No. 19-1835

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
NO. 1:19-CV-00163 (BARBADORO, J.)

BRIEF OF ASSOCIATION OF GAMING EQUIPMENT MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Association of Gaming Equipment Manufacturers states that it does not have a parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

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2018 Opinion	*Reconsidering Whether The Wire Act Applies To Non Sports Gambling*, 42 Op. O.L.C. __ (Nov. 2, 2018)
Act	Wire Act, 18 U.S.C. § 1084
Association	*Amicus curiae* Association of Gaming Equipment Manufacturers
District Court Op.	June 3, 2019 Memorandum and Order issued by the District Court in this case, *reprinted at* ADD1 of Appellant's Addendum
Gov't Br.	Opening Brief for Defendants-Appellants, Doc. No. 00117531642 (filed Dec. 27, 2019)
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OLC	U.S. Department of Justice, Office of Legal Counsel

STATEMENT OF INTEREST

Amicus curiae Association of Gaming Equipment Manufacturers is a not-for-profit trade association representing manufacturers and suppliers of electronic gaming devices, lotteries, systems, table games, components, and support products and services for the gaming industry.[1] The Association works to further the interests of gaming equipment manufacturers and suppliers throughout the world. Through participation in legislative, regulatory, and judicial proceedings, as well as educational alliances and other programs, the Association's members work together to create a business environment in which the Association's members can prosper, and to support education and responsible-gaming initiatives.

The Association has an interest in this case because its members market products and services that use communications networks to ensure that gaming is conducted lawfully, securely, and efficiently. The Office of Legal Counsel's 2018 Opinion could jeopardize many of those technologies by applying the Wire Act's criminal prohibitions not only to sports betting, but also to all other types of bets and wagers. The Association files this brief to challenge that overbroad reading of

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the Association certifies that all parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and no person—other than the Association, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

the statute and to support the District Court's narrower, well-reasoned construction.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this appeal—whether the Wire Act, 18 U.S.C. § 1084(a), extends beyond sports betting to other types bets and wagers—has tremendous practical significance for the gaming industry as well as the state and tribal governments with which the industry partners. In particular, the Act's scope affects a wide range of products and services that use interstate communications networks to maximize the benefits of slot machines, bingo, poker, and other games for consumers, regulators, and gaming operators alike. This broader context—which the Office of Legal Counsel overlooked in issuing its 2018 Opinion—plays a critical role in determining the Act's proper reach.

The District Court correctly held that the Wire Act applies only to sports betting and that the sweeping interpretation adopted in OLC's 2018 Opinion is inconsistent with the Act's text, structure, and history. This Court should affirm the District Court's judgment for three reasons.

First, the Government did not adequately account for the significant reliance interests engendered by OLC's 2011 Opinion. That opinion concluded that the Act applies only to sports betting, and thus confirmed that use of interstate communications for *other* types of gaming would not violate federal law. Acting in reliance on the 2011 Opinion, the gaming industry invested in a broad range of new products and services that use communications networks to modernize and improve

casino games. For example, the industry partnered with state and tribal regulators to implement real-time monitoring systems that help ensure gaming is conducted lawfully and that governments receive the gaming taxes they are owed. Connected gaming technologies have likewise enhanced the ability of casinos and other gaming operators to manage and maintain the security of the games they offer. The industry also has devoted significant resources to developing and deploying "wide area" slot machine networks that allow customers in different locations to compete for common prize pools that are larger and grow faster than would be possible at any single site. Similar services developed in the wake of the 2011 Opinion make it possible for customers hailing from different jurisdictions that allow gambling to play together in bingo and poker games.

In light of these reliance interests, the Government was required to provide a heightened justification for the 2018 Opinion's reversal in course. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The 2018 Opinion does not come close to meeting that demanding test. Indeed, the 2018 Opinion addresses governmental reliance interests only in passing, and does not address industry's reliance interests at all. The 2018 Opinion thus gives short shrift to the significant destabilizing effects it would have on the market. Courts repeatedly have rejected agency interpretations based on such omissions, and the same result is warranted here.

