IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

NEW HAMPSHIRE LOTTERY COMMISSION,

NEOPOLLARD INTERACTIVE, LLC, and

POLLARD BANKNOTE LIMITED,

Plaintiffs,

v.

WILLIAM BARR, in his official capacity as Acting Attorney General of the United States of America,

UNITED STATES DEPARTMENT OF JUSTICE, and

UNITED STATES OF AMERICA

Defendants.

Civil Action No. 19-cv-00163-PB

BRIEF FOR iDEVELOPMENT AND ECONOMIC ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS

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iDevelopment and Economic Association ("**iDEA**") respectfully submits this Brief of Amicus Curiae pursuant to the Court's Order (ECF No. 24) granting iDEA the right to submit a memorandum in support of its arguments that the Department of Justice's ("**DOJ**" or the "**Department**") revised interpretation of the Wire Act is unlawful.

STATEMENT OF INTEREST

iDEA is a Washington, D.C.-based trade association that represents the interests of the online interactive entertainment ("**iGaming**") industry. iDEA was formed in 2016 to represent nearly two dozen member-organizations from virtually every sector of the iGaming community, including operations, development, technology, supply, marketing, and payment processing. Among the iGaming businesses that iDEA members operate and support are games such as online poker, online bingo, online casinos, and online lottery ("**iLottery**") in States whose laws permit these activities. iDEA's members have deep and broad experience in iGaming, regulating it to protect participants, and experimenting with the approaches of different jurisdictions.

Like Plaintiffs New Hampshire Lottery Commission ("**NHLC**") and NeoPollard Interactive, LLC/Pollard BankNote Limited ("**NeoPollard**") (collectively, "**Plaintiffs**"), iDEA and its member-organizations have relied in good faith on the DOJ's longstanding interpretation of the Wire Act that it applies ***only*** to sports betting. After being acknowledged to be safely outside the prohibition of the Wire Act, however, iDEA and its members now suddenly find themselves on the wrong side of the DOJ and its pointed threat of prosecution based on the DOJ's new interpretation of the Wire Act that certain aspects of the Act actually apply to all forms of betting activity. Thus, despite having relied in good faith on the DOJ's earlier, longstanding interpretation of the Wire Act and despite having poured millions of dollars into technology and infrastructure to establish legally compliant, state-licensed iGaming operations, iDEA and its members now face grave legal peril as the DOJ threatens to launch prosecutions

under the Wire Act starting June 14, 2019. Accordingly, iDEA respectfully submits this amicus curiae brief in support of Plaintiffs' motions for summary judgment and for the sake of protecting its members' distinct interests.

INTRODUCTION

Historically, the power to legalize and regulate gambling has been reserved to the States and subject to each State's police power. To the extent that the federal government has enacted gambling legislation, it has generally done so with an eye toward assisting States' enforcement of their own laws and, with little exception, has generally exempted from enforcement whatever conduct is legal under state law. In other words, in the area of gambling, the federal government has stepped in only to help combat conduct that States themselves have seen fit to outlaw.

By its own terms, the Wire Act applies only to sports gambling. The only specific category of gambling conduct that it specifically addresses is "bets or wagers on any sporting event or contest," *see* 18 U.S.C. § 1084, whereas other federal gambling statutes, including one passed the very same day, target other gambling activity in more specific respects. *See* 18 U.S.C. § 1953(a) (applying to gambling paraphernalia used "in a numbers, policy, bolita, or similar game," in addition to "bookmaking" or "wagering pools with respect to a sporting event"); *see also* 18 U.S.C. § 1955(b)(4) (defining "gambling" to "include[] but not [be] limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein"). It is no accident that Congress used more limited language in the Wire Act; it clearly intended to confine the Wire Act to sports gambling, in contradistinction with other federal statutes that are directed at other specified types of gambling activity. This understanding is confirmed by the Wire Act's legislative history. *See, e.g.*, 107 Cong. Rec. 16,533 (1961) (statement of Rep. Celler, Chairman,

H. Judiciary Comm.) ("[T]his particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events."). It is further fortified by the Supreme Court's recent observation that the Wire Act specifically "outlaws the interstate transmission of information that assists in the placing of a bet on a sporting event," and "only if the underlying gambling is illegal under state law." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1483 (2018).

It was against the backdrop of (i) the federal government's historical deference to States' decisions about the extent to which gambling should be legal or illegal, and (ii) the limitations in the Wire Act as compared to other statutes addressing gambling, that the States of New York and Illinois inquired about the legality of extending their state-lottery operations to the Internet. In 2011, the Office of Legal Counsel ("**OLC**") of the DOJ responded with an opinion instructing that the Wire Act applies ***only*** to gambling on sporting events and not to other forms of betting and wagering; it reasoned that the Wire Act "does not reach interstate transmissions of wire communications that do not relate to a 'sporting event or contest.'" *See 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*, Office of Legal Counsel, 35 Op. O.L.C. ___ (Sept. 20, 2011), https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf ("**2011 Opinion**"). The First Circuit in *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014), agreed with DOJ's analysis, much as the Fifth Circuit had concluded in *In re Mastercard Int'l Inc.*, 313 F.3d 257, 262 (5th Cir. 2002). Accordingly, following the 2011 Opinion, and consistent with the federal approach allowing States to decide how to regulate gambling, numerous state legislatures enacted comprehensive iGaming legislation that legalized various forms of iGaming activity, including online casino and online poker gaming, while

fashioning and implementing intricate statutory frameworks to regulate iGaming activity.

