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.

Appeal from the United States District Court
District of New Hampshire
Honorable Paul Barbadoro

BRIEF OF AMICUS CURIAE STATE OF MICHIGAN, MICHIGAN BUREAU OF STATE LOTTERY, AND 17 OTHER JURISDICTIONS IN SUPPORT OF PLAINTIFFS-APPELLEES, IN SUPPORT OF AFFIRMANCE

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Dated: March 4, 2020

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STATEMENT OF INTEREST OF AMICUS CURIAE MICHIGAN BUREAU OF STATE LOTTERY

The Michigan Bureau of State Lottery (Michigan Lottery) and the nation's 46 other government-operated lotteries raised over $80 billion in gross revenues in 2017[1] to support public education, college scholarships, environmental protection, senior citizens, first responders, and infrastructure projects, among other things. Defendants-Appellants Barr and the Department of Justice (collectively, DOJ) claim to recognize "the widespread and longstanding use of lotteries by sovereign States to fund their public objectives." Brief of Defendants-Appellants (DOJ Br.) at 20. But their actions show that they do not comprehend what is at stake if this Court reinstates the DOJ's 2018 Opinion, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling,* 42 Op. O.L.C. 1 (2018), ECF Doc. No. 2-5 (2018 Opinion). Doing so would cause governments nationwide a catastrophic loss of revenue, precipitating the reduction or elimination of vital public services.

[1] Terri Markle, Bruce LaFleur, & Byron LaFleur, *LaFleur's 2018 World Lottery Almanac*, 243 Tbl. *FY 17 Consolidated U.S. Lottery Revenues, Prizes & Government Transfers by GDP* (26th ed. 2018).

Through this amicus curiae brief, the Michigan Lottery, joined by 17 other jurisdictions, supports Plaintiffs-Appellees New Hampshire Lottery Commission (NHLC), NeoPollard Interactive LLC, and Pollard Banknote Limited in asking this Court to affirm the district court's decision in its Memorandum and Order, ECF No. 81 (June 3, 2019), reported at *New Hampshire Lottery Commission v. Barr*, 386 F. Supp. 3d 132 (D. N.H. 2019).

The Michigan Lottery and the joining jurisdictions have multiple interests in this case.

First, the DOJ has taken a striking new position on appeal, contending that even *intra*state wire communications may violate the Wire Act's prohibitions on transmissions that "entitle[] the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a); *see* DOJ Br. at 37–38. Prohibiting in-state use of wire-communication technology for these purposes would amplify the 2018 Opinion's harm, requiring lotteries to revert to using antiquated systems to transmit data. Although each lottery employs geolocation or other technology to

ensure that lottery wagers are placed only within its jurisdiction, lottery communications covered by the Wire Act may cross state lines.

Second, most of the supporting lotteries and jurisdictions have entered into at least one multi-jurisdictional agreement with the NHLC governing sales of multi-jurisdictional lottery games such as Mega Millions, Powerball, or Lucky for Life. Nationwide, these three games generated a reported $7.8 billion in revenues in 2017.[2] Reinstating the DOJ's 2018 Opinion to prohibit interstate transmissions essential to operating these games would cause the lotteries, including the NHLC, and their jurisdictions substantial financial harm.

Third, the lotteries have contracted with various vendors—including, in some cases, Plaintiff Pollard Banknote—to provide services that would potentially be implicated if the 2018 Opinion is reinstated.

Fourth, reinstating the 2018 Opinion would force the lotteries to choose whether to discontinue activities generating vital public funding or potentially face criminal liability.

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[2] Markle, LaFleur, & LaFleur at 357 Tbl. *U.S. Lotteries' Calendar 2017 Sales By Game.*

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The Amicus Curiae Brief of the Michigan Lottery is being filed pursuant to Federal Rule of Appellate Procedure 29(a)(2). Because this litigation involves crucial issues generating strong nationwide interest, the Michigan Lottery requests that the Court grant it ten minutes of oral argument, *see* Fed. R. App. P. 29(a)(8), additional to the time allocated to Plaintiffs-Appellees, consistent with the district court's grant of permission to participate in oral argument. *See* Transcript of Oral Argument Before the Honorable Paul J. Barbadoro, Afternoon Session 24–29, April 11, 2019.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court correctly vacated the 2018 Opinion. The Michigan Lottery offers support on three aspects of the district court's decision. As an initial matter, this case remains ripe for adjudication. The DOJ has unsuccessfully attempted to deny the risk of prosecution by claiming indecision on the Wire Act's application to government-operated lotteries and their vendors. But the Deputy Attorney General's April 2019 memorandum, *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), ECF No. 61-1 at 4, is conditioned on matters within the DOJ's discretion and, on its face, leaves to DOJ attorneys the decision whether to prosecute. Plaintiffs (and their amici) will continue to face hardship if judicial consideration is delayed. *See Whitman v. American Trucking Associations*, 531 U.S. 457, 479 (2001). The DOJ cannot defeat this case's ripeness by leaving government-operated lotteries in legal limbo.

