

DUELING D.O.J. OPINIONS FIGHT FOR THE SOUL OF E-GAMBLING IN
THE WAKE OF *NEW HAMPSHIRE LOTTERY COMMISSION V. ROSEN*

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I. INTRODUCTION

Gaming is America's most regulated industry.¹ Sports betting is inherently problematic, especially after the Black Sox Scandal of 1919, "where it was alleged that professional gamblers influenced the Chicago White Sox baseball team in such a way that they 'threw' the World Series."²

Gambling is mostly regulated locally, as it is a states' rights issue.³ "Because of the differences of population, culture, religion, history, demographics, and professional sports franchises in the state, it must be up to each state to determine the availability of gambling within their own borders."⁴ However, there are some federal acts that allegedly intrude on the states' rights hegemony: the Wire Act,⁵ Illegal Gambling Business Act (IGBA),⁶ Indian Gaming Regulatory Act (IGRA),⁷ Professional and Amateur Sports Act (PASPA),⁸ and the Unlawful Internet Gambling Enforcement Act (UIGEA).⁹

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¹ WALTER T. CHAMPION & I. NELSON ROSE, *GAMING LAW IN A NUTSHELL* 52 (West Academic, 2d ed. 2018) ("No industry in America is as heavily regulated as gambling, including atomic power plants.").

² *Id.* at 34.

³ *Id.* at 10.

⁴ Walter T. Champion, *PASPA's Got a Brand New Bag: President Trump's States' Rights Bias for Gambling Calls the Winning Hand*, 49 *STETSON L. REV.* 39 (2019) (citing Richard McGowan, *The Dilemma That Is Sports Gambling*, 18 *GAMING L. REV. & ECON.* 670 (2014)) [hereinafter Champion PASPA].

⁵ See 18 U.S.C. § 1084 (2019).

⁶ See 18 U.S.C. § 1955 (2019).

⁷ See 25 U.S.C. § 2701 (2019).

⁸ See 28 U.S.C. §§ 3701–3704 (2019).

⁹ See 31 U.S.C. §§ 5361–5363 (2019).

“Internet gambling allows people the comfort of gambling in their own homes.”¹⁰ The federal act that appears to regulate e-gambling is the Wire Act of 1961, but it was promulgated thirty years before the internet became a reality.¹¹ “Wire schemes as showcased in *The Sting* [were] made a crime as part of Attorney General Robert F. Kennedy, Jr.’s war on organized crime in 1961.”¹² The Wire Act “was designed to go after ‘the Wire’, i.e., the telegraph wire services illegal bookies used to get horserace results before their patrons.”¹³

“Criminal prosecutions require a statute making the activity illegal. Lacking anything better, until 2011, the federal Department of Justice has mainly relied on the Wire Act in its fight against [i]nternet gambling.”¹⁴ However, the Wire Act was not mentioned in the “Black Friday” indictments revealed on Friday, April 15, 2011, against the founders and principals of the largest online poker operations who were taking money bets from the United States.¹⁵ Instead, the U.S. Attorneys relied on the Illegal Gambling Businesses Act¹⁶ and the more recent—but incoherent—Unlawful Internet Gambling Enforcement Act.¹⁷

On January 14, 2019, the Department of Justice (D.O.J.) Office of Legal Counsel issued a memorandum dated November 2, 2018, entitled *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*.¹⁸ The memo reversed the D.O.J.’s 2011 Opinion,¹⁹ which determined that the Wire Act’s prohibitions apply only to sports.²⁰ The 2011 Opinion gave states a “Christmas Present” by allowing them to operate, license, and tax every form of online gambling within their borders and across state lines, except for sports betting, which was still

¹⁰ CHAMPION & ROSE, *supra* note 1, at 80.

¹¹ *Id.* See also *N.H. Lottery Comm’n v. Barr*, 386 F. Supp. 3d 132, 161, n. 12 (D.N.H. 2019), *aff’d in part & vac’d in part sub nom* *New Hampshire Lottery Commission v. Rosen.*, 986 F.3d 38, 2021 WL 191771, (1st Cir. Jan. 20, 2021).

¹² CHAMPION & ROSE, *supra* note 1 at 65.

¹³ *Id.* See generally DAVID G. SCHWARTZ, *CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET* (Univ. of Nev. Press rev. ed. 2005); Andrew M. Nevill, *Folded Industry? Black Friday’s Effect on the Future Online Poker in the United States*, 2013 U. ILL. J.L. TECH. & POL’Y 203 (2013).

¹⁴ CHAMPION & ROSE, *supra* note 1, at 65.

¹⁵ *Id.*

¹⁶ 18 U.S.C. § 1955 (2019). See CHAMPION & ROSE, *supra* note 1, at 65–66.

¹⁷ 31 U.S.C. §§ 5361–5363 (2019). See CHAMPION & ROSE, *supra* note 1, at 85–86.

¹⁸ *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 1 (Nov. 2, 2018) [hereinafter 2018 Opinion].

¹⁹ *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, 35 Op. O.L.C. (Sept. 20, 2011) [hereinafter 2011 Opinion].

²⁰ See Mark Hichar & Erica Okerberg, *DOJ Opinion Increases the Scope of the Wire Act Significantly Affecting Gaming Industry Stakeholders*, 23 GAMING L. REV., ECON., REG’N, COMPLIANCE & POL’Y 168 (2019).

prohibited under the Wire Act and PASPA.²¹ On May 14, 2018, however, the Supreme Court deemed PASPA unconstitutional in an unprecedented 7-2 decision in *Murphy v. NCAA*.²² The 2018 D.O.J. Opinion upset the apple cart, and the New Hampshire Lottery Commission (NHLC) promptly filed a federal lawsuit against the U.S. Attorney General in *New Hampshire Lottery Commission v. Barr*.²³

The 2018 D.O.J. Opinion reversed the 2011 D.O.J. Opinion mostly on arcane, grammatical nuances of syntactic structure and punctuation.²⁴ The Court in *NHLC v. Barr* disagreed with the 2018 Opinion on statutory-interpretation grounds based on the clear wording of the Wire Act²⁵ and its legislative history.²⁶ Former President Trump's 2018 Opinion was clearly a New Year's gift to his friend, casino magnate, intransigent foe of internet gambling, and uber campaign contributor, the late Sheldon Adelson.²⁷

In short, the Wire Act is dated and irrelevant, UIGEA is incoherent, and the 2018 D.O.J. Opinion is a nonsensical bone thrown to Adelson.²⁸

II. THE WIRE ACT GENERALLY

Until December 2011, the United States government considered online poker illegal because all internet gambling violated the Wire Act.²⁹ The Wire Act applies to "wire communication" facilities that transmit wagering information. It specifically provides that:

(a) 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

²¹ CHAMPION & ROSE, *supra* note 1, at 340–41. *See also* I. Nelson Rose, *The DOJ Gives States a Gift*, 4 UNLV GAMING L.J. 1, 8 (2013).

