No. 19-1835

United States Court of Appeals for the First Circuit

NEW HAMPSHIRE LOTTERY COMMISSION; NEOPOLLARD INTERACTIVE LLC; POLLARD BANKNOTE LTD.,

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, Nos. 1:19-cv-163 & -170
(Hon. Paul J. Barbadaro)

BRIEF OF INTERNATIONAL GAME TECHNOLOGY PLC AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

Jonathan F. Cohn
Counsel of Record
Peter D. Keisler
Joshua J. Fougere
Daniel J. Hay
Derek A. Webb
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jfcohn@sidley.com

Counsel for International Game Technology PLC

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, International Game Technology PLC ("IGT") states that it is a public limited company established under the laws of England and Wales. As of December 31, 2019, De Agostini S.p.A., a closely held società per azioni formed under the laws of Italy, held approximately 50.6% of IGT's stock. IGT has no other parent company, and no publicly traded company owns 10% or more of IGT's stock.

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STATEMENT REGARDING ORAL ARGUMENT

The Coalition to Stop Internet Gambling, as *amicus curiae* in support of the government, has requested ten minutes of oral argument time to address why the Wire Act must be read to cover state lotteries, their employees, and their vendors. *See* Coalition Br. 2. If the Coalition's request is granted, pursuant to Federal Rule of Appellate Procedure 29(a)(8), IGT requests an equal length of time at oral argument. The Coalition has argued that state lotteries themselves and lottery vendors, like IGT, are subject to prosecution under the Wire Act. *See* Coalition Br. 25-26. Neither Appellee has responded to the Coalition's argument in their brief. Therefore, to the extent the Court permits the Coalition to present argument, IGT would be in the best position to respond to the Coalition's arguments.

INTEREST OF *AMICUS*[1] AND SUMMARY

International Game Technology PLC (with its subsidiaries, "IGT") is the largest gaming company in the world and the largest lottery services provider in the United States. IGT provides equipment and services for 37 of the 46 U.S. lotteries and is the primary lottery contractor in 25 of those states. IGT is also a leading innovator in "iLottery," which allows state lotteries to sell lottery tickets over the internet to in-state customers. In fact, the two states (New York and Illinois) whose requests led to the 2011 Office of Legal Counsel ("OLC") opinion contracted with IGT to launch their iLottery programs.

Lotteries are a core sovereign function of the states, and have been since "the colonial period and the early years of the Republic." Steven G. Bradbury, *Scope of Exemption under Federal Lottery Statutes for Lotteries Conducted by a State Acting Under Authority of State Law*, 32 O.L.C. 129, 129 (2008) [hereinafter, "2008 OLC Op."]. For that reason, throughout American history, Congress has sought to

[1] All parties consent to the filing of this brief. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than IGT or its counsel contributed money intended to fund preparing or submitting the brief.

"accommodate the promotion of [] state-run lotteries." *Id.* at 129-30; *accord Murphy v. NCAA*, 138 S. Ct. 1461, 1483 (2018) ("federal policy … respect[s]" state policy choices on gambling).

Lottery games are also vital revenue sources for states. In fiscal year 2018, state lotteries generated over $80 billion in gross revenue, the net proceeds of which funded important causes like education, infrastructure, and pensions. Today, virtually all state-sanctioned lotteries rely on wire transmissions. Everything from instant-win scratch tickets to iLottery uses wires to accomplish basic functions like accepting purchases, validating wins, and disbursing winnings. Popular games like Mega Millions and Powerball are inherently interstate because they involve one prize pool for ticket purchasers in multiple states. As a result, OLC's new interpretation of the Wire Act will force all states either to abandon or severely limit their lottery programs, or to operate under the looming threat of federal felony prosecution.

IGT urges the Court to affirm the decision below and to avoid crippling state-authorized lotteries nationwide. IGT focuses on three points: (I) the Wire Act is limited to sports betting; (II) even if the Wire

Act reached some non-sports betting, it does not reach state lotteries; and (III) the Court should resolve these issues now, rather than subject states to months or years of dire uncertainty.

First, the Court should affirm because the district court correctly rejected the government's novel and expansive interpretation of the Wire Act. The entire premise for the government's position is that the Act *unambiguously* reaches non-sports betting. OLC did *not* conclude in the alternative that, if the statute is ambiguous, the more sensible construction is that it applies to non-sports betting. Nor could the agency reach that conclusion, in light of numerous tools of statutory interpretation, OLC precedent, legislative history, and the Act's manifest purpose. Instead, OLC believed itself bound by "the plain language of the statute." ADD.68.

But several courts have examined this issue, and not a single one has agreed with the government's interpretation. Further, the government itself took the contrary view for many years. The Act is thus, at best, ambiguous, and the district court properly employed the full range of interpretative tools to conclude that the Wire Act applies only to "sporting event[s] or contest[s]," 18 U.S.C. § 1084(a), just as

eight other federal judges—including three judges of this Court—have recognized.