Moreover, the Wire Act does not apply to transmissions concerning non-sports wagering. Reviewing the statute as a whole and in context reveals the implausibility of the DOJ's view that only one of the four prohibitions is limited by the sports-gambling modifier. Congress did not enact a mishmash of mismatched prohibitions and exclusions. If the DOJ's position can be considered plausible enough to create ambiguity, reviewing the legislative history confirms the Wire Act's limited scope.

Furthermore, the 2018 Opinion and the January 2019 memorandum adopting it, *Applicability of the Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling*, U.S. Dept. Just. (Jan. 15, 2019) (January 2019 memo), ECF No. 2-6, constitute final agency action

under the Administrative Procedures Act, 5 U.S.C. § 704. Through those documents, the DOJ issued its "last word on the matter," *Whitman*, 531 U.S. at 478 (2001) (internal quotation omitted), required compliance by DOJ attorneys, and gave persons who had relied on the DOJ's prior opinion 90 days to conform their activities to the 2018 Opinion, depriving them of the assurance they had received from the 2011 opinion. *See U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1814–15 (2016) (recognizing deprivation of a safe harbor as a legal consequence).

ARGUMENT

I. The DOJ has not unambiguously disclaimed an intent to prosecute government-operated lotteries and their vendors for violating the Wire Act.

This case is justiciable. The district court recognized that "[s]tanding and ripeness concerns overlap in pre-enforcement cases" and followed the parties' lead in prioritizing standing in its opinion. Mem. and Order at 14 n.5 (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007)). Concluding that Plaintiffs "easily satisfy the imminence requirement," the district court emphasized that Plaintiffs "have openly engaged for many years in conduct that the 2018

OLC Opinion now brands as criminal," and that they face a substantial risk of prosecution. Mem. and Order at 15–16.

To prove that this case is unripe, the DOJ, as it did below, relies extensively on the Deputy Attorney General's April 2019 memorandum, which disclaims a position on whether State lotteries and their vendors can face prosecution under the Wire Act. But, for multiple reasons, Plaintiffs (and their amici) will continue to face hardship if judicial consideration is delayed. *See Whitman*, 531 U.S. at 479.

First, the DOJ's late-in-the-game decision to stand mute on the Wire Act's application speaks volumes when viewed in context. As the district court recounted, a DOJ official warned the Illinois Lottery in 2005 that it would be violating the Wire Act if it sold tickets online, *see* ECF No. 57-2, Letter from Laura H. Parsky, Deputy Assistant Attorney General, to Carolyn Adams, Illinois Lottery Superintendent (May 13, 2005). Government-operated lotteries delayed selling lottery tickets online until after the DOJ issued its 2011 opinion responding to state inquiries concerning online lottery-ticket sales, and the 2011 opinion did not even suggest "that states would be exempt from the [Wire] Act's proscriptions," Mem. and Order at 16–17. And then—suddenly

reversing the 2011 opinion—the DOJ discounted the reliance interests of jurisdictions that had initiated online ticket sales based on the 2011 opinion, deeming them insufficient to justify upholding that opinion. 2018 Opinion at 22–23. The 2018 Opinion left those interests to Congress, "if Congress finds it appropriate to protect those [reliance] interests." *Id.* By vacating the 2011 opinion, the DOJ put the lotteries back where they found themselves in 2005 when the DOJ warned Illinois that its intention to implement internet lottery sales violated the Wire Act. *See* Response Brief for Appellees NeoPollard Interactive, LLC and Pollard Banknote Limited (Pollard Br.) at 27–28.

