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June 18, 2021

Honorable Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Lisa O. Monaco
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Department of Justice's interpretation of Wire Act, 18 U.S.C. § 1084

Dear Attorney General Garland and Deputy Attorney General Monaco:

We, the undersigned State Attorneys General, are seeking clarity and finality from the Department of Justice regarding its interpretation of the Wire Act, 18 U.S.C. § 1084. As you may be aware, 25 State Attorneys General wrote to your predecessors on March 21, 2019 to express our strong objection to the Office of Legal Counsel's (OLC's) Opinion "*Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*," which reversed the Department's seven-year-old position that the Wire Act applied only to sports betting. Many States relied on that former position to allow online gaming to proceed. Since that letter, the U.S. Court of Appeals for the First Circuit upheld a challenge to the new OLC Opinion, holding that the Wire Act applies only to sports betting.

After the First Circuit decision, it is vital that States get clarity on the Department's position going forward. States and industry participants need to understand what their rights are under the law without having to file suit in every federal circuit, and finality is needed so the industry may confidently invest in new products and features without fear of criminal prosecution. As such, we are asking the Department to adopt the First Circuit's holding and issue (1) a memorandum rescinding the January 15, 2019, memorandum (which adopted the 2018 Opinion as

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the official interpretation of the Department), and instead adopting the First Circuit's interpretation; and (2) an OLC Opinion rescinding the 2018 Opinion.

The Wire Act was part of a broad anti-organized-crime initiative in the 1960s. Specifically, the Wire Act targeted bookmaking, which was a significant source of revenue for organized crime syndicates, and thus, in the words of Department of Justice, the law applied only to sporting events.¹ Until the 2000s, the Department's position was consistent with Congress's intent that the Wire Act apply only to sports betting. But in 2002, the Department advised the Nevada Gaming Control Board that "the Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style gambling." (Letter from Michael Chertoff, Assistant Att'y Gen., to Peter C. Bernhard, Nev. Gaming Comm'n (Aug. 23, 2002)). And in 2005, the Department warned the Illinois Lottery that the Wire Act prohibits "the purchase of lottery tickets over the Internet." (Letter from Laura H. Parsky, Deputy Assistant Att'y Gen., to Carolyn Adams, Ill. Lottery Superintendent (May 13, 2005)).

In light of this contradiction, the States of New York and Illinois wrote to the Department of Justice in 2011, seeking clarification as to whether the Wire Act applied to the proposed online sale of lottery tickets. In response, the Office of Legal Counsel issued a formal opinion declaring that the Wire Act's prohibitions with respect to the interstate transmission of bets, wagers, or certain related information or communications apply only to those involving sporting events—meaning that sales of lottery tickets online are not covered by the Act. *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). As noted, many States, including Michigan, relied on that Opinion and invested in their online lottery platforms, having been assured that doing so would not run afoul of federal criminal laws. The industry boomed in the following years, and billions of dollars have since been raised to support education and other important infrastructural needs. In Michigan alone, internet Lottery sales contributed \$70 million to schools in FY 2018.

¹ See, e.g., S. Rep. No. 87-588, at 3 (1961), *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 Before the S. Comm. on the Judiciary, 87th Cong.* 278 (1961) (statement of Assistant Attorney General of the Criminal Division Herbert Miller) (explaining that the bill was "limited to sporting events or contests"); *Report of Proceedings: Hearing Before the S. Comm. on the Judiciary, Exec. Sess., 87th Cong.* 55 (1961) (statement of Deputy Attorney General Byron White) (confirming that the bill was "aimed now at those who use the wire communication facility for the transmission of bets or wagers in connection with a sporting event").

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Unfortunately, in late 2018 the Department drastically altered its interpretation of the Wire Act. Without seeking input from state governments and without a formal request to do so, the Department adopted this new reading in its Opinion, which issued in 2018 and was published in 2019. See *Reconsidering Whether the Wire Act Applies to Non Sports Gambling*, 42 Op. O.L.C. (2018). Deputy Attorney General Rod Rosenstein thereafter adopted the OLC Opinion as the official position of the Department in a January 15, 2019 memorandum. See Rod Rosenstein, U.S. Dep't of Just., *Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling* (2019).

Thus, with the stroke of a pen, the Department suddenly declared that state-operated online platforms—which support schools, services for senior citizens, first responders, infrastructure projects, and other critical fiscal needs—were part of a criminal enterprise. The New Hampshire Lottery Commission, along with one of its vendors (which it shares with Michigan), promptly filed suit to challenge the new interpretation. Ultimately, the First Circuit struck down the 2018 Opinion and restored the proper interpretation of the Wire Act as set forth in the 2011 Opinion, limiting the scope of the statute to sports betting. See *N.H. Lottery Comm'n v. Rosen*, 986 F.3d 38 (1st Cir. 2021). That ruling, however, directly binds the Department only as to the specific parties in that lawsuit and is binding precedent only in the First Circuit.

Meanwhile, the 2018 Opinion remains on the books, and Deputy Attorney General Rosenstein's memorandum adopting the 2018 Opinion has never been rescinded. As a result, there remains substantial uncertainty in the industry as to whether other state lotteries and vendors are at risk of criminal prosecution. That uncertainty is heightened because, on the eve of oral argument in the District Court, the Department issued a directive that federal prosecutors not apply the Wire Act to States while it "reviewed" whether the Wire Act applied to state actors and their vendors. *Notice Regarding Applicability of the Wire Act, 18 U.S.C. § 1084, to State Lotteries and Their Vendors*, U.S. Dept. Just. (April 8, 2019). As of the date of this letter, that "review" has been pending for 764 days.