²² *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018).

²³ *Barr*, 386 F. Supp. 3d at 132.

²⁴ 2018 Opinion, *supra* note 18, at 4.

²⁵ *Barr*, 386 F. Supp. 3d at 148–54.

²⁶ *Id.* at 154–57.

²⁷ *See* Sue Schneider, *Notes from the Editor*, 23 GAMING L. REV., ECON., REGUL., COMPLIANCE & POL'Y 135, 135 (2019) [hereinafter Schneider]; *Interview with Senator Raymond Lesniak on the OLC's New Wire Act Interpretation*, 23 GAMING L. REV. ECON., REGUL., COMPLIANCE & POL'Y 241, 242 (2019) [hereinafter Interview with Sen. Raymond Lesniak]. *See also* Robert D. McFadden, *Sheldon Adelson, Billionaire Donor to G.O.P. and Israel, is Dead at 87*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/12/business/sheldon-adelson-dead.html>.

²⁸ Interview with Sen. Raymond Lesniak, *supra* note 27, at 242.

²⁹ CHAMPION & ROSE, *supra* note 1, at 43.

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.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sports events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.³⁰

In 2011, the D.O.J. reevaluated the Wire Act in the post-internet era and concluded that it unambiguously only covered “bets or wagers” related to sports gambling.³¹ The Wire Act is now reviewed in the context of the 2011 D.O.J. Opinion³² and the idiosyncratic 2018 D.O.J. Opinion.³³ Section 1084(d) of the Wire Act provides:

When any common carrier subject to the jurisdiction of the Federal Communications is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State, or local law, it shall discontinue or refuse the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscribe³⁴

This section seems to imply, as the Trump D.O.J. Opinion asserted, that once the 2018 Opinion was published, any law enforcement agency could notify in writing a common carrier used for receiving or transmitting gambling information, and upon receipt of such notice, the provider would be compelled to discontinue or refuse that service to the offending subscriber.³⁵

The intent of the Wire Act was to eliminate the use of a telegraph wire as a means to bet on horse races.³⁶ The first section clearly states that it is a crime if anyone “engaged in the businesses of betting . . . knowingly uses a wire communication facility for the transmission . . . of bets or wagers . . . assisting in the place of bets or wagers on any sporting event or contests”³⁷ Former

³⁰ 18 U.S.C. § 1084(a)–(b).

³¹ *Id.*

³² *See* 2011 Opinion, *supra* note 19, at 3–4.

³³ *See* 2018 Opinion, *supra* note 18, at 1.

³⁴ 18 U.S.C. § 1084(d).

³⁵ *Barr*, 386 F. Supp. 3d at 146.

³⁶ CHAMPION & ROSE, *supra* note 1, at 65.

³⁷ 18 U.S.C. § 1084(a) (2019).

New Jersey State Senator Raymond Lesniak opined that the “Wire Act, when it was passed in 1961, was the brainchild or cause célèbre of Attorney General Robert Kennedy to go after organized crime, bookies . . . taking bets over the phone and taking bets on sporting events and horseracing.”³⁸ In 1961, internet gaming did not even exist.

III. UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT

Former President George W. Bush signed the UIGEA into law on Friday, October 3, 2006.³⁹ The Act is Title VIII of a completely unrelated bill, the SAFE Port Act (HR 4954), which deals with port security.⁴⁰ “Senate Majority Leader Bill Frist (R-TN) rammed the UIGEA through Congress, apparently without even being proofread [T]he Republican Leadership refused to let members of Congress read the final version, or even have the author or anyone else explain what the UIGEA would do.”⁴¹

“Although the UIGEA scared all of the publicly traded [i]nternet gambling operators out of the American market, the law actually does only two things.”⁴² The Act created a new crime concerning the business of gambling in connection with internet transactions and called on the federal investigators to make appropriate regulations.⁴³ However, the Board of Governors of the Federal Reserve System and the Secretary of the Department of Treasury, in consultation with the Department of Justice, “found it impossible to issue those regulations since it is difficult to determine whether a particular [i]nternet gambling transaction is illegal.”⁴⁴ Instead, the regulators issued final regulations that merely required banks to use due diligence when setting up new commercial variants.⁴⁵

Rather than expressly changing state or federal substantive law, the UIGEA is merely an enforcement statute.⁴⁶ Because it was rushed through so quickly, though, it actually led to an expansion of internet gaming, though some forms of gaming—including fantasy sports, inter-tribal gaming, and intra-state gaming—are *expressly* excluded from the Act.⁴⁷

³⁸ Interview with Sen. Raymond Lesniak, *supra* note 27, at 241.

³⁹ CHAMPION & ROSE, *supra* note 1, at 85.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 85–86.

⁴³ See CHAMPION & ROSE, *supra* note 1, at 86. See generally 31 U.S.C §§ 5361– 5367 (2019).

⁴⁴ See CHAMPION & ROSE, *supra* note 1, at 86. See also FED. DEPOSIT INS. CORP., Unlawful Internet Gambling Enforcement Act of 2006 1 (2010), <https://www.fdic.gov/news/financial-institution-letters/2010/fil10035a.pdf>.

⁴⁵ 12 C.F.R. § 233.6(b)(1) (2009) duplicated at 31 C.F.R. § 132.6(b) (2009).

⁴⁶ CHAMPION & ROSE, *supra* note 1, at 86 (emphasis added).

⁴⁷ *Id.*

Daily Fantasy Sports (DFS) proponents argue that all fantasy sports are excluded from the UIGEA since the Act exempts a “fantasy or simulation sports game or educational game or contest” from the definition of bet or wager.⁴⁸ “But the Act expressly states that it is not intended to change only federal or state substantive law.”⁴⁹

Although the UIGEA includes an express exemption for fantasy games,⁵⁰ it also expressly defers to existing statutes, such as the Indian Gaming Regulatory Act (IGRA), the Wire Act, and PASPA, though none of them have been invoked against fantasy leagues.⁵¹ “Under the UIGEA, the definition of unlawful gambling depends upon the substantive law of the states where the bettor and the operator reside; it is expressly made irrelevant if the wire happens to cross into another state that prohibits the type of gambling involved. Many states have at least implicitly declared that fantasy leagues are predominantly contests of skill and not gambling.”⁵²

⁴⁸ 31 U.S.C. § 5362.

⁴⁹ CHAMPION & ROSE, *supra* note 1, at 87. *See also* Walter T. Champion & I. Nelson Rose, *Daily Fantasy Sports and the Presidential Debate*, 27 MARQ. SPORTS L. REV. 301, 314–16 (2017) [hereinafter Champion & Rose DFS].

⁵⁰ 31 U.S.C. § 5362.

⁵¹ CHAMPION & ROSE, *supra* note 1 at 357.