Even if the DOJ did not understand how government-operated lotteries work—for example, not comprehending that they rely on wire transmissions for even traditional brick-and-mortar ticket sales—the DOJ plainly understood that its opinion was applying to government-operated lotteries and affecting their conduct. If the DOJ had reservations about the Wire Act's application, it could have resolved them in the 2018 Opinion. Of course, during this litigation, the DOJ has rejected every basis raised for concluding that the Wire Act does *not* apply to government-operated lotteries and their vendors. The DOJ

cannot evade judicial review of its erroneous 2018 Opinion by claiming that it has not made up its mind on this issue and that, as result, the case is unripe. Notably, if the Court endorses the position that the DOJ's amici take—that the Wire Act *does* apply to government-operated lotteries and their vendors—the DOJ's reliance on the April 2019 memo crumbles.

Second, and significantly, the DOJ incorrectly characterizes its April 2019 memo as an *unambiguous* disclaimer of intent to prosecute State lotteries and their vendors. DOJ Br. at 23. The memorandum states, "Department of Justice attorneys should refrain from applying Section 1084(a) to State lotteries and their vendors, *if they are operating as authorized by State law*, until the Department concludes its review" (emphasis added). Whether the emphasized condition is satisfied remains within the DOJ's sole discretion. Federal prosecutors could choose to initiate prosecution, contending that the April 2019 memo does not apply because the lottery in question somehow violates its state's laws, even laws unrelated to gambling. And, inexplicably, nearly a year after issuing the April 2019 memo, the DOJ has not provided any update on the status of its review.

Consequently, unlike in *Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014), where the government expressly stated that the statute in question did not apply to the plaintiffs' anticipated speech-related activities, the April 2019 memo does nothing to alleviate government-operated lotteries' fears about whether they may generate crucial income for governments nationwide through the use of modern technology without risking federal prosecution. The memo does not alleviate governmental budgeting concerns over the continued availability of lottery dollars. The memo does not alleviate contracting concerns about whether payment processors and other essential vendors will be willing to engage in business with government-operated lotteries. If vendors would be receiving funds from activities the 2018 Opinion deemed illegal, they may deem the risk of prosecution too great and refuse to provide critical services. *See* Pollard Br. at 33. In short, "the statute in question is not a dead letter, and the [DOJ has] not disclaimed any intention ever to enforce it." *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 17 (1st Cir. 1996).

As the amici lotteries argued below, they have historically relied on OLC opinions and have based significant decisions, in part, on those

opinions. *See* 32 Op. O.L.C. 129, *Scope of Exemption under Federal Lottery Statutes for Lotteries Conducted by a State Acting Under the Authority of State Law* (examining whether operating state lotteries under private management agreements means they are not "conducted by the State," leading some states to enter private management agreements); 35 Op. O.L.C. 1, *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 Violates the Wire Act* (Sept. 20, 2011) (2011 Opinion) (determining that the Wire Act permitted transmissions of non-sports wagers). To continue raising billions of dollars for vital public services, the amici must know that the Wire Act does not extend to non-sports wagering activities. If this Court deems this case unripe, the amici will not be able to fulfill their purposes unshackled by the 2018 Opinion. States in other circuits may need to pursue adjudication in their own jurisdictions, creating a mishmash of litigation nationwide.

II. Subsection (a) of the Wire Act extends only to interstate transmissions concerning sporting events or contests.

Unlike the DOJ's analysis of the Wire Act, a proper statutory analysis begins with carefully examining "the ordinary meaning and structure of the law itself." *Food Marketing Inst. v. Argus Leader*

Media, 139 S. Ct. 2356, 2364 (2019) (citation omitted). The resulting construction "must, to the extent possible, ensure that the statutory scheme is coherent and consistent." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)); *see also Mellouli v. Lynch*, 135 S. Ct. 1980, 1989 (2015). Determining a statute's plain meaning requires employing all traditional tools of statutory construction, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (citation omitted), including examining the language's context, *see Graham County Soil & Water Conservation Dist. v. United States ex rel Wilson*, 545 U.S. 409, 415 (2005). When examining context, the analysis must consider " 'the specific context in which th[e] language is used, and the broader context of the statute as a whole.' " *Yates v. United States*, 135 S. Ct. 1074, 1081–82 (2015) (quoting *Robinson*, 519 U.S. at 341) (alterations in *Yates*). Here, conducting a comprehensive, context-sensitive analysis of the Wire Act reveals that the DOJ's interpretation is not even plausible. *See Graham County*, 545 U.S. at 419 n.2; *see also* Brief for Appellee New Hampshire Lottery Commission (NHLC Br.) at 50–51.