Second, the 2018 Opinion conflicts with the consistent pattern in federal law of allowing the States to determine their own gaming policies. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). Gaming is a traditional area of state regulation, and federal gaming statutes—including the Johnson Act, the Indian Gaming Regulatory Act, the Unlawful Internet Gambling Enforcement Act, and even the Wire Act itself—reflect this both in their narrow scope and their inclusion of provisions that accommodate or account for state gaming laws. Limiting the Wire Act to sports betting comports with this framework by freeing the States to adopt their own laws governing other types of gaming. The absence of a clear statement that the Wire Act overrides state laws, *see Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), and the Supreme Court's recent observation that the Wire Act "appl[ies] only if the underlying gambling is illegal under state law," *Murphy*, 138 S. Ct. at 1483, reinforce this conclusion. In contrast, the 2018 Opinion's interpretation would conflict with longstanding federal practice by raising questions regarding the legality of gaming operations that comply with state law, including some carried out by the States themselves.

Third, and finally, the Government's interpretation of the Wire Act, a criminal statute, is not entitled to deference. To the contrary, the rule of lenity counsels in favor of an interpretation that would avoid the significant practical problems that the 2018 Opinion's expansive approach could cause.

ARGUMENT

I. The 2018 Opinion Does Not Adequately Account for the Substantial Reliance Interests that the 2011 Opinion Engendered.

The 2018 Opinion's interpretation of the Wire Act fails—and the District Court's decision rejecting that interpretation should be affirmed—because the Government gave inadequate consideration to the substantial reliance interests that the 2011 Opinion engendered.

A. States, Tribes, and the Gaming Industry Made Significant Investments in Reliance on the 2011 Opinion's Common-Sense Interpretation of the Wire Act.

In the years following issuance of the 2011 Opinion, states, tribes, and the gaming industry made significant investments and policy choices based on OLC's conclusion that the Wire Act applies only to sports betting.

States have relied on the 2011 Opinion in important ways. In addition to the online lotteries that Plaintiffs seek to protect, six states—Delaware, Michigan, Nevada, New Jersey, Pennsylvania, and West Virginia—have enacted legislation authorizing online gaming in a regulated capacity, including online poker. *See, e.g.*, N.J. Stat. Ann. §§ 5:12-95.17 *et seq.* These laws are designed to "increase public trust and confidence in legalized gambling, inhibit wagering by underage or otherwise vulnerable individuals, [and] ensure that any games offered through the Internet are fair and safe." *Id.* § 5:12-95.17(h). Moreover, three of these states (Delaware, Nevada, and New Jersey) have entered into an interstate compact that

permits their residents to play online poker with one another. *See* Steve Ruddock, *New Jersey, Nevada And Delaware Will Share Online Poker Player Pools After Gov. Christie Signs Deal*, Online Poker Report (Oct. 13, 2017), https://perma.cc/8ZK7-HWNF. The gaming industry responded to these state laws—all of which authorize games that involve the transmission of bets and wagers through wire communications—by investing vast resources to develop the technologies and operational capacity needed to offer such games to the public.

Native American tribes have followed a similar course. For example, many tribes now offer intertribal bingo games, which permit individuals to play bingo against players physically present in other tribal lands that in some instances are located in different states. Because bingo requires a minimum number of players, connecting individuals in this way greatly increases the ability of tribes to offer such games. But a consequence of connecting bingo players located in different tribal lands is that the wire transmissions that communicate game information between players can cross state lines—an architecture permissible under the 2011 Opinion.[2]

[2] In 2009, the National Indian Gaming Commission, the federal agency charged with regulating tribal gaming, considered the legality of inter-tribal bingo games and concluded that they are permitted under federal law. *See* Letter to Donald Bailey, Atlantis Internet Group Corp., from Penny J. Coleman, Acting General Counsel, National Indian Gaming Commission, *RE: Casino Gateway Network* (Sept. 24, 2009), https://perma.cc/DV8N-HY6Y.