⁵² *Id.* at 357–58. *See* Champion & Rose DFS, *supra* note 49, at 314–16; Walter T. Champion, *The NCAA ‘Doth Protest Too Much, Methinks’ About DFS*, 15 CARDOZO, PUB. L. POL’Y & ETHICS J. 117, 129–32 (2016) [hereinafter Champion NCAA]; Champion PASPA, *supra* note 4, at 60; and Walter T. Champion, *Using State v. Rosenthal to Trump PASPA and Save Atlantic City*, 7 MISS. SPORTS L. REV. 1, 20 (2017) [hereinafter Champion Rosenthal]. *See also* Fern L. Kletter, Annotation, *Validity, Construction, and Application of Unlawful Internet Gambling Enforcement Act of 2006*, 31 U.S.C.A. §§ 5361 *et seq.*, 16 A.L.R. Fed. 3d Art. 6 (2016); 31 U.S.C. § 5362(10)(C).

(C) Intratribal transactions.—The term “unlawful Internet gambling” does not include placing, receiving, or otherwise transmitting a bet or wager where—

(i) the bet or wager is initiated and received or otherwise made exclusively—

(I) within the Indian lands of a single Indian tribe (as such terms are defined under the Indian Gaming Regulatory Act); or

(II) between the Indian lands of 2 or more Indian tribes to the extent that intertribal gaming is authorized by the Indian Gaming Regulatory Act;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and complies with the requirements of—

(I) the applicable tribal ordinance or resolution approved by the Chairman of the National Indian Gaming Commission; and

However, the 2018 Opinion concluded that the UIGEA does not modify the Wire Act.⁵³

IV. PRESIDENT OBAMA’S CHRISTMAS GIFT

Until December 2011, the government’s position was that all internet gambling violated the Wire Act,⁵⁴ including “the relatively typical situation of four online poker players from four different countries (including a player from California), using a server based in Antigua”⁵⁵ However, two days before Christmas, the D.O.J. announced that after re-evaluating the issue, it was reversing its position that the Wire Act covers all gambling of any kind.⁵⁶

This reversion limited the Wire Act to bets on sports events and races.⁵⁷ Prosecutors must find that there is both a violation of a specific state law and an

(II) with respect to class III gaming, the applicable Tribal-State Compact;

(iii) the applicable tribal ordinance or resolution or Tribal-State Compact includes—

(I) age and location verification requirements reasonably designed to block access to minors and persons located out of the applicable Tribal lands; and

(II) appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with the applicable tribal ordinance or resolution or Tribal-State Compact; and

(iv) the bet or wager does not violate any provision of—

(I) the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(II) chapter 178 of title 28 (commonly known as the “Professional and Amateur Sports Protection Act”);

(III) the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or

(IV) the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

⁵³ See 2018 Opinion, *supra* note 18. See Hichar & Okerberg, *supra* note 20, at 169.

⁵⁴ CHAMPION & ROSE, *supra* note 1, at 43.

⁵⁵ *Id.*

⁵⁶ *Id.* at 43–44. See 2011 Opinion, *supra* note 19.

⁵⁷ CHAMPION & ROSE, *supra* note 1, at 44. See also Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, Occasional Paper Series, 29 Las Vegas: Center for Gaming Res., U. Libr. (2014) (The Wire Act was only applied to sports betting for its first 40 years, but another D.O.J. opinion in 2001 from the Bush administration declared that the Act covered all forms of online gambling. This opinion came because of a request from the Nevada Gaming Control and the Nevada Gaming Commission seeking an opinion on the applicability of the Wire Act to Nevada’s recently enacted law legalizing intrastate online gambling. On August 23, 2002, then-Assistant Attorney

organization involved in interstate commerce to constitute a federal crime.⁵⁸ This Christmas gift represented a shift in the interpretation of the Wire Act, with the federal government deciding that it only applied to sports betting, so prosecutors must find another statute, such as the IGBA, to prevent a licensed overseas gaming operator from taking bets from the United States.⁵⁹

The effect of the 2011 D.O.J. Opinion was momentous and immediate. Leading up to the Opinion, half a dozen state lotteries had been selling subscriptions over the internet to residents of their own states for years through cashless transactions.⁶⁰ Illinois and New York asked the D.O.J. if they could use out-of-state payment processors.⁶¹ The Opinion gave the states a Christmas Gift that represented “far more than what they asked for,” with the D.O.J. ruling that the states could conduct any form of gambling other than sports betting.⁶² Illinois was the first state to sell individual online lottery tickets and had so much success that its computers crashed.⁶³

The formal title of the Christmas Gift was “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.” The 2011 Opinion focused on whether states could use the internet and out-of-state transaction processors to route lottery sales to in-state adults.⁶⁴ The Opinion concluded that the Wire Act was ambiguous and covered only sports bets or wagers.⁶⁵ The bottom line was that the Wire Act did not apply to lottery sales of any gambling information not related to sports.⁶⁶

In *NHLC v. Barr*, the U.S. District Court of New Hampshire concluded the following:

Although the 2011 and 2018 OLC Opinions end up in very different places, they proceed from common ground. Both agree that § 1084(a) includes two general clauses that each, in turn, prohibit two types of wire transactions. The first clause bars anyone engaged in the business of gambling from knowingly using the wires “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.” The second clause prohibits any such person from using the

General Michael Chertoff responded that the D.O.J. believed that federal law prohibits internet gambling but provided no rationale).

⁵⁸ CHAMPION & ROSE, *supra* note 1, at 44.

⁵⁹ *Id.* at 268–69.

⁶⁰ *Id.* at 447.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 12.

⁶⁶ 2011 Opinion, *supra* note 19, at 13.

wires “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.”⁶⁷

The Court in *NHLC v. Barr* held that the 2011 Opinion is correct and that the Wire Act pertains solely to sports gambling.⁶⁸

V. THE EMPIRE STRIKES BACK: TRUMP’S NEW YEAR GIFT TO SHELDON ADELSON

“Now is the winter of our discontent.”⁶⁹ Donald Trump was the 45th President of the United States and a former casino owner who apparently supported states’ rights, which “normally included gaming.”⁷⁰ Described as “a new sheriff in town,”⁷¹ Trump was something of a quirky enigma; he was the only President who had no experience in both politics and the military. He was also the only billionaire President, and had a “myriad of branding conflicts.”⁷² He had “a record of unethical behavior, racist discourse, and disregard for the truth,”⁷³ and his White House was “dysfunctional [and] dystopian.”⁷⁴

The D.O.J.’s new interpretation was at the behest of the late Sheldon Adelson, who was known as a gambling mogul, Republican financier, implacable e-gaming foe, and Trump’s friend.⁷⁵ Adelson was “not only the largest political contributor in the entire United States, but the largest to President Trump, the largest to Republican congressional candidates, and . . . the largest to Senator Lindsey Graham.”⁷⁶ Sen. Graham was “Trump’s biggest cheerleader and

⁶⁷ *Barr*, 386 F. Supp. 3d at 148 (citations omitted).