Second, even if the Wire Act applied to some non-sports gambling, it does not apply to state lotteries or their agents. The Wire Act applies to "[*w*]*hoever* being engaged in the business of betting or wagering." 18 U.S.C. § 1084(a) (emphasis added). The term "whoever" "does not include the sovereign" absent "some indication in the text or context of the statute that affirmatively shows Congress intended to include the Government." *Return Mail, Inc. v. USPS*, 139 S. Ct. 1853, 1855, 1861-62 (2019). Here, there is none. Moreover, a statute should not be construed to reach agents of the state acting within the scope of their agency unless Congress has "clearly" indicated such a scope, *McNally v. United States*, 483 U.S. 350, 360 (1987), because subjecting agents of the state to laws that do not apply to the state itself will often "work obvious absurdity." *Nardone v. United States*, 302 U.S. 384, 383 (1937). There is no indication here, much less a clear indication, that Congress intended to interfere with state lotteries by ensnaring their employees and contractors under the Wire Act.

Finally, the Court should not postpone a decision on these critical issues. The gaming industry relied on the 2011 OLC opinion to develop lottery infrastructure, and OLC's 2018 opinion recognizes the potential risk and interference that it poses for state lotteries in particular. ADD.88-89. The district court's order setting aside the OLC opinion was not only correct on the substance and compelled under the APA, 5 U.S.C. § 706(2), but it also provided freedom to operate for the other 45 state lotteries who would otherwise face the imminent threat of prosecution. Reversing the decision below on jurisdictional grounds would plunge every state lottery back into uncertainty.

The government argues that it has not yet decided to subject lotteries to the Wire Act, and claims that it should be given more time to resolve the issue. But the 2018 OLC opinion explicitly mentions lotteries, and the government has not limited or withdrawn that opinion despite the problems and uncertainty it created. *More than a year has passed* since OLC issued its opinion, and the government still professes that it is considering the issue. Meanwhile, the entity that sparked this whole disturbance (*amicus* the Coalition to Stop Internet Gambling)

argues vigorously that state-sanctioned lotteries *do* violate the Wire Act.

Enough time has passed, and the erroneous OLC opinion remains in place, looming over the industry. The government's litigation-driven memoranda of forbearance give no peace of mind to state lotteries and their agents, and they do nothing to limit the government from enforcing the Wire Act against state lotteries as soon as it is freed from this litigation. The Court should reject the government's gamesmanship, reach the merits, and hold that the Wire Act applies only to sports betting.

ARGUMENT

I. The District Court Correctly Rejected the Government's Expansive Interpretation of the Wire Act.

The district court correctly considered the Wire Act's text, structure, purpose, and context to hold that it is directed narrowly at the issue of sports betting. IGT agrees fully with the statutory arguments advanced by Appellees and emphasizes two key points.

First, OLC concluded the Wire Act *unambiguously* applied to non-sports betting, and on that basis alone, refused to consider other indicia

of statutory meaning. *See* Gov. Br. 35-37; ADD.68; ADD.82-83. OLC's premise is untenable.

OLC's no-ambiguity position is internally inconsistent with its admission that the statute is "not a model of artful drafting." ADD.68. It is also irreconcilable with the Wire Act's nearly sixty-year history. Every Article III judge to consider the statute's scope has rejected the government's position. Nine of ten judges, including a three-judge panel of this Court, concluded that the Act is limited to sports betting. *See United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014); *In re MasterCard Int'l Inc.*, 313 F.3d 257, 262-63 (5th Cir. 2002), *affirming* 132 F. Supp. 2d 468 (E.D. La. 2002); *United States v. DiCristina*, 886 F. Supp. 2d 164, 215 (E.D.N.Y. 2012), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013); ADD.28-53. The tenth, also rejecting the government's position, held the entire first clause of the Wire Act applied only to sports betting. *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah 2007).[2] Likewise, OLC's 2011 opinion, senior DOJ officials, and the enacting legislators all rejected the government's

[2] As NeoPollard explains (at 8 n.3), the magistrate's report and recommendation in *United States v. Kaplan* was never adopted.

interpretation. *See* NeoPollard Br. 4-9, 55-61; ADD.47-53. Surely the Wire Act cannot *unambiguously* mean the opposite of what every branch of government previously said it means. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996) (it is "difficult indeed to contend" a statutory term is unambiguous where courts disagree).