Under the relevant state-law regimes, iGaming companies including iDEA's member-organizations may apply for licenses to operate iGaming platforms. In the States that have legalized online casino and online poker gaming, iGaming providers must not only be licensed by the State, but they must also take technical measures to limit gambling activity to the geographic confines of the State or between States that have entered into interstate agreements authorizing that activity. In response to the 2011 Opinion, the iGaming industry has blossomed into a multi-billion dollar industry that offers consumers safe, well-developed, and highly-regulated gaming options. The iGaming industry as a whole has relied in good faith on the 2011 Opinion and has invested hundreds of millions of dollars to develop and create online gaming products compliant with state and federal laws as hitherto understood throughout the country.

After iGaming businesses worked for years in reliance on the 2011 Opinion, on January 14, 2019, the OLC published a new opinion that abruptly disavowed and reversed its longstanding interpretation of the Wire Act. *See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, Office of Legal Counsel, 42 Op. O.L.C. ___ (Nov. 2, 2018), https://www.justice.gov/olc/file/1121531/download ("**2018 Opinion**"). The Department now claims that certain aspects of the Wire Act apply to all forms of betting and wagering, not just gambling on sporting events—the very conclusion it flatly rejected in 2011, as did two courts of appeals (including the First Circuit). And the Department then provided pointed warning that, after a short period of prosecutorial grace, it is declaring open season on anyone who may be relying on the 2011 Opinion and subsequent state regulation to continue their established businesses and activities.

As a result of the 2018 Opinion's attempt to apply certain aspects of the Wire Act to all

forms of betting and wagering (rather than just sports gambling), iGaming and iLottery businesses suddenly find themselves on the wrong side of DOJ's pointed threat of prosecution under the Wire Act, despite having poured millions of dollars into technology and infrastructure to establish legally compliant, state-regulated iGaming operations, in good faith reliance on the 2011 Opinion and ensuing state regulation. For example, after the 2011 Opinion, iGaming businesses, including iDEA member-organizations, started allowing online poker players in the States of New Jersey, Delaware, and Nevada to participate in games together, pursuant to state regulations surrounding a shared liquidity agreement between those three States. In another example, prior to the 2018 Opinion, the Commonwealth of Pennsylvania enacted regulations in reliance on the 2011 Opinion allowing iGaming businesses to locate certain electronic equipment across state lines. iGaming businesses proceeded accordingly, in compliance with state law. After the 2018 Opinion was issued, the Pennsylvania Gaming Control Board ("**PGCB**") sent a letter to all state-licensed casino operators informing them that the 2018 Opinion required it to rescind the regulation previously allowing equipment to be located in other States. In these respects, among others, the DOJ's attempt to reach beyond sports gambling in the 2018 Opinion now threatens iGaming and iLottery businesses who invested to develop infrastructure pursuant to state laws that were enacted in reliance on the 2011 Opinion.

DOJ's revised interpretation of the Wire Act flies in the face of the traditional federal approach to gambling, on-point precedent, constitutional imperatives, any sensible reading of the statute, telling and mutually-reinforcing legislative history, and other indicia of Congress's clear intent to limit the Wire Act to sports gambling. Therefore, iDEA joins Plaintiffs in respectfully urging this Court to grant summary judgment rejecting DOJ's misconceived reinterpretation of the Wire Act and holding DOJ within the bounds of established law.

FACTUAL BACKGROUND

The Wire Act was passed in 1961 and provides, in relevant part:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1084(a). In 2011, the OLC published an opinion concluding that the Wire Act applies only to sports betting. *See* 2011 Opinion. That is, the Wire Act did *not*, according to the OLC, apply to any other form of betting or wagering.

Following the 2011 Opinion, many States, including New Hampshire, Kentucky, Illinois, Georgia, Michigan, and Pennsylvania, legalized the in-state online sale of lottery tickets. Several other States, including Delaware, Pennsylvania, New Jersey, and Nevada, enacted various iGaming legislation legalizing some form of either online casino gaming, online poker, or both. Each State that has adopted iGaming legislation has developed a tight statutory framework to regulate iGaming operations and activities that occur within its boundaries or between States that have authorized that activity. For example, the laws of each State require Internet gambling providers to be licensed by the State and to limit gambling activity to the geographic confines of the State. *See, e.g.*, Letter from Gurbir S. Grewal, Att'y Gen. of N.J., & Josh Shapiro, Att'y Gen. of Pa., to Hon. Matthew G. Whitaker, Acting Att'y Gen., U.S. Dep't of Justice, at 2 (Feb. 5, 2019), https://www.nj.gov/oag/newsreleases19/WireActLetter.pdf (last visited March 4, 2019) ("**NJ/PA Letter**") ("Since 2013, New Jersey has worked hard to keep its online betting in state, where it is lawful, and to prevent it from occurring in other states, where it is not.").