⁶⁸ *Id.* at 149.

⁶⁹ Champion Rosenthal, *supra* note 52, at 3 (quoting WILLIAM SHAKESPEARE, KING RICHARD THE THIRD act 3, sc. 1).

⁷⁰ *Id.* (citing I. Nelson Rose, *President Trump and the Future of Legal Gaming*, 20 GAMING L. REV. & ECON. 818 (2016)).

⁷¹ Champion PASPA, *supra* note 4, at 40 (footnote omitted).

⁷² *Id.* at 69 (footnote omitted).

⁷³ Richard Cherwitz, *Trumpian Language is Strategic Rhetoric [Opinion]*, HOUSTON CHRONICLE (June 12, 2018), <https://www.houstonchronicle.com/opinion/outlook/article/Trumpian-language-is-strategic-rhetoric-Opinion-12985542.php>.

⁷⁴ Maureen Dowd, *Vlad, the Trump Impaler*, N.Y. TIMES (July 8, 2017), <https://www.nytimes.com/2017/07/08/opinion/sunday/putin-trump-bannon-taxes.html>.

⁷⁵ See Schneider, *supra* note 27, at 135; see also Interview with Sen. Raymond Lesniak, *supra* note 29, at 243.

⁷⁶ Interview with Sen. Raymond Lesniak, *supra* note 27, at 242.

chairman of the Senate Judiciary Committee,” and with little doubt the political influence behind the D.O.J.’s abrupt about-face.⁷⁷

The 2018 D.O.J. Opinion overtly acknowledged that because of states’ “reliance interests” on the 2011 D.O.J. Opinion, they began to sell lottery tickets via the internet.⁷⁸ The 2018 Opinion suggested that such reliance may be a defense for acts taken in violation of the Wire Act.⁷⁹ “The U.S. D.O.J. cannot issue two wholly conflicting legal opinions within eight years that both *expressly* pertain to the legality (or illegality) of state-lottery activity, and, at the same time, proclaim that the NHLC does not present this Court with a concrete case or controversy.”⁸⁰ The 2018 D.O.J. Opinion “departed from existing circuit court precedent and from the coherent federal policy that according to the United States Supreme Court, the Wire Act helped advance.”⁸¹

The 2018 Opinion “exposes the New Hampshire lottery system to substantial uncertainty as to the continued legality of its operations, which fund New Hampshire’s public education system.”⁸² On January 15, 2019, the Deputy Attorney General acknowledged the 2018 Opinion and issued a memorandum directing U.S. D.O.J. Attorneys to “adhere to the OLC’s interpretation, which represents the Department’s position on the meaning of the Wire Act.”⁸³

The NHLC noted that “as with all other industries, the lottery business has adopted the use of modern communications technology, including the [i]nternet, to conduct its business.”⁸⁴ The NHLC has further relied on the decades-long practice of using this technology to operate high-profile, multi-jurisdictional lottery games.⁸⁵ Based on the 2018 Opinion and ninety-day memo, the NHLC alleged that it faced “a credible threat of prosecution on an ongoing basis under [the Wire Act] for engaging in conduct that has otherwise been deemed lawful for decades and [risked] substantial criminal and civil penalties for continuing to operate its state lottery activities.”⁸⁶

In *NHLC v. Barr*, the Court noted that “[t]he 2018 OLC Opinion will also have an immediate adverse effect on the Commission even if no indictment issues.”⁸⁷ The Court explained that the 2011 OLC Opinion explicitly gave businesses engaged in non-sports gambling a “reasonable” defense to

⁷⁷ *Id.*

⁷⁸ *See* 2018 Opinion, *supra* note 18, at 22–23.

⁷⁹ *Id.* at 23, n. 19.

⁸⁰ Pl.’s Mem. Objecting to Defs.’ Mot. to Dismiss & Replying to Defs.’ Objection to Pl.’s Mot. for Sum. J. at 1, *N.H. Lottery Comm’n v. Barr*, 386 F. Supp. 3d 132 (2019) (No. 1:19-cv-00163-PB) (emphasis in original) [hereinafter NHLC Mem.].

⁸¹ Complaint at 12, *N.H. Lottery Comm’n v. Barr*, (D.N.H June 3, 2019) (Case 1:19-cv-00163) [hereinafter NHLC Compl.].

⁸² *Id.* at 4.

⁸³ *Id.* at 13 (citation omitted).

⁸⁴ NHLC Compl., *supra* note 81, at 14.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Barr*, 386 F. Supp. 3d at 145.

prosecution under the Wire Act, but that defense would no longer be available to those businesses once the D.O.J. began to enforce the 2018 Opinion.⁸⁸ Therefore, the Commission would be in a perilous position if the 2018 Opinion was allowed to stand, regardless of whether or not it was immediately indicted.⁸⁹ The court further explained the following:

In other words, once the 2018 OLC Opinion was published, any law enforcement agency could notify in writing a common carrier (such as a telephone or internet service provider) that it was providing services “used for the purposes of transmitting or receiving gambling information” in violation of the Wire Act. Upon receipt of such notice, the provider would be compelled to “discontinue or refuse” that service to the offending subscriber.⁹⁰

Importantly, “[t]he Government has not represented that it will forbear from enforcing” the Wire Act.

Adelson was the main crusader of outlawing most forms of online gambling. To repay the Las Vegas Sands founder’s wildly generous donations, Republicans introduced the Restoration of America’s Wire Act (RAWA), on Adelson’s behalf.⁹¹ The RAWA, jokingly called the “Adelson Protection Act,” would reverse the 2011 D.O.J. Opinion and “once again make all forms of online gambling subject to the Wire Act.”⁹² Congressional efforts, however, thwarted all attempts to stop the expansion of legalized gambling.⁹³ But the 2018 D.O.J. Opinion effectively incorporated RAWA by reversing the 2011 D.O.J. Opinion without *any* congressional oversight.⁹⁴

⁸⁸ *Id.* at 145–46.

⁸⁹ *Id.*

⁹⁰ *Id.* at 146.

⁹¹ *See generally* Restoration of America’s Wire Act, H.R. 707, 114th Cong. (2015); Alex Rogers, *House Introduces Online Gambling Bill Backed by Sheldon Adelson*, TIME (Feb. 4, 2015, 4:45 PM), <https://time.com/3695948/sheldon-adelson-online-gambling/>.

⁹² CHAMPION & ROSE, *supra* note 1, at 85.

⁹³ *Id.* *See also* Julio Rodriguez, *Sheldon Adelson Gets His Way, Department of Justice Says All Online Gambling Illegal*, CARD PLAYER (Jan. 15, 2019), <https://www.cardplayer.com/poker-news/23543-sheldon-adelson-gets-his-way-department-of-justice-says-all-online-gambling-illegal>.

