congress could have done the same thing in the Wire Act, but chose not to do so. At the very least, the absence of such identifiers and the absence of commas renders the Wire Act ambiguous.

Grammatical canons of construction do nothing to clarify the ambiguity. OLC relied exclusively on the rule of the last antecedent (or the nearest reasonable referent canon). See 2018 OLC Op. 7–8. But that rule has been called “a rule of last resort,” which is “applied only where there is no contraindication from legislative history or another source that the statute in question is intended to convey a meaning different than application of the Rule would permit.” Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (2012); accord, e.g., *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (last antecedent canon applies “where no contrary intention appears”).

The series qualifier rule would counsel a contrary result. See *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016) (last antecedent canon “is not an absolute and can be overcome by other indicia of meaning,” including purpose and “reader intuiti[on]”). The canon provides that, where a modifier “undeniably applies to at least one antecedent, and ... *makes sense* with [the rest], the more plausible construction here is that it in fact applies to all [antecedents].” *United States v. Bass*, 404 U.S. 336, 339–40 (1971) (emphasis added). Deciding which canon applies requires an assessment of the statute’s purpose rather than applying one or the other “in a mechanical way where it would require accepting unlikely premises.” *Paroline v. United States*, 572 U.S. 434, 447 (2014). In short, these linguistic canons are at best in equipoise and at worst contravene OLC’s interpretation; either way, they require an assessment of context, and are not to be applied formulaically in isolation.

Additional interpretative tools only add to the ambiguity, but OLC never grappled with any of them. OLC nowhere considered the federalism implications of displacing state policy judgments on gaming and lotteries, even though courts require a “clear statement” before “assum[ing] Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.” *Bond v. United States*, 572 U.S. 844, 858–59 (2014). And of course there is a centuries-old “coherent federal policy” of respecting “the policy choices of the people of each State on the controversial issue of gambling.” *Murphy*, 138 S. Ct. at 1483. As the Supreme Court made clear, the Wire Act is part of this coherent congressional policy. Nonetheless, OLC’s new opinion risks displacing these policy judgments without ever even confronting them.

Nor does OLC’s analysis properly account for the text of the Wire Act as a whole and the absurd results that it creates, even though a complete textual analysis “look[s] to the particular statutory language at issue, *as well as the language and design of the statute as a whole.*” *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988). After declaring certain forms of betting and wagering illegal under § 1084(a), for example, the Act creates express exemptions for First Amendment-protected speech in § 1084(b). But those exemptions apply only to information relating to “sporting events or contests.” It would make no sense for Congress, having declared

all forms of betting illegal, to craft exemptions only for protected activity that related to sports betting. Surely Congress did not want to criminalize truthful reporting about lottery results.

Suffice it to say, there are plenty of reasons to conclude that the Act is less than clear. OLC, however, brushed aside all of them. And, because OLC concludes the text is plain, it never meaningfully engages with the other indicia of meaning including the Act's purpose, drafting history, and statutory context. The Department's enforcement guidance should be developed against the backdrop of these threshold concerns.

III. The Department Should Make Clear that Certain State-Regulated or -Operated Actives Do Not Come Under the Wire Act.

Even if the 2018 OLC opinion correctly interpreted the Wire Act to apply beyond sports betting, the Department should still take steps to limit the scope of the opinion. A statute can apply to some non-sports betting without applying to all non-sports betting. In particular, a federal statute can apply to unregulated non-sports betting without criminalizing betting that is permitted under state law. Such a limitation would respect the traditional role of states as the primary regulator of gaming activity, protect investment-backed expectations, and give much-needed comfort to entities like IGT and its state, tribal, and commercial partners who are engaged in lawfully regulated conduct. We thus propose three specific limitations on the Wire Act that would eliminate much of the uncertainty and concern over OLC's new interpretation, while not interfering with the Department's ability to prosecute black-market gambling.

A. The Wire Act Should Not Be Enforced Against State Lotteries or Their Contractors.

The 2018 OLC opinion specifically intimates an effect on state lotteries by calling out states that "began selling lottery tickets via the Internet after the issuance of [the] 2011 Opinion." See 2018 OLC Op. 22. This apparent threat to enforce the Wire Act against state lotteries is unprecedented and has "create[d] substantial uncertainty" in this important, multi-billion-dollar industry.¹² The Wire Act has never before been enforced against a state-run lottery or a state lottery contractor. Indeed, in the more than half century since the Wire Act was enacted, both Congress and the Department have repeatedly recognized that federal law does not and should not inhibit state lotteries. To alleviate this substantial uncertainty, the Department should clarify that the Wire Act has no application to state-run lotteries (both retail lottery and iLottery) or to third parties who provide products or services to state lotteries.

1. The Wire Act Does Not Cover Sovereign Governments.

The Wire Act does not apply to state lotteries, because the Act applies only to "[w]hoever being engaged in the business of betting or wagering." 18 U.S.C. § 1084(a) (emphasis added). The Dictionary Act defines the terms "person" and "whoever" synonymously to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies,

¹² See N. Am. Assn. of State & Provincial Lotteries, *NASPL Responds to DOJ's Reversal of Opinion* (Feb. 4, 2019), <http://www.naspl.org/img/press/NASPL%20Responds%20to%20the%20DOJ%20Reversal%20of%20Opinion.pdf>.

as well as individuals.” 1 U.S.C. § 1; *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014) (Dictionary Act definitions apply “unless the context indicates otherwise”). That definition says nothing about sovereign governments. The Supreme Court has applied a “longstanding interpretive presumption that ‘person’ does not include the sovereign.” *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 780–82 (2000); *accord, e.g., Int’l Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991) (“person” does not include a sovereign absent an affirmative intent “to bring state or nation within the scope of the law”). Courts have extended this same principle to the Dictionary Act’s definition of “whoever.” *See, e.g., United States v. Lara*, 181 F.3d 183, 198 (1st Cir. 1999) (finding that “whoever” as defined in the Dictionary Act does not apply to government bodies); *United States v. Ramsey*, 165 F.3d 980, 987 (D.C. Cir. 1999) (“whoever” “does not apply to the government or affect governmental rights unless the text expressly includes the government”); *United States v. Singleton*, 165 F.3d 1297, 1300 (10th Cir. 1999) (“construing ‘whoever’ to include the government is semantically anomalous”).

There is no indication from the text, context, or purpose of the Wire Act that the term “whoever” extends to state governments or agencies. *See Nardone v. United States*, 302 U.S. 379, 383 (1937) (“[G]eneral words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act.”). The Act itself says nothing about states, and nothing in the legislative record makes states an intended target of the statute. To the contrary, the Wire Act’s entire legislative history shows that its focus was *helping states* combat organized crime.

Nor is there anything in the broader context of federal lottery or gaming law that would suggest states should be subject to liability under the Wire Act. Rather, “Congress has generally exempted state-run lotteries and casinos from federal gambling legislation,” as part of a policy of “defer[ring] to, and even promot[ing], differing gambling policies in different States.” *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999). And in the limited instances where Congress intended to bring states within the scope of federal gaming law, it has done so expressly. The Professional and Amateur Sports Protection Act, for example, provides that “[i]t shall be unlawful for (1) a governmental entity ... or (2) a person” to engage in certain activities relating to sports betting. 28 U.S.C. § 3702, *abrogated by Murphy*, 138 S. Ct. 1461. That Congress made no comparable mention of states or sovereigns here should be dispositive.

Similarly, construing the Wire Act to apply to state-operated lotteries would run afoul of precedent requiring a “clear statement” before a court will “assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.” *Bond*, 572 U.S. at 858–59. Regulation of state lotteries has long been a traditional state prerogative. *See, e.g., Greater New Orleans Broad.*, 527 U.S. at 187. What is more, states rely on lottery revenue to fund critical state programs. *See infra* at 14. If all of these lotteries were to suddenly become illegal under a federal law passed during the Kennedy Administration, it would be more than just the proverbial elephant in the mousehole; it would be an elephant successfully hiding in a mousehole for over half a century. *See Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001).

The Department and OLC have repeatedly recognized that states have been and should be the primary regulators of lotteries. In its 1986 opinion concerning the creation of a national lottery, OLC noted that “lotteries were an important source of governmental revenues at the time the Constitution was drafted.” 1986 Op. 43; *see also* 2008 OLC Op. 130 (“State-chartered lotteries were prevalent during the colonial period and the early years of the Republic.”). In concluding that the Constitution did not permit the creation of a national lottery, OLC opined that the Framers seemingly intended to “*reserve to the states alone the power to authorize lotteries*” for two reasons: to protect states ability to raise needed revenue and to allow state governments to decide for themselves whether and how to offer a lottery. *Id.* at 44–45 (emphasis added). Applying the Wire Act to state lotteries would subvert both of these purposes. Moreover, the Wire Act had been on the books for 25 years at the time OLC wrote this opinion. It is hard to believe that the same agency could simultaneously bless and protect state lotteries while believing that another federal statute outlawed them completely.

Finally, post-enactment congressional activity reinforces that Congress never intended nor understood the Wire Act to apply to state lotteries. Since the passage of the Wire Act in 1961, Congress has enacted and amended numerous statutes relating to state-run lotteries. In 1975, Congress undertook a comprehensive review of federal gaming law and enacted exemptions for “lotter[ies] conduct by [a] State under the authority of State law” from various criminal statutes that prohibited transporting equipment for or communicating information about illegal lotteries. Pub. L. 93-583, 88 Stat. 1916 (Jan. 2, 1975) (amending 18 U.S.C. §§ 1301–04 & 1953, and adding § 1307). As OLC has previously recognized, these amendments were expressly intended to “accommodate the promotion of [] state-run lotteries.” 2008 OLC Opinion 130. That Congress amended all of these statutes—including 18 U.S.C. § 1953, which was enacted on the same day as the Wire Act, *see infra* at 12—but did not revisit the Wire Act “can be likened to the dog that did not bark.” *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991). It would make no sense at all for Congress, having devoted such time and attention to exempting materials and advertisement related to state lotteries from federal criminal law, to leave in place a statute that criminalized the lotteries themselves.

The text of the Wire Act and these interpretive guides make clear that the Wire Act does not apply to state governments, including state-run lotteries. By suggesting that its new opinion would portend consequences for state lotteries, OLC erred and needlessly sowed confusion. We respectfully ask the Department to correct that error and affirm that the Wire Act does not apply to sovereign governments, including state lotteries.

2. *The Wire Act Does Not Apply to Contractors That Enable State Lotteries To Operate.*

Just as it would make no sense to construe the Wire Act to prohibit state lotteries, it would make no sense to construe it to prohibit the equipment and operations that are necessary to run state lotteries. The Department should clarify that third-party contractors who provide goods and services to state lotteries are also not subject to the Wire Act.

Extending the Wire Act to a state’s contractors would not only give rise to the same federalism concerns identified above, but it would also be flatly inconsistent with the express scope of the statute, which applies only to those who are “engaged in the business of betting or

wagering.” 18 U.S.C. § 1084(a). This term is not defined in the statute, but in context, it cannot be construed as covering equipment suppliers and operators. Determining the meaning of an undefined statutory term requires a “holistic” assessment of the statute’s text, grammar, and subject matter; further, when all of those sources fail to provide a clear meaning, courts will also consider the statute’s legislative history. *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455, 461 n.11 (1993); *see also Garcia v. United States*, 469 U.S. 70, 75 (1984).

In this case, all of those considerations support construing the phrase to cover only those who themselves take and stake bets or wagers, and not mere equipment makers and service providers like IGT. Starting with the text of the statute, the Wire Act is read most naturally to apply only to those who themselves use a wire to take bets or wagers. By modifying the word “business” with the prepositional phrase “of betting or wagering,” Congress indicated that, to come under the statute, the business itself must be betting or wagering, and not merely a business that indirectly supports or relates to betting or wagering. Moreover, by using the gerunds “betting or wagering” (rather than the simpler nouns “bets or wagers”), Congress further required that the business itself must be a participant in the bets or wagers. *See In re Deepwater Horizon*, 745 F.3d 157, 171 (5th Cir. 2014) (statute’s use of “gerunds connote[s] active conduct”). Finally, the activity prohibited by the Wire Act is the *use* of a wire for betting or wagering activity—not, for example, the mere provision of the wire for another’s use. Taken together, these grammatical clues suggest that a defendant under the Wire Act must himself use a wire as part of his own business of betting or wagering.

