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.
“Internet gambling allows people the comfort of gambling in their own homes.” 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. “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.” 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.”

“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 [internet gambling.]” 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. Instead, the U.S. Attorneys relied on the Illegal Gambling Businesses Act and the more recent— but incoherent— Unlawful Internet Gambling Enforcement Act.

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. The memo reversed the D.O.J.’s 2011 Opinion, which determined that the Wire Act’s prohibitions apply only to sports. 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.
12 CHAMPION & ROSE, supra note 1 at 65.
14 CHAMPION & ROSE, supra note 1, at 65.
15 Id.
prohibited under the Wire Act and PASPA. On May 14, 2018, however, the Supreme Court deemed PASPA unconstitutional in an unprecedented 7-2 decision in Murphy v. NCAA. 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.

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

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.

II. THE WIRE ACT GENERALLY

Until December 2011, the United States government considered online poker illegal because all internet gambling violated the Wire Act. 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

23 Barr, 386 F. Supp. 3d at 132.
26 Id. at 154–57.
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.\(^\text{30}\)

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.\(^\text{31}\) The Wire Act is now reviewed in the context of the 2011 D.O.J. Opinion\(^\text{32}\) and the idiosyncratic 2018 D.O.J. Opinion.\(^\text{33}\) 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 subscriber . . . .\(^\text{34}\)

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.\(^\text{35}\)

The intent of the Wire Act was to eliminate the use of a telegraph wire as a means to bet on horse races.\(^\text{36}\) 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 . . . .”\(^\text{37}\) Former

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\(^\text{30}\) 18 U.S.C. § 1084(a)–(b).
\(^\text{31}\) Id.
\(^\text{32}\) See 2011 Opinion, supra note 19, at 3–4.
\(^\text{33}\) See 2018 Opinion, supra note 18, at 1.
\(^\text{34}\) 18 U.S.C. § 1084(d).
\(^\text{35}\) Barr, 386 F. Supp. 3d at 146.
\(^\text{36}\) CHAMPION & ROSE, supra note 1, at 65.
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.” 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. The Act is Title VIII of a completely unrelated bill, the SAFE Port Act (HR 4954), which deals with port security. “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.”

“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.” 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. 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.” Instead, the regulators issued final regulations that merely required banks to use due diligence when setting up new commercial variants.

Rather than expressly changing state or federal substantive law, the UIGEA is merely an enforcement statute. 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.

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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.
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


51 CHAMPION & ROSE, supra note 1 at 357.


(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.\textsuperscript{53}

\section*{IV. \textsc{President Obama’s Christmas Gift}}

Until December 2011, the government’s position was that all internet gambling violated the Wire Act,\textsuperscript{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 . . .”\textsuperscript{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.\textsuperscript{56}

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

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\item [(II)] with respect to class III gaming, the applicable Tribal-State Compact;
\item [(iii)] the applicable tribal ordinance or resolution or Tribal-State Compact includes—
\item [(I)] age and location verification requirements reasonably designed to block access to minors and persons located out of the applicable Tribal lands; and
\item [(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
\item [(iv)] the bet or wager does not violate any provision of—
\item [(I)] the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);
\item [(II)] chapter 178 of title 28 (commonly known as the “Professional and Amateur Sports Protection Act”);
\item [(III)] the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or
\item [(IV)] the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).
\end{itemize}

\textsuperscript{54} CHAMPION \& ROSE, \textit{supra} note 1, at 43.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 43–44. \textit{See} 2011 Opinion, \textit{supra} note 19.
\textsuperscript{57} CHAMPION \& ROSE, \textit{supra} note 1, at 44. \textit{See also} Michelle Minton, \textit{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. 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.

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. Illinois and New York asked the D.O.J. if they could use out-of-state payment processors. 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. Illinois was the first state to sell individual online lottery tickets and had so much success that its computers crashed.

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. The Opinion concluded that the Wire Act was ambiguous and covered only sports bets or wagers. The bottom line was that the Wire Act did not apply to lottery sales of any gambling information not related to sports.

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

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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.
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.”

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

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

“No is the winter of our discontent.” Donald Trump was the 45th President of the United States and a former casino owner who apparently supported states’ rights, which “normally included gaming.” Described as “a new sheriff in town,” 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.” He had “a record of unethical behavior, racist discourse, and disregard for the truth,” and his White House was “dysfunctional [and] dystopian.”

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. 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.” Sen. Graham was “Trump’s biggest cheerleader and

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67 *Barr*, 386 F. Supp. 3d at 148 (citations omitted).
68 Id. at 149.
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).
75 See Schneider, *supra* note 27, at 135; *see also* Interview with Sen. Raymond Lesniak, *supra* note 29, at 243.
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.
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. 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. 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.

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. 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.” Congressional efforts, however, thwarted
all attempts to stop the expansion of legalized gambling. But the 2018 D.O.J.
Opinion effectively incorporated RAWA by reversing the 2011 D.O.J. Opinion
without any congressional oversight.