Second, the government's statutory construction argument relies heavily on the last-antecedent canon. The government describes it as a "default rule," Gov. Br. 33, but it is really the opposite. The Supreme Court has cautioned that the canon applies only "where no contrary intention appears." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *accord Buscaglia v. Bowie*, 139 F.2d 294, 296 (1st Cir. 1943) (last-antecedent canon "is of no great force"). In fact, the treatise OLC cited heavily in its 2018 opinion relies on an article dubbing the government's featured canon "a rule of last resort." *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 145 & n.3 (2012).

Other canons of construction offer stronger evidence of the Wire Act's meaning. *See* NeoPollard Br. 37-54; NHLC Br. 42-51; ADD.31-47. Textually, the series-qualifier canon is more suitable. It states that, when a modifier "undeniably applies to at least one antecedent, and …

makes sense with [the rest], the more plausible construction [] is that it in fact applies to all." *United States v. Bass*, 404 U.S. 336, 339-40 (1971). And it applies when "several words are followed by a clause which is applicable as much to the first and other words as to the last," *Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014), as in § 1084(a). As the district court and Appellees explain, the statute's structure, context, purpose, and legislative history *all* support the district court's interpretation. It should be affirmed.

II. Even If the Wire Act Applied to Some Non-Sports Betting, It Would Not Reach State Lotteries.

One of the core reasons why the government's broader interpretation is wrong is that there is no indication—much less a "clear statement"—that Congress intended to upset the "balance of federal and state powers" over gambling regulation. *Gregory v. Ashcroft*, 501 U.S 452, 460 (1991); *see Bass*, 404 U.S. at 339 (rejecting interpretation of criminal statute that would "mark a major inroad into a domain traditionally left to the States"). That same principle underscores why the Wire Act does not extend to state lotteries. Even if the Court concludes the Act reaches some non-sports betting, it should hold that the statute does not reach state lotteries.

A. The Wire Act Does Not Apply to State Lotteries or Their Agents.

The government's *amicus*, the Coalition to Stop Internet Gambling, is a group funded by the land-based casino industry that played a role in OLC's decision to change its position on the scope of the Wire Act.[3] In its brief, the Coalition takes the astonishing position that the Wire Act subjects states themselves, along with their agents, to felony federal charges. The Coalition is mistaken, and the ramifications of its position, if adopted, would be extreme.

1. The Wire Act Does Not Apply to State Lotteries.

"In the absence of an express statutory definition, the Court applies a longstanding interpretive presumption that 'person' does not include the sovereign." *Return Mail*, 139 S. Ct. at 1861-62. That same presumption applies to the synonymous term "whoever," 1 U.S.C. § 1,

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[3] *See, e.g.*, Nicholas Confessore & Eric Lipton, *Seeking to Ban Online Betting, G.O.P. Donor Tests Influence*, N.Y. TIMES (Mar. 27, 2014), https://www.nytimes.com/2014/03/28/us/politics/major-gop-donor-tests-his-influence-in-push-to-ban-online-gambling.html; Tom Hamburger et al., *Justice Department Issues New Opinion that Could Further Restrict Online Gambling*, WASH. POST. (Jan. 14, 2019), https://www.washingtonpost.com/politics/justice-department-issues-new-opinion-that-could-further-restrict-online-gambling/2019/01/14/a501e2da-1857-11e9-8813-cb9dec761e73_story.html.

and controls this case. *See United States v. Lara*, 181 F.3d 183, 198 (1st Cir. 1999) ("whoever" typically does not include the government); *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"). State lotteries are arms of the state, and thus are presumptively not "whoever[s]" regulated by the Wire Act.

The Coalition (at 7) seeks to sidestep the presumption altogether based on the unremarkable truism that it is "not absolute" or "set-in-stone." No presumption is. But the Coalition needs "some indication in the text or context … that *affirmatively shows* Congress intended to include the Government." *Return Mail*, 139 S. Ct. at 1862 (emphasis added). It has none, and instead focuses on outdated, pre-Dictionary Act cases construing the unique language and context of those statutes—some of which did not even use the word "person" or "whoever." *See* Coalition Br. 7-8, 22-24.[4] The Coalition cites to nothing in the Wire Act itself to displace the *Return Mail* presumption.

[4] Most of the Coalition's cases merely recognize that Congress did not immunize illegal conduct when the victim happens to be a sovereign. *See, e.g.*, *Georgia v. Evans*, 316 U.S. 159, 161 (1942) (state

In stark contrast, other gaming statutes show that Congress knows how to bring states within their ambit when it wants to. The Interstate Horse Racing Act, for example, expressly defines "person" to include a "State or political subdivision thereof." 15 U.S.C. § 3002(1). The Professional and Amateur Sports Protection Act expressly applied to both "person[s]" and "governmental entit[ies]." 28 U.S.C. § 3702, *abrogated by Murphy*, 138 S. Ct. 1461. The U.S. Code is replete with additional examples. *See, e.g.*, 49 U.S.C. § 31141. That Congress made no comparable mention of states in the Wire Act should be dispositive.