Gaming equipment manufacturers responded to the 2011 Opinion by investing billions of dollars in a broad variety of new gaming devices and systems that incorporate wire communications as a key element. Wide-area progressive and multi-jurisdictional systems for slot machines are a prime example. These systems connect local slot machines in disparate physical locations to a broader network, enabling a communal jackpot that grows at a faster rate than if the devices were operated independently of one another.[3] In some cases the slot machines connected to these networks are located in different states; in other instances, the networks merely connect machines within the same state or even the same casino.[4] As a result, information that assists in conducting the slot machine games may be transmitted across state lines as the devices and servers that administer the overall system communicate with each other. Even though these games may involve use of interstate wire transmissions, their use has become widespread and complies with state and tribal laws in many jurisdictions. *See, e.g.*, 4 Pa. Stat. Ann. §§ 1103, 1207 (authorizing licensing of "multistate wide-area progressive slot machine sys-

[3] *See, e.g.*, Aristocrat Technologies, Inc., *Aristocrat's Game-Changing Fast Cash(TM) Wide Area Progressive Slot Product Now Racing Across the United States* (Feb. 28, 2017), https://perma.cc/8TA8-4AFS.

[4] Communications between slot machines within the same state may nevertheless cross state lines due to the network architecture or routing employed. *See* District Court Op. at 9 (transmissions that facilitate New Hampshire's iLottery games "begin and end in New Hampshire," but nevertheless may involve "intermediate routing of data" that crosses state lines).

tems"); 8 Maine Rev. Stat. Ann. § 1004(1)(C) (addressing regulation of "wide-area" "progressive slot machines"); Ariz. Rev. Stat. Ann. § 5-601.02 ("Gaming devices authorized pursuant to this compact may be operated to offer an aggregate prize or prizes as part of a network, including a network … [b]eyond the state pursuant to a mutually-agreed appendix containing technical standards for wide area networks."); Little River Band of Ottawa Indians Reg. R400-04:GC-05, 11 (regulating the use of "wide-area progressive gaming machines").

The interconnected structure of wide-area progressive and multi-jurisdictional slot systems not only offers consumers greater choice—it is often mandated by state law. Many states have enacted statutes or adopted regulations *requiring* that slot machines, video lottery terminals, and other electronic gaming devices be connected to a central monitoring system. *See, e.g.*, N.M. Stat. Ann. § 60-2E-43 (requiring "a central system into which all licensed gaming machines are connected" capable of monitoring and communicating with such gaming machines); 8 Maine Rev. Stat. Ann. § 1003(2)(J) (same). These systems allow regulators to monitor gaming activities in real-time for suspicious patterns and ensure that the government receives a full accounting of revenues for tax purposes.[5]

[5] The Association's members provide states with these systems. *See, e.g.*, International Game Technology PLC, *International Game Technology Announced Signing of Agreement with the Massachusetts Gaming Commission for New Central Monitoring System* (June 1, 2015), https://perma.cc/7X79-U2G4;

That tax-auditing function is particularly important to state and local governments, which received more than $9 billion in gaming taxes in 2018 alone.[6] However, central monitoring systems, like wide-area progressive slot machine systems, can involve use of interstate wire transmissions that communicate detailed gameplay information. *See also* District Court Op. 7-9.

Casinos and other gaming operators have relied on the 2011 Opinion as well, for example by employing sophisticated digital management systems to administer their operations and enhance the integrity of their games. These technologies allow for real-time monitoring of gaming activity and player tracking—important for compliance, auditing, accounting, and similar purposes.[7] By ensuring that games are played lawfully and in accordance with applicable rules, these systems benefit consumers and advance important public policies. But as with central monitoring systems used by state regulators, slot management systems also can involve use of interstate wire transmissions to communicate wagering information. Indeed, the

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Scientific Games Corporation, *Scientific Games Signs Central Monitoring System Contract with New Mexico Gaming Control Board* (Jan. 29, 2014), https://perma.cc/3R74-Z9AV.

[6] *See* American Gaming Association, *State of the States 2019*, at 16 (June 11, 2019), https://perma.cc/M6GA-VTDV ("*State of the States*"); *see also* N.H. Br. 16-17 (documenting state revenues from gaming supported by network infrastructure).

[7] *See, e.g.*, Bally Systems, *Slot Management Systems Gaming Solutions Across Multiple Platforms*, (last accessed Jan. 15, 2020), https://perma.cc/D7EP-LSBK.

point of these systems is to utilize communications networks as a means of enhancing the quality and integrity of the gaming experience.