Collectively, Delaware, Pennsylvania, New Jersey, and Nevada have issued a significant number of licenses to various iGaming businesses, including to iDEA member-organizations that

now operate pursuant to state regulations. *See, e.g.*, Listing of Locations, State of Nev. Gaming Control Bd., http://gaming.nv.gov/odules/showdocument.aspx?documentid=7279; Internet Gaming Companies Issued A Transactional Waiver, New Jersey Division of Gaming Enforcement, http://www.nj.gov/oag/ge/docs/InternetGaming/TransactionWaivers/RelatedTransactionWaivers.pdf; Andrew Maykuth, *Pa. Approves 3 Online Gaming Licenses, But Don't Expect Internet Betting To Begin Right Away*, The Philadelphia Inquirer (Aug. 15, 2018), https://www.philly.com/philly/business/pennsylvania-pgcb-approves-online-gaming-licenses-parx-harrahs-mt-airy-20180815.html. [1] As a result, the iGaming industry has experienced exponential growth in recent years. Today, iGaming is a multi-billion dollar industry offering customers dozens of safe, well-developed, and highly-regulated gaming options.

Like the various States that have enacted iGaming legislation or otherwise provide direct iGaming and/or iLottery products to their residents, iDEA's member-organizations have relied in good faith on the 2011 Opinion and have, collectively, invested millions of dollars to develop markets and create iGaming products that comply with state laws. For example, iDEA members provide online poker services subject to a shared liquidity agreement involving the States of New Jersey, Delaware, and Nevada. As part of the shared liquidity agreement, online poker players from those States can all play in games together. Importantly, this service utilizes geolocation technology to ensure that players utilizing the service are physically within the borders of those three States when playing. For this type of poker play, the gaming activity still begins and ends in a State where the underlying activity is legal. Even so, certain data necessarily travels

[1] Because the State controls all licensed gaming agents, Delaware does not license private entities to operate Internet gambling in the same manner as the other three states. *See* DEL. CODE ANN. tit. 29, § 4826(a) (2012) (under section 4826(a), only the operation of an "Internet Lottery" is authorized, which by definition must be operated by the State Lottery Office).

between the three States subject to the agreement. The software necessary for the interstate agreement was tested and approved by state regulators. *See* Richard N. Velotta, *Nevada Pokers Players Can Now Play Online Against New Jersey Players*, Las Vegas Review Journal (May 1, 2018), https://www.reviewjournal.com/business/casinos-gaming/nevada-pokers-players-can-now-play-online-against-new-jersey-players/ (last visited Feb. 18, 2018).

iGaming has generated significant revenues, jobs, and tax revenue in States where such activity has been legalized. For example, in New Jersey between 2013 and 2016, iGaming directly and indirectly generated 3,374 full-time jobs, $218.9 million in employee wages, and $124.4 million in tax revenue (including $83.5 million in iGaming taxes). *See Economic Benefits*, https://ideagrowth.org/economic-benefits/ (last visited Feb. 18, 2018). According to the Attorney General of New Jersey, the iGaming industry now generates $352.7 million in annual revenue and $60 million in direct taxes. *See* NJ/PA Letter, at 2. In Pennsylvania, where online casinos and online poker were only recently allowed by the legislature, the State generated over $100 million just in licensing fees alone, prior to the commencement of gaming. *See* Bill Grinstead, *Expanded Gambling Netted Pa $322 Million In Fees Alone In 2018*, Penn Bets (Dec. 28, 2018), https://www.pennbets.com/expanded-gambling-fees-pennsylvania-2018/ (last visited Feb. 19, 2019). And since Pennsylvania's launch of iLottery in May 2018, that State generated $23.8 million in gross gaming revenue, according to its Attorney General. *See* NJ/PA Letter, at 2.

On January 14, 2019, the Department published a new opinion (dated November 2, 2018) reversing its position in the 2011 Opinion and concluding that certain aspects of the Wire Act do, in fact, reach all forms of bets or wagers. *See* 2018 Opinion. The following day, the Deputy Attorney General issued a memorandum to all U.S. Attorneys, Assistant Attorneys General, and the Director of the Federal Bureau of Investigation informing them of the 2018 Opinion that

certain of the Wire Act's prohibitions apply to non-sports gambling activity. *See* Memorandum from Rod Rosenstein, Deputy Attorney General (January 15, 2019), https://www.justice.gov/file/1124286/download ("**Rosenstein Memo I**"). Rosenstein Memo I instructed federal prosecutors to refrain from applying the new interpretation of the Wire Act for a period of 90 days; in doing so, it characterized the 90-day period as "not a safe harbor for violations of the Wire Act," but instead reflecting "an internal exercise of prosecutorial discretion." *Id.* As a result, any present conduct that does not conform to the 2018 Opinion is, according to the Department's interpretation, in violation of the Wire Act and subject to prosecution.