Unable to find an affirmative showing of legislative intent, the Coalition manufactures a series of *per se* rules for reading "whoever" to reach the states. Each is either inapplicable or misstated.

First, the Coalition claims that the Supreme Court has limited the presumption to "the sovereign by or under whom the law was enacted."

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may bring a claim under the Sherman Act); *United States v. Persichilli*, 608 F.3d 34, 37-39 (1st Cir. 2010) (government can be a victim under a Social Security fraud statute). The presumption "is weakest" in that scenario. *Return Mail*, 139 S. Ct. at 1862. Other opinions cited by the Coalition turned on the facts and history unique to each statute. *See, e.g.*, *California v. United States*, 320 U.S. 577, 585-86 (1944) (Congress intended to regulate public docks and piers); *Green v. United States*, 76 U.S. 655 (1869) (an evidentiary rule that does not use the term "person" or "whoever" applied in cases brought by the federal government).

Coalition Br. 11 (quoting *United States v. Fox*, 94 U.S. 315, 319 (1876)). That is false. The passage that the Coalition relies on comes from the summary of the parties' arguments, *not* the Court's opinion. *See Fox*, 94 U.S. at 320 (announcing "the opinion of the court"). In truth, the presumption "is *particularly applicable* where it is claimed that Congress has subjected *the States* to liability." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (emphases added). The Supreme Court has regularly invoked this presumption when a party seeks to apply a federal statute to a state. *See, e.g.*, *id.*; *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000); *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374 (1991).

Second, the Coalition (at 9) argues the presumption is "inapplicable where a State is acting in a business capacity." But the Coalition's cases all rest on a standard that the Supreme Court has since rejected as "unsound in principle and unworkable in practice." *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 541 n.6, 546-47 (1985).[5] In addition, the Coalition's premise is wrong, because a

[5] The Coalition argues (at 10 n.*) that *Garcia* did not actually reject this line of reasoning because the Supreme Court relied on it two years *before* it decided *Garcia*. That is illogical.

state lottery is "more governmental than proprietary in nature." *Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 100 (1st Cir. 2002). That is because lotteries, currently and historically, have been a critical "source of governmental funding." Charles J. Cooper, *Congressional Authority to Adopt Legislation Establishing a National Lottery*, 10 O.L.C. 40, 44 (1986) [hereinafter, "1986 OLC Op."]. In that context, a state lottery is no more a gambling "business" than a state bond department is a financial services "business."

The Coalition further claims (at 15) that "both courts and legislatures have consistently read [other gaming and lottery] statutes to include States." Wrong again. Not a single case the Coalition cites holds, or even suggests, that *States* (or their agents) are subject to all federal gaming laws, as the Coalition argues. Rather, the Coalition's cases all concern *private* action by private individuals or entities that indirectly involved state-sanctioned lotteries. For example, in *United States v. Fabrizio*, the Court reinstated an indictment of a defendant accused of transporting New Hampshire lottery tickets to illegally resell them in New York. 385 U.S. 263, 268-69 (1966). Far from authorizing the inflexible application of federal gaming law to state lotteries and

their agents, *Fabrizio* recognizes a "congressional policy of respecting the individual gambling policies of the States," including New York's policy at the time of prohibiting "the sale of lottery tickets … regardless of the legality of the lottery in the place of drawing." *Id.* at 268-69. It would pervert this policy to read the Wire Act to regulate—through criminal sanctions—states' ability to sell tickets to their own citizens.

Further, *Fabrizio* and the other cases that the Coalition cites involves statutes that, in contrast to the Wire Act, clearly do apply to private activities that relate to state lotteries. For example, in two cases, private broadcasters challenged a federal law expressly applicable to radio, print, and television advertisements for lotteries. *United States v. Edge Broad. Co.*, 509 U.S. 418, 422-23 (1993); *N.Y. State Broad. Ass'n v. United States*, 414 F.2d 990, 995-96 (2d Cir. 1969).[6] But it is unremarkable and irrelevant that the courts construed a statute regulating *lottery* advertisements to reach *state* lottery advertisements, given that lotteries historically have been offered by

[6] The first case held that the specific broadcasting statute "intended to prohibit broadcast of lottery information regardless of the legality of the lottery under local law." *N.Y. State Broad.*, 414 F.2d at 996. By the second, the parties did not even dispute the statutes' scope. *Edge Broad.*, 509 U.S. at 424.

state government. This is akin to construing a statute regulating fire departments to reach municipal governments rather than narrowly targeting private fire departments. The Wire Act, however, does not expressly reach lotteries or use any other language suggesting that *States themselves* would come within its scope.