In the context of federal gaming law, “the business of betting or wagering” is the actual taking or staking of bets and wagers. As courts have explained, “bookmakers” are the “persons ‘engaged in the business of betting or wagering.’ Bookies *take* bets, they receive them, they handle them.” *United States v. Tomeo*, 459 F.2d 445, 447 (10th Cir. 1972). This does not describe IGT, which does not take bets and does not have a stake in the outcome of lottery games. *See also United States v. Sellers*, 483 F.2d 37, 45 (5th Cir. 1973) (quoting *Tomeo*), *abrogated on other grounds, United States v. McKeever*, 905 F.2d 829 (5th Cir. 1990); *accord* 107 Cong. Rec. 15,503, 16,534 (1961) (statement of Rep. Harris) (“[The Wire Act] only gets after the bookmaker, the gambler who makes it his business to take bets or to lay off bets.”). This singular focus on the bet taker excludes application of the statute to the bettors themselves, as well as to those who provide services or supplies to the bookmaker. In the core example of the bookmaker, it is the bookmaker—not the person who supplies the bookmaker with betting slips or a telephone line—that is subject to direct liability under the Wire Act.¹³ So too here, IGT, by providing state lotteries with materials like lottery tickets, terminals, and data networks, is not itself taking, receiving, or handling bets or wagers, and thus is not itself engaged in the business of betting or wagering.

The Wire Act’s legislative history further confirms that Congress never intended the statute to cover equipment makers and other service providers. An early version of the Wire Act would have applied to anyone who “*leases, furnishes, or maintains any wire communication*

¹³ Individuals who aid, abet, or conspire with those engaged in the business of betting or wagering could have secondary liability under the Wire Act. But here, since state lotteries themselves cannot violate the Wire Act, *see supra* § III.A.1, it is not unlawful for IGT to provide material assistance to state lotteries.

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 Senate, however, amended the bill to apply only to those “engaged in the business of betting or wagering” who “use” a wire for a prohibited purpose. S. Rep. No. 87-588, at 1 (emphasis added). The reason for this change, the Senate Report noted, was to reflect the Senate’s view that “the individual user, engaged in the business of betting or wagering, is the person at whom the proposed legislation should be directed.” *Id.* at 2. This amendment draws a clear line between those “engaged in the business of betting or wagering” and those who “lease[], furnish[], or maintain” equipment for betting or wagering. Because IGT does the latter, its conduct is outside of the Wire Act.

Construing the Wire Act not to apply to equipment makers like IGT would also harmonize the Act with other statutes addressed to the same topic. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006). Most notably, on the same day Congress passed the Wire Act, it also enacted the Paraphernalia Act, 18 U.S.C. § 1953. The Paraphernalia Act, unlike the Wire Act, *is* addressed to those who provide equipment or services to gaming or lottery businesses—specifically, whoever provides any “record, paraphernalia, ticket, certificate, bill[], slip, token, paper, writing, or other device” for use by various types of betting or wagering. *See* 18 U.S.C. § 1953(a) (1964). When the same Congress passes two statutes addressed to the same topic, courts should interpret each to have independent meaning and scope, *see, e.g., Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071–72 (2018), especially when the statutes are enacted on the very same day. It would make no sense for Congress to enact an entirely separate statute that carefully regulates equipment makers if all of those activities were separately illegal under the blunt provisions of the Wire Act.

Other statutory provisions provide additional support. In 1975, Congress amended the Paraphernalia Act 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.” 18 U.S.C. § 1953(b)(4) (1976); *see supra* at 10. On its face, this amendment creates a safe harbor for those, like IGT, that provide equipment to state lotteries. But that safe harbor is in fact quite perilous if any person within it is separately liable under the Wire Act. Similarly, construing the Wire Act to apply to products and services related to state lotteries would run counter to 18 U.S.C. § 1307, which Congress enacted in 1975 specifically to exempt state lotteries from provisions of federal law prohibiting the transmission of equipment for or broadcasts regarding illegal lotteries across state lines. *See* 18 U.S.C. §§ 1301–04; *supra* at 10. As with the Paraphernalia Act, these exemptions would be a mirage if the same conduct exempted under these statutes was nonetheless illegal under the Wire Act.

Finally, OLC already recognized the lawfulness and necessity of states contracting with private parties for assistance in running state lotteries. In 2008, OLC opined that federal law permits “a state to contract with private firms to provide goods and services necessary to enable the state to conduct its lottery, including management services.” 2008 OLC Op. 129 (interpreting 18 U.S.C. §§ 1307, 1953(b)). To run lotteries, states need management services, communications terminals, and physical tickets, among other services. There is no basis for

reversing the 2008 opinion and criminalizing the provision of these basic services to state lotteries.

3. *State Lotteries and Their Contractors Should Not Be Targeted..*

Even if the Department disagrees with the foregoing as a matter of statutory interpretation, the Department should nonetheless exercise its enforcement discretion not to target state lotteries (whether retail or iLotteries) or their contractors.

As an initial matter, both retail lottery and iLottery are equally vulnerable under the Department's broad reading of the Wire Act. While retail lottery tickets are purchased at a retail counter, vending machine, or some other physical location, those ticket sales rely on interstate wire transmissions both at the time the ticket is purchased and at the time winning tickets are redeemed. Specifically, when a customer purchases a lottery ticket from a retail vendor, that purchase is typically entered into a lottery-specific terminal that routes the purchase to a central data center, which authorizes the wager and allows the vendor to issue the ticket. Because the data centers are frequently located in other states, and because of the intermediate-data issue, sales of lottery tickets often implicate the use of interstate wires – albeit maybe not in a way that satisfies the interstate-commerce requirement in the Wire Act, the scope of which is ambiguous at best.

While it *may* be theoretically possible for all retail lottery activity to involve only intrastate transmissions, that typically is not how modern lottery systems are set up, as they have relied on the prior long-standing interpretation of the Wire Act. Using IGT's lottery contracts as an example, IGT is typically required by contract to have at least one data center in a different state, or at least a sufficient distance apart from one another in the same state. This structure is in line with industry best practices to ensure redundancy and uninterrupted service in the event of outages or natural disasters that impact one of the data centers. Thus, for example, for the Virginia Lottery, IGT maintains a primary data center in Virginia, but also routes all data through a secondary data center in Texas. Indeed, in some states, such as Missouri and Washington, both the primary and the secondary data centers are located in other states. And even in states where the data centers are all located in the state where the lottery is offered, that still may not be enough to prevent intermediate data routing across state lines, since IGT may not be able to how telecommunications companies route transmissions and physical communications lines. In addition, by definition, multi-state lottery games such as Mega Millions and Powerball transmit bets and wagers across state lines, even though the bets and wagers are each placed in states legally authorized to offer such games.

The compliance cost for the industry of converting all lottery networks to use only intrastate data transmissions would likely be cost prohibitive – and indeed, it may well be impossible to entirely eliminate incidental interstate transmissions. In IGT's case alone, the compliance costs, additional operating expenses, and lost revenue would be substantial and could constitute a material adverse event for the company. These costs include the:

- lost book value of existing data and communications networks;

- new capital expenditures to replace existing data centers, communications networks, and call centers;
- additional operational expenses due to redundant and more costly technology;
- lost profits during the time lottery games are offline so compliance measures can be implemented; and
- lost profits from not being able to offer multijurisdictional games like Powerball and Mega Millions.

These costs would be particularly devastating for IGT’s state partners. As OLC has previously recognized, lotteries have always been an important source of state revenue. During the Colonial Era, colonies sanctioned 158 lotteries that were used to finance bridges, roads, schools, lighthouses, churches, and the war against the French. 1986 OLC Op. 43 44.¹⁴ Today, lottery proceeds are a regular and reliable part of most states’ budgets. In fiscal year 2017 alone, state lotteries transferred over \$22 billion to fund public education, infrastructure projects, environmental conservation, indigent representation, police and firefighters’ pensions, teacher retirement programs, and other good causes. *See La Fleur’s World Lottery Almanac* 23 25 (26th ed. 2018). Were state lotteries suddenly illegal under the Wire Act, state governments almost all of which are legally required to maintain a balanced budget¹⁵ would have to scramble to replace millions or even billions of dollars of state revenue. The resulting tax hikes and service reductions would no doubt force state officials to feel the brunt of unpopular federal policy choices. *Cf., e.g., New York v. United States*, 505 U.S. 144, 169 (1992) (“[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”).

For these reasons, even if the Department *can* use the Wire Act to eliminate state lotteries (and it cannot), it still should not. Without further clarity, IGT and its state partners could soon face the Hobson’s choice of shutting down their lottery businesses, fundamentally restructuring that business with upfront and ongoing costs, or risking criminal prosecution. We believe that none of this should be necessary, because the Wire Act does not apply to state lotteries. However, we respectfully request clarity from the Department so that state lotteries can continue free from the threat of federal prosecution.

B. The Wire Act Should Not Be Enforced Against Brick-and-Mortar Gaming.

We also ask the Department to clarify that it will not enforce the Wire Act against land-based casino gaming based solely on intermediate data routing. We see no basis for the Department to enforce the Wire Act against land-based casino gaming, which has operated lawfully in several states for decades. However, in light of the breadth of OLC’s opinion and the

¹⁴ In fact, some of the figures who helped organize or support these state lotteries included such notable founders as George Washington, Benjamin Franklin, Thomas Jefferson, James Madison, and Alexander Hamilton.

¹⁵ Nat’l Council of State Legislatures, *NCSL Fiscal Brief: State Balanced Budget Provisions* (Oct. 2010), <http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf>.

lack of specific guidance, there are broad concerns that the Wire Act might reach such activities — concerns that the Department can address by clarifying the OLC opinion.

Fundamentally, land-based gaming is an intra-state (indeed, intra-casino) activity. A person sitting at a gaming machine or card table places her bets and receives her winnings at the machine or table. However, as is unavoidable in the modern economy, table and machine gaming often rely on intermediate data transmissions to support the in-person gaming activity. IGT provides thousands of gaming machines at casinos and racinos nationwide. To track wins, detect fraud, and hedge risk across multiple machines or even casinos, most or all gaming machines are connected to data servers. IGT is concerned that the Department may use those incidental data transmissions as a predicate for charging IGT with violation of the Wire Act. However, for both statutory and policy reasons, we ask the Department to disclaim any such intent.

The interstate data transmissions used in brick-and-mortar gaming are not the type of transmissions prohibited by the Wire Act. As construed by OLC in its 2018 Opinion, the Wire Act prohibits three forms of wire transmissions relating to non-sports betting: (1) bets or wagers themselves, (2) communications that entitle the recipients to winnings, and (3) communications that entitle the recipient to money or credit for information assisting in the placing of bets or wagers. *See* 2018 OLC Op. 3.¹⁶

Gaming machines offered broadly fall into two categories: centrally determined or randomly determined. In centrally determined games, each time a machine is played, the player is randomly assigned a predetermined outcome. Operating these machines requires data communications between the machine and a data server that stores the predetermined outcomes. However, by and large, IGT’s centrally determined games are set up on local area networks (“LANs”), and other centrally determined networks are likewise LAN-based.¹⁷ Because these transmissions use a LAN, the transmission does not go over an interstate wire and does not leave the casino property. The bet itself is placed at the machine, while the communication entitling a winner to money goes from the server to the machine over the LAN. Interstate wire facilities are used only to report information about what has occurred at the machines and within the casinos — namely, that a certain number of bets were placed, that a certain amount of money was paid out, etc. None of that information is prohibited under the Wire Act.

Similarly, randomly determined machines do not use interstate wires for any purpose prohibited by the Wire Act. When a player, for example, pulls the handle on a slot machine, everything relevant to the bet and payout is determined by a random number generator within the machine itself. That random number generator determines whether the player is a winner and, if so, how much. The bet never leaves the machine, except in the form of accounting and analytics reports of all activity on the machine, and the communication that entitles winning players to

¹⁶ There is no dispute that the fourth type of transmissions prohibited by the Wire Act applies only to sports betting.

¹⁷ IGT is not always privy to information on how casinos’ networks and servers are designed. Regardless, even the advocates who have supported OLC’s new opinion have recognized that the Wire Act was never intended to criminalize wire transmissions that merely facilitate in person betting or wagering. *See supra* text accompanying note 2. In all events, the machine and the player are in the same state, and the betting transaction is made only in that state.

money comes from the machine as well (either through a printout or by uploading the win to a player card).