A. The last-antecedent rule does not apply to limit the sports-gambling modifier to the second prohibition.

The DOJ's 2018 Opinion epitomizes an "antiseptic laboratory" inspection of statutory language, like that criticized in *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996). Canons of statutory interpretation, such as the last-antecedent canon on which the 2018 Opinion so heavily relied, are guides "designed to help judges determine the Legislature's intent" rather than "mandatory rules"; they should not be used to overcome evidence of Congress' intent. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (recognizing a drafting error instead of applying a "convoluted" reading that Congress would not have intended). Specifically, the last-antecedent canon " 'can assuredly be overcome by other indicia of meaning.' " *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). But the DOJ's 2018 Opinion applied the last-antecedent canon in a "mechanical way" that "required accepting unlikely premises," contrary to *Paroline v. United States*, 572 U.S. 434, 447 (2014) (internal quotation omitted).

In contrast, the cases on which the 2018 Opinion primarily relied to support applying the last-antecedent canon, *Lockhart* and *Barnhart*,

involved comprehensive statutory reviews that do not support the DOJ's simplistic application of that canon. For example, the Court in *Lockhart* undertook a context-sensitive analysis to decide that the canon applied to determine the reach of "involving a minor or ward" in the phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," 18 U.S.C. § 2252(b)(2). *Lockhart*, 136 S. Ct. at 961. The Court recognized the subject provision's similarity to statutory section names in an adjacent United States Code chapter, which supported that Congress had used the terms similarly in the subject statute. *Id.* at 963. And the Court found no contrary indicia of meaning to overcome the canon's application. *Id.* at 964. Further, the Court observed that if it applied the series-qualifier canon instead of the last-antecedent canon, its interpretation might violate another tenet of statutory construction, the rule against superfluity; applying the last-antecedent canon preserved meaning in the statute's terms. *Id.* at 965–66. But here, applying the last-antecedent canon causes, rather than resolves, multiple interpretive problems.

Barnhart also fails to support the DOJ's application of the canon. There, the Court applied the last-antecedent canon to determine the

scope of "which exists in the national economy" in the complex language dictating requirements for finding a disability in 42 U.S.C. § 423(d)(2)(A) (disability exists only if a person's "impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . ."). The Court examined whether "which exists in the national economy" applied to "previous work" or was limited to "any other kind of substantial gainful work," *Barnhart*, 540 U.S. at 25–26, and was merely determining whether an agency interpretation was "at least reasonable," thus meriting deference, *id.* at 29–30. *Barnhart* did not articulate any reason the canon would not apply, sharply contrasting with the DOJ's summary invocation of the canon despite the resulting inconsistencies.

Engaging in the thoughtful context- and structure-sensitive analysis that *Lockhart* and *Barnhart* modeled reveals abundant "other indicia of meaning" that overcome applying the last-antecedent canon to the Wire Act.

1. The two clauses of § 1084(a) state prohibitions in only one prepositional phrase each, and each prepositional phrase must be read as a whole.

The structure of subsection (a) overcomes the canon's application. Congress' structural choices, just like its wording choices, are " 'presumed to be deliberate' and deserving of judicial respect." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)). Congress structured subsection (a) to state the four prohibited uses of a wire communication facility in two clauses, identified throughout this matter as clause 1 and clause 2 ("Whoever . . . knowingly uses a wire communication facility [1] *for the transmission* . . . or [2] *for the transmission* . . . ."). Congress stated two prohibitions in each clause, but it did so in only *one* prepositional phrase per clause ("[1] for the transmission . . . *of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest*, or [2] for the transmission *of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers* . . . .").

Instead of viewing the sports-gambling modifier as part of the whole prepositional phrase in the first clause, the DOJ characterizes the sports-gambling modifier as appearing only in the second prohibition. 2018 Opinion at 7; DOJ Br. at 30. But that view assumes the DOJ's ultimate conclusion—that "on any sporting event or contest" is part of *only* the second prohibition. Instead, the sports-gambling modifier is at the end of the single prepositional phrase that contains both the first and second prohibitions.