Within five days of the issuance of the 2018 Opinion, the PGCB wrote to all state-licensed casino operators describing the 2018 Opinion as placing "significant restrictions on the future conduct of internet-based gambling." The letter further declared that—in light of the new opinion—the PGCB would be forced to rescind relevant parts of Pennsylvania Title 58, Regulation 809.3, which had allowed certain interactive gaming devices and associated equipment to be located across state lines, provided that the jurisdiction where the equipment was located met certain specified criteria. The PGCB said that it understood that this change would likely "alter the plans of licensees in implementing expanded gaming offerings," but that the change was "commanded by the changing interpretation by federal law enforcement authorities." Letter from Kevin O'Toole, Executive Director of the Pennsylvania Gaming Control Board, to All Casino Managers and Counsel (Mar. 7, 2019), https://www.onlinepokerreport.com/wp-content/uploads/2019/01/KFO-Ltr-to-Casino-GMs-re-DOJ-Wire-Act-Opinion-REDACTED-1-18-19.pdf (last visited Feb. 22, 2019). Thus, in addition to the threat to the shared poker liquidity agreement discussed above, the effects of the 2018 Opinion are already being experienced by iGaming operators.

On February 28, 2019, the Deputy Attorney General extended the 90-day forbearance period for an additional 60 days (through June 14, 2019). *See* ECF No. 23-1 (Memorandum from Rod Rosenstein, Deputy Attorney General (February 28, 2019)) ("**Rosenstein Memo II**"). Thus, upon the expiration of the now 150-day period in June, criminal prosecutions flowing from the 2018 Opinion can commence.

ARGUMENT

As detailed by Plaintiffs, the Wire Act is limited to gambling on sporting events. *See* ECF No. 2-1 ("**NHLC MSJ**") at 18–22; ECF No. 10-1 ("**NeoPollard MSJ**") at 11–23. For the sake of brevity, iDEA focuses on additional historical indications and canons of statutory construction that further foreclose DOJ's instant reading of the Wire Act, over and above those invoked by NHLC and NeoPollard, whose submissions iDEA agrees with and adopts.[2]

A. The History of Federal Gaming Regulation Demonstrates that the Power to Regulate Gambling Rests Primarily With the States

Since our Nation's founding, "the regulation of gambling has been largely left to the state legislatures." *U.S. v. King*, 834 F.2d 109, 111 (6th Cir. 1988).[3] When the colonies and States passed legislation and engaged in prosecutions surrounding gambling, "these anti-gambling enactments and prosecutions were sporadic and were usually directed more at the threats to public welfare that attended gambling than at gambling itself." *Id.* The first federal legislation involving gambling came in the 1890s when Congress passed two separate laws banning the carriage of lottery paraphernalia in interstate commerce. *See* 18 U.S.C. §§ 1301, 1302; *see also*

[2] iDEA does not adopt NHLC's arguments in support of a narrow carve-out for state-conducted lotteries. Rather, iDEA endorses Plaintiffs' broader arguments urging a declaratory judgment that the Wire Act does not extend beyond gambling on sporting events or contests.

[3] Although *King* involved a prosecution under 18 U.S.C. § 1955, in which the Court reached its decision on grounds not germane to the issues in this case, the Sixth Circuit provided a helpful overview of the history of gambling regulation in the United States.

King, 834 F.2d at 111 (discussing same). These federal lottery statutes were later amended, however, to exempt state lottery operations conducted pursuant to state law. *See* NHLC MSJ at 7–8, 25; *see also* 2011 Opinion at 11 n.9. In the first half of the 1900s, especially after the repeal of Prohibition eliminated a source of income, gambling was largely promoted via organized crime syndicates. *Id.* at 111–12. Congress did not address gambling again until it enacted several organized crime statutes in 1961: the Wire Act, 18 U.S.C. § 1084; the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprise Act, 18 U.S.C. § 1952 ("**Travel Act**"); and the Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953 ("**Paraphernalia Act**"). *See* I. Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Bets*, 45 Conn. L. Rev. 653, 659 (stating that Wire Act was first direct federal regulation on gambling since lottery statutes).

The Travel Act does not make specific gambling conduct illegal; instead, it applies to gambling offenses that violate either state or federal law. 18 U.S.C. § 1952(b)(1). However, at the time of its enactment, the only federal laws speaking to gambling were the Wire Act—which, as discussed by Plaintiffs, was designed only with an eye toward sports gambling, *see* NHLC MSJ at 14–16; NeoPollard MSJ at 8–23—and the lottery statutes which, as discussed above, were later amended to exempt legal state lotteries. The Paraphernalia Act prohibits one from carrying gambling paraphernalia across state lines but carves out an exception for shipments to state jurisdictions that permit gambling. 18 U.S.C. § 1953(b)(2), (4) & (6). In other words, the Paraphernalia Act permits the transport of gambling paraphernalia through States that prohibit gambling so long as the paraphernalia is finally delivered in a State where gambling is legal.[4]

[4] Similarly, the Gambling Devices Transportation Act, 15 U.S.C. § 1171 *et seq.*, carves out the transportation of gambling devices to States where the device is designed to be used at

Courts have all but held that the same exception applies to cases brought under the Wire Act. *See Lyons*, 740 F.3d at 714 ("[T]he Wire Act prohibits interstate gambling without criminalizing lawful intrastate gambling."); *United States v. Yaquinta*, 204 F. Supp. 276, 279 (N.D. W. Va. 1962 ("[T]he objective of the [Wire] Act is not to assist in enforcing the laws of the States through which the electrical impulse traversing the telephone wires pass, but the laws of the State where the communication is received.").