⁹⁴ CHAMPION & ROSE, *supra* note 1, at 85; *see also* 2018 Opinion, *supra* note 18, at 6.

VI. INTERPRETING E-SPORTS AFTER DAILY FANTASY SPORTS

It should be easy to determine whether DFS and eSports constitute gambling and, if so, whether they are legal.⁹⁵ DFS “is another example of America’s contradictory approach to gambling.”⁹⁶ Through DFS websites and mobile applications, players compete in daily contests for cash prizes based on real-world athlete and team performances.⁹⁷ Unlike Traditional Fantasy Sports (TFS) leagues, in which fans own teams and draft players,⁹⁸ DFS “can be started and finished in one day.”⁹⁹

The threshold question is whether DFS is illegal.¹⁰⁰ The UIGEA may govern DFS¹⁰¹ pursuant to its so-called “carveout” for fantasy sports.¹⁰² States leaped at the opportunity to raise money. Maryland, for example, legalized fantasy sports in 2012 “by enacting a statute that tracked UIGEA’s language and declared those games to be not gambling.”¹⁰³ To the surprise of many, DFS became the fastest growing segment of online gambling in 2015.¹⁰⁴ Despite each state’s unique history and approach to gambling, many are looking to gambling to generate revenue in a sluggish economy.¹⁰⁵ Now legal in ten states, DFS has been described as “a glorified sportsbook.”¹⁰⁶ The question remains: if the states can legislate the legality of DFS, why can’t they legislate PASPA’s illegality?¹⁰⁷

⁹⁵ CHAMPION & ROSE, *supra* note 1, at 419; *See also* Angela Childers, *E-sports Exposures Evolve as Events Take Off*, BUSINESS INSURANCE (Feb. 16, 2021), <https://www.businessinsurance.com/article/20210216/NEWS06/912339673/E-sports-exposures-evolve-as-events-take-off-COVID-19-entertainment-coronavirus-p> (E-sports is a huge and growing business: A \$1.6-billion industry that has a 27% rate of annual growth).

⁹⁶ Champion PASPA, *supra* note 4, at 59 (footnote omitted).

⁹⁷ *In re Daily Fantasy Sports Litig.*, No. MDL 16-02677-GAO, 2019 WL 6337762, at *10 (D. Mass. Nov. 27, 2019), *reprinted in* 24 GAMING L. REV. ECON., REGUL., COMPLIANCE & POL’Y 87 (2020).

⁹⁸ Champion PASPA, *supra* note 4, at 59 (footnote omitted).

⁹⁹ *Id.* (footnote omitted).

¹⁰⁰ *See generally* CHAMPION & ROSE, *supra* note 1, at 419–35.

¹⁰¹ Champion NCAA, *supra* note 52, at 130 (emphasis in original) (footnote omitted).

¹⁰² 31 U.S.C. § 5362(1)(E)(ix)(I)–(III).

¹⁰³ Champion NCAA, *supra* note 52, at 130 (footnote omitted); MD. CODE ANN. CRIM. LAW, § 12-114 (2012).

¹⁰⁴ Champion NCAA, *supra* note 52, at 131 (footnote omitted).

¹⁰⁵ Champion Rosenthal, *supra* note 52, at 15 (footnote omitted).

¹⁰⁶ *Id.* at 18 (footnote omitted).

¹⁰⁷ *Id.*

VII. INTERPRETING E-SPORTS AFTER *MURPHY V. NCAA*

PASPA was yet another irrational federal act that attempted to control gambling.¹⁰⁸ It was the only federal act that barred a state from changing its public policy toward gambling, which is a states' rights issue.¹⁰⁹ Accordingly, PASPA became the poster child for Justice Douglas's oft-quoted analogy in *Flood v. Kuhn* to "a derelict in the stream of law that we, its creator, should remove. Only a romantic view of a rather dismal business account over the last fifty years would keep that derelict in midstream."¹¹⁰ PASPA "created the 'Las Vegas loophole' that allows Nevada a monopoly on legal sports gambling."¹¹¹ Former President Bush signed PASPA into law in 1992, placing a moratorium on sportsbooks while granting immunity to states, including Nevada, that allowed sports wagering prior to October 2, 1991.¹¹²

New Jersey was given a year to approve legislation to legalize sports betting, but failed to do so within the given time.¹¹³ PASPA prevented states and tribes from creating any new sports gambling.¹¹⁴ "New Jersey voters finally got religion in November 2011 and amended their state constitution to allow sports betting on professional and amateur sporting events at Atlantic City casinos and state-wide horse tracks."¹¹⁵ New Jersey enacted the New Jersey Sports Wagering Law (2012 Act), which created a highly regulated sports wagering regime.¹¹⁶ The 2012 Act was repealed by New Jersey's 2014 law, which unilaterally disallowed prohibitions on sports wagering.¹¹⁷

At the same time, New Jersey was thwarted again in *NCAA v. Governor of New Jersey* (Christie II),¹¹⁸ in which the Third Circuit illogically construed PASPA to preclude "states from enacting legislation repealing sports wagering

¹⁰⁸ 28 U.S.C. §§ 3701–3704; see Champion Rosenthal, *supra* note 52, at 1–3.

¹⁰⁹ See Champion Rosenthal, *supra* note 52, at 1 (footnotes omitted).

¹¹⁰ *Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting) (footnote omitted). See generally, WALTER T. CHAMPION, JR., *SPORTS LAW: CASES, DOCUMENTS, AND MATERIALS* 281–99, 324–26 (2d ed. 2014); WALTER T. CHAMPION, JR., *SPORTS LAW IN A NUTSHELL* 116–21 (5th ed. 2017); Walter T. Champion, Jr., *The Baseball Antitrust Exemption Revisited 21 Years After Flood v. Kuhn*, 19 T. MARSHALL L. REV. 573 (1994).

¹¹¹ Champion Rosenthal, *supra* note 52, at 2 (footnotes omitted).

¹¹² CHAMPION & ROSE, *supra* note 1, at 309–10 (footnotes omitted).

¹¹³ *Id.* at 310 (footnote omitted).

¹¹⁴ *Id.* (footnote omitted).

¹¹⁵ Champion PASPA, *supra* note 4, at 40 (citing N.J. CONST. art. 4, § 7, cl. 2(D)–(F)).

¹¹⁶ See N.J. STAT. ANN. § 5:12A-1–6 (West 2012) (repealed 2014). See also N.J. ADMIN. CODE § 13:69N-1.2–1.4 (2019).

¹¹⁷ N.J. REV. STAT. § 5:12A-7–9 (2014).