As a result of the innovative technologies and services described above, the gaming-supplier industry has grown in the years since the 2011 Opinion, increasing its contributions to the economy. For example, according to a recent study prepared by economists at Applied Analysis and published by the Association, in 2018 the gaming-supplier industry directly generated $21 billion in economic output, directly employed nearly 62,000 workers, and paid nearly $6 billion in direct wages. *See* Association of Gaming Equipment Manufacturers, *Global Gaming Supplier Industry Economic Impact*, at 2 (May 2019), https://perma.cc/2LA2-UUQP.[8] This analysis also shows that the industry is growing rapidly, as illustrated by a six percent year-over-year increase in economic output. *See id.* However, these important contributions—which result from activities that are authorized by state law—are now jeopardized by the 2018 Opinion.

B. The 2018 Opinion Fails to Provide the Heightened Justification Required to Overturn Agency Action that Has Engendered Significant Reliance Interests.

The Government erred in adopting the 2018 Opinion's interpretation because the 2018 Opinion did not adequately consider the state, tribal, and

[8] Although these figures reflect global totals for the gaming-supplier industry, a significant proportion of the industry's economic output and employment comes from the U.S. market. *See id.* at 5-6.

commercial reliance interests discussed above.[9]

Precedent constrains the ability of agencies to depart from their existing policies and legal interpretations. Although agencies may reconsider past practices and adopt new approaches, an agency changing course "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (quoting *Fox*, 556 U.S. at 515). Thus, "[a]n agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Ramaprakash v. FAA*, 346 F.3d 1121, 1130 (D.C. Cir. 2003) (Roberts, J.).

Of particular relevance here, an agency must provide a heightened, "'more detailed justification'" when it departs from a past interpretation that "may have 'engendered serious reliance interests.'" *Encino Motorcars*, 136 S. Ct. at 2126 (quoting *Fox*, 556 U.S. at 515). In these circumstances, the agency must assess the effect its proposed change would have on the parties who hold those interests and explain its rationale for "'disregarding [the] facts and circumstances that … were

[9] The Department of Justice adopted OLC's 2018 interpretation of the Wire Act in a memorandum dated January 15, 2019. *See* Gov't Br. 9. Thus, regardless of whether the 2018 Opinion independently is subject to Administrative Procedure Act ("APA") review, the question whether the Department of Justice's subsequent memorandum adopting the 2018 Opinion complies with the APA is properly before the Court. *See* District Court. Op. 23-27; N.H. Br. 61-62, 66-70.

engendered by the prior policy.'" *Id.* at 2126 (quoting *Fox*, 556 U.S. at 515); *see also National Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1114 (D.C. Cir. 2019) (failure to "take into account the reliance interests of" businesses "that had crafted business models and invested significant resources" in reliance on agency's prior policy was arbitrary and capricious).

The 2018 Opinion does not satisfy that demanding test. Although the 2018 Opinion mentions reliance interests in passing, that discussion consists of only two sentences regarding the interests of states, and says nothing at all regarding the interests of tribes or private industry. *See* 2018 Opinion at 22-23 ("We acknowledge that some may have relied on the views expressed in our 2011 Opinion about what federal law permits. Some States, for example, began selling lottery tickets via the Internet after the issuance of our 2011 Opinion."). The 2018 Opinion does not grapple with the effect its interpretation could have on state-authorized online gaming, inter-tribal bingo games, wide-area progressive slot machine systems, central monitoring systems, or other elements of the gaming market and regulatory structure that rely on interstate wire communications—and thus on the 2011 Opinion's narrower interpretation of the Act.

Courts repeatedly have invalidated agency action that overlooks reliance interests in this way. For example, in *Encino Motorcars* the Supreme Court rejected a Department of Labor rule that reclassified automobile dealership service advisors

under the Fair Labor Standards Act, thereby entitling the service advisors to overtime wages. *See* 136 S. Ct. at 2121, 2126-27. The Department's prior rules had exempted service advisors from overtime pay, and "[d]ealerships and service advisors [had] negotiated and structured their compensation plans against th[at] background understanding," such that a new overtime-pay mandate "could necessitate significant changes to" existing contracts. *Id.* at 2126. Nevertheless, the Department "said almost nothing" about these reliance interests in adopting its new regulation, beyond acknowledging that service advisors had previously been found ineligible for overtime pay and "industry had relied on that interpretation." *Id.* at 2126-27. Given "the serious reliance interests at stake," the Court held that the "Department's conclusory statements d[id] not suffice to explain its" reversal in course. *Id.* at 2127. Likewise, in *National Lifeline*, the D.C. Circuit vacated a Federal Communications Commission order that failed to "take into account the [] interests of" service providers "that had crafted business models and invested significant resources into providing" telephone service adversely affected by the order's new regulatory restrictions. 921 F.3d at 1114.