To be sure, some slot machines are structured as wide-area progressives (“WAPs”), where a single jackpot is pooled across multiple casinos and progressively grows or reduces based on payouts. These machines are necessarily connected by a data network, which incrementally grows the jackpot as wagers are placed at connected machines and reduces the jackpot after large payouts. These data transmissions, however, are not the type prohibited by the Wire Act. As with non-WAP slot machines, WAP machines generate results at the machine itself. Further, the “communication which entitles the recipient to receive money or credit” also comes from the machine itself. To be sure, interstate data transmissions are necessary to provide other information, such as up-to-date information about the size of the jackpot and the results of other linked machines. But such information does not appear to fall within the statute, the relevant portion of which covers only communications “entitl[ing] the recipient to receive money or credit.” Again, that information comes from the machine. At the very least, the rule of lenity should apply to this ambiguous statutory provision. *See Abramski v. United States*, 573 U.S. 169, 203 (2014) (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”).¹⁸

For these reasons, the Department should clarify that land-based gaming is outside the scope of the Wire Act. But, even if the Department disagrees as a statutory matter, non-enforcement is warranted to avoid crippling the gaming industry. There is simply no indication that Congress intended to criminalize Las Vegas, Atlantic City, and all other jurisdictions which have casino gaming through a generally applicable and cryptically written statute that was targeted at organized crime, not state-regulated gaming businesses. Such an indirect criminalization of so many forms of legal gaming would be an unprecedented overreach into an area of law traditionally regulated by the states. And it would have far-reaching and devastating consequences on state and tribal casinos, which are important local sources of revenue and employment. The Department should clarify that it will not seek to enforce the Wire Act against traditional brick-and-mortar gaming that is legal under and regulated by state law.

C. The Wire Act Should Not Be Enforced Against State-Regulated iGaming.

Finally, the Department should issue enforcement guidance that it will not apply the Wire Act to iGaming that is legal under the laws of the state where the bets are placed and received and focus its prosecutorial resources on black-market internet gambling. As the Supreme Court recently recognized in *Murphy*, the Wire Act and other federal gaming statutes “implement a coherent federal policy: They respect the policy choices of the people of each State on the controversial issue of gambling.” 138 S. Ct. at 1483. In testimony relating to the Wire Act, the Department has echoed this sentiment. *See Internet Gambling Prohibition Act of 1997: Hearing Before the H. Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 167 (1998)

¹⁸ Other transactions in a casino may also involve interstate communications, such a credit check. Likewise, many casinos provide loyalty programs (akin to frequent flyer miles), which enable a player to earn points that can be converted into meals, lodging credit, or additional games. These transactions, however, are plainly not the kinds of transmissions that are prohibited by the Wire Act because they do not involve bets, wagers, or winnings. At the very least, the statute is ambiguous, warranting application of the rule of lenity.

(statement of Kevin DiGregory, Deputy Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice) (“[P]rimary regulatory enforcement responsibilities for gambling laws should remain with the States.”). And indeed, before OLC’s recent change of opinion, federal gaming law defined illegal gaming in reference to state law or exempted gaming authorized under state law.

For example, the Illegal Gambling Business Act defines an illegal gambling business as, along with other requirements, one that “is a violation of the law of a State or political subdivision in which it is conducted.” 18 U.S.C. § 1955(b)(1)(i). UIGEA, likewise, applies only to a “bet or wager [that] is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.” 31 U.S.C. § 5362(10)(A). That Act further specifies that intermediate data routing is irrelevant to determining whether the gambling is illegal. *See id.* § 5362(10)(E) (“The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.”). Even the Wire Act itself is written to comply with, not depart from, this policy, creating an exemption 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.” 18 U.S.C. § 1084(b).

The Department should craft enforcement guidance in line with this coherent federal policy. While iGaming necessarily uses a channel of interstate commerce (the internet), iGaming is at its core an intrastate activity. In states where iGaming is legal, IGT uses geolocation technology to ensure that bettors are physically present in the state when the bet is placed. For example, to engage in iGaming in New Jersey, the player must be physically present in the state. If state law permits companies within the state to offer iGaming to bettors physically present in the state, it is hard to see why federal law should stop that simply because fleeting electrons may (though need not) pass through a server in a neighboring state.

Ultimately, enforcing the Wire Act against iGaming will not eliminate iGaming; it will eliminate only *legal, regulated* iGaming, while allowing black-market online casinos to flourish without competition. And even if the issues here represented a choice only between land-based and online casino gaming, the federal government should not be dictating that choice and especially should not be doing so as a matter of criminal law. IGT shares the Department’s desire to stop black-market gambling, which operates beyond consumer protection laws and uses its revenues to fund other, more dangerous forms of organized crime. Declining to enforce the Wire Act against state-sanctioned iGaming will allow the Department to train its resources on combatting black-market gambling while at the same time subjecting such criminal operations to competition from safe, regulated alternatives.

Conclusion

For the foregoing reasons, we respectfully request that the Department clarify the scope of the 2018 OLC Opinion. In particular, we ask the Department to recognize that the Wire Act does not apply to state lotteries or a state’s contractors; that land-based casino gaming does not violate the Wire Act, notwithstanding incidental data transmissions; and that, as a matter of federal policy, the Department will not use the Wire Act to prosecute online gaming that is authorized and regulated by state law.

Dated: March 15, 2019

Respectfully submitted,

/s/ James M. Cole

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O'Callaghan, Edward C. (ODAG)

From: O'Callaghan, Edward C. (ODAG)
Sent: Friday, March 08, 2019 5:57 PM
To: Rosenstein, Rod (ODAG); Ellis, Corey F. (ODAG); Peterson, Andrew (ODAG)
Subject: RE: Letter Re OLC Wire Act Opinion

We have been directing these inquiries/offers of guidance assistance to OCGS and CRM. I don't think it is accurate that there was any promise of a guidance memorandum by any date certain, but we will follow up with CRM and Sujit.

Edward C. O'Callaghan
202-514-2105

From: Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov>
Sent: Friday, March 8, 2019 5:47 PM
To: O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov>; Ellis, Corey F. (ODAG) <cfellis@jmd.usdoj.gov>; Peterson, Andrew (ODAG) <anpeterson@jmd.usdoj.gov>
Subject: Fwd: Letter Re OLC Wire Act Opinion

Let's discuss process.

Begin forwarded message:

From: "Cole, James M." <jcole@sidley.com>
Date: March 8, 2019 at 4:18:41 PM EST
To: "Rod.Rosenstein5@usdoj.gov" <Rod.Rosenstein5@usdoj.gov>
Subject: Letter Re OLC Wire Act Opinion

Rod

Attached is a letter to you and the AG concerning the recent OLC opinion on the Wire Act.

I don't have the AG's email address, so would ask you to please pass it along to him.

Thanks very much and I look forward to hearing from you.

Jim
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March 8, 2019

Honorable William P. Barr
Attorney General
United States Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530

Rod. J. Rosenstein
Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue N.W.
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Re: OLC's New Interpretation of the Wire Act

Dear Attorney General Barr and Deputy Attorney General Rosenstein:

Sidley represents International Game Technology PLC (IGT) and we write concerning the Office of Legal Counsel's recent opinion, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. __ (2018). In holding that the Wire Act applies to all betting, OLC's new opinion has threatened an entire industry and spawned numerous questions about the scope and potential effect of the Wire Act and DOJ's enforcement plans.

To that end, although we disagree with the new opinion's bottom line, we firmly believe there are at least two threshold points on which we can all agree: (1) the opinion has created significant uncertainty, and (2) the entire industry needs guidance and sufficient time to bring their operations in compliance with DOJ's new interpretation and enforcement priorities. The day the opinion came out, DOJ promised to issue and implement enforcement guidance by April 15, 2019, and the agency has since further extended the compliance deadline to June 14, 2019.

We appreciate that DOJ has delayed enforcement of the Wire Act, and would like to use the additional time to help DOJ craft clear and appropriate enforcement guidance. Among other things, IGT and other stakeholders can bring important perspectives about changes in the industry since 2011 and about the substantial concerns the opinion has caused for activities that have always operated free from threat of federal prosecution. We therefore respectfully request an in-person meeting during which we can discuss the opinion and its potential consequences. We are hopeful that, through engagement, we can reach common ground on our many shared goals.

March 8, 2019

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I. There Are Valid and Widespread Concerns About the Scope of OLC's Interpretation.

Like virtually all modern commerce, the gaming industry today is necessarily built around the internet and cellular transmissions. That extends to state lotteries and brick-and-mortar casinos, as well as internet gaming.

Retail lotteries have been a fixture in storefronts across America for decades. They bring significant benefits to states and their citizens, operating in 47 jurisdictions including Puerto Rico and the U.S. Virgin Islands. These lotteries generate over 23 *billion* dollars in annual revenue that is then used to fund numerous good causes locally. The money subsidizes, for example, state education funds, veterans causes, indigent defense, environmental improvement and conservation projects, public works, and other economic development.

Many of the transactions behind these lottery and traditional gaming transactions have the potential to cross state lines. That is simply a byproduct of the ubiquity of the internet: everything from simple payment transactions to the data centers and servers that manage lottery gaming numbers may well involve the internet. And of course, multi-state games like Powerball and Mega Millions—also decades old and important sources of state revenue—by definition involve multiple states. In a similar vein, brick-and-mortar casinos operate with internet-based features. When a customer plays a slot machine, for instance, data may be collected and monitored in a data center located in a different state. Or the casino may use the internet to perform a simple credit check on a player sitting at a casino table game.

Given these present-day realities, it should come as no surprise that countless reports and press releases have recognized the considerable uncertainty and unease that the new OLC opinion has injected across the entire industry. On February 1, 2019, for example, the North American Association of State and Provincial Lotteries (NASPL) warned that the opinion “creates substantial uncertainty” about the lawfulness of state lotteries and gaming. Four days later, on February 5, 2019, the Attorneys General of New Jersey and Pennsylvania wrote a letter to DOJ explaining the adverse effect that the new opinion will have on their states and in particular the “significant concerns” with the potential impact on conduct that is lawful under state law, including lotteries. Trade press has also remarked that “[t]he opinion could have wide-reaching effects in states that sell lottery tickets online or where online gambling is legal.” Natasha Bach, *Justice Department Says All Online Gambling Is Illegal*, *Fortune* (Jan. 15, 2019), <http://fortune.com/2019/01/15/online-gambling-illegal-doj/>.

The same is true for gaming. On January 18, 2019, the Pennsylvania Gaming Control Board sent a letter to all casinos warning about potential negative impacts of the new opinion. According to the Nevada State Gaming Control Board Chairwoman, who oversees a state without a lottery but with plenty of casinos, the opinion “has the potential to be very broad and sweeping.” Richard N. Velotta, *Legal Interpretations Will Determine What's Next for Wire Act*,

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Las Vegas Review Journal (Jan. 15, 2019), <https://www.reviewjournal.com/business/casinos-gaming/legal-interpretations-will-determine-whats-next-for-wire-act-1573925/>.

II. DOJ Guidance Developed With Stakeholder Input Can Resolve Many Existing Concerns While Also Aligning DOJ's Position With Traditional Views on the Wire Act's Reach.

The strong reactions to the new OLC opinion spotlight why DOJ should meet with industry stakeholders before releasing enforcement priorities and guidance. We are confident, moreover, that the appropriate guidance would quell many of the concerns that have been raised because, even if DOJ had the statutory authority to go after state lotteries or state-authorized gaming (and DOJ does not), it should decline to do so for several reasons.

First, the OLC opinion threatens a stark departure from longstanding federal policy. Just this past year, the Supreme Court recognized that the Wire Act's "provisions implement a coherent federal policy: They respect the policy choices of the people of each State on the controversial issue of gambling." *Murphy v. NCAA*, 138 S. Ct. 1461, 1483 (2018). If DOJ were to implement OLC's interpretation, the Wire Act would stand alone as the *only* federal statute that criminalizes gaming activity that is legal in and regulated by the state or states where it occurs. Such a stance would be directly contrary to DOJ's previous assertions to Congress that the "primary regulatory enforcement responsibilities for gambling laws should remain with the States." *Internet Gambling Prohibition Act of 1997: Hearing Before the H. Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 167 (1998) (statement of Kevin DiGregory, Deputy Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice).