Consistent with venerable precedent and practice, at the joint signing ceremony for the Wire Act, Travel Act and Paraphernalia Act, the President stated that "[i]t is a pleasure to sign these three important bills which we hope will aid the United States Government and the people of this country in the *fight against organized crime*," quite different from conduct legalized by the States. *See* Public Papers of the Presidents of the United States, John F. Kennedy: Containing the Public Messages, Speeches, and Statements of the President, January 20 to December 31, 1961, at 600 (1962) (emphasis added).

Gambling laws passed subsequent to the Wire Act likewise showed solicitude for state laws and prerogatives. In 1970, Congress passed the Illegal Gambling Business Act, 18 U.S.C. § 1955 ("**IGBA**"), "in an attempt to attack sophisticated, large-scale illegal gambling operations which Congress thought to be a major source of income for organized crime." *King*, 834 F.2d at 112. The text of the statute explicitly defines an "illegal gambling business" as one that operates in "violation of the law of a State or political subdivision in which it is conducted," explicitly carving out conduct made legal by the States. 18 U.S.C. § 1955(b)(1)(i). Likewise, in the Interstate Horseracing Act of 1978, 15 U.S.C. § 3001 *et seq.*, Congress recognized in the text of

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establishment licensed under state laws, or where the device is made specifically lawful by a State. *Id.* § 1171(a).

the statute that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders." 15 U.S.C. § 3001(a)(1).

Similarly, the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–5367 ("**UIGEA**"), carves out bets or wagers made pursuant to state law, provided the operator utilizes age and location verification technology to ensure participants are of legal age and present in the State that legalized the activity. 31 U.S.C. § 5362(10)(B). The NHLC is correct to observe that UIGEA "recognizes the legality of state-conducted lotteries." NHLC MSJ at 10. But UIGEA does more than that: it recognizes the legality of all activity made legal by a State in which "the bet or wager is initiated and received or otherwise made exclusively within a single State." 31 U.S.C. § 5362(10)(B)(i). And UIGEA expressly sets forth that "[t]he intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(E). By including the "intermediate routing" clarification in UIGEA, which applies to all bets or wagers, Congress further indicated that the Wire Act did not apply to non-sports gambling related transmissions.

In short, the historical federal approach to gambling enforcement has been simply to support States' enforcement of their own laws governing gambling, without outlawing conduct that States have opted to legalize. Consistent with all of this, in the Supreme Court's background discussion in *Murphy*—which held that the Professional and Amateur Sports Protection Act was unconstitutional on anti-commandeering principles—the Court stated both that the Wire Act only "outlaws the interstate transmission of information that assists in the placing of a bet *on a sporting event*," *and* that it only applies "if the underlying gambling is *illegal* under state law." 138 S. Ct. at 1483 (emphasis added).

Defying a host of contrary indicators, the DOJ's new interpretation would jeopardize

iDEA member-organizations' activities conducted pursuant to state law, including the shared liquidity agreement for poker in Delaware, New Jersey, and Nevada, three States with robust regulatory structures allowing for such activity, along with activities conducted by iGaming businesses in Pennsylvania under state law permitting them to locate specified equipment outside the State. Even beyond breaking from settled legal authorities, DOJ is breaking from a longstanding, deeply-rooted federal policy not to regulate gambling directly and instead to leave policymaking to the States while assisting States in enforcing their own laws against *illegal* gambling. As such, the 2018 Opinion effectuates an improper expansion of the Wire Act's narrow scope and a departure from Congress's well-considered, well-expressed intent.

B. The Wire Act's Limitation to Sports Gambling Becomes Especially Apparent Upon Comparing It to Other Federal Statutes

Beyond the historical federal policy generally allowing States to determine whether gambling is illegal, the terms of the Wire Act themselves limit the statute's application solely to sports gambling, as discussed at length by NeoPollard. *See* NeoPollard MSJ at 11–18. But this reading is resoundingly confirmed when the text of the Wire Act is compared to that of other statutes that make reference to gambling. As discussed above, the Paraphernalia Act was enacted on the same day as the Wire Act. Yet the Paraphernalia Act, in addition to criminalizing conduct related to "bookmaking" or "wagering pools with respect to a sporting event," explicitly restricts paraphernalia used "in a numbers, policy, bolita, or similar game." 18 U.S.C. § 1953(a). This language is far more inclusive than the "bets or wagers on any sporting event or contest" found in the Wire Act. 18 U.S.C. § 1084(a). Thus, had Congress intended for the Wire Act to cover anything beyond sports gambling, it could have utilized the *exact same language* that the Paraphernalia Act—which was signed into law on the *exact same day*—utilized to reach such non-sports gambling activity. Congress's decision *not* to include such language in the Wire Act

should not be seen as a mistake—clearly, Congress's intent was to limit the Wire Act to sports gambling activity, while crafting the Paraphernalia Act to extend more broadly. And, of course, the legislative history—discussed more fully by NeoPollard—is strongly supportive of a sports-only reading of the Wire Act. *See, e.g.*, 107 Cong. Rec. 16,533 (1961) (statement of Rep. Celler, Chairman, H. Judiciary Comm.) ("[T]his particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events."); *see also* NeoPollard MSJ at 20–23.