¹¹⁸ *NCAA v. Christie*, 832 F.3d 389, 391 (3d Cir. 2016), *cert. granted*, *Christie v. NCAA*, 137 S. Ct. 2327, 2327–28 (2017) (mem.), *rev'd sub nom. Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

prohibitions in casinos and at racetracks.”¹¹⁹ However, the U.S. Supreme Court granted certiorari¹²⁰ and held that PASPA was unconstitutional in *Murphy v. NCAA* on May 14, 2018.¹²¹ The *Murphy* Court “expressly held that the federal government cannot order states, or state officials, to do anything.”¹²² *Murphy* controls *NHLC v. Barr*, which was New Hampshire’s attempt to disavow Trump’s D.O.J. opinion.¹²³ *Murphy* allows the “interstate transmission of information that assists in the placing of a bet on a sporting event” and applies “only if the underlying gambling is illegal under state law.”¹²⁴ *Murphy* helps advance “a coherent federal policy” that allows the people of each state to make their own policy choices relating to gambling.¹²⁵

VIII. *NEW HAMPSHIRE LOTTERY COMMISSION v. BARR* AND DUELING D.O.J. OPINIONS

The 2018 D.O.J. Opinion, titled “Reconsidering Whether the Wire Act Applies to Non-Sports Gambling,”¹²⁶ upset New Hampshire’s lucrative lottery juggernaut, which has exceeded \$2 billion since 1964.¹²⁷ “The [U.S.] D.O.J.’s reversal of its 2011 Opinion potentially subjects the NHLC and its employees and agents to criminal and civil liability,” leaving the NHLC in the dark about whether or to what extent it needs to cease its operations given that it uses the internet or wires for all of its lottery-related activities.¹²⁸ In fact, “the broadest interpretation of the 2018 Opinion could result in the suspension of all the NHLC’s sales, resulting in an immediate financial loss of over \$90 million to the State.”¹²⁹ The NHLC argued that the 2018 Opinion is invalid as a matter of law and should thus be set aside.¹³⁰

¹¹⁹ Champion PASPA, *supra* note 4, at 41 (citing *NCAA v. Christie*, 832 F.3d at 402 (3d Cir. 2016)).

¹²⁰ *Id.*

¹²¹ *Murphy*, 138 S. Ct. at 1468, 1485.

¹²² Champion PASPA *supra* note 4, at 42–43, citing I. Nelson Rose, *The Supreme Court Changes Everything*, GAMBLING AND THE LAW (June 4, 2018), <http://www.gamblingandthelaw.com/the-supreme-court-changes-everything/> (emphasis added).

¹²³ See NHLC Mem., *supra* note 80; NHLC Compl., *supra* note 81, at 2.

¹²⁴ NHLC Compl., *supra* note 81, at 2 (quoting *Murphy*, 138 S. Ct. at 1483).

¹²⁵ *Id.*

¹²⁶ 2018 Opinion, *supra* note 18.

¹²⁷ Mem. in Supp. of Mot. Sum. J. at 2, *N.H. Lottery Comm’n v. Barr* 386 F. Supp. 3d 132 (2019) (No. 19-cv-163).

¹²⁸ *Id.* (footnotes omitted) (emphasis added).

¹²⁹ *Id.* at 12 (footnote omitted) (emphasis added).

¹³⁰ *Id.* at 5.

Adding to this volatile mix, on January 15, 2019, the Deputy Attorney General directed D.O.J. attorneys to adhere to the 2018 Opinion.¹³¹ But the D.O.J. instructed its operatives to refrain from applying Wire Act penalties for ninety days to give businesses that relied on the 2011 Opinion time to bring their operations into compliance with federal law as mandated by the 2018 Opinion.¹³² However, the D.O.J. specifically stated that the ninety-day window was “not a safe harbor for violations of the Wire Act.”¹³³

The Attorneys General of New Jersey (Gurbir Grewal) and Pennsylvania (Josh Shapiro) joined in a letter to the U.S. Attorney General expressing their “strong objections to the office of Legal Counsel’s opinion announcing that federal criminal law could apply to the state-sanctioned online gambling that has taken place for years across the country.”¹³⁴ Grewal wrote, “[t]his about-face is wrong and raises significant concerns in our states. We ask that [D.O.J.] withdraw its opinion altogether or assure us that [D.O.J.] will not bring any enforcement actions against companies and individuals engaged in online gaming in our states”¹³⁵ The letter also said that the 2018 Opinion reverses the D.O.J.’s seven-year-old position *expressly* allowing online gaming to proceed, which states relied on when they created online lotteries and other forms of e-gaming.¹³⁶

Pennsylvania and New Jersey prospered with their respective online-gaming schemes, generating millions in revenue and gaming taxes. For example, the New Jersey Lottery has annual sales of about \$3 billion and contributes approximately \$1 billion to the state, which makes it New Jersey’s fifth largest source of revenue.¹³⁷ Unsurprisingly, then, the states “see no good reason for D.O.J.’s sudden reversal.”¹³⁸

In its complaint in *NHCL v. Barr*,¹³⁹ the NHLC argued that in *United States v. Lyons*,¹⁴⁰ the First Circuit already indicated that the Wire Act only applies to sports betting. Additionally, the Fifth Circuit held that its court’s interpretation of the Wire Act in *In re MasterCard Int’l, Inc.* does not prohibit non-sports internet gambling, so any gambling debts are not illegal.¹⁴¹

¹³¹ Mem. on Applicability of Wire Act, 18 U.S.C. § 1084, to Non-Sports Gambling from Office of Deputy Att’y Gen., to U.S. Att’ys Gen. Director, Fed. Bureau of Investigation (Jan. 15, 2019).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Letter from Gurbir S. Grewal & Josh Shapiro, the Att’ys Gen. of N.J. & Pa. to U.S. Dept. of Just. (Feb. 5, 2019).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ NHLC Compl., *supra* note 81, at 2.

¹⁴⁰ *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014).

¹⁴¹ *In re Mastercard Int’l Internet Gambling Litig.*, 313 F.3d 257, 263 (5th Cir. 2002).