Notably, Congress did not insert the word "of" before "information" to create two separate prepositional phrases within the first clause—one prohibiting transmissions *of* "bets or wagers" and one prohibiting transmissions *of* "information assisting in the placing of bets or wagers on any sporting event or contest." Thus, although containing two prohibitions, the text's structure indicates that the prepositional phrase should not be divided into isolated parts, as the DOJ reads it. Employing a single prepositional phrase communicates that "on any sporting event or contest" modifies both "bets or wagers" and "information assisting in the placing of bets or wagers" and that, consequently, the last-antecedent canon is inapplicable.

If Congress had wanted to restrict the sports-gambling modifier to the second prohibition, it could have inserted "of" to separate the two prohibitions into distinct prepositional phrases. "The typical way in which syntax would suggest" that a modifier does *not* apply to both items in a list "is that a determiner (*a, the, some, etc.*) will be repeated before the [list's] second element." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 148 (2012). Although not absolute, that determiner "tends to cut off the modifying phrase so that its backward reach is limited . . . ." *Id.* at 149. Providing a helpful example, Scalia and Garner considered the complex list examined in *United States v. Pritchett*, 470 F.2d 455, 456 (D.C. Cir. 1972), in which the subject statute did not apply to "jail wardens, or their deputies, policemen or other duly appointed law enforcement officers, or to members of the Army, Navy, or Marine Corps of the United States . . . when on duty." The authors explained that it was the insertion of "to" in the phrase "or *to* members . . ." that separated that phrase from the list's preceding components, preventing "when on duty" from reaching back to limit the preceding components. Scalia & Garner at 150. Applying those principles here, by omitting "of" before "information

assisting in the placing of bets or wagers," Congress conveyed that "on sporting events or contests" reaches back to modify "bets or wagers" in the first prohibition.

2. The absence of commas in the first clause does not support applying the last-antecedent rule.

Pritchett also refutes the DOJ's reliance on the absence of commas around the words "or information assisting in the placing of bets or wagers" in the first clause. Although the authors of *Reading Law* agreed with *Pritchett* that inserting a comma before "when on duty" could have added clarity, they stated that a comma would not have been determinative. *Id.* Similarly, although commas could have been included in the first clause of § 1084(a), they were not grammatically necessary to confine the sports-gambling modifier to the second prohibition. *See also Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of the City of Boston*, 184 F.3d 88, 101 (1st Cir. 1999) (analyzing lack of syntactic impact of similar commas). Like the Supreme Court in *United States v. Bass*, 404 U.S. 336, 340 n.6 (1971), this Court should recognize that such commas are discretionary and decline to "attach significance" to their omission.

B. Consistency and context require applying the sports-gambling modifier to all four prohibitions.

Preserving coherency and consistency in the statutory scheme, the district court properly applied the sports-gambling modifier to all four prohibitions in § 1084(a). The DOJ opposes this conclusion on multiple grounds. For example, it wrongly contends that Congress could have placed the sports-gambling modifier in the statute's prefatory phrase to remove doubt about its scope. *See* DOJ Br. at 32 n.4. But instead of clarifying the types of prohibited transmissions, the DOJ's suggested revision would limit only to whom the prohibitions apply. The DOJ's own reasoning would preclude carrying the sports-gambling modifier forward to describe what types of transmissions are prohibited.

1. Preserving consistency among the Wire Act's provisions requires rejecting the DOJ's position.

The DOJ also relies on the repeated references to sporting events in subsection (b) as evidence that Congress would have stated the sports-gambling modifier four times in subsection (a) if it had intended it to limit all four prohibitions. But, as the district court acknowledged, subsection (b) has a wholly different structure, excluding "the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of

information assisting in the placing of bets or wagers on a sporting event or contest [between states or countries where the gambling is legal in both jurisdictions] . . . ." 18 U.S.C. § 1084(b). This repetition does not show that Congress did not use "bets or wagers" in § 1084(a) as shorthand for "bets or wagers on any sporting event or contest." Rather, the repeated references in subsection (b) modify discrete terms—"news reporting" and "bets or wagers"—so the modifier needed to be repeated. "Unlike the recurrent 'bets or wagers[]' [in § 1084(a)] th[e] diverse phrases [in § 1084(b)] are not susceptible to an abridged reference." Mem. and Order at 46.