Second, as far as we can tell, DOJ previously never sought to prosecute gaming activities that were lawful under state law. Everyone agrees that federal (and state) law enforcement should have the appropriate tools to combat unregulated, black-market gambling, and DOJ has often prosecuted otherwise *illegal* gambling activities under the Wire Act. But DOJ has not gone so far as to apply the statute to state-authorized lotteries or traditional casinos that might happen to touch the internet in some indirect way. None of the cases or prosecutions cited in OLC's opinion do so. To the contrary, each enforces the Wire Act as a *supplement* to support state enforcement. Guidance contradicting such enforcement efforts would not only break from DOJ's own precedent but would also plainly conflict with Congress's "decision to defer to, and even promote, differing gambling policies in different States." *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 17 (1999).

Finally, although we do not want to belabor our disagreement with OLC's opinion point-by-point, we do think that the opinion's facial vulnerabilities should inform the Department's approach to prosecution. That includes, for example, the opinion's implausible threshold determination that the text of the Wire Act is unambiguous. Existing judicial precedent is to the

March 8, 2019
Page 4

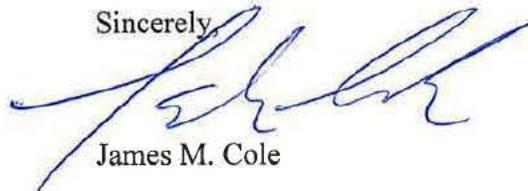
contrary. See, e.g., *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014); *In re MasterCard Int'l Inc.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff'd*, 313 F.3d 257, 262–63 (5th Cir. 2002).

So are DOJ's *own statements* to Congress. In 2000, for instance, DOJ testified that "Section 1084 applies to sports betting but not to contests like a lottery," *Internet Gambling Prohibition Act of 1999: Hearing Before the Subcomm on Telecommunications, Trade, & Consumer Protection of the H. Comm. on Commerce*, 106th Cong. 35, 88 (2000); see also *Internet Gambling Prohibition Act of 1997: Hearing Before the H. Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 167 (1998) (statement of Kevin DiGregory, Deputy Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice) ("the statute may relate only to sports betting"). The opinion also disregards numerous interpretative canons and statutory clues at the expense of one and only one interpretative canon (the last antecedent canon) that is known as a canon of last (not first) resort. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 144–46 (2012). And the opinion would yield illogical results, including criminalizing news reports on Powerball lottery numbers, which Congress could not possibly have intended, and rendering other federal statutory provisions complete nullities. The facial breadth of the opinion implicates additional arguments as to why the Wire Act does not sweep up state-authorized lotteries and gaming that are legal under state law, but a carefully drafted enforcement guidance may alleviate many of the concerns.

III. Conclusion

For all of these reasons, we reiterate our request for an in-person meeting to discuss these issues further. We are available at your convenience, and we look forward to hearing from you.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Cole", is written over the word "Sincerely,".

James M. Cole

Rosenstein, Rod (ODAG)

From: Rosenstein, Rod (ODAG)
Sent: Monday, February 25, 2019 12:33 AM
To: O'Callaghan, Edward C. (ODAG)
Subject: Re: Status

OK. Thanks.

On Feb 24, 2019, at 11:54 PM, O'Callaghan, Edward C. (ODAG) <ecocallaghan@jmd.usdoj.gov> wrote:

We have been referring these inquiries to John Cronan and OCGS. I am happy to respond to her and connect her.

Edward C. O'Callaghan
202-514-2105

On Feb 24, 2019, at 11:25 PM, Rosenstein, Rod (ODAG) <rrosenstein@jmd.usdoj.gov> wrote:

Unusual message, but where is the right point of contact on the wire act? I have no idea who she represents.

Begin forwarded message:

From: "Yang, Debra Wong" <DWongYang@gibsondunn.com>
Date: February 22, 2019 at 5:46:28 PM EST
To: "rod.rosenstein5@usdoj.gov" <rod.rosenstein5@usdoj.gov>
Subject: Status

ROD,

I was going to write you an email and thank you for your service and for your friendship. And also offer any type of help or resource as you explore next moves. But I realized that that might be premature given that you're not gone from the department yet. When are you planning on leaving, because on a work related note, I may want to raise the wire act issue before your departure. Just checking on whether you will still be there.

Thanks much,

Deb

Debra Wong Yang

GIBSON DUNN

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
333 South Grand Avenue, Los Angeles, CA 90071-3197
Tel +1 213.229.7472 • Fax +1 213.229.6472
DWongYang@gibsondunn.com • www.gibsondunn.com

This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.

Chuck Cooper

From: Chuck Cooper
Sent: Monday, May 22, 2017 5:16 PM
To: Hunt, Jody (OAG)
Subject: OLC opinion on internet gambling
Attachments: 2017-05-16 Letter to Sessions on Wire Act (3).pdf; Cooper and Kirk Wire Act memorandum.pdf

Jody,
Attached are (1) my firm's legal analysis rebutting the OLC opinion and (2) a letter from Senators Graham and Feinstein dated this past Friday asking for reconsideration of the OLC opinion. Below is a link to an interesting story on this.
Chuck

<https://www.onlinepokerreport.com/23433/jeff-sessions-ag-hearing-online-gambling/>

Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Ave., NW
Washington D.C., 20036
202-220-9660

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United States Senate

WASHINGTON, DC 20510

May 16, 2017

The Honorable Jeff Sessions
Attorney General
Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Attorney General Sessions:

We are writing to inquire about the status of the September 20, 2011, Office of Legal Counsel opinion entitled “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.” That opinion reversed longstanding Department precedent by interpreting the Wire Act to prohibit sports betting only, instead of prohibiting all forms of gambling online.

At your confirmation hearing, Senator Graham asked, and you responded:

Senator Graham: About the Wire Act, what is your view of the Obama administration’s interpretation of the Wire Act to allow online video poker, or poker gambling?

Senator Sessions: Senator Graham, I was shocked at the memorandum, I guess the enforcement memorandum that the Department of Justice issued with regard to the Wire Act and criticized it. Apparently there is some justification or argument that can be made to support the Department of Justice’s position, but I did oppose it when it happened and it seemed to me to be an unusual –

Senator Graham: Would you revisit it?

Senator Sessions: I would revisit it, or -- and I would make a decision about it based on careful study, rather than--and I have not reached--gone that far, to give you an opinion today.

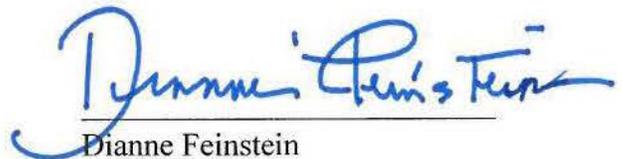
It is our hope that your careful study of the opinion has exposed the flaws of the opinion, and that you will restore the Department’s longstanding practice of enforcing the Wire Act against online gambling by revoking the opinion.

We look forward to your reply.

Sincerely,



Lindsey O. Graham
United States Senator



Dianne Feinstein
United States Senator

Cooper & Kirk

Lawyers

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ATTORNEY WORK PRODUCT

MEMORANDUM

To: The Coalition To Stop Internet Gambling
From: David H. Thompson
Date: February 17, 2017
Re: The Scope of the Wire Act

The Wire Act criminalizes the knowing use of a “wire communication facility for the transmission in interstate or foreign commerce of bets or wagers” and other gambling-related transmissions. 18 U.S.C. § 1084(a). For 50 years after the law’s enactment, the Department of Justice had “uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling.”¹ In 2011, however, the Office of Legal Counsel (OLC) upended that longstanding position. With minimal textual analysis and extensive focus on the legislative history, OLC issued an opinion concluding that the Wire Act applies to only sports-related gambling.

This memorandum reexamines the Wire Act and concludes that the plain meaning of the statute clearly encompasses non-sports gambling. The Act sets forth a multi-part prohibition on interstate gambling transmissions, and only *one* part of that prohibition is confined to sports-related gambling. OLC reached a contrary conclusion by neglecting applicable rules of statutory construction and privileging its flawed reading of legislative history over the clear text.

BACKGROUND

The Wire Act bars the use of the interstate wires to transmit certain information, wagers, and funds for purposes of gambling. 18 U.S.C. § 1084(a) (codifying Pub. L. No. 87-216, § 2, 75

¹ 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.”), as quoted by Memorandum Opinion for the Assistant Attorney General, Criminal Division, from Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, 2011 WL 6848433 (Sept. 20, 2011) (“Seitz Mem.”).

Stat. 491 (1961)). The Act was enacted in 1961, after a series of Congressional hearings and investigations revealed that organized crime syndicates had turned to gambling as their principal source of revenue after the repeal of Prohibition. A consensus developed throughout the 1950s that the federal government had an important role to play in preventing the use of interstate facilities, including telephone and telegraph wires, to enrich organized criminals. *Gambling & Organized Crime: Hearings Before the S. Comm. on Government Operations Permanent Subcomm. on Investigations*, 87th Cong. 2–3 (1961) (statement of Sen. John L. McClellan, Chairman). Accordingly, in 1961 Attorney General Robert F. Kennedy proposed a package of bills, including the Wire Act, designed to target organized crime syndicates at the federal level by cutting off their sources of illegal revenue. *Legislation Relating to Organized Crime: Hearings Before the H. Comm. on the Judiciary*, 87th Cong. 18–32 (1961) (statement of Robert F. Kennedy, Attorney General) (“House Judiciary Committee Hearing”).

Subsection (a) of the Wire Act forbids anyone “engaged in the business of betting or wagering” from knowingly using the interstate 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, 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

18 U.S.C. § 1084(a). Because only one of this section’s several prohibitions is expressly limited to gambling “on any sporting event or contest,” the Department of Justice long read the Act as applying more broadly to *any* type of gambling that utilizes interstate means of electronic communication. Indeed, from its enactment in 1961 until 2011, the Justice Department had “uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling.” Seitz Mem. 2 (quoting Crim. Mem. 3).

There is little judicial precedent interpreting the scope of the Act, but the most persuasive authorities read the Act as applying to both sports gambling and non-sports gambling. In *United States v. Lombardo*, 639 F. Supp. 2d 1271 (D. Utah 2007), a federal district court concluded that the Act reached forms of online gambling unrelated to sporting contests. “The phrase ‘sporting event or contest,’ ” the court noted, “modifies only the first of the[] three uses of a wire communication facility.” *Id.* at 1281. “Giving effect to the presumably intentional exclusion of the ‘sporting event or contest’ qualifier from the second and third prohibited uses indicates that at least part of § 1084(a) applies to forms of gambling that are unrelated to sporting events.” *Id.* Similarly, in *People ex rel. Vacco v. World Interactive Gaming Corp.*, a New York court concluded that the Wire Act prohibited “virtual slots, blackjack or roulette” and enjoined the conduct of a group of online gambling business on that basis. 714 N.Y.S.2d 844, 847, 861–62 (N.Y. Sup. Ct., N.Y. Cty. 1999); *see also* Report & Recommendation of U.S. Magistrate Judge Regarding Gary Kaplan’s Motion to Dismiss Counts 7, *United States v. Kaplan*, No. 06-CR-337CEJ-2 (E.D. Mo. Mar. 20, 2008), ECF No. 606 (“[B]ased on the language of the statute, the legislative history, the logical interpretation of the statute and the available case law, the court finds that § 1084(a) is not limited to sports betting but includes other kinds of gambling as well.”). *Lombardo* and *World Interactive* are consistent with a long history of criminal

convictions under the Wire Act predicated on non-sports gambling. *See, e.g., United States v. Vinaithong*, No. 97-6328, 1999 WL 561531, at *1 (10th Cir. Apr. 9, 1999) (affirming sentence of defendants convicted under the Wire Act for transmission related to a “gambling enterprise which has been referred to as a ‘mirror lottery’ ”); *United States v. Chase*, 372 F.2d 453, 457 (4th Cir. 1967) (upholding a conviction for conspiracy to violate the Wire Act where alleged gambling involved “writing bets on numbers”); *United States v. Manetti*, 323 F. Supp. 683, 687 (D. Del. 1971) (denying motion to dismiss criminal indictment which charged “a business enterprise involving gambling in the form of numbers writing, otherwise known as lottery policy writing” with conspiracy to violate the Wire Act).