The 1970 IGBA—also discussed in the preceding section—likewise provides far more detail than the Wire Act, so as to reach beyond just sports gambling. Indeed, that statute explicitly provides an expansive definition of "gambling," stating that the term "includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." 18 U.S.C. § 1955(b)(4). The Wire Act, by contrast, neither delineates any specific gambling activity beyond sports gambling, nor utilizes expansive "includ[ing] but [] not limit[ed] to"-type language as found in IGBA. Again, given Congress's explicit targeting of non-sports conduct elsewhere, its failure to do so in the Wire Act counsels against the DOJ's new interpretation.

By no means should the Wire Act be read in a vacuum. Considering the terms of other gambling laws—including one which was enacted on the same day as the Wire Act—that explicitly reach beyond sports gambling to proscribe other activity, the Wire Act's omission of comparably expansive language is no mere oversight. Intending to limit the Wire Act to sports gambling, Congress used terminology that narrowed the scope of the Wire Act relative to other statutes.

C. Context Precludes The Department's New Interpretation Of The Wire Act

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v.*

Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (quotation marks omitted). Here, the statutory scheme and the legislative history of the Wire Act are perfectly clear: Congress intended to limit the Wire Act's reach to combating sports betting that is illegal in the State in which it occurs. *See* NeoPollard MSJ at 20–23. This intent is informed by Congress's historical reluctance to enact gaming legislation directed toward conduct that is legal under state law. *See* Section A, *supra*.

Congress's intent to limit the scope of the Wire Act is further evidenced by the fact that, since its passage in 1961, members of Congress have ***repeatedly*** tried to expand or amend the Wire Act's scope by including non-sports gambling activity within its strictures. If, as the Department claims, the Wire Act has always applied to non-sports gambling activity, members of Congress would have perceived no need to consider expanding its scope. But that is precisely what members of Congress have repeatedly sought. In 1995, for example, Senator Jon Kyl (R-Ariz.), introduced the Crime Prevention Act, which included an amendment to the Wire Act that would have broadened the activities covered by the law. *See* Crime Prevention Act of 1995, S. 1495, Title XV, 104th Congress (1996) 1st Session. Similarly, the following year, Rep. Tim Johnson (D-S.D.) again attempted to amend the Wire Act with the Computer Gambling Prevention Act. Both bills attempted to excise the phrase "on any sporting event or contest," but neither bill was enacted.

In 1997, Sen. Kyl tried again to amend the scope of the Wire Act. This time he introduced the Internet Gambling Prohibition Act, which would have added a definition of "bets and wagers" that included contests, sports, and games of chance. *See* The Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong. (1997) 1st Sess. Sen. Kyl stated that this bill was necessary because it "dispels any ambiguity by making it clear that all betting, including sports

betting, is illegal." Senator Kyl (AZ), Congressional Record 143:36, p. S2560, https://www.congress.gov/crec/1997/03/19/CREC-1997-03-19-pt1-PgS2553.pdf (last visited Mar. 6, 2019). As with previous attempts to amend the scope of the Wire Act, this effort, too, was not enacted. Several years later, in 2002, Rep. Bob Goodlatte (R-Va.) introduced the Combating Illegal Gambling Reform and Modernization Act, which, like Sen. Kyl's 1995 bill, would have added a definition of "bets and wagers" to the Wire Act that broadened it to all forms of interstate gambling activities, including games of chance. *See* Combating Legal Gambling Reform and Modernization Act, H.R. 3215, 107th Congress (2001) Second Session. Again, this bill was not enacted. Most recently, Sen. Lindsey Graham (R-SC) and Rep. Jason Chaffetz (R-UT) introduced the Restoration of America's Wire Act ("**RAWA**"), which, again, attempted to broaden the definition of "sporting event or contest." Despite numerous attempts, RAWA has never been passed.

If the Wire Act has always applied to non-sports related gambling, there is no good reason why Congress has repeatedly considered but ***declined*** opportunities to extend the scope of the Wire Act, which DOJ now claims to have been inherent to the text of the statute all along. In short, what DOJ has done through the 2018 Opinion is to enact the legislative revision of the Wire Act that isolated Congressmen and Congresswomen could not convince Congress to enact on their own. The Court should not countenance usurpation by the Executive Branch of legislative powers reserved exclusively for Congress. *See* Art. I, § 1. Nor would it be appropriate for the Court to permit the Executive Branch to obtain, by judicial edict, that which it was otherwise unable to obtain legislatively, and that which is expressly foreclosed by the text, context, and legislative history of the Wire Act and related anti-gambling legislation. *See United Food & Commercial Workers Union-Employer Pension Fund v. Rubber Assocs., Inc.*, 812 F.3d

521, 528 (6th Cir. 2016) (recognizing that it is not the court's "role to create law in situations where Congress has declined to act").