Finally, many of the statutes the Coalition cites were amended to expressly carve out "lotter[ies] conducted by [a] State acting under the authority of State law." Pub. L. No. 93-583, 88 Stat. 1916 (1975). The purpose of these amendments, OLC itself has recognized, was to "accommodate the promotion of [] state-run lotteries." 2008 OLC Op. 130. The Wire Act, however, was not amended, which reflects Congress's understanding that the Wire Act—unlike the amended statutes, which all expressly covered lottery broadcasts, lottery paraphernalia, and other lottery-related conduct—did not reach lotteries at all. It would make no sense 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.

In the end, the construction the Coalition advances is equal parts unprecedented, unsupported, and unwise. No court has ever ruled that the states are subject to criminal liability under general provisions of federal gaming law. This Court should not be the first.

2. The Government Cannot Circumvent the "Whoever" Limitation by Prosecuting State Employees or Contractors.

Given that "states can act only through human beings," *Wall v. King*, 206 F.2d 878, 882 (1st Cir. 1953), the presumption against applying federal laws to states also shields state employees and contractors acting at the states' direction. In 2008, OLC recognized that it is often "necessary" for state lotteries to "contract with private firms to provide goods and services." *See* 2008 OLC Op. 139. There is no reason to upend that "necessary" aspect of state lotteries by subjecting states' agents to federal prosecution.

State employees and agents "are impliedly excluded from language embracing all persons" whenever applying the statute in such a manner would "work obvious absurdity" by interfering with core state functions, such as applying "a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm." *Nardone*

States, 302 U.S. at 384. In this context, "Congress has generally exempted state-run lotteries and casinos from federal gambling legislation" and has, as a policy, sought to "promote" states' abilities to define their own lottery and gaming statutes. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999).

It would "work an obvious absurdity" to conclude that Congress protected state lotteries while threatening anyone who works for those lotteries to federal criminal liability. If that were actually what Congress intended, then it "must speak more clearly than it has." *McNally*, 483 U.S. at 360.[7] As OLC recognized in 2008, "contract[s] with private firms to provide goods and services" to state lotteries are not only permissible but often "necessary." 2008 OLC Op. 129. It would be plainly absurd for the Wire Act to be read to threaten these "necessary" contractors with criminal liability.

As for state vendors, they are not subject to the Wire Act for an additional reason: they are not "in the business of betting or wagering." 18 U.S.C. § 1084(a). Persons "engaged in the business of betting or

[7] For example, 18 U.S.C. § 241 and 42 U.S.C. § 1983 "speak[] more clearly" by covering persons acting "under color of" state law.

wagering" are "bookmakers"; they are the ones who "take bets, they receive them, they handle them." *United States v. Tomeo*, 459 F.2d 445, 447 (10th Cir. 1972); *see also United States v. Sellers*, 483 F.2d 37, 45 (5th Cir. 1973), *overruled on other grounds by United States v. McKeever*, 905 F.2d 829 (5th Cir. 1990); *Kelley v. United States*, 89 S. Ct. 391, 393 n.3 (1968) (Warren, C.J., dissenting from denial of certiorari) ("The essential element [of a Wire Act charge] is that the accused be a professional gambler."). Equipment providers are not bookies.

The Wire Act's history confirms this. An earlier version applied to anyone who "leases, furnishes, or maintains any wire communication facility." S. 1656, 87th Cong. § 2 (1961) (as introduced). But Congress deleted that text because "the individual user, engaged in the business of betting or wagering, is the person at whom the proposed legislation should be directed." S. Rep. No. 87-588, at 2 (1961). In other words, the statute targets "the gambler who makes it his business to take bets or to lay off bets," 107 Cong. Rec. 15,503, 16,534 (1961). By contrast, the Paraphernalia Act was enacted on the same day and *does* expressly cover those who provide equipment or services to gaming or lottery

businesses. 18 U.S.C. § 1953. Congress therefore knew how to regulate equipment makers but deliberately chose not to do so in the Wire Act.

B. Construing the Wire Act to Cover State Lotteries or Their Agents Would Have Disastrous Consequences.

Lotteries are critical sources of revenue and have been since "the colonial period and the early years of the Republic." 2008 OLC Op. 130; *accord* 1986 OLC Op. 43 ("[L]otteries were an important source of governmental revenues at the time the Constitution was drafted."). Colonies sanctioned 158 lotteries that were used to finance bridges, roads, schools, churches, wars, and more. *Id.* at 43-44. Many of the Founding Fathers even organized or sponsored early lotteries. *See, e.g.*, Benjamin Franklin, *Scheme of the First Pennsylvania Lottery*, Penn. Gazette (Dec. 5, 1747), https://founders.archives.gov/documents/Franklin/01-03-02-0097; Ron Chernow, *Washington: A Life* 117-18 (2011); 2 George Tucker, *The Life of Thomas Jefferson, Third President of the United States* 544-50 (1837).