In *In re MasterCard International, Inc.*, by contrast, a federal district court in Louisiana read the Wire Act to apply narrowly to sports-related gambling only. 132 F. Supp. 2d 468 (E.D. La. 2001), *aff’d*, 313 F.3d 257 (5th Cir. 2002).² But *MasterCard’s* reasoning on this point is sparse—and, as *Lombardo* convincingly demonstrates, does not withstand scrutiny. Although the court in *MasterCard* stated that it was relying primarily on “the plain language of the statute,” *id.* at 480, it did not even discuss the “conspicuous” “absence of the ‘sporting event or contest’ qualifier in the second and third prohibitions” of subsection (a), *Lombardo*, 639 F. Supp. 2d at 1281. Further, while *MasterCard* seeks support from the “case law interpreting the statute,” 132 F. Supp. 2d at 480, as *Lombardo* explains, none of the cases *MasterCard* cites “specifically address whether [the law] could be applied to communications related to non-sports betting,” *Lombardo*, 639 F. Supp. 2d at 1280. And further still, while *MasterCard* also cites “the legislative history of the Act,” its principal piece of legislative history evidence is a series of failed *post*-1961 attempts to expand the Wire Act’s reach, 132 F. Supp. 2d at 480. It is well settled that this type of “post-enactment” legislative history is “a particularly dangerous ground” for statutory construction, *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 170 (2001), and since the *Mastercard* decision, legislation has been introduced to *exempt* certain non-sports betting from the Wire Act. *See* Skill Game Protection Act, H.R. 2610, 110th Cong. § 3 (2007).

In 2011, the Criminal Division asked the Office of Legal Counsel for its opinion on whether the Department’s longstanding reading of the Act conflicted with a more recent statute, enacted in 2006, which “appears to permit intermediate out-of-state routing of electronic data associated with lawful lottery transactions that otherwise occur in-state.” Seitz Mem. 1. In other words, the Criminal Division sought OLC’s view on whether the Wire Act still barred online gambling where the use of the interstate “wires” was confined to the out-of-state “routing” of data pertaining to an otherwise wholly *intra*-state gambling transaction.

Rather than answer this narrow question, OLC chose to discard the Criminal Division’s premise that the Wire Act applied to non-sports-related betting at all. It concluded that it did not, reading the “sporting event or contest” qualifier in the middle of subsection (a) as limiting the scope of *all* of that subsection’s prohibitions.

² On appeal, the Fifth Circuit stated that it “agree[d]” with the district court’s interpretation of the Wire Act without any further analysis on the issue. *Mastercard*, 313 F.3d at 262.

ANALYSIS

I. The Plain Meaning of the Wire Act Clearly Encompasses Non-Sports Gambling.

“As with any other question of statutory interpretation, we begin with the text.” *Nebraska v. Parker*, 136 S. Ct. 1072, 1079 (2016). The Wire Act opens with a two-part criminal prohibition:

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). This provision contains two major clauses, each set off by the phrase “for the transmission.” Seitz Mem. 4. The first bars anyone engaged in the gambling business 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 “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.* As OLC correctly noted, the most natural, grammatical reading of the second clause is that it prohibits a transmission that entitles the recipient to money or credit *either* in return for a bet or wager or for information assisting in the placing of bets or wagers. Seitz Mem. 4 & n.5.

The Act does not define the terms “bets” and “wagers,” but the ordinary meaning of those terms clearly includes sports gambling and non-sports gambling alike.³ Contemporaneous statutory definitions confirm that plain meaning. A provision of the Internal Revenue Code enacted six years before the Wire Act, for example, defines “wager” to mean not only gambling on “any . . . sports event or . . . contest” but also “a lottery,” including “the numbers game, policy, and similar types of wagering.” *See* 26 U.S.C. § 4421(1), (2) (68A Stat. 528 (1954)).⁴

³ *See* AMERICAN HERITAGE DICTIONARY (1969) (defining “bet” as “[a]n agreement between two parties that the one proved wrong about an uncertain outcome will forfeit a stipulated thing or sum to the other”; defining “wager” as “[a]n agreement under which each bettor pledges a certain amount to the other depending on the outcome of an unsettled matter”).

⁴ The term “policy” refers to a lottery-style game that was common prior to the Wire Act. *See* Robert F. Kennedy, *The Baleful Influence of Gambling*, THE ATLANTIC (Apr. 1962), <https://goo.gl/nKmxEH>.

Congress used the broad gambling terms “bets or wagers” four times in subsection (a) and attached the limiting phrase “on any sporting event or contest” to only one of those usages. OLC assigned an improbable reach to that phrase by ignoring a well-established canon of statutory interpretation rooted in rules of English grammar. The Supreme Court has recognized that “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *see also Hays v. Sebelius*, 589 F.3d 1279, 1281 (D.C. Cir. 2009) (“Ordinarily, qualifying phrases are to be applied to the words or phrase immediately preceding and are not to be construed as extending to others more remote.”); ANTONIN SCALIA & BRYAN GARNER, *READING LAW: INTERPRETATION OF LEGAL TEXTS* 152 (2012) (“When the syntax [of a statutory provision] involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.”). Because “on any sporting event or contest” follows the second usage of “any bet or wagers,” that is the phrase it modifies. *See Fakhouri v. Ober Gatlinburg, Inc.*, 821 F.3d 719, 721–22 (6th Cir. 2016) (Sutton, J.) (applying the rule of the nearest reasonable referent); *United States v. Lockhart*, 749 F.3d 148, 152–53 (2d Cir. 2014), *aff’d sub nom. Lockhart v. United States*, 136 S. Ct. 958 (2016) (same).⁵

Under normal rules of construction, the Wire Act’s prohibition on interstate transmission of “information assisting in the placing of bets or wagers on any sporting event or contest” is limited to sports gambling, but the other prohibitions are not. As a result, the first clause bans use of interstate wires “for the transmission in interstate or foreign commerce of bets or wagers”—including numbers games and other non-sports gambling about which Congress was keenly aware and concerned. *See infra* Part II. The first clause also bans interstate transmission of “information assisting” in sports gambling only. That limitation makes sense given Congress’s evident understanding that dissemination of information such as horseracing odds and point spreads on other games were the currency of sports bookmakers, but were not

⁵ The series-qualifier rule is inapplicable here because subsection (a) is clearly not “straightforward, parallel construction that involves all nouns or verbs in a series.” SCALIA & GARNER, *supra*, at 147 (explaining the series-qualifier rule); *compare United States v. Lockhart*, 749 F.3d at 152–53 (“[T]his is not the prototypical situation in which the series qualifier canon is applied, since the list itself falls in the middle of a longer list of qualifying predicate crimes; that is, the modifier does not end the list in its entirety.”) *with United States v. Bass*, 404 U.S. 336, 337–341 (1971) (applying the series qualifier rule to the phrase “receives, possesses, or transports in commerce or affecting commerce” where that series provided the sole list of conduct prohibited by the statute and “there [wa]s no reason consistent with any discernible purpose of the statute to apply” the limiting phrase to the last antecedent alone). In *Lockhart v. United States*, the majority and dissent disagreed on the proper application of the series qualifier canon, but both agreed that it is limited to when “the listed items are simple and parallel without unexpected internal modifiers or structure.” 136 S. Ct. at 963; *id.* at 971 (Kagan, J., dissenting) (noting that the series qualifier canon applies to a “‘single, integrated list’ of parallel terms . . . followed by a modifying clause”); *see also Wong v. Minnesota 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.”).

necessary in non-sports gambling. *See id.* The second clause targets financial rewards and inducements for illegal gambling by broadly prohibiting transmission of any entitlement to money or credit either “as a result of bets or wagers” or “for information assisting in the placing of bets or wagers.” That prohibition addresses conduct such as wired payments for winning bets and compensation for the work of gambling intermediaries including “layoff men,” who played a role in sports and non-sports gambling—as described in Part II, *infra*.

The structure of the Wire Act further confirms this interpretation. Subsection (a) regulates the role of senders and recipients in gambling-related transmissions. The statute’s other substantive provision, subsection (d), regulates the role of the telecommunications carriers in facilitating those transmissions. That provision requires any “common carrier, subject to the jurisdiction of the Federal Communications Commission” to “discontinue or refuse” its services to any subscriber when the carrier is “notified in writing by a Federal, State, or local law enforcement agency” that its facilities are “being used or will be used for the purpose of transmitting or receiving *gambling information* in interstate or foreign commerce.” 18 U.S.C. § 1084(d) (emphasis added). The term “gambling” is undefined, but its ordinary meaning clearly includes non-sports betting. *See* WEBSTER’S THIRD INTERNATIONAL DICTIONARY (1966) (defining “gambling” as “the act or practice of betting; the act of playing a game and consciously risking money or other stakes on its outcome”). A related statutory definition that appears in the same chapter as the Wire Act confirms that understanding. *See* 18 U.S.C. § 1081 (defining “gambling establishment” to mean “any common gaming or gambling establishment operated for the purpose of gaming or gambling, including accepting, recording, or registering bets, or carrying on a policy game or any other lottery, or playing any game of chance, for money or other thing of value”). OLC inexplicably declined to comment on the significance or meaning of this provision, Seitz Mem. 10 n.10, but its import is clear: Subsection (d) enlists the help of telecommunications carriers in preventing interstate transmission of sports and non-sports gambling information—the kind of transmissions that subsection (a) prohibits. It does not make sense that Congress would require telecommunications carriers to crack down on subscribers for transmitting any gambling information in subsection (d), while prohibiting only transmissions related to sports gambling in subsection (a).

Subsection (b) of the Act is also probative of subsection (a)’s meaning. That provision effectively carves out a safe harbor for transmission 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.” 18 U.S.C. § 1084 (emphases added). Subsection (b) demonstrates that when Congress meant to apply the modifying phrase “sporting events or contest” to multiple terms, it had no trouble either repeating the phrase three times in the same breath or using the right adjective to refer back to a preceding modifier (“*such* betting”). That deliberate inclusion of a similar qualifying phrase throughout subsection (b) suggests that its *exclusion* from all but one sub-clause of subsection (a) was deliberate. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). (“ ‘[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’ ”) (citation omitted). Subsection (b) suggests that, contrary to OLC’s gloss, the Wire Act was not written in shorthand. Seitz Mem. 7. Moreover, it makes

sense that this information-sharing safe harbor would be limited to innocuous or permissible *sports-related* information because subsection (a)'s ban on transmission of "information assisting in the placing of bets or wagers on any sporting event or contest" is similarly limited. The safe harbor in subsection (b) tracks the prohibition in subsection (a).⁶

The plain language of the statute is also consistent with its preamble and caption. Congress described the Wire Act as "AN ACT To amend chapter 50 of title 18, United States Code, with respect to the transmission of bets, wagers, and related information," and titled the operative provisions, "Transmission of wagering information; penalties." Pub. L. No. 87-216 (1961). This broad and unqualified language supports the understanding that the Wire Act was not strictly limited to sports gambling. *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("[A]lthough the language in the preamble of a statute is 'not an operative part of the statute,' it may aid in achieving a 'general understanding' of the statute.") (citation omitted).

The Wire Act is not a model of precision draftsmanship, to be sure. But the text and structure clearly indicate that the law's reach is *not* limited to sports betting. OLC reached a contrary conclusion by committing two basic errors. First, OLC privileged its own flawed understanding of legislative history over the plain text; we describe those errors in Part II. Second, OLC strained to impose a symmetry on subsection (a) that the language does not permit.

⁶ Some have argued, based on subsection (b), that the Wire Act in its entirety must be limited to gambling that is independently illegal under state law, reasoning that "[i]t strains credulity that the prohibitions in § 1084(a) would ban transmissions assisting in wagering of any and all types, while § 1084(b) would exempt from those prohibitions wagering related transmissions between two states where the underlying wagering is legal, only when the underlying wagering [is] related to sporting events or contests." See Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, 29 CTR. FOR GAMING RESEARCH 1, 3–4 (2014). But that argument merely restates—and then criticizes without explanation—*precisely* the line drawn by the Act's plain text. Put simply, it is hard to see how the inclusion of an express sporting-event limitation in subsection (b)—*in triplicate*—"bolsters the case for [a] narrow interpretation" of subsection (a), *id.*, which, by its plain text, is *not* so limited. One would think the natural inference would be precisely the opposite. See *Hamdan*, 548 U.S. 578. What is more, the argument fails on its own terms, for even if it is atextually limited to sports-related betting, subsection (a) still does more than merely assist States in enforcing their own gambling laws. Minton, *Original Intent*, *supra*, at 2. While subsection (b)'s "safe harbor" reaches only the transmission of gambling information, subsection (a) on any reading goes farther, prohibiting the transmission of wagers and gambling-related payments *whether or not* the underlying event or contest is legal under state law. Finally, far from "strain[ing] credulity," *id.* at 3, as demonstrated above, the lines drawn by subsections (a) and (b) dovetail perfectly. Subsection (b)'s "safe harbor" for "the transmission of information assisting in the placing of bets or wagers" is limited to wagering "on a sporting event or contest" because subsection (a)'s prohibition, in the first clause, of "the transmission . . . of . . . information assisting in the placing of bets or wagers" is *also* limited to sports-related betting; it is the other prohibitions in subsection (a) that extend more broadly.