D. The Department's Interpretation of The Wire Act Is Undermined By Additional Canons of Statutory Construction

UIGEA prohibits certain financial transactions related to "unlawful Internet gambling." Under UIGEA, "unlawful Internet gambling" is defined as "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law . . . in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5364(a). Importantly, this definition contains several notable exceptions that expressly narrow the definition of "unlawful Internet gambling"—for example, excluding intrastate Internet gambling so long as the activity comports with the laws of the State in which the gambling occurs and the bet is initiated and received within that State's borders—going into substantially greater detail than the text of the Wire Act, which, of course, long predated the internet. 31 U.S.C. § 5362(10)(B)(i)–(ii) (2012); *see also* 31 U.S.C. § 5362(10)(E).

UIGEA, which is a gambling statute passed in 2006, must "be regarded as a legislative interpretation of" the earlier-in-time Wire Act, which is also a gambling statute and was passed in 1961—well before the advent of the Internet and decades before the iGaming industry first emerged. *Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972). Especially in these circumstances, where UIGEA so clearly reflects Congress's considered judgment about how to regulate gambling activity in the Internet era, specifically in light of modern technologies and practices, Congress's more recent statutory prescription is "entitled to great weight in resolving any ambiguities and doubts" that may exist between it and the Wire Act. *See id.* (recognizing that "a 'later act can . . . be regarded as a legislative interpretation of (an) earlier act . . . in the

sense that it aids in ascertaining the meaning of the words as used in their contemporary setting,' and 'is therefore entitled to great weight in resolving any ambiguities and doubts'") (citation omitted). Thus, in the face of any ambiguity (and there is none), such ambiguity should be resolved so as to give full effect to the later-in-time UIGEA. *See Rathbun v. Autozone, Inc.*, 361 F.3d 62, 68 (1st Cir. 2004) (recognizing that "statutes which relate to the same subject matter should be considered together so that they will harmonize with each other and be consistent with their general objective scope").

The same conclusion follows from the canon that commends interpreting statutes so as to avoid conflicts with one another. *See Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 370 (1986). If credited, the Department's new interpretation of the Wire Act could sow statutory conflict. Nor can the Department elide any such potential conflict just by relying on a boilerplate savings clause in UIGEA. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) ("We do not believe Congress intended to undermine this carefully drawn statute through a general savings clause."). Put differently, by linking what is "unlawful" to the laws of the States in which a wager is "initiated, received, or otherwise made," UIGEA reinforced federal policy to rely on States to define what is illegal, but use federal resources for enforcement, placing it in the spirit of other federal laws such as the Paraphernalia Act, Travel Act, IGBA, and, properly understood, the Wire Act. Viewed thusly, the savings clause in UIGEA simply means that Congress did not intend to deprive the use of these federal mechanisms to aid the states in enforcement of their laws, and cannot mean that Congress understood lawful state-authorized iGaming was impermissible. Had Congress thought that, UIGEA's exclusion for such activity would effectively be meaningless.

Finally, it bears emphasizing that the Department's new reading of the Wire Act is blind

to pivotal technological and legislative changes that have occurred since its passage. In the intervening decades, the Internet emerged as a ubiquitous mode of communication that spawned dozens of industries that did not exist in 1964. In response to consumer demand for iGaming activities, several States passed comprehensive legislation that legalized various forms of iGaming activity. Since then, iGaming has grown into a multi-billion dollar industry that offers consumers dozens of options, all of which take place pursuant to and in strict accordance with State law. Although these iGaming activities are a far cry from the indisputably criminal gambling activities that the Wire Act was specifically designed to eradicate, the 2018 Opinion inexplicably targets these otherwise lawful iGaming activity as blessed by the States. It defies common sense for the Department to construe the Wire Act in the manner it is.

E. Constitutional Avoidance Weighs Against The Department's Interpretation of The Wire Act

Although the statutory text and legislative history of the Wire Act are clear, particularly when examined amidst the historical backdrop of federal deference to States in this realm, the canon of constitutional avoidance further compels limiting the Wire Act to sports gambling. The canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Thus, "when deciding which of two plausible statutory constructions to adopt, . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail." *Id.* at 380–81. Here, even if the Department's new interpretation were textually permissible (and it is not), the constitutional doubts it raises would nonetheless preclude it.

Specifically, the Department's new interpretation of the Wire Act, if accepted, would raise, at the very least, serious concerns under the Tenth Amendment, as submitted by NHLC.