The same conclusion applies here in light of the substantial investments, long-term contracts, and regulatory changes made in reliance on the 2011 Opinion. Here, as in *Encino Motorcars*, the 2018 Opinion's new approach could "necessitate significant" legal and marketplace changes that the Government has not men-

tioned, let alone addressed in a "detailed justification." *Fox*, 556 U.S. at 515. This Court should therefore reject the 2018 Opinion's interpretation and restore the Wire Act's proper scope.[10]

II. The 2018 Opinion Upsets the Longstanding Structure of Federal Gaming Laws by Overriding State Policy Choices Regarding Gaming.

A. Prior to the 2018 Opinion, Federal Law Consistently Took a Restrained Approach that Respected State Gaming Laws.

As the Supreme Court recently observed, "the general federal approach to gambling" is to criminalize only conduct that is unlawful under state law. *Murphy*, 138 S. Ct. at 1483 (citing 18 U.S.C. §§ 1952-53, 1955). Indeed, specifically with respect to the Wire Act, the Supreme Court reasoned that "18 U.S.C. § 1084, which outlaws the interstate transmission of information that assists in the placing of a bet *on a sporting event*, appl[ies] *only if the underlying gambling is illegal under state law*." *Id.* (emphases added). Although that statement was dicta, this Court is "bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement." *Cuevas v. United States*, 778 F.3d 267, 272-73 (1st Cir. 2015) (cleaned up). The *Murphy* Court's under-

[10] That the Government unilaterally self-imposed a post-hoc forbearance period does not change the fact that OLC failed to address the reliance interests that its 2011 Opinion engendered. *Contra* Gov't Br. 47-48. The forbearance period is at most a temporary reprieve during which time the Government expects industry to come into compliance with its expanded reading of the Wire Act.

standing of the Wire Act is therefore entitled to significant weight in this Court's analysis.

Other federal gaming statutes follow the approach described in *Murphy*. For example, the Johnson Act, which prohibits the transportation of certain gambling devices, exempts devices that are "legal under applicable State laws." 15 U.S.C. § 1172(a). The Indian Gaming Regulatory Act, which governs tribal gaming, generally permits tribes to engage in gaming if that activity is permitted under state law, even requiring state approval (in the form of compacts) for certain games. *See* 25 U.S.C. § 2710. And the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361 *et seq.*, prohibits gaming-related financial transactions that make use of the Internet, but only when the underlying gaming is itself prohibited by state law.

This restrained federal approach is important because it respects and reinforces the different choices that states make with respect to gaming—and thus enhances the States' sovereignty and primary role in regulating gaming. In other words, federal gaming laws "implement a coherent federal policy: They respect the policy choices of the people of each State." *Murphy*, 138 S. Ct. at 1483. Many states have exercised their prerogative to enact their own gaming policies:

41 states have authorized commercial casino gaming or are home to tribal casino gaming operations.[11]

If Congress had designed the Wire Act to depart from that longstanding federal policy and intrude in the States' historic domain, it would have said so clearly. Courts enforce a "plain statement rule," which requires that if Congress "intends to pre-empt the historic powers of the States" in "traditionally sensitive areas"—such as gaming—"it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460-61 (cleaned up). The Wire Act provides no such plain statement. To the contrary, the Act contains 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). This exemption fits the statutory scheme and the federal gaming laws' policy of respecting states sovereignty only if the Act is interpreted as being limited to sports betting. To hold otherwise would mean that Congress respected the States' sports betting laws (by providing an exemption for activities that comply with those laws) while simultaneously overriding *sub silentio* the States' other gaming laws—an absurd outcome. In fact, the Act's legislative history suggests the opposite conclusion based on the House Report's

[11] *See* American Gaming Association, *State of the States*, *supra*, at 1.

statement that the Act is intended to "assist the various States and the District of Columbia in the enforcement of *their* [gaming] laws." H.R. Rep. No. 87-967, at 1-2 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2631 (emphasis added).