Today, almost all states offer lotteries, which collectively generate more than $80 billion in annual gross revenue. *See* Terri Markle et al., *LaFleur's 2018 World Lottery Almanac* 243 (26th ed. 2018). Lottery is often one of the largest sources of state revenue. *See, e.g.*, Economic

Progress Institute, *Budget Matters: An Overview of Rhode Island's Budget Revenues* 2 (Oct. 2016), http://www.economicprogressri.org/wp-content/uploads/2016/10/An-Overview-of-Rhode-Island%E2%80%99s-Budget-Revenues.pdf (lottery accounts for 10% of funds). In fact, lotteries are so essential to states that OLC observed that the Framers may have omitted lottery from the Constitution's revenue-raising provisions out of concern that national lotteries would compete with states' ability to raise lottery revenue. *See* 1986 OLC Op. 43-45.

Applying the Wire Act to state lotteries would criminalize most facets of modern lotteries. That is because practically all lottery games rely on interstate wire transmissions. By way of background, when a lottery customer buys a scratch-off card or picks numbers for a nightly draw game, that purchase is entered into a lottery-specific terminal that routes the purchase to a central data center. Through that process, the state lottery authorizes the wager and allows the vendor to issue the ticket. These data centers are often located in other states, and wire transmission routing can be unpredictable. A similar process repeats itself on the back end: when a customer presents a winning lottery card, retailers use their lottery terminals to report the win to the

data center, which validates the win and authorizes payment. In addition, popular games like Mega Millions and Powerball are interstate by design and would have to be discontinued. Thus, complying with the Wire Act—if possible, *see infra* 32—would cost state lotteries billions of dollars. There is no reason to think Congress intended that fate for core state functions that have been around for centuries.

The Coalition disagrees. In its view, state lotteries must be subject to the Wire Act in order to hold back an inevitable wave of states "undermin[ing] the gaming laws of other States" by selling lottery tickets across state lines. *E.g.*, Coalition Br. 5-6. The Coalition's speculation is unfounded. Nothing like that occurred in the seven years between the 2011 and 2018 OLC opinions, or in the eighteen years since the Fifth Circuit's decision in *In re Mastercard*. That is because, separate from the Wire Act, there are numerous legal and practical impediments preventing a state from expanding its lottery beyond state lines. There are lottery-specific federal laws on point. The Anti-Lottery Law, for one, prohibits operating a lottery or mailing lottery tickets in interstate commerce. 18 U.S.C. §§ 1301-03. State lotteries are exempt

from those prohibitions, but *only* to the extent they operate *in state*. 18 U.S.C. § 1307(b). The Paraphernalia Act also prohibits the interstate transportation of lottery tickets and other equipment, unless such materials are "designed for use *within a State* in a lottery *conducted by that State* acting under authority of State law." 18 U.S.C. § 1953 (emphases added).

There are also interlocking state laws that impede states from offering lotteries beyond their boundaries. Take, for example, the Coalition's made-up fear that "New Hampshire could sell its lottery tickets … to people in Alabama." Coalition Br. 6. That is not possible under New Hampshire law, which permits its lottery to operate only "within the state" at locations owned or controlled by the state or its subdivisions. N.H. Rev. Stat. § 284:21-h(I)(a), (c); *see also id.* § 647:1 (criminally prohibiting all lotteries not authorized by law). And it is not possible under Alabama law either, which prohibits all lottery activity. Ala. Const. art. IV § 65. States with lottery, moreover, generally permit only *their* lotteries to operate and prohibit unlicensed ones. *See, e.g.*, R.I. Const. art. VI § 15.

In sum, the only result that would "upend all federal gaming regulation," Coalition Br. 4, would be to interpret the Wire Act to reach state lotteries, their employees, and their agents, thereby making criminal what has been a steady component of state governments since before the founding of this country.

III. The District Court Was Correct to Exercise Jurisdiction Over and Set Aside the OLC Opinion.

Hoping to avoid the merits altogether, the government asks the Court to dismiss the appeal as non-justiciable, either because the OLC opinion is not reviewable under the APA or because the case does not present an Article III case or controversy. Both arguments fail. The Court should reject the government's efforts to kick the jurisdictional can down the road, which would create needless uncertainty for state lotteries and their agents.

A. The 2018 OLC Opinion Is Final Agency Action.

An agency action is final, and thus reviewable under 5 U.S.C. § 704, when it (1) "mark[s] the consummation of the agency's decisionmaking process," and (2) is the source from which "legal consequences will flow," meaning that it "alter[s] the legal regime to

which the action agency is subject." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Both are true here.

1. The consummation requirement screens out actions that are "merely tentative or interlocutory." *Id.* at 178. Once all legally required parties have signed off on an action and no further action is legally required, the process has consummated. *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948).

