

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

New Hampshire Lottery Commission,		
Plaintiff,		
v.		Civil Case No. 19-cv-163
William Barr, in his official capacity		<i>Expedited Treatment Requested</i>
As Attorney General; United States		
Department of Justice		
Defendants		

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

The Plaintiff, the New Hampshire Lottery Commission, by and through counsel, submits this motion for summary judgment, and states as follows:

1. Through this action the New Hampshire Lottery Commission (“NHLC”) challenges an interpretation of 18 U.S.C. § 1084 advanced by binding opinion of the United States Department of Justice (“USDOJ”) dated November 2, 2018, titled *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling* (the “2018 Opinion”). 42 Op. O.L.C. 1-23.

2. The 2018 Opinion reverses a 2011 opinion of the USDOJ, which found that 18 U.S.C. § 1084, a criminal statute known as the Wire Act, applies only to betting or wagering on sporting events or contests and therefore did not apply to sales of lottery tickets over the Internet by States. *See Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violates the Wire Act*, 35 Op. O.L.C. 1-13 (2011) (the “2011 Opinion”).

3. Just as the USDOJ concluded in 2011, at least two federal circuit courts of appeal, including the First Circuit, have held that 18 U.S.C. § 1084 applies solely to betting or wagering on sports events or contests. *See United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014) (“The

Wire Act applies only to ‘wagers on any sporting event or contest,’ that is, sports betting.”) (quoting 18 U.S.C. § 1084(a)); *In re MasterCard Int’l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002) (“Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal.”).

4. The United States Supreme Court has also indicated that this is the correct reading of the Wire Act. See *Murphy v. Nat’l Collegiate Athletic Assn.*, ___ U.S. ___, ___, 138 S. Ct. 1461, 1483 (2018) (explaining 18 U.S.C. § 1084, which “outlaws 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,” helps advance “a coherent federal policy” that “respect[s] the policy choices of the people of each State on the controversial issue of gambling”).

5. Nonetheless, in the face of these clear precedents, the 2018 Opinion finds that 18 U.S.C. § 1084 extends to non-sports betting or wagering. 42 Op. O.L.C. 1-23. In reaching this conclusion, the USDOJ gave short shrift to the reliance interests at stake and indicated that the Wire Act now encompasses state-run lotteries:

We acknowledge that some may have relied on the views expressed in our 2011 Opinion about what federal law permits. Some States, for example, began selling lottery tickets via the Internet after the issuance of our 2011 Opinion. But in light of our conclusion about the plain language of the statute, we do not believe that such reliance interests are sufficient to justify continued adherence to the 2011 opinion.

Id. at 22-23. The opinion further suggests that “[a]n individual who reasonably relied upon our 2011 Opinion may have a defense for acts taken in violation of the Wire Act after publication of that opinion and prior to the publication of this one. . . . The reliance interest implicit in any such defense, however, does not bear upon our reconsideration of the 2011 Opinion.” *Id.* at 23 n. 19.

6. On January 15, 2019, the Deputy Attorney General formally recognized the publication of the 2018 Opinion and issued a memorandum directing USDOJ attorneys to “adhere to the OLC’s interpretation, which represents the Department’s position on the meaning of the Wire Act.” *Memo. for the Deputy Attorney General to United States Attorneys, Assistant Attorneys General, and Director, Federal Bureau of Investigation* (January 15, 2019) (the “90-Day Memo”). However, the Deputy Attorney General specified that the USDOJ “should refrain from applying Section 1084(a) in criminal or civil actions to persons who engaged in conduct violating the Wire Act in reliance on the 2011 OLC opinion prior to the date of this memorandum, and for 90 days thereafter.” *Id.* The 90-day window is designed to “give businesses that relied on the 2011 OLC opinion time to bring their operations into compliance with federal law.” *Id.* The Deputy Attorney General further explained that “[t]his is an internal exercise of prosecutorial discretion; it is not a safe harbor for violations of the Wire Act.” *Id.*

7. The effect of the 2018 Opinion is to extend criminal liability under 18 U.S.C. § 1084 far beyond betting or wagering on sporting events or contests to include state-conducted lotteries. The NHLC, which is authorized by New Hampshire law to use a state lottery as a means of generating revenue to fund public education, uses the wires in conjunction with substantial aspects of its operations, including its instant ticket games, draw-based games, multi-jurisdictional games, iLottery Games, as well as for advertising and customer interaction purposes. Decl. of Charles R. McIntyre at ¶¶ 5-6, 13-32.