Further, Congress' limitation of the exclusions in subsection (b) to transmissions involving sporting events or contests actually supports applying the sports-gambling modifier to all four prohibitions in subsection (a). Failing to do so would render the statute's exclusions inconsistent with its prohibitions. Likewise, applying the sports-gambling modifier to only the second prohibition in subsection (a) would create inconsistency among the prohibitions and require accepting the unlikely premise that Congress had prohibited using the wires for transmitting *all* bets or wagers (first prohibition) but had prohibited

using the wires to transmit information assisting in placing *only* sports-related bets or wagers (second prohibition). *Id.* at 41–42. Similarly, the DOJ would have the Court believe that Congress intended to prohibit transmitting information facilitating *only* sports-related bets or wagers (second prohibition), but also intended to prohibit transmissions enabling payment for information facilitating *any* bet or wager (fourth prohibition). In the trial court's words, "[i]t is bizarre to authorize an activity [in the second prohibition] but prohibit getting paid for doing it [in the fourth prohibition]." *Id.* at 42–43.

Limiting the sports-gambling modifier to the second prohibition is also inconsistent with Congress' placement of the interstate-transmission requirement within the first clause in subsection (a). Below, the DOJ wrongly and repeatedly contended that "in interstate or foreign commerce" came before the first clause, thus justifying its application to all four prohibitions. But, as the district court saw, Congress placed that requirement *within* the first clause, thus expressly limiting only the first and second prohibitions. The district court properly reasoned that Congress' decision not to repeat the interstate-transmission requirement in the second clause supported

concluding that Congress found it unnecessary to repeat the sports-gambling modifier. Mem. and Order at 36–39.

But the DOJ shifts its view of the interstate-transmission requirement on appeal, strangely questioning whether Congress intended to limit the third and fourth prohibitions to interstate transmissions. DOJ Br. at 37–38. This shift simply makes the DOJ's position even less plausible; it creates two additional inconsistencies between the statute's prohibitions and its other provisions. First, subsection (b) excludes only transmissions through interstate or foreign commerce. It is inconceivable that Congress prohibited both intra-state and interstate transmissions in subsection (a) but excluded only interstate transmissions in subsection (b). Second, subsection (d) obligates a common carrier to discontinue services only if its wire communication facility is used for "transmitting or receiving gambling information in interstate or foreign commerce . . . ." It is likewise inconceivable that Congress would have limited that obligation accordingly if subsection (a) had outlawed intrastate transmissions as well.

2. Reading the Wire Act in context discredits the DOJ's position.

The district court also properly recognized that the Interstate Transportation of Wagering Paraphernalia Act was enacted the same day as the Wire Act and "sends a strong contextual signal concerning the Wire Act's scope." Mem. and Order at 45. That act's prohibitions apply to certain paraphernalia to be used in "(a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game." 18 U.S.C. § 1953(a). This itemization reflects that Congress knew how to distinguish between sports gambling and lottery games such as "numbers, policy, bolita, or similar game[s]." Mem. and Order at 45.

Likewise sending a strong contextual signal is the Wire Act's placement in the gambling chapter (chapter 50) of Title 18. *See Nassar*, 570 U.S. at 353–54 (considering statute's placement). The definitions applicable to chapter 50 are found in 18 U.S.C. § 1081, which was amended to incorporate the definition of "wire communication facility" that applies in the Wire Act. Pub. L. No. 87-216, 75 Stat. 491. Section 1081 includes a definition of "gambling establishment" that, like the Paraphernalia Act, shows that Congress understood what language

would encompass lotteries—and that referring only to bets and wagers did not include lotteries. That definition distinguishes between "accepting, recording, or registering bets," and "carrying on a policy game or any other lottery." 18 U.S.C. § 1081; *see also* NHLC Br. at 55; Pollard Br. at 38. Thus, Congress was aware that, when proscribing transmissions of "bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest," it was not proscribing transmissions related to "a policy game or any other lottery." *See Wisconsin Central, Ltd. v. United States*, 138 S. Ct. 2067, 2071–72, 2074 (2018) (comparing two statutes in the same title of the United States Code).

C. Precedent supports applying the sports-gambling modifier to all four prohibitions.

The DOJ's interpretation also contradicts interpretations of this Court and the Fifth Circuit Court of Appeals. In *United States v. Lyons,* 740 F.3d 702, 718 (1st Cir. 2014), this Court stated that the Wire Act "applies only to 'wagers on any sporting event or contest,' that is, sports betting." *Id.* (quoting 18 U.S.C. § 1084(a)). Although the parties have disputed whether *Lyons* is binding, this Court relied on the Fifth Circuit's decision in *In re Mastercard International, Inc.*, 313 F.3d 257,

262–63 & n.20 (5th Cir. 2002), which in turn relied on the Louisiana district court's conclusion that " 'a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest.' " *Id.* at 262 n.20 (quoting *In re MasterCard Int'l Inc.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001)). The DOJ has presented no justification for creating a split among the circuits on the Wire Act's scope.