That is what happened. The government does not contend that the 2018 OLC opinion required further sign off, 28 C.F.R. § 0.25, or, even if it did, why the Deputy Attorney General's January 2019 memo adopting OLC's analysis as "*the Department's position*" would be insufficient, ADD.90. This lawsuit challenges OLC's official declaration that the Wire Act extends to non-sports betting. The fact that the government may later rely on the 2018 OLC opinion to initiate *another* agency action—*i.e.*, prosecution of a state lottery or vendor, Gov. Br. 45, 47-48—has no effect on the finality of the agency action actually under review.

2. Because OLC decisions are binding within the executive branch, the decision to withdraw and replace the 2011 OLC decision

"alters the legal regime to which the action agency is subject." *Bennett*, 520 U.S. at 169-70. The 2018 OLC opinion upset the legal regime by authorizing a federal criminal prosecutor to bring a Wire Act charge for non-sports betting. Subjecting parties to new potential liability—regardless of whether such liability ever actually befalls the party—is reviewable. *See U.S. Army Corps of Eng'rs v. Hawkes*, 136 S. Ct. 1807, 1814-15 (2016) ("denial of the safe harbor" that is "binding on the Government" is a final agency action). The government's litigation-motivated decision to temporarily pause prosecutions did not retroactively render its earlier decision non-final.

The government tries characterizes the 2018 OLC opinion as merely "predecisional and deliberative," with no self-effecting legal consequences. Gov. Br. 45-46, 49-50. That is wrong. The 2018 opinion describes itself as "binding legal advice within the Executive branch," ADD.85—the opposite of advisory. By regulation, the Attorney General has delegated such authority to OLC, 28 C.F.R. § 0.25, and OLC opinions are broadly recognized as final within the Executive. *See* Memorandum from David J. Barron, Acting Asst. Atty. Gen., to Attorneys of the Office, Best Practices for OLC Legal Advice and

Written Opinions (July 16, 2010), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf (OLC "provide[s] controlling advice to Executive Branch officials"); *see also* Walter Dellinger et al., *Principles to Guide the Office of Legal Counsel* (2004), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2927&context=faculty_scholarship (OLC decisions may "constrain the administration's pursuit of desired policies"). The cases the government cites, moreover, all involve interpretations of civil statutes. The opinion here, by contrast, opens the door to *criminal* prosecution. And it is well-established that a party need not "await and undergo a criminal prosecution as the sole means of seeking relief." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010).

The government also cites FOIA cases, Gov. Br. 46-47, but they actually underscore why this OLC opinion *is* final agency action. Under Exemption 5 to FOIA, 5 U.S.C. § 552(b)(5), agencies may refuse to produce legal analyses that do not represent the "working law" of the agency. Some circuits have found that OLC opinions do not reflect an agency's working law until it has "'adopted' the opinion as its own." *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 922

F.3d 480, 486 (D.C. Cir. 2019). Even accepting that this "working law" analysis is instructive, the Department of Justice *has* adopted the OLC's analysis as "the Department's position on the meaning of the Wire Act." ADD.90. The position of the Department of Justice is not in doubt, and it is the Department of Justice—not any other agency—that brings criminal prosecutions under the Wire Act. FOIA is simply inapposite.

3. IGT has a tangible interest in ensuring that the district court's decision to set aside the 2018 OLC opinion is affirmed. The district court provided two distinct remedies. First, the court issued a declaratory judgment in favor of NHLC and NeoPollard. That remedy reaches only the parties. ADD.53-57. In addition, the court provided relief under the APA by "hold[ing] unlawful and set[ting] aside" the 2018 OLC opinion. ADD.58-59; *see* 5 U.S.C. § 706(2) (reviewing court "shall … hold unlawful and set aside"). That decision inured to the benefit not only of the plaintiffs but to all segments of the regulated gaming industry, since vacatur of the 2018 OLC opinion reinstated the 2011 OLC opinion. Under the 2011 OLC opinion, IGT and its state partners have freedom to operate and a legal defense from potential

prosecution under the Wire Act. IGT therefore has a concrete and particular interest in ensuring on appeal that this APA remedy is affirmed.

B. State Lotteries Face a Credible Threat of Prosecution.

The district court was also correct to exercise subject-matter jurisdiction, notwithstanding the government's self-serving indecision on the lottery question. Notably, the Department of Justice has not withdrawn or amended the OLC opinion, which it certainly could do so. Instead, it has exercised prosecutorial discretion during the pendency of this litigation in a transparent attempt to deprive the courts of jurisdiction. Four particular facts, in addition to those raised by Appellees, demonstrate why this dispute is justiciable.