See NHLC MSJ at 23–24. Regulation of gambling has long been reserved to the States under the Tenth Amendment. *See, e.g.*, *Murphy*, 138 S. Ct. at 1480–81 (striking down federal law that prohibited States from "author[izing] sports gambling" finding federal law did not preempt state regulation of gambling, and the Tenth Amendment prohibited Congress from giving "direct commands" to the States as to whether or not to permit gambling); *Johnson v. Collins Entm't Co.*, 199 F.3d 710 720 (4th Cir. 1999) ("The regulation of gambling enterprises lies at the heart of the state's police power."); Congressional Authority to Adopt Legislation Establishing a National Lottery, 10 Op. O.L.C. 40, 44–45 (1986) (concluding that the Framers of the Constitution reserved the power to conduct lotteries to the States under the Tenth Amendment); *see also* Section I.A, *supra* (discussing historical federal legislative carve-outs for gambling activity permitted by States). Consistent with this, in passing the Wire Act, Congress stated that its purpose was to "assist the various States, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses," and not to thwart them in adopting gaming policies suitable to their citizenry. *See* H.R. Rep. 87-967, *reprinted in* 1961 U.S.C.C.A.N., at 2633. The Department's new interpretation, however, impermissibly treads on the States' rights to regulate gambling activity conducted by iDEA members pursuant to, and in accordance with, State law. In addition, by narrowly construing the Wire Act, the First Amendment concerns raised by NHLC can be avoided. *See* NHLC MSJ at 21–22.

F. The Rule of Lenity Precludes The Department's Interpretation Of The Wire Act

Finally, the Department's new interpretation of the Wire Act is precluded by the rule of lenity. The rule of lenity requires that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher

alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221–22 (1952); *see also id.* at 222 ("We should not derive criminal outlawry from some ambiguous implication."). "[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 560 U.S. 474, 488 (2010). To the extent the Court finds the Wire Act ambiguous as to whether or not it applies to all forms of betting and wagering, such an ambiguity would trigger application of the rule of lenity and commend the conclusion that the Wire Act applies only to sports betting.

As discussed, following the 2011 Opinion, iGaming and iLottery businesses, including iDEA member-organizations, relied in good faith on the Department's conclusion that the Wire Act applied only to sports betting. Indeed, in reliance on the 2011 Opinion, as well as the case law and legislative history upon which that opinion relied, iGaming businesses invested hundreds of millions of dollars to develop markets and create online gaming products compliant with state law, including in technology related to the interstate poker agreement involving New Jersey, Delaware, and Nevada, and in infrastructure related to maintaining equipment outside of Pennsylvania, as allowed by Pennsylvania regulations. As a result, the iGaming industry has quickly mushroomed and emerged as one of the fastest growing segments of the entire gaming industry. *See* Online Gambling Market in the US to Exceed USD 4 Billion by 2020, Reports Technavio, Business Wire (September 21, 2016), https://www.businesswire.com/news/home/20160921005854/en/Online-Gambling-Market-Exceed-USD-4-Billion. The 2018 Opinion, however, has now imperiled these iGaming and iLottery organizations' established businesses, notwithstanding their good-faith reliance on the 2011 Opinion and their assiduous adherence to

governing state law.

NHLC and NeoPollard each also discuss how electronic data related to otherwise in-state wagering activity could, due to the nature of the Internet, incidentally cross state lines despite starting and ending in-state. *See* NHLC MSJ at 6, 10; NeoPollard MSJ at 14 & ECF No. 10-2 ¶¶ 15–16 (Declaration of Liz Siver). Because the rule of lenity dictates that the Court should narrowly interpret the Wire Act, which would lead the Court to find that the Wire Act applies only to sports betting, the Court need not reach this issue. As the Court recognized, "[NHLC], NeoPollard, and the [iDEA] seek the same ultimate objective: a declaration that the 2011 interpretation by the OLC, and not the 2018 interpretation, is the proper interpretation of the Wire Act," and that "the Wire Act is limited to gambling on sports events." ECF No. 24 at 8. Since the rule of lenity dictates that any ambiguity be resolved in Plaintiffs' favor, the inquiry should end with the determination that the Wire Act applies only to sports betting.

The impact of the Department's new reading of the Wire Act cannot be overstated. In short, the 2018 Opinion forces businesses to choose between risking criminal penalties or abandoning their established business practices that have been blessed and regulated by the States where they operate. Moreover, the risk of criminal penalties is neither inchoate nor insignificant. The Department has now repeatedly threatened criminal enforcement of the Wire Act, as now interpreted, upon the expiration of the now 150-day forbearance period. *See* Rosenstein Memo I; *see also* Rosenstein Memo II. Lest these iGaming and iLottery businesses fail to timely bring their entire business operations into compliance with the Department's new interpretation of the Wire Act, they could face severe criminal penalties. *See* 29 U.S.C. § 1084(d)). Against the backdrop of criminal prosecution, the Department's adventurous, newly-expansive interpretation of the Wire Act should be utterly foreclosed and "resolved in favor of

lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971); s*ee also Lockheed Martin Corp. v. Speed*, 2006 WL 2683058, at *7 (M.D. Fla. Aug. 1, 2006) ("To the extent 'without authorization' or 'exceeds authorized access' can be considered ambiguous terms, the rule of lenity, a rule of statutory construction for criminal statutes, requires a restrained, narrow interpretation.").

CONCLUSION

For the foregoing reasons and those stated by the other Plaintiffs, the Court should grant summary judgment in favor of Plaintiffs and enter a judgment declaring that the Wire Act does not extend beyond betting on sporting events or contests.

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Respectfully Submitted,

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