D. The Wire Act's legislative history opposes the DOJ's reading.

If the Court determines that considering the Wire Act's legislative history is appropriate, it should conclude, as the district court did, that the history supports Plaintiffs, not the DOJ. Mem. and Order at 47. The Wire Act was passed to combat sports gambling. In 1961, Attorney General Robert F. Kennedy proposed the legislation to fight organized crime, which relied in part on gambling to fund its operations. *See Robert Kennedy Urges New Laws to Fight Rackets*, N.Y. Times, Apr. 7, 1961, at 1; *see also* Martin R. Pollner, *Attorney General Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 Brook. L. Rev. 37, 38 (1961).

The DOJ observes that the Wire Act was designed to "assist the various States . . . in the enforcement of their laws pertaining to gambling . . . ." *See* DOJ Br. at 3 (quoting H.R. Rep. No. 87-967, at 1–2 (1961)). But it ignores that broadly reading this statement to encompass all gambling conflicts with the statute's reference to *only* sports-related state gambling laws in § 1084(b). In that subsection, Congress excluded from the Wire Act's prohibitions transmissions of sports-related bets between jurisdictions where the bets are legal. This indicates that the only state gambling laws Congress intended to supplement were those prohibiting sports-related bets or wagers.

And as discussed above, the removal of commas around "or information assisting in the placing of bets or wagers" in the first clause during the bill's revisions does not support that removing the commas was intended to comprehensively expand the bill's scope beyond sports-related gambling. *See* Mem. and Order at 50–52. Those commas were merely discretionary; removing them did not dictate a change in meaning. *See Cablevision of Boston*, 184 F.3d at 101; *Bass*, 404 U.S. at 340 n.6.

Further, two communications that the DOJ relies on confirm that "bets or wagers" in the Wire Act was shorthand for referring to sports-related bets or wagers, as the district court recognized, Mem. and Order at 39. In the September 1, 1961 letter from Deputy Attorney General Byron White to David E. Bell, Director of the Bureau of the Budget, White described the Wire Act as encompassing interstate "transmission of bets or wagers or information assisting in the placing of bets or wagers." ECF Doc. No. 61-1 at 6. And in the corresponding September 7, 1961 memorandum to the President from the Bureau of the Budget, Phillip S. Hughes described the Wire Act as implicating "bets or wagers or information assisting in the placing thereof." ECF Doc. No. 61-1 at 8. Both communications failed to state that the Wire Act expressly limited the prohibition on transmitting wagering information to information assisting in placing *sports-related* wagers. Either these two communications erroneously described the legislation or they show that the Wire Act's limitation to sports-related wagering was a given. In sum, the legislative history provides no express indication that Congress intended the Wire Act's prohibitions to extend beyond sports-wagering activity.

III. The 2018 Opinion and January 2019 memorandum constitute final agency action reviewable under the APA.

"[T]wo conditions . . . generally must be satisfied for agency action to be 'final' under the APA." *Hawkes*, 136 S. Ct. at 1813 (citing *Bennett v. Spear*, 520 U.S. 154 (1997)). " 'First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.' " *Id* (quoting *Bennett*, 520 U.S. at 177–78). This is not a rigid test. Instead, the Supreme Court takes a " 'pragmatic' approach . . . to finality." *Hawkes*, 136 S. Ct. at 1815 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)); *see also Abbott*, 387 U.S. at 150 (approving a "flexible view of finality").

A. The DOJ concluded its decisionmaking process.

Relying on largely inapplicable cases examining disclosing legal advice under the Freedom of Information Act, the DOJ portrays the 2018 OLC Opinion as predecisional and deliberative. But the 2018 Opinion, particularly as adopted through the January 2019 memorandum, constituted the DOJ's "last word on the matter" and thus

constitutes final action. *See Whitman*, 531 U.S. at 478 (internal quotation omitted) (applying *Bennett* to whether final action had been taken under the Environmental Protection Act).