88 Id. at 145–46.
89 Id.
90 Id. at 146.
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

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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).
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).
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.\textsuperscript{108} It was the only federal act that barred a state from changing its public policy toward gambling, which is a states’ rights issue.\textsuperscript{109} Accordingly, PASPA became the poster child for Justice Douglas’s oft-quoted analogy in \textit{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.”\textsuperscript{110} PASPA “created the ‘Las Vegas loophole’ that allows Nevada a monopoly on legal sports gambling.”\textsuperscript{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.\textsuperscript{112}

New Jersey was given a year to approve legislation to legalize sports betting, but failed to do so within the given time.\textsuperscript{113} PASPA prevented states and tribes from creating any new sports gambling.\textsuperscript{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.”\textsuperscript{115} New Jersey enacted the New Jersey Sports Wagering Law (2012 Act), which created a highly regulated sports wagering regime.\textsuperscript{116} The 2012 Act was repealed by New Jersey’s 2014 law, which unilaterally disallowed prohibitions on sports wagering.\textsuperscript{117}

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

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\item \textsuperscript{108} 28 U.S.C. §§ 3701–3704; see Champion Rosenthal, supra note 52, at 1–3.
\item \textsuperscript{109} See Champion Rosenthal, supra note 52, at 1 (footnotes omitted).
\item \textsuperscript{111} Champion Rosenthal, supra note 52, at 2 (footnotes omitted).
\item \textsuperscript{112} \textsc{Champion & Rose}, supra note 1, at 309–10 (footnotes omitted).
\item \textsuperscript{113} \textit{Id}. at 310 (footnote omitted).
\item \textsuperscript{114} \textit{Id}. (footnote omitted).
\item \textsuperscript{115} Champion PASPA, supra note 4, at 40 (citing N.J. Const. art. 4, § 7, cl. 2(D)–(F)).
\item \textsuperscript{117} N.J. Rev. Stat. § 5:12A-7–9 (2014).
\end{itemize}
prohibitions in casinos and at racetracks.” However, the U.S. Supreme Court granted certiorari and held that PASPA was unconstitutional in Murphy v. NCAA on May 14, 2018. The Murphy Court “expressly held that the federal government cannot order states, or state officials, to do anything.” Murphy controls NHLC v. Barr, which was New Hampshire’s attempt to disavow Trump’s D.O.J. opinion. 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.” Murphy helps advance “a coherent federal policy” that allows the people of each state to make their own policy choices relating to gambling.

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,” upset New Hampshire’s lucrative lottery juggernaut, which has exceeded $2 billion since 1964. “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. 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.” The NHLC argued that the 2018 Opinion is invalid as a matter of law and should thus be set aside.

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.
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.
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.\textsuperscript{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.\textsuperscript{132} However, the D.O.J. specifically stated that the ninety-day window was “not a safe harbor for violations of the Wire Act.”\textsuperscript{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.”\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{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.\textsuperscript{137} Unsurprisingly, then, the states “see no good reason for D.O.J.’s sudden reversal.”\textsuperscript{138}

In its complaint in \textit{NHLC v. Barr},\textsuperscript{139} the NHLC argued that in \textit{United States v. Lyons},\textsuperscript{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 \textit{In re MasterCard Int’l, Inc.} does not prohibit non-sports internet gambling, so any gambling debts are not illegal.\textsuperscript{141}


\textsuperscript{132} Id.

\textsuperscript{133} Id.

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

\textsuperscript{135} Id.

\textsuperscript{136} Id.

\textsuperscript{137} Id.

\textsuperscript{138} Id.

\textsuperscript{139} NHLC Compl., supra note 81, at 2.

\textsuperscript{140} United States v. Lyons, 740 F.3d 702, 718 (1st Cir. 2014).

\textsuperscript{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.
144 NHLC Compl., supra note 81, at 4.
146 Id. at 2.
147 Id. at 5 (footnotes omitted).
148 Id. at 6.
149 Id.
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,

161 Id.
162 Id.
164 Rosen, 986 F.3d. at 61.
166 Id.
respect for the rule of law and credibility for both sides of the aisle.” Judge Garland was sworn in as America’s 86th Attorney General on March 11, 2021.

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.” 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.”

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. 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 [internet transactions of state lotteries and their vendors.”

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. 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. 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...” Accordingly, the First Circuit vacated the district court’s grant of relief under the APA.

**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.” 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

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167 *Id.*  
168 *Id.*  
169 *Rosen*, 986 F.3d at 62.  
169 *Id.* at 61.  
170 *Id.* at 44–45.  
171 *Id.* at 39.  
172 *Id.* at 158.  
173 *Barr*, 386 F. Supp. 3d at 132.  
174 *Id.* (footnotes omitted).  
175 *Id.* at 60–61.
to tell the winner the results of his bet.”

The conclusion in *Barr* was vindicated, as the 2018 Opinion was set aside. The NHLC in *Barr* reminded the court that *Murphy v. NCAA* is controlling, and that the 2018 Opinion is “not faithful to the text, structure, purpose, or legislative history of the Wire Act.” The NHLC has consistently argued that the 2018 Opinion is “not credible, and the court should reject it.” 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.

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.” 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. Co-plaintiff Pollard Banknote Limited averred that it invested tens of millions of dollars “to develop the iLottery system,” 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.”

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.” “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.” Therefore, “[r]elief is needed on an expedited basis.”

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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).
185 *Id.* at 1 (emphasis added).
187 *Id.*
189 *Id.* at 2.
190 *Id.*