B. The 2018 Opinion Raises Questions About Legitimate Gaming Activities that Comply with State Law.

By expanding the scope of the Wire Act beyond sports betting, the 2018 Opinion raises new questions about the legality of myriad gaming activities that utilize wire transmissions but nevertheless are permitted under state law—thus undermining longstanding federalism values embedded in federal gaming law. *See Murphy*, 138 S. Ct. at 1475 (Both "the Federal Government and the States wield sovereign powers," which "is why our system of government is said to be one of 'dual sovereignty.'" (quoting *Gregory*, 501 U.S. at 457)).

For example, the 2018 Opinion could disrupt compliance efforts that make gaming safer and more secure, such as the monitoring systems described in Part I.A above. Many of these systems are mandated by state law or regulations and serve important purposes, such as assisting governments in collecting the full amount of the gaming taxes required by law. In some instances it may be cost prohibitive and impractical to design monitoring systems that satisfy all the requirements imposed by state law without using interstate wire transmissions to communicate wagers or information assisting in the placement of wagers. Yet the 2018 Opinion creates uncertainty regarding whether these systems are within the

ambit of the Wire Act's prohibitions on transmission of gaming-related information—thus destabilizing efforts by states to regulate gaming activities they deem lawful.

Further, as Plaintiffs-Appellees and the State *amici* demonstrate in this proceeding, under OLC's current interpretation of the Act, it is unclear whether even the States themselves may engage in some gaming-related activities. This dispute began in 2010 when Illinois and New York asked the Department of Justice whether they could operate online lotteries. *See* 2011 Opinion at 1. The 2018 Opinion obliquely acknowledges that it could render such activities unlawful (at 22-23), but fails to grapple with the implications of that result. That failure is particularly remarkable because the revenues these lotteries generate are critical to state budgets—billions in lottery revenues are used to fund education, hospitals, and other core government services. *See* North American Association of State and Provincial Lotteries, *Where the Money Goes*, https://perma.cc/5RXA-K7G8.

Similarly, rote application of the 2018 Opinion could undermine the investments that the gaming industry and tribes have made in wide-area progressive slot machine systems and inter-tribal bingo games. These systems may involve use of interstate wire transmissions in some form—for example to track contributions to a common jackpot, or to coordinate payouts across jurisdictions. By calling into question the legality of such transmissions, the 2018 Opinion frustrates settled ex-

pectations and discourages additional investments into these legitimate gaming activities.

Even conduct that is ancillary to gaming could be ensnared within the ambiguity that results from the 2018 Opinion's expanded interpretation. For example, electronic payment processing (both to fund player accounts and to pay out successful wagers) can involve interstate wire transmissions because the devices and servers that belong to the players, casinos, financial intermediaries, and banks involved may be located in different jurisdictions. Electronic payment processing benefits consumers by eliminating the need to rely on cash transactions and allows regulators to more easily track funds. But by sowing confusion regarding whether these activities violate the Wire Act, the 2018 Opinion deters gaming industry participants from relying on electronic payment processing and instead requires use of cash transactions—a less secure alternative for consumers and regulators alike.

This cloud on the use of electronic payment processing creates an unnecessary conflict with the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361 *et seq.* (the "Enforcement Act"), which permits such activities. As noted above, the Enforcement Act prohibits gaming-related financial transactions that make use of the Internet, but only when the underlying gaming is itself prohibited by state law. Moreover, the Enforcement Act permits the use of intermediate interstate wire transmissions associated with lawful intrastate gaming. *See* 31 U.S.C.

§ 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."); 2011 Opinion at 1. Because the activities described above comply with state law, the Enforcement Act permits the use of interstate intermediate routing (i.e., wire transmissions) to facilitate them—even as the 2018 Opinion raises questions about their lawfulness under the Wire Act. Indeed, it was this tension between the Enforcement Act and the expansive view of the Wire Act that the Government now embraces that prompted the Department of Justice's Criminal Division to first request input from OLC in 2011. *See* 2011 Opinion at 1 (noting that an interpretation of the Wire Act as extending beyond sports betting may conflict with the Enforcement Act).