The NHLC further argued that the D.O.J.'s interpretation of the Wire Act in the 2018 Opinion intrudes upon New Hampshire's sovereign interests without clearly demonstrating that Congress intended for that result.¹⁴² This interpretation, the NHLC contended, runs afoul of Tenth Amendment jurisprudence as established by the Supreme Court in *Gregory v. Ashcroft*.¹⁴³ Consequently, it was the NHLC's position that the 2018 Opinion was contrary to law and exposed the New Hampshire lottery system to substantial uncertainty regarding the legality of its operation.¹⁴⁴

Pennsylvania filed a memorandum of law in support of its emergency motion to intervene, arguing that the 2018 Opinion laid the groundwork for the D.O.J.'s threat to prosecute states that fail to comply by April 2019.¹⁴⁵ The NHLC challenged the D.O.J.'s interpretation of the Wire Act by "seeking a declaration that the act 'does not apply to state-conducted lotteries.'"¹⁴⁶

Here, the Pennsylvania Lottery is statutorily authorized to intervene because the constitutionality of at least one Pennsylvania statute is plainly "drawn in question" by the Defendants' position in this case – 4 Pa. C.S. §§ 501-503 (the 'iLottery' Statute). The iLottery Statute authorizes the Pennsylvania Lottery to operate "iLottery games" and sell "traditional lottery products over the Internet." 42 Pa. C.S. §§502. "iLottery game" is defined by the iLottery Statute.¹⁴⁷

The 2018 D.O.J. Opinion put Pennsylvania's iLottery statute in direct conflict with the Wire Act.¹⁴⁸ Pennsylvania argued that the statute provides "the unqualified statutory right to intervene."¹⁴⁹ However, Pennsylvania's motion was denied without prejudice on March 8, 2019, on the grounds that the intervenor's interests were already adequately represented.¹⁵⁰

The District Court of New Hampshire in *NHLC v. Barr*, decided that the Wire Act was limited to sports gambling and that the 2018 D.O.J. Opinion should

¹⁴² NHLC Compl., *supra* note 81, at 3.

¹⁴³ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *See also* NHLC Compl., *supra* note 81, at 3. ("*Gregory v. Ashcroft* . . . mandates . . . a clear statement of congressional intent before a statute is susceptible of an interpretation that alters the state-federal balance.>").

¹⁴⁴ NHLC Compl, *supra* note 81, at 4.

¹⁴⁵ Proposed Intervenor Commonwealth of Pa., Dep't of Revenue's Mem. in Supp. of Emergency Mot. to Intervene at 1, N.H. Lottery Comm'n v. Barr, No. 19-cv-163, 2019 WL 1099715 (D.N.H. Mar. 8, 2019).

¹⁴⁶ *Id.* at 2.

¹⁴⁷ *Id.* at 5 (footnotes omitted).

¹⁴⁸ *Id.* at 6.

¹⁴⁹ *Id.*

¹⁵⁰ N.H. Lottery Comm'n v. Barr, No. 19-cv-163, 2019 WL 1099715, at *1 (D.N.H. Mar. 8, 2019).

be set aside rather than remanded for reconsideration.¹⁵¹ Declaratory judgment was limited to the parties of the lawsuit.¹⁵² New Hampshire's substantial revenue from lottery games would have been deemed criminal under the D.O.J.'s 2018 interpretation of the Wire Act.¹⁵³ The court also agreed with the NHLC that the D.O.J.'s Office of Legal Counsel violated the Administrative Procedure Act (APA) when it issued the 2018 Opinion.¹⁵⁴

Under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law."¹⁵⁵ "Notwithstanding the mandatory 'shall,' the First Circuit has explained that a reviewing court 'is not required automatically to set aside [an] inadequately explained order.'"¹⁵⁶ Pursuant to the controlling case *Central Me. Power Co. v. FERC*, the reviewing court in *NHLC v. Barr* had sound discretion to mend the 2018 D.O.J. Opinion without altering the order because the errors were so severe.¹⁵⁷ Judge Barbadoro characterized the defect in the 2018 D.O.J. Opinion as sufficiently substantive with possibly devastating results, so he set the opinion aside, which in effect restored the 2011 D.O.J. Opinion.

Judge Barbadoro decided that the Wire Act criminalizes only sports betting on solid syntactic and grammatical grounds:

The key question this case presents is whether the limiting phrase "on any sporting event or contest" in § 1084(a)'s first clause modifies all references to "bets or wagers" in both clauses or only the single reference it directly follows in the first clause. If, as the OLC concluded in 2011, the sports-gambling modifier limits each reference to "bets or wagers," then both clauses apply only to sports gambling.¹⁵⁸

The 2011 D.O.J. Opinion notes that the OLC explained that it was "difficult to discern' why Congress would forbid the interstate transmission of all types of bets or wagers but only prohibit the transmission of information assisting in the placing of bets or wages that concern sports."¹⁵⁹ In his sixty-page opinion, Judge Barbadoro struck down the 2018 D.O.J. Opinion, which threatened the online gambling industry. This opinion re-opened the door to internet gambling, online lotteries, and poker. The D.O.J. responded by appealing the decision to the First Circuit, once again disrupting the billion-dollar internet gambling industry.

¹⁵¹ *Barr*, 386 F. Supp. 3d at 159.

¹⁵² *Id.* at 157.

¹⁵³ *Id.* at 136.

¹⁵⁴ *Id.* at 159. *See also* 5 U.S.C. § 706(2)(A).

¹⁵⁵ *Barr*, 386 F. Supp. 3d at 159.

¹⁵⁶ *Id.* (quoting *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001)).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 136.

¹⁵⁹ *Id.* at 137 (quoting 2011 Opinion, *supra* note 19, at 5).

IX. THE FIRST CIRCUIT SPEAKS: *NEW HAMPSHIRE LOTTERY COMMISSION V. ROSEN*

The constitutional crisis of January 6, 2021, the death of Sheldon Adelson five days later, and both the demise of the Trump regime and the First Circuit's long-awaited opinion in *NHLC v. Rosen* on January 20, 2021, ended the Trump D.O.J.'s attempt to criminalize e-gambling and create a dystopian universe for would-be state lottery providers. There is peace in the Valley—Silicon Valley, that is. Although the First Circuit did not invalidate the 2018 D.O.J. Opinion per se, by declining to address whether the opinion was valid under the APA, the court reaffirmed the District of New Hampshire's decision on June 3, 2019.¹⁶⁰ The First Circuit agreed that the Wire Act applies only to interstate wire communications relating to sporting contests.¹⁶¹ The court granted the plaintiffs' motions for summary judgment, but because the relief under the Declaratory Judgment Act was sufficient, the First Circuit vacated the district court's grant of relief under the APA.¹⁶²

On June 18, 2020, the D.O.J. argued that its 2018 Opinion was not a justiciable action because there was no threat of enforcement against the parties.¹⁶³ NHLC's counsel mentioned Adelson as a possible motivation for the OLC's change of heart. But Adelson is dead, and Trump lost the election. In fact, there is no chance that SCOTUS will grant certiorari for *NHLC v. Rosen*, which proclaims that “[n]either common sense nor the legislative history suggests that Congress likely intended such a result.”¹⁶⁴ Is President Biden's choice for Attorney General, Merrick Garland, the type of person who would affirm a Trump AG Opinion that overturned an Obama AG Opinion? Judge Garland was Former President Obama's choice for the Supreme Court in 2016, but he was denied hearings by Republicans.¹⁶⁵ The Senate confirmed Judge Garland as the Attorney General on March 10, 2021.¹⁶⁶ Majority Leader Chuck Schumer (D-N.Y.) described Judge Garland as “someone with integrity, independence,

¹⁶⁰ See *N.H. Lottery Comm'n v. Rosen*, 986 F.3d 38, 62 (1st Cir. 2021).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Eric Ramsey, *U.S. Justice Department Argues Wire Act Case Before First Circuit Court of Appeals*, ONLINE POKER REPORT (June 18, 2020, 5:31 AM), <http://www.onlinepokerreport.com/42687/>.