In its relatively brief textual analysis, OLC began from the premise that it is “equally plausible” to read the phrase “on any sporting event or contest” as modifying the entire first clause or only “information assisting in the placing of bets or wagers.” That premise is wrong: The rule of nearest reasonable referent creates a “presumption [that] ‘qualifying phrases attach only to the nearest available target.’ ” *Maple Drive Farms Ltd. P’ship v. Vilsack*, 781 F.3d 837, 847 (6th Cir. 2015) (citation omitted). OLC overlooked that canon of interpretation altogether, and its interpretive errors did not end there.

Assuming incorrectly that the text was in equipoise, OLC adopted the reading that, in its view, “produce[d] the more logical result.” Seitz Mem. 5. OLC found it “difficult to discern why” Congress would have wanted to ban transmission of all bets and wagers but limit its ban on transmission of information assisting in placing bets or wagers to sports gambling. *Id.* Here too OLC faltered, for there is a logical reason for that asymmetry: Congress was aware that sports gambling relies on a constant exchange of information assisting in the placing of bets—including up-to-the-minute race and game results, odds, and spreads, without which the bookmaker could not price his bets and exposure. *See infra* Part II. The Seitz Memorandum acknowledges this feature of sports gambling without recognizing its implications. *See* Seitz Mem. 9 (“[I]nformation so quickly received as to be almost simultaneous . . . is essential to both the illegal bookmaker and his customers.”) (quoting statement of Sen. Eastland). By contrast, non-sports gambling did not require the same constant flow of information assisting in the placing of bets and wagers, although it did rely on paid intermediaries who assisted in taking and “laying off” bets in person and by telephone. *See infra* Part II. This distinction may explain the clauses’ difference in scope. Even assuming, however, that OLC’s rendering is logically superior to the clear words Congress chose, the text prevails. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (cautioning against “read[ing] an absent word into the statute”); *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) (“Because our role is not to ‘correct’ the text so that it better serves the statute’s purposes, we will not ratify an interpretation that abrogates the enacted statutory text absent an extraordinarily convincing justification.” (quotation marks and citation omitted)).

OLC’s analysis of the second clause was even more unmoored from the text. The qualifier “on any sporting event or contest” appears nowhere in subsection (a)’s prohibition on “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). But again ignoring applicable canons of construction, OLC applied that limitation to the entire second clause to “make[] functional sense of the statute.” Seitz Mem. 7. OLC cited no authority for applying a qualifying prepositional phrase to not only every referent that it *follows*, but also to every referent that it *precedes*. Instead, OLC invoked the absurdity canon to justify this linguistic feat, *id.* at 7 (citing *Corley v. United States*, 129 S. Ct. 1558, 1567 n.5 (2009)), without coming close to showing that the plain meaning of subsection (a) would produce results so “nonsensical . . . that Congress could not have intended it.” *United States v. Cook*, 594 F.3d 883, 891 (D.C. Cir. 2010) (describing the “high threshold” that must be met before concluding that a statute does not mean what it says). OLC observed that its preferred interpretation would yield a set of prohibitions that “serve the same end” and have “the same scope.” Seitz Mem. 7. But an atextual construction is a high price to pay for symmetry, and OLC’s reading does not even achieve that much: If subsection (a) addresses only sports betting, as OLC concluded, then the scope and ends of the Wire Act’s prohibitions are much narrower

than the compliance requirements in subsection (d), which apply to “transmi[ssion] . . . of gambling information” without qualification. 18 U.S.C. § 1084(d). OLC’s interpretation does not even achieve the consistency that it stretched the text to reach.⁷

OLC also relied on its erroneous interpretation of the first clause to justify its even more improbable reading of the second clause. The memorandum argues that 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.” Seitz Mem. 7. But if the qualifying phrase “on any sporting event or contest” is limited to its nearest logical referent—as we presume under normal rules of construction—then this asserted anomaly disappears. The “counterintuitive patchwork of prohibitions” that the memorandum describes, *id.*, is largely a product of OLC’s own cramped interpretation of the first clause. *Cf. Kloeckner v. Solis*, 133 S. Ct. 596, 606–07 (2012) (“[T]he Government’s remedy requires our reading new words into the statute. We think a better option lies at hand. If we reject the Government’s odd view of [the statute], then no absurdity arises in the first place.”).

OLC’s final textual argument turns on the significance of the Interstate Transportation of Wagering Paraphernalia Act, Pub. L. No. 87-218, 75 Stat. 492 (1981) (codified at 18 U.S.C. § 1953). Enacted the same day as the Wire Act, that statute provides in relevant 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). OLC understood this statute as the non-sports betting counterpart to the Wire Act because “it expressly address[es] types of gambling other than sports gambling” in clause (c). Seitz Mem. 10. But of course the Wagering Paraphernalia Act also expressly addresses specific types of *sports* betting, using different language than the Wire Act. OLC overlooked the obvious relationship between these two statutes: The Wagering Paraphernalia Act is not the non-sports gambling counterpart to the Wire Act; it is the *tangible* communications

⁷ OLC defended its implied addition of the qualifying phrase “on any sporting event or contest” by pointing out that “the phrase ‘in interstate and foreign commerce’ is likewise omitted from the second clause [of the Wire Act], even though Congress presumably intended” that nexus to apply to “*all* the prohibitions in the Wire Act.” Seitz Mem. 7. That comparison fails because default rules of construction *require* reading an “interstate commerce nexus” into a federal criminal statute absent a “clear statement” otherwise. *Bass*, 404 U.S. at 350. It is reasonable to think Congress left that nexus to be implied in the second clause of the Wire Act, but there is no clear statement rule to explain OLC’s implied immunity for non-sports betting.

counterpart to the Wire Act, covering the sending and receiving of papers and other items for use in sports and non-sports gambling. Far from supporting OLC’s position, the Wagering Paraphernalia Act undermines the neat symmetry that OLC strained to achieve. It would be very surprising indeed if Congress intended, on the same day, to *criminalize* the transmission of a lottery bet by courier (under Wagering Paraphernalia Act), but *permit* its more efficient transmission by telegram or telephone (under the Wire Act). But that is precisely what OLC’s contrived interpretation of the Wire Act requires.

II. The Legislative History of the Wire Act Confirms that the Act Applies to Non-Sports Gambling.

A. The Act’s History and Purpose Support—and Illuminate—the Plain Meaning of its Text.

When as here the statutory text is “straightforward,” there is “no reason to resort to legislative history.” *Zuni Pub. Sch. Dist. No. 89 v. Department of Educ.*, 550 U.S. 81, 109 (2007) (citation omitted). Nevertheless, the purpose and history of the Wire Act further support what is clear from its text alone: subsection (a) reaches use of the interstate wires for any type of gambling, not merely gambling on a sporting event or contest. OLC’s contrary reading of the Act’s legislative history both mistakes the Act’s purpose and seriously misunderstands its drafting history.

The Wire Act was one of several pieces of legislation designed by Congress to combat the epidemic of organized crime that swept the Nation in the middle of the Twentieth Century. After the repeal of Prohibition, the Mafia, the Capone Syndicate, and other nation-wide criminal organizations turned to trades such as gambling, prostitution, and illegal drugs as a new source of revenue. And in the early 1950s, a decade before the Wire Act was passed in 1961, a series of Congressional committees began to investigate the extent, nature, and causes of nationwide criminal organizations—and what steps Congress could take to defeat them.

The best known of these committees was the Senate’s Special Committee to Investigate Organized Crime in Interstate Commerce—widely known as the “Kefauver Committee,” after its Chairman, Senator Estes Kefauver. From 1950 through 1951, the Kefauver Committee held hearings in fourteen cities across the Nation, taking the testimony of over 600 witnesses. WILLIAM N. THOMPSON, *GAMBLING IN AMERICA* 207 (2001). Because many of its hearings were nationally televised, the Kefauver Committee became something of a media sensation—and its findings gained widespread publicity and influence. S. REP. NO. 82-307, at 24–25 (1951). After its hearings were concluded, the Kefauver Committee issued a series of four reports—three interim reports and a final report—which detailed its conclusions that “the tentacles of organized crime reach into virtually every community throughout the country,” S. REP. NO. 82-725, at 2 (1951), and that “the Federal Government must provide leadership and guidance in the struggle against organized crime, for the criminal gangs and syndicates have Nation-wide ramifications,” S. REP. NO. 82-307, at 6.

While the Kefauver Committee found that organized crime received its revenue from many different sources—including some legitimate business interests—it concluded that “[g]ambling profits are the principal support of big-time racketeering and gangsterism.” *Id.* at 2.

“Since prohibition has been repealed, organized criminal gangs have found a new bonanza in the conduct of various forms of gambling.” S. REP. NO. 82-141, at 11 (1951). And critically, organized crime’s involvement extended *beyond* sports-related betting to gambling in all of its “various forms,” including “slot machines, the numbers or policy game, punchboards, [and] gambling casinos.” *Id.* at 7. “No form of gambling is overlooked.” *Id.* at 12. Indeed, as a contemporaneous report by another Senate Committee put it, lottery games such as “[n]umbers or policy, as it is known in some places, unquestionably [constitute] the most widely followed gambling activity in this country; and, despite the fact that the individual bets are small, the total in play is probably four or five times that in horse-race betting.” S. REP. NO. 81-1752, at 6 (1950). Moreover, the numbers racket generally involved wagers that were multiples lower than the minimum bets accepted in sports-related gambling, and it was thus seen as “the most tragic kind of gambling because it is indulged in by people who can’t afford to spend a quarter or 50 cents every day.” *Gambling & Organized Crime: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Government Operations*, 87th Cong. 25 (1961) (statement of Goodman A. Sarachan, Chair, N.Y. State Commission of Investigation) (“Senate Investigations Committee Hearing”).

The Kefauver Committee made several policy recommendations as a result of its investigation. Most relevant here, the Committee proposed that “[t]he transmission of gambling information across State lines by telegraph, telephone, radio, television, or other means of communication or communication facility should be regulated so as to outlaw any service devoted to a substantial extent to providing information used in illegal gambling.” S. REP. NO. 82-307, at 12. Over the following decade, Congress considered multiple proposed bills drawn to limit such interstate communications. While some of those pieces of draft legislation were confined to the use of the interstate wires in relation to sports-related gambling, *see, e.g.*, S. 2116, 82d Cong. (1st Sess. 1951); S. 2314, 83d Cong. (1st Sess. 1953), others extended to gambling of any kind, *see, e.g.*, S. 1624 § 1304, 82d Cong. (1st Sess. 1951); *see also* AMERICAN LAW INST., MODEL ANTI-GAMBLING ACT §§ (2)(6) & (5), *reprinted in The Attorney General’s Program to Curb Organized Crime & Racketeering: Hearings Before the S. Comm. on the Judiciary*, 87th Cong. 123, 140 (1961) (“Senate Judiciary Committee Hearings”).

When the Congress that ultimately passed the Wire Act began to consider anti-crime legislation, like the Congresses before it, it considered bills of *both* scopes. The House bill, H.R. 3022, which imposed certain reporting requirements on wire communications carriers who transmitted “gambling information,” defined that term to include *both* “any wager with respect to a sports event or a contest” *and* “any wager placed in a lottery conducted for profit.” H.R. 3022, 87th Cong. (1st Sess. 1961). The Senate bill that ultimately became the Wire Act did not, as initially proposed, reach non-sports-related betting. But it was amended by the Senate Judiciary Committee—which rewrote subsection (a) and added the second clause discussed above—after an important exchange in which Senator Kefauver criticized the failure of the draft bill to reach non-sports gambling.