The 2018 Opinion fails to confront this tension, concluding (at 18) that the latter statute "simply does not" modify the earlier one. In doing so, the 2018 Opinion ignores the concrete conflict that results from adopting an interpretation of the Wire Act that could criminalize conduct that is lawful under the Enforcement Act, a later-in-time federal statute. *Cf. United States v. Arif*, 897 F.3d 1, 6 (1st Cir. 2018) (later enactment controls over earlier one if they are in "irreconcilable conflict"). Congress struck a careful balance when drafting and passing the Enforcement Act, yet the 2018 Opinion would upset that balance without providing a compelling reason for doing so.

III. The 2018 Opinion's Interpretation Is Not Entitled to Deference, and any Ambiguity Should Be Resolved in Plaintiffs' Favor.

The Government has not asserted that its revised interpretation of the Wire Act is entitled to deference—and for good reason. Courts do not defer to the federal government's interpretations of criminal statutes. *See, e.g.*, *Abramski v. United States*, 573 U.S. 169, 191 (2014) ("[C]riminal laws are for courts, not for the Government, to construe."). Although "[t]he Justice Department, of course, has a very specific responsibility to determine for itself" what a statute means "in order to decide when to prosecute," courts "have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference." *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).

For an agency's interpretation to be entitled to deference, "the interpretation must be in an area where Congress has delegated authority to the agency. In other words, the interpretation must relate to the agency's congressionally delegated administration of the statute, typically its exercise of regulatory authority." *Del Grosso v. Surface Transp. Bd.*, 811 F.3d 83, 84 (1st Cir. 2016). There is no indication that Congress delegated to the Department of Justice authority to adopt controlling interpretations of the Wire Act. Rather, OLC's interpretation of the Wire Act constitutes an "advisory opinion" that is not "entitled to deference under *Chevron*." *Crandon*, 494 U.S. at 177 (Scalia, J. concurring). Indeed, the Government itself acknowledges as much in arguing that the 2018 Opinion has no legal

force. *See* Gov't Br. 45 (quoting 28 C.F.R. § 0.25(a), (c), which "delegat[es] responsibility to OLC to 'render[] informal opinions and legal advice to the various agencies' and 'to the heads of the various organizational units of the Department [of Justice]" (alterations in original)). Nor is the Department of Justice's formal adoption of OLC's interpretation, *see* Gov't Br. 9, entitled to deference, *see United States v. Apel*, 571 U.S. 359, 369 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."). Deference is particularly inappropriate here because the Government's current view "conflicts with a prior interpretation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019).

Instead, to the extent this Court determines that the scope of the Wire Act is uncertain, the rule of lenity requires it to resolve that ambiguity in favor of a narrower reading, rather than the expanded interpretation sought by the Government. *See, e.g.*, *McNally v. United States*, 483 U.S. 350, 359-60 (1987); Antonin Scalia & Bryan A. Garner, *Reading Law* § 49 (1st ed. 2012). Adopting the narrower construction set forth in the 2011 Opinion would avoid the potentially severe practical consequences discussed above, while also "'ensur[ing] that criminal statutes will provide fair warning concerning conduct rendered illegal and strik[ing] the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.'" *Yates v. United States*, 574 U.S. 528, 1088 (2015) (quoting

Liparota v. United States, 471 U.S. 419, 427 (1985)).

CONCLUSION

The 2018 Opinion does not meaningfully address some of its most significant real-world effects, including the ways in which it would destabilize investments and policy choices made in reliance on the 2011 Opinion. Just as importantly, the 2018 Opinion's broadened interpretation of the Wire Act conflicts with other federal gaming laws—which respect and accommodate state laws, rather than overriding them—as well as the Supreme Court's recent explanation that the Wire Act applies only to wagering "on a sporting event." *Murphy*, 138 S. Ct. at 1483. For these and the other reasons given above, the District Court's judgment should be affirmed.

Respectfully submitted,

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March 4, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with the type-volume limitations of Rule 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 5,313 words, excluding the parts of the brief exempted by Rule 32(f). I further certify that this Brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020, I caused the foregoing Brief to be filed with the Clerk of the U.S. Court of Appeals for the First Circuit using the appellate CM/ECF system and to be served upon counsel for all parties via the CM/ECF system.

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