Accordingly, we are asking that the Department conclude its "review" by (1) formally rescinding the January 15, 2019 memorandum adopting the 2018 Opinion; (2) endorsing the First Circuit's proper interpretation of the Wire Act as applying only to sports betting; (3) and rescinding the 2018 OLC Opinion. As the First Circuit noted, adopting the 2018 OLC Opinion would lead to "odd and seemingly inexplicable results." For instance, the 2018 Opinion interprets 18 U.S.C. § 1084(a) as criminalizing the transmission of all "bets or wagers," while allowing the transmission of information assisting in the placing of non-sports bets. But the Court found that it would make little sense for Congress to criminalize all bets or wagers, yet allow the transmission of information assisting in the placement

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of non-sports bets or wagers. On the other hand, the 2011 Opinion's reading of the Wire Act as related only to sports gambling ensures that the entire act "serves the same end" and reaches a sensible result. The 2011 Opinion's reading would also be consistent with the language in 18 U.S.C. § 1084(b), which exempts transmission of news reporting of sporting events or contests and the transmission of information in placing bets or wagers on sporting events where such an act is legal in both the place where the bet is made and the place where it is received. Finally, the 2011 Opinion's interpretation is consistent with the legislative history, which "contains strong indications that Congress did indeed train its efforts solely on sports gambling." *N.H. Lottery Comm'n*, 986 F.3d at 61. The Department should recognize that the First Circuit's interpretation—and the 2011 Opinion it affirmed—is the better-reasoned reading of the Wire Act, and the Department should adopt it.

In addition, President Biden has firmly stated his view that the Wire Act does not extend beyond sports betting and that the decisions in the First Circuit striking down the 2018 Opinion are correct. In July 2019, the President stated that, if elected, he "would reverse the White House opinion [on the Wire Act] that was then reversed and overruled by the [district] court. The court is correct. That should be the prevailing position." Megan Messerly, *Biden Says Democratic Millennials Are Not 'A Generation of Socialists,' Draws Distinction with Sanders on Health Care*, Nev. Indep. (July 20, 2020).² And in December 2019, the President reiterated that he did not "support adding unnecessary restrictions to the gaming industry like the Trump Administration has done." Howard Stutz, *Biden Says DOJ's Wire Act Changes Add "Unnecessary Restrictions" to the Gaming Industry*, CDC Gaming Reports (Dec. 16, 2019).³ We believe that the official position of the Department should reflect that view.

To conclude, rescission and replacement of the January 15, 2019 memorandum, adoption of the First Circuit's reasoning, and rescission of the 2018 OLC Opinion are the most efficient steps to resolve this legal predicament. States have no interest in pursuing legal cases in every federal circuit to obtain a ruling like the one issued by the First Circuit, nor is litigation a good use of the Department's resources. But States need finality on this issue before they invest more resources in the development of online lottery platforms. The Department can and should put an end to this matter once and for all. Regardless of whether the Department intends to prosecute state lotteries or their vendors, the fact remains that the

² See <https://thenevadaindependent.com/article/biden-says-democratic-millennials-are-not-a-generation-of-socialists-draws-distinction-with-sanders-on-health-care>.

³ See <https://www.cdcgamingreports.com/biden-says-dojs-wire-act-changes-add-unnecessary-restrictions-to-the-gaming-industry>.

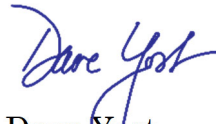
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Department's official public position places state online lotteries at risk of criminal prosecution. Moreover, a future administration may recognize the fact that the 2018 OLC Opinion and the 2019 Memorandum are still the official positions of the Department and use that fact to shut down or limit state lotteries. Clarification of the Department's official position following the First Circuit's decision will help avoid that possibility. It will also allow state lotteries and others in the industry to move forward with confidence that they will not be targeted for criminal prosecution.

Sincerely,



Dana Nessel
Michigan Attorney General



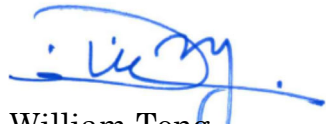
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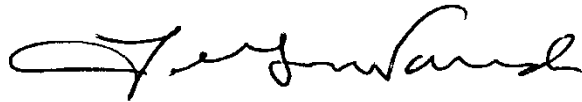
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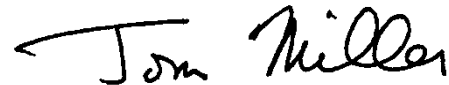
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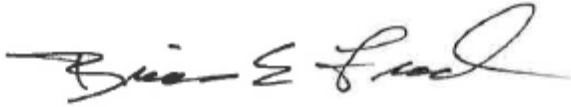


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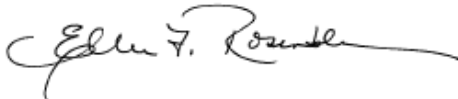
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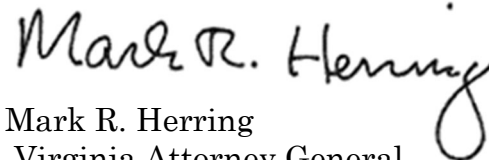
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