As initially introduced in the Senate and referred to the Judiciary Committee, the Senate bill that became the Wire Act—S. 1656—appears to have been limited to the wire transmission of bets, wagers, or gambling information relating to “any sporting event or contest.” S. 1656 § 1084(a), 87th Cong. (1st Sess. Aug. 18, 1961) (as introduced). But near the close of the

Judiciary Committee’s hearings on the bill, Senator Kefauver homed in on precisely this limitation, in an exchange with a representative of the Department of Justice (which had proposed the legislation). “The bill,” Senator Kefauver noted, “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?” Senate Judiciary Committee Hearings 277. The witness, Assistant Attorney General Herbert Miller, responded that it was principally “wagers on a sporting event or contest” that “indispensabl[y]” involved the use of the wires, and that “your numbers game does not require the utilization of communications facilities.” *Id.* Senator Kefauver was, however, unsatisfied with that response, noting that in his extensive investigations a decade earlier he had found the interstate wires to be “used quite substantially in the numbers games, too.” *Id.* at 278.

Significantly, when the Judiciary Committee reported out an amended version of the bill, it had entirely rewritten subsection (a) and added a second clause which, as discussed in detail above, on its face is not limited to sports-related gambling. S. 1656, 87th Cong. (1st Sess. July 24, 1961) (as reported). The timing alone of this crucial revision raises a strong inference that these changes were made *precisely* to address Senator Kefauver’s concerns that the unamended bill would not extend beyond sports-related wagering.

This inference is strengthened by the other changes the Judiciary Committee made. In addition to adding the second clause of subsection (a), the Committee significantly rewrote the first clause to apply to individuals who *used* the interstate wires for gambling purposes rather than the communications carriers themselves. The Committee also eliminated a critical set of commas in subsection (a) that would have applied the modifying phrase “on any sporting event or contest” to both uses of “bets or wagers” in that clause. *See* Appendix A (attached) (replacing “of bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest” with “of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest”). That revision was an economical but perfectly sensible way to narrow the application of the modifying phrase. *U.S. Nat’l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 454 (1993) (“A statute’s plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation.”); *see also* SCALIA & GARNER, *supra*, at 161 (“Punctuation in a legal text will rarely change the meaning of a word, but it will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part.”).

In addition, the Committee added a new provision, subsection (d), further delimiting the communications carriers’ responsibility to discontinue services to a subscriber who was using the wires for gambling purposes, upon notice of such use by a law enforcement agency. This change, like the addition to subsection (a), closely tracks a proposal made by Kefauver, in his exchange with Assistant Attorney General Miller, that communications carriers ought to be obligated to discontinue service only upon request by a “State or Federal Official.” Senate Judiciary Committee Hearings 276. Finally, as amended by the Committee, the second clause of subsection (a) is also drawn to target “the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers”—language which appears to follow Sen. Kefauver’s suggestion that the bill “be expanded to include transmission of money.” *Id.* at 278. This drafting history strongly indicates that subsection (a) was revised precisely for the purpose of expanding the Wire Act to reach non-sports-related gambling.

The legislative history also provides valuable insight into the rationale for the varied scope of the prohibitions in subsection (a). As noted above, the first clause bans interstate transmission of “any bets or wagers”—including numbers games and other non-sports gambling about which Congress was acutely concerned. The first clause also bans interstate transmission of “information assisting” in sports gambling only. The second clause targets financial incentives for illegal gambling by broadly prohibiting transmission of any entitlement to money or credit either “as a result of bets or wagers” or “for information assisting in the placing of bets or wagers.” This set of prohibitions raises a fair question: Why did Congress target the *sending* of gambling-related information with respect only to sports-related betting, but target the wiring of *money in exchange* for gambling-related information with respect to all forms of gambling? While nothing in the legislative history directly explains why Congress chose to draw these lines, the record does offer some important clues.

In rebutting Assistant Attorney General Miller’s suggestion that the numbers game did not involve interstate wires, Senator Kefauver described his earlier investigative work in 1951. He indicated that those investigations had uncovered heavy use of interstate communications “in connection with policy and the numbers game” in “New York and in New Jersey.” Senate Judiciary Committee Hearings 278. It appears that Senator Kefauver was referring at least in part to the popular form of the numbers game known as the “Treasury Daily Balance” game, which his 1951 report described as follows:

The Treasury-balance lottery, according to testimony obtained by the committee, operates in most of the Eastern States and in sections of the Midwest. Tickets are sold for 25 cents and 50 cents, with occasional “specials” during the year selling for \$1. The last five figures of the daily balance issued by the United States Treasury determine the winners . . . A special service of the Western Union Telegraph Co. speeds the number daily from Washington to 51 subscribers who have been identified either as the principals or chief agents in the operation of the racket throughout the East.

S. REP. NO. 82-725, at 52 (1951). While “the profit of the racketeers who run the lottery [wa]s enormous,” *id.*, the racket was difficult to reach by legislation because some of those *transmitting* the information that facilitates the gambling—the communications carriers themselves—are innocent. Indeed, a Western Union executive emphasized that point in 1951 testimony on the topic before the Senate Interstate and Foreign Commerce Committee. *Anticrime Legislation: Hearings before the S. Comm. on Interstate & Foreign Commerce*, 82d Cong. 78–79 (1st Sess. 1951). With respect to sports-related gambling, those *sending* gambling information—such as odds and spreads—were themselves part of the criminal enterprise. See House Judiciary Committee Hearing 24–25. Hence Congress’s decision to ban individuals from *sending* such transmissions in the first clause. In the numbers racket, however, the wrongdoers were not the communications carriers that *sent* the publicly available information—such as the daily balance of the Treasury—but rather those who *solicited the receipt* of otherwise innocent information to aid in gambling. Hence Congress’s decision in the second clause to reach only those *paying* “for information assisting in the placing of bets or wagers.” 18 U.S.C. § 1084(a).

The second clause of subsection (a) also appears to address the role of gambling intermediaries, including “layoff men.” As Senator Kefauver noted in response to Miller, both sports-related “bookmaking” and non-sports-related numbers rackets involved a form of secondary betting known as “layoff betting.” Senate Judiciary Committee Hearing at 278; *see also* Senate Investigations Committee Hearing at 26 (noting that the layoff was “part of the established modus operandi of the gamblers,” including those who run the numbers game).⁸ Attorney General Kennedy’s testimony introducing the legislation explained “layoff” betting as follows:

[The local bookie] cannot control the choices of his customers and very often he will find that one horse is the favorite choice of his clientele. His “action,” as he calls it, may not reflect the “action” of the track. Therefore, he must reinsure himself on the race in much the same fashion that casualty insurance companies reinsure a risk that is too great for it to assume alone. To do this the bookmaker uses the “layoff” man, who for a commission, accepts the excess wager. The local layoff bettor also will have limited funds and his layoff bets may be out of balance. When this occurs he calls the large layoff bettors, who because of their funds, can spread the larger risk. These persons are gamblers who comprise a nationwide syndicate or combine. They are in close touch with each other all the time and they distribute the bets among themselves so that an overall balance is reached on any horserace.

Senate Judiciary Committee Hearing 3. While it is clear that Congress meant the Wire Act to target this layoff betting, there was some confusion about which part of the initial draft—the ban on wagers themselves or the ban on gambling information—captured the layoff. *Legislation relating to Organized Crime: Hearings Before the Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. 363 (1st Sess. 1961). Layoff betting does plainly involve, however, the transmission of entitlements to money “as a result of bets or wagers” and in exchange “for information assisting in the placing of bets or wagers.” 18 U.S.C. § 1084(a). As Senator Kefauver noted in a 1950 hearing, layoff men generally transmitted the wagers they were laying off to each other by wire for compensation. *Transmission of Gambling Information: Hearings before the S. Comm. on Interstate and Foreign Commerce*, 81st Cong. 634 (2d Sess. 1950) (“Transmission of Gambling Information Hearing”). It thus seems reasonable to conclude that this first part of the second clause in subsection (a) was designed to capture the use of the wires for the layoff—with respect to sports-related and non-sports-related gambling alike, as it was employed in both.

⁸ An Internal Revenue Service regulation adopted in 1959 makes clear that the federal government was aware that “layoffs” were a key part of both non-sports and sports betting. *See* 26 C.F.R. § 44.4401-2(c) (1959) (“Lay-offs. If a person engaged in the business of accepting wagers or conducting a lottery or betting pool for profits lays off all or part of the wagers placed with him with another person engaged in the business of accepting wagers or conducting a betting pool or lottery for profit, he shall, notwithstanding such lay-off, be liable for the tax on the wagers or contributions initially accepted by him.”).

The purpose and history of the Wire Act thus support what the text itself demonstrates: the law applies, by design, to all forms of gambling, not merely sports betting. And the history helps to explain the choices Congress made with respect to the varying scope of the prohibitions in subsection (a). As that history shows, there were plausible reasons for Congress to target the *sending* of gambling information with respect to sports-related gambling alone, but to shift its sights to the *wiring of money* from bets or wagers and *paying* for gambling information when it came to other types of gambling.

B. OLC’s Contrary Reading of the Act’s Legislative History Fails to Persuade.

OLC read the legislative history as supporting its blinkered interpretation of the Wire Act by making two errors. First, OLC misunderstood the basic purpose of the Wire Act and the other anti-crime legislation that Congress passed contemporaneously. “Congress’s overriding goal in the Act,” according to OLC, “was to stop the use of wire communications for sports gambling in particular.” Seitz Mem. 8. But as already canvassed, there is *abundant* evidence—going all the way back to the Kefauver report—that Congress was concerned about organized crime’s dependence on gambling of *all* kinds—including the numbers racket. Indeed, the legislative history shows that lotteries like the numbers racket were *far more profitable* than sports betting, *see* S. REP. NO. 81-1752, at 6 (“[D]espite the fact that the individual bets are small, the total in play [in numbers] is probably four or five times that in horse-race betting.”); Senate Interstate & Foreign Commerce Committee Hearings 81 (Treasury lottery “has reached staggering proportions”); S. REP. NO. 82-307, at 46 (“The principal organized crime [in Philadelphia] is the numbers game.”); *id.* at 64 (“The principal source of revenue for the gambling fraternity in Tampa is a variation of the numbers racket . . .”). And the legislative history also shows that lotteries like the numbers game were *regressive* in a way that sports wagering was not. Senate Investigations Committee Hearing at 25.

Moreover—as also detailed above—Congress had a great deal of evidence before it that like bookmaking, the numbers racket and other forms of lottery did involve use of the interstate wires (though for different purposes than sports betting). *See* Senate Judiciary Committee Hearings 278; S. REP. NO. 82-725, at 52; Senate Investigations Committee Hearing at 26; Transmission of Gambling Information Hearing 634. The Seitz Memorandum not only did not rebut any of this wealth of evidence that the purposes behind the Wire Act extended to non-sports-related gambling; *it did not even address it.*

OLC also misunderstood the specific drafting history of the Wire Act. “There is no indication,” OLC opined, “that Congress intended the prohibition on money or credit transmissions to sweep substantially more broadly” than the first clause’s bar on sports-related wagers. Seitz Mem. 8. That is simply not so. To the contrary, as discussed in detail above, there is a *highly persuasive indication* that the Senate Judiciary Committee’s late-breaking revision of subsection (a) was designed to accomplish *precisely* this result: that change was made directly after the Senate’s leading expert on criminal gambling organizations, Senator Kefauver, criticized the previous draft of the bill for reaching only sports betting. At a minimum, the Kefauver-prompted revisions preclude OLC’s excessive reliance on statements made before that major revision.

The Seitz Memorandum did mention (in a footnote) Senator Kefauver’s exchange with Assistant Attorney General Miller. Seitz Mem. 10 n.7. But the only conclusion OLC drew from the exchange was that “Congress was well aware” of what the memo characterized as the Justice Department’s understanding that “the bill . . . reach[ed] only . . . sports-related wagering and communications.” *Id.* That conclusion is deeply flawed, and twice over. First, the memorandum does not note, after discussing Kefauver’s colloquy with Miller, that the bill was *re-written* in apparent response to the limitations that Senator Kefauver identified in that exchange. And second, the memorandum wholly neglects to mention that while the Justice Department may have understood the *unamended* bill to be limited to sports betting, it has *uniformly* understood the Act *as amended and passed* to apply to non-sports-related gambling such as the numbers racket. Seitz Mem. 2 (quoting Crim. Mem. 3).