Like the EPA in *Whitman*, the DOJ's "own behavior . . . belies the claim that its interpretation is not final." *Id.* at 479. The 2018 Opinion described the OLC's role as providing "binding legal advice" and recognized the opinion's influence, stating that changing the 2011 Opinion's conclusion "make[s] it more likely that the Executive Branch's view of the law will be tested in the courts." 2018 Opinion at 19, 22. And, rather than characterizing its views as advisory, the OLC stated that it was lifting the ban imposed by the 2011 opinion on pursuing non-sports-gambling related prosecutions under the Wire Act: "under the conclusions *we adopt today*, such prosecutions *may proceed* where appropriate . . . ." *Id.* at 19 (emphases added). Shortly thereafter, eliminating any question, the Deputy Attorney General issued the January 2019 memo, in which he recounted the OLC's published opinion, summarized its conclusions, and declared that it constituted the DOJ's position: "Department of Justice attorneys should adhere to

OLC's interpretation, which represents the Department's position on the meaning of the Wire Act."

B. The DOJ's action created legal consequences.

The DOJ's action also satisfies *Bennett*'s second prong because legal consequences flow from it. The present situation does not resemble that in *Valero Energy Corp. v. Envtl. Prot. Agency*, 927 F.3d 532 (D.C. Cir. 2019), despite the DOJ's reliance. There, the EPA merely issued an interpretive document explaining its compliance with a statute; the document did not constitute final action because it imposed "no obligations, prohibitions, or restrictions" and "compel[led] action by neither the recipient nor the agency. . . Rather, [i]t [left] the world just as it found it." *Id.* at 534, 536.

The DOJ's 2018 Opinion and January 2019 memo fell at the other end of the spectrum, giving "businesses that relied on the 2011 OLC opinion [90 days] to bring their operations into compliance with federal law." *Id.* The memo also placed obligations on DOJ attorneys, requiring them to "adhere to the OLC's interpretation" as the Department's official view. *Id.* Notably, the memo did not criticize those who had relied on the 2011 opinion for relying on a merely

advisory opinion. As the district court observed, the 2018 Opinion had an immediate adverse effect on the NHLC because it rendered its position "far more perilous." Mem. and Order at 25–26 (citing *Hawkes*, 136 S. Ct. at 1815).

Hawkes amply supports affirming the district court's decision that the DOJ's action was reviewable under the APA. There, the Court recognized that depriving landowners of a five-year safe harbor from liability based on an agency's determination that their property contained "waters of the United States" created legal consequences sufficient to support finding that the agency's determination constituted final action. 136 S. Ct. at 1814–15. *Hawkes* also cited the determination's binding effect on the enforcing agencies as indicating final action. *Id.* at 1814.

Frozen Food Express v. United States, 351 U.S. 40 (1956), buttressed the decision in *Hawkes*. There, the Court reasoned that even though an agency order merely notified people of how the agency interpreted a statute and the order was not directed to a particular party, it had "immediate and practical impact," 351 U.S. at 44, and constituted final action. *See Hawkes*, 136 S. Ct. at 1815 (citing *Frozen*

Food Express, 353 U.S. at 44–45); *contra* DOJ Br. at 49. Similar to the decisions in *Frozen Food Express* and *Hawkes*, the 2018 Opinion, particularly in tandem with the January 2019 memorandum, warns those who relied on the 2011 Opinion that if they violate the 2018 Opinion, "they do so at the risk of significant criminal . . . penalties." *Hawkes*, 136 S. Ct. at 1815.

Especially considering the pragmatic nature of the "final action" inquiry, the incongruity of the DOJ's positions concerning the Deputy Attorney General's memos is remarkable. On one hand, the DOJ asks the Court to conclude that the April 2019 memorandum—instructing DOJ attorneys to refrain from applying the Wire Act to State lotteries and their vendors (if operating pursuant to state law)—carries so much weight that it renders this case unripe. On the other hand, the DOJ contends that the January 2019 memorandum—affirming that the OLC's 2018 Opinion represents the Department of Justice's position on the Wire Act's meaning—carries so little weight that it, even in tandem with the 2018 OLC opinion, cannot be viewed as "final action." Both cannot be true. In fact, neither is.

CONCLUSION AND RELIEF REQUESTED

The district court's decision should be affirmed. The 2018 Opinion and January 2019 memo constitute final action under the APA, and the 2018 Opinion is contrary to law. Plaintiffs and their amici face a substantial risk of prosecution that persists despite the April 2019 memo, and amici urge the Court to protect the billions of dollars in public revenues at stake and resolve this dispute by affirming the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I certify that on March 4, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users.

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