¹⁶⁴ *Rosen*, 986 F.3d. at 61.

¹⁶⁵ Michael Balsamo & Mary Clare Jalonick, *Garland, Fudge Confirmed in Bipartisan Votes*, HOUSTON CHRON. (Mar. 11, 2021), <https://www.pressreader.com/usa/houston-chronicle/20210311/281668257726084>; Katie Benner, *Garland Speaks to Justice Colleagues of Renewed Commitment to 'Equal Justice'*, N. Y. TIMES (Mar. 12, 2021), <https://www.nytimes.com/2021/03/11/us/politics/merrick-garland-attorney-general.html?>

¹⁶⁶ *Id.*

respect for the rule of law and credibility for both sides of the aisle.”¹⁶⁷ Judge Garland was sworn in as America’s 86th Attorney General on March 11, 2021.¹⁶⁸

The First Circuit in *Rosen* concluded that the NHLC’s “claims are justiciable and the Wire Act applies only to interstate wire communications related to sporting events or contests.”¹⁶⁹ The court affirmed the district court, noting that the “government’s reading of the [Wire Act] . . . would most certainly create an odd and unharmonious piece of criminal legislation.”¹⁷⁰

The difference between *NHLC v. Barr* and *NHLC v. Rosen* is that *Rosen* contradicts *Barr*’s rationale that the AG violated the APA when he issued the 2018 D.O.J. Opinion knowing that it was contrary to its 2011 Opinion.¹⁷¹ The *Rosen* court held that qualifying for relief under the Declaratory Judgment Act was sufficient for the court to find for the NHLC on the grounds that the Wire Act did not “bar [i]nternet transactions of state lotteries and their vendors.”¹⁷²

The NHLC, along with its vendor NeoPollard, alleged that the D.O.J.’s legal counsel violated the APA when it issued the 2018 Opinion.¹⁷³ The First Circuit disagreed with the district court’s opinion that the APA applied on the basis that Declaratory Judgment Act relief alone was sufficient.¹⁷⁴ Although the district court granted the NHLC and NeoPollard relief under the APA, and actions under the Declaratory Judgment Act and APA can be maintained together, the First Circuit found it unnecessary to determine whether to “hold unlawful and set aside [an] agency action . . . where the remedy provided by the Declaratory Judgment Act is adequate under the circumstances”¹⁷⁵ Accordingly, the First Circuit vacated the district court’s grant of relief under the APA.¹⁷⁶

X. CONCLUSION

The *Rosen* court concluded that the “text of section 1084 [was] not entirely clear . . . and . . . the government’s resolution of the Wire Act’s ambiguity would lead to odd and seemingly inexplicable results.”¹⁷⁷ Under the Trump view, “either Congress outlawed lottery betting over the wires while simultaneously allowing lotteries to provide assistance over the wires in placing lottery bets, or Congress allowed lottery betting over the wires while outlawing use of the wires

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Rosen*, 986 F.3d at 62.

¹⁷⁰ *Id.* at 61.

¹⁷¹ *Id.* at 44–45.

¹⁷² *Id.* at 39.

¹⁷³ *Barr*, 386 F. Supp. 3d at 132.

¹⁷⁴ *Id.* at 158.

¹⁷⁵ *Id.* (footnotes omitted).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 60–61.

to tell the winner the results of his bet.”¹⁷⁸ The conclusion in *Barr* was vindicated, as the 2018 Opinion was set aside.¹⁷⁹

The NHLC in *Barr* reminded the court that *Murphy v. NCAA* is controlling,¹⁸⁰ and that the 2018 Opinion is “not faithful to the text, structure, purpose, or legislative history of the Wire Act.”¹⁸¹ The NHLC has consistently argued that the 2018 Opinion is “not credible, and the court should reject it.”¹⁸² In short, the D.O.J. “cannot issue two wholly conflicting legal opinions within eight years that both expressly pertain” to a lottery’s legality.¹⁸³

Allowing the 2018 Opinion to prevail would destroy the e-gaming industry as we know it. For example, “[s]ince its inception in 1964, the [NHL] Commission has deposited in excess of \$2 billion in the Education Trust Fund for the support of New Hampshire Public Education.”¹⁸⁴ The D.O.J. apparently did not consider the far-reaching implications of the 2018 Opinion. The reversal of the 2011 Opinion has potentially criminalized conduct that the Commission and other lotteries have engaged in for several decades.¹⁸⁵ Co-plaintiff Pollard Banknote Limited averred that it invested tens of millions of dollars “to develop the iLottery system,”¹⁸⁶ and that “[a]ny interference with a state’s iLottery operations that slows or suspends the iLottery’s ability to generate commissions will result in substantial financial harm to Pollard.”¹⁸⁷

In its motion for a Speedy Hearing, the NHLC argued that “[e]xtending 18 U.S.C. §1084 to state-conducted lotteries exposes the plaintiff and its agents to criminal and civil liability including liability under the Racketeer Influenced and Corrupt Organizations Act . . . and raises substantial questions as to whether the plaintiff needs to cease all of its modern day lottery operations.”¹⁸⁸ “If the plaintiff does need to cease all of its modern day lottery operations . . . the defendants’ new interpretation of 18 U.S.C. §1084 will result in the loss of millions in revenue that New Hampshire uses to fund its public education system.”¹⁸⁹ Therefore, “[r]elief is needed on an expedited basis.”¹⁹⁰

¹⁷⁸ *Id.* at 61.

¹⁷⁹ *Barr*, 386 F. Supp. 3d at 132.

¹⁸⁰ NHLC Compl., *supra* note 81, at 2.

¹⁸¹ *Id.*

¹⁸² NHLC Mem., *supra* note 80.

¹⁸³ *Id.* at 2 (emphasis in original).

¹⁸⁴ Pl.’s Mem. Supp. Mot. for Sum. J. at 2, N.H. Lottery Comm’n. v. Barr, 386 F. Supp. 2d 132 (2019) (No. 1:19-cv-00163-PB).

¹⁸⁵ *Id.* at 1 (emphasis added).

¹⁸⁶ Decl. of Douglas E. Pollard in Supp. of Pl.’s Mot. for Sum. J. at 2, Neopollard Interactive LLC v. Barr, 386 F. Supp. 3d 132 (2019) (No. 1:19-cv-00170).

¹⁸⁷ *Id.*

¹⁸⁸ Pl.’s Mot. for Speedy Hearing at 1–2, N.H. Lottery Comm’n, 386 F. Supp. 32d 132 (2019) (No. 19-cv-0163) (emphasis added).

¹⁸⁹ *Id.* at 2.

¹⁹⁰ *Id.*