OLC’s conclusion that “[n]othing in the legislative history” of the Judiciary Committee’s revision of subsection (a) “suggests that . . . Congress intended to expand dramatically the scope of [the Wire Act] . . . to *all* ‘bets or wagers,’ ” Seitz Mem. 6, thus simply does not withstand scrutiny.

* * *

The text and structure of the Wire Act make clear that its criminal prohibition extends to interstate wire transmissions of non-sports bets and wagers, as well as financial inducements for such activity. The analysis should end there. Notwithstanding the Seitz Memorandum’s excessive reliance on legislative history, there is simply no evidence sufficient to overcome the presumption here “that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citation omitted). The Congress that enacted the Wire Act was keenly aware that organized crime thrived on revenue from the “numbers racket” and other non-sports gambling, and the Act’s drafting history supports the view that those activities were not impliedly exempted from the law’s prohibition.

Chuck Cooper

From: Chuck Cooper
Sent: Thursday, May 25, 2017 5:36 PM
To: Hunt, Jody (OAG)
Subject: RE: OLC opinion on internet gambling
Attachments: Sessions OLC Online Gambling 5.25.17.pdf

And here is a new letter, dated today, from three Dem congressmen asking for reconsideration.

Charles J. Cooper
Cooper & Kirk, PLLC
1523 New Hampshire Ave., NW
Washington D.C., 20036
202-220-9660

From: Chuck Cooper
Sent: Monday, May 22, 2017 5:19 PM
To: 'Hunt, Jody (OAG)' <Jody.Hunt@usdoj.gov>
Subject: OLC opinion on internet gambling

Jody,
Attached are (1) my firm's legal analysis rebutting the OLC opinion and (2) a letter from Senators Graham and Feinstein dated this past Friday asking for reconsideration of the OLC opinion. Below is a link to an interesting story on this.
Chuck

<https://www.onlinepokerreport.com/23433/jeff-sessions-ag-hearing-online-gambling/>

Charles J. Cooper
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Congress of the United States
Washington, DC 20515

May 25, 2017

The Honorable Jeff Sessions
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Attorney General Sessions:

We are writing to ask you to consider withdrawing a December 2011 Opinion issued by the Department of Justice (DOJ) Office of Legal Counsel (OLC) which has opened the doors for the legalization of online gambling in a handful of States across the country. We believe there are strong legal and policy arguments for the Department to consider withdrawing this Opinion and allow Congress to more closely examine the public policy implications of making gambling so accessible in our society.

We appreciate your pledge to take a second look at this opinion, which was issued without consideration of policy concerns expressed by former Senate Democratic Leader Harry Reid and others on both sides of the political landscape. As you settle into your new position in the Administration, we know you will be addressing a number of polarizing and partisan issues in the coming months. Internet gambling is not a partisan issue, and its one we believe should be more closely examined by policy-makers in Congress before being allowed to expand any further.

Thank you very much for your serious consideration of these concerns.

Sincerely,



Henry Cuellar
Member of Congress



Daniel Lipinski
Member of Congress



Emanuel Cleaver II
Member of Congress

Chuck Cooper

From: Chuck Cooper
Sent: Monday, June 19, 2017 3:37 PM
To: Hunt, Jody (OAG)
Subject: Cooper & Kirk client matters adverse to DOJ
Attachments: client matters adverse to doj (06-19-17).docx; ATT00001.txt

Jody,

As discussed, I attach a list of pending matters in which my firm, Cooper & Kirk, represents clients adverse to the Department of Justice and/or its client agencies. I believe the list is complete, but will of course supplement it if we have overlooked any such matter. Please let me know any further steps that my firm needs to take to ensure compliance with all Department ethics rules and practices.

Best,
Chuck

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LIST OF COOPER & KIRK MATTERS ADVERSE TO DOJ

Arkansas

Lea v. Unites States, No. 1:16-cv-00043-EDK (Fed. Cl.).

C&K Clients: We represent the plaintiff Andrea Lea, who is the Auditor of the State of Arkansas.

Description: The suit alleges breach of contract in connection US Savings bonds in the possession of the state.

Advance America and CFSA

Community Financial Services Association of America, Ltd. v. FDIC, No. 1:14-cv-00953-GK (D.D.C.)

C&K Clients: We represent the plaintiffs, Community Financial Services Association of America, Ltd. (which has been dismissed), Advance America, Cash Advance Centers, Inc., Check Into Cash, Inc., NCP Finance Limited Partnership, NCP Finance Ohio, LLC, Northstate Check Exchange, PH Financial Services, LLC, and Richard Naumann.

Description: We are challenging the legality of Operation Choke Point under the APA and the due process clause. The suit alleges that the banking regulators have adopted a sweeping and amorphous conception of “reputational risk” that is unauthorized by statute and was adopted without notice and comment.

Advance America, Cash Advance Centers, Inc. v. FDIC, No. 17-5045 (D.C. Cir.).

Description: We are representing the clients described above in an appeal from the denial of a preliminary injunction in a suit alleging a due process violation resulting from Operation of Choke Point.

CFPB

State National Bank of Big Spring v. Lew, No. 1:12-cv-01032-ESH (D.D.C.).

C&K Clients: We filed an amicus brief in support of plaintiffs on behalf of Congressman Sean Duffy and Consumers’ Research.

Description: This case challenges the CFPB’s structure as violating constitutional separate of powers principles.

Coalition to Stop Internet Gambling

C&K Client: Coalition to Stop Internet Gambling.

Description: We represent the Coalition to Stop Internet Gambling in petitioning the Department of Justice to reconsider its 2011 interpretation of the Wire Act.

Fannie Mae and Freddie Mac

Perry Capital, LLC v. Mnuchin, No. 14-5243 (D.C. Cir.).

C&K Clients: Fairholme Funds, Inc., The Fairholme Fund, Berkley Insurance Co., Acadia Insurance Co., Admiral Indemnity Co., Admiral Insurance Co., Berkley Regional Insurance Co., Carolina Casualty Insurance Co., Midwest Employers Casualty Insurance Co., Nautilus Insurance Co., Preferred Employers Insurance Co.

Description: This suit challenges the legality under the APA of the “net worth sweep,” an agreement between the Treasury Department and the Federal Housing Finance Agency, as conservator of Fannie Mae and Freddie Mac, to pay 100% of Fannie’s and Freddie’s profits into the U.S. Treasury.

Fairholme Funds, Inc. v. United States, No. 13-465 (Fed. Cl.)

C&K Clients: Fairholme Funds, Inc., The Fairholme Fund, Berkley Insurance Co., Acadia Insurance Co., Admiral Indemnity Co., Admiral Insurance Co., Berkley Regional Insurance Co., Carolina Casualty Insurance Co., Continental Western Insurance Co., Midwest Employers Casualty Insurance Co., Nautilus Insurance Co., Preferred Employers Insurance Co.

Description: This suit challenges the government’s payment of 100 percent of Fannie’s and Freddie’s profits into the U.S. Treasury as violations of binding contractual commitments and of the takings clause of the Fifth Amendment.

Collins v. FHFA, No. 17-20364 (5th Cir.)

C&K Clients: J. Patrick Collins, Marcus J. Liotta, William M. Hitchcock.

Description: We are challenging the legality of the net worth sweep of all of Fannie Mae and Freddie Mac’s profits into the US Treasury. Our suit claims that the sweep violates the APA.

Robinson v. FHFA, No. 16-6680 (6th Cir.)

C&K Client: Arnetia Joyce Robinson.

Description: We are challenging the legality of the net worth sweep of all of Fannie Mae and Freddie Mac's profits into the US Treasury. Our suit claims that the sweep violates the APA.

Roberts v. FHFA, No. 17-1880 (7th Cir.)

C&K Clients: Christopher M. Roberts, Thomas P. Fischer.

Description: We are challenging the legality of the net worth sweep of all of Fannie Mae and Freddie Mac's profits into the US Treasury. Our suit claims that the sweep violates the APA.

Saxton v. FHFA, No. 17-1727 (8th Cir.)

C&K Clients: Thomas Saxton, Ida Saxton, Bradley Paynter.

Description: We are challenging the legality of the net worth sweep of all of Fannie Mae and Freddie Mac's profits into the US Treasury. Our suit claims that the sweep violates the APA.

Inseego

C&K Client: Inseego Corp.

Description: We represent Inseego in its effort to gain approval under the CFIUS process for a sale of one of its product lines to a foreign purchaser.

Shell Oil, et al.

Shell Oil Co. v. United States, 2017-1695 (Fed. Cir.) (in CFC 06-141 & 06-1411)

C&K Clients: Shell Oil Co., Atlantic Richfield Co., Texaco, Inc., and Union Oil Co. of California.

Description: We represent Shell, Unocal, Atlantic Richfield Co., and Chevron-Texaco in a contract dispute with the United States government. Our clients seek compensation for environmental remediation costs that they have incurred as a result of their performance of World War II contracts for the federal government.

Mississippi River Gulf Outlet

St. Bernard Parish, et al. v. United States, Nos. 16-2301, 16-2373 (CFC 05-1119)

C&K Clients: St. Bernard Parish and a class of residents.

Description: We represent the Parish and a class of residents of the Parish and the Lower Ninth Ward of New Orleans in a takings claim against the U.S., alleging that the

U.S. Army Corps of Engineers' construction, operation, maintenance, and dredging of 76-mile long navigational channel connecting Gulf of Mexico and Port of New Orleans caused severe flooding on our clients' properties during Hurricanes Katrina and Rita and further water damage thereafter for which the Fifth Amendment requires just compensation.

North Carolina Medicaid Legislation.

Berger v. Price, No. 5:17-cv-25 (E.D.N.C.).

C&K Clients: We represent the plaintiffs, Phil Berger and Tim Moore, who are the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives.

Description: This suit challenges under the APA the legality of the Governor's plan to submit a request for approval to expand Medicaid.

National Black Chamber of Commerce

Chamber of Commerce of the United States of America v. U.S. Department of Labor, 17-10328 (5th Cir.).

C&K Clients: National Black Chamber of Commerce.

Description: We filed an amicus brief in support of the plaintiffs on behalf of the National Black Chamber of Commerce when the case was in district court. The case involves the legality of the Department's new fiduciary duty rules.

OPM

Bonner v. United States, No. 1:15-cv-01617-ABJ (D.D.C.), *In re: U.S. Office of Personnel Management Data Security Breach Litigation*, No. 1:15-mc-01394-ABJ (D.D.C.).

C&K Clients: We represent plaintiff Ryan Bonner, and we are on the steering committee for the plaintiffs in the consolidated MDL proceeding.

Description: This suit seeks relief against the government and its contractor under the APA and various common law doctrines in connection with the data breach affecting more than 21 million past and present government workers.

Susquehanna International Group.

Susquehanna International Group, LLP v. SEC, No. 16-1061 (D.C. Cir.).

C&K Clients: We represent the petitioners, Susquehanna International Group, LLP, KCG Holdings, Inc., Miami International Securities Exchange, LLC, and Box Options Exchange LLC.

Description: This suit challenges under the APA a plan that converts the Options Clearing Corporation into a for-profit monopoly.

Other

US ex rel. Cloninger v. DynCorp Int'l Inc., 14-cv-00581 (DDC).

C&K Client: We represent a whistleblower-relator, Fred Cloninger.

Description: We're not adverse to DOJ in *Cloninger*, and DOJ has not entered an appearance, but the United States has an interest and DOJ is monitoring the case. We represent a relator in a qui tam action arising under the False Claims Act, who alleges multiple violations of the FCA arising out of the defendants' actions in connection with a Government contract to provide logistical and operational support for the U.S. Counter Narcoterrorism Technology Program Office in Afghanistan. The defendants are the prime contractor (Northrop Grumman Corp.) and a subcontractor (DynCorp International). In addition to raising claims under the FCA, the relator also raises claims under state employment law.

Board of Education of the Highland Local School District vs. U.S. Department of Education, No. 2:16-cv-00524-ALM-KAJ (S.D. Oh.). We filed an amicus brief in support of the school district on behalf of the State of Texas. We are not sure if this case is still live.

Description: This case involved a school board's challenge to the Obama Administration's interpretation of Title IX as requiring schools to allow students to use bathrooms of their chosen gender.