First, OLC's 2018 opinion does not "simply declare, in the abstract, how the Department will interpret a particular statute." Gov. Br. 20. The opinion explicitly mentions state lotteries, acknowledges that states "began selling lottery tickets via the Internet after the issuance of [the] 2011 Opinion," and warns that those programs would no longer be "protect[ed]" absent *congressional* intervention. ADD.88-89. The opinion reverses the 2011 OLC opinion, which was issued

specifically to address the lawfulness of proposals *by state lotteries*. ADD.93. The January 2019 memorandum then cautions "businesses that relied on the 2011 OLC opinion"—the *only* ones identified are state lotteries—to "bring their operations into compliance with federal law" or face prosecution. ADD.90. That places lotteries and their vendors in the "rock and a hard place" scenario of choosing between "costly compliance … or risky noncompliance." *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 206-07 (1st Cir. 2002).

Second, the government's eleventh-hour attempt to moot this case had no effect on the district court's subject-matter jurisdiction. While it is true that a "disavowal of *any intention to prosecute*" could moot a pre-enforcement challenge, Gov. Br. 23 (emphasis added), the government has done nothing of the sort. It has merely delayed prosecutions temporarily, in an effort to evade jurisdiction. The supposed disavowal here is *not* categorical and permanent, *see Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 192 (3d Cir. 1990), nor is future prosecution contingent on the acts of third parties that are "speculative at present," *Reddy v. Foster*, 845 F.3d 493, 502-03 (1st Cir. 2017). The government can change its mind at any time. There has been no

"affirmative[] represent[ation] that [the government] does not intend to prosecute [lotteries] because it does not think [they are] prohibited by the statute." *Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014).

Third, the supposed interim relief the government offers—90 days forbearance after a decision on whether it thinks the Wire Act covers lotteries—is cold comfort at best. Even if 90 days were enough time to litigate the issue (highly unlikely), it is certainly not enough time for lotteries to transform their operations to try to comply with the government's new position. Multijurisdictional games like Mega Millions and Powerball and iLottery would be forbidden overnight with no conceivable fix.

Changes to retail lottery, moreover, would likely take years and be imperfect even then. As explained above (at 21-22), most lottery games today rely on interstate wires. Reconfiguring these networks to involve only in-state data centers would require that lotteries be taken offline for months or years and would be enormously expensive. A vendor would need to write off large parts of its existing data and communications network, lay out millions of dollars in new capital expenditures, and incur additional operational expenses to replicate

networks in every state. And after all of that, the solution would still be incomplete, because state lotteries and their vendors have no control over how telecommunications companies route transmissions. A lottery ticket purchased in Newport could be sent to a data center in Providence by way of a server in Stamford, Boston, or Sacramento depending on the telecommunications provider's routing protocol.

These consequences would be devastating to state lotteries and the state programs that rely on lottery revenues. Even a short-term interruption would force states to scramble to replace millions or even billions of dollars of revenue or cut vital services.

Finally, the government has had ample opportunity to make clear that it does not intend to go after lotteries, but has not done so. In the government's silence, the Coalition—which played a major role in OLC's decision to revisit the Wire Act in the first place—has argued that all lotteries and their agents face the risk of criminal prosecution. That raises real concerns that the government will open the door to state lottery prosecutions as soon as it is freed from this litigation.

It has now been *over a year* since the 2018 OLC opinion was published, the lottery ramifications of which were immediately

apparent.[8] The issue was raised in the district court, and the government was pressed to say whether lotteries are subject to the Wire Act. *See* ADD.23 n.6. It refused. *See* Suppl. Memo, ECF No. 70. The government could disavow the position of its amicus and pledge not to prosecute state lotteries at any point, but it cannot equivocate its way to a reversal of the decision below.

CONCLUSION

For these reasons, and those provided by Appellees, the Court should affirm the district court's judgment.

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Respectfully submitted,

/s/ Jonathan F. Cohn
Jonathan F. Cohn (No. 1121592)
Peter D. Keisler (No. 1074286)
Joshua J. Fougere (No. 1192973)
Daniel J. Hay (No. 1192972)
Derek A. Webb (No. 1190616)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 736-8000
Fax: (202) 736-8711
jfcohn@sidley.com

Counsel for International Game Technology PLC

[8] *See, e.g.*, N. Am. Ass'n of State & Provincial Lotteries, NASPL Responds to DOJ Reversal of Opinion (Feb. 4, 2019), http://www.naspl.org/img/press/NASPL%20Responds%20to%20the%20DOJ%20Reversal%20of%20Opinion.pdf.

CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure 29(a)(4)(g), I certify that:

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 6,497 words, as determined by the Microsoft Word 2016 word-processing system used to prepare the brief, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Jonathan F. Cohn
Jonathan F. Cohn

CERTIFICATE OF SERVICE

I certify that I caused this document to be electronically filed with the Clerk of the Court using the appellate CM/ECF system on March 4, 2020. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Jonathan F. Cohn
Jonathan F. Cohn