8. The USDOJ’s reversal of its 2011 Opinion potentially subjects the NHLC and its employees and agents to criminal and civil liability. *Id.* at ¶ 44. As a result, the NHLC is confronted with the uncertainty of whether or to what extent it needs to cease its operations because all of its lottery-related activities use the Internet or wires. *Id.* at ¶ 42. More

specifically, the broadest interpretation of the 2018 Opinion could result in the suspension of all NHLC sales, resulting in an immediate annual loss of over \$90 million to the State, as well as additional expenses to try to comply with the 2018 Opinion. *Id.* at ¶ 45.

9. The 2018 Opinion's construction of the Wire Act is also incorrect as a matter of law. An examination of the plain language of 18 U.S.C. § 1084 does not support its extension to authorized state-run lotteries. For one, as a matter of statutory construction, the term "whoever" does not include a sovereign state absent an affirmative showing of congressional intent to include the states, which the Wire Act lacks. Therefore, the court cannot read Wire Act to proscribe the acts of sovereign states. Next, as the First and Fifth Circuits have held, 18 U.S.C. § 1084(a)'s language expressly limits the statute's reach to sports betting, as opposed to other forms of gambling, such as state lotteries.

10. The 2018 Opinion's interpretation of the Wire Act also intrudes upon the sovereign interests of the State of New Hampshire without unmistakably clear language demonstrating that Congress intended such a result. Consequently, the interpretation runs afoul of the United States Supreme Court's Tenth Amendment jurisprudence as set forth in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), which mandates that a clear statement of congressional intent before a statute is susceptible of an interpretation that alters the state-federal balance.

11. The 2018 Opinion also transgresses the First Amendment. Specifically, under the USDOJ's present reading of the Wire Act, a State or private entity could not use the wires to transmit lawful, non-misleading information helpful in the placement of bets or wagers, such as advertisements, to an intrastate customer-base if the data transmitted incidentally flowed through the channels of interstate commerce or the broadcast, although originating in the State where the activity is legal, is received by neighboring states where such activity is illegal. Existing United

States Supreme Court precedent indicates that such a result fails the *Central Hudson* test and violates the First Amendment. *See Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173 (1999) (holding that 18 U.S.C. § 1304 “may not be applied to advertisements of private casino gambling that are broadcast by radio or television located in Louisiana, where such gambling is legal” though such broadcasts may be received in neighboring states where the activity is illegal).

12. Finally, expansion of the Wire Act’s prohibition to state-conducted lotteries is inappropriate where more specific federal statutes govern the subject matter of lotteries. Indeed, Title 18 of the U.S. Code, Chapter 61, contains explicit provisions that: restrict lotteries; regulate interstate commerce with respect to lottery ticket transmissions; exempt lottery activity “conducted by a State” from certain of its prohibitions; and define a “lottery” to specifically not include “the placing or accepting of bets or wagers on sporting events or contests,” 18 U.S.C. §§ 1301-1308. In the face of these existing laws that explicitly exempt state-run lotteries from the federal lottery proscription, the Wire Act’s general prohibition pertaining to sports betting cannot be read to criminalize state-lottery operations and thereby nullify portions of 18 U.S.C. §§ 1301-1308.

13. Consequently, for these reasons—as articulated in full in the NHLC’s incorporated memorandum of law in support of this motion—the 2018 Opinion is invalid as a matter of law and, thus, the Court should set it aside.

14. The above-referenced 90-day “compliance” period articulated by the Deputy Attorney General will expire on April 15, 2019. At that point the NHLC will either have to substantially and detrimentally modify its present, longstanding operations or face potential criminal liability. Because this court’s standard procedural track would not require a response

from the Defendants until after April 15, 2018, the Plaintiff requests expedited treatment of this motion for summary judgment, L.R. 7.1(f), and has filed a Motion For Speedy Hearing, invoking Federal Rule of Civil Procedure 57, requesting similar relief.

15. In further support of this motion for summary judgment, the plaintiff is filing this day a: (1) Memorandum Of Law In Support Of Motion For Summary Judgment; (2) Declaration Of Charles R. McIntyre In Support Of Plaintiff's Motion For Summary Judgment; (3) and Declaration Of Anthony J. Galdieri In Support Of Plaintiff's Motion For Summary Judgment.

Wherefore the NHLC, respectfully requests that this honorable court issue an order:

- A. Granting this motion for summary judgment;
- B. Declaring that 18 U.S.C. § 1084 does not apply to state-conducted lotteries;
- C. Vacating and setting aside the interpretation of 18 U.S.C. § 1084 advanced by the 2018 Opinion and endorsed by the 90-Day Memo under the APA as in violation of 5 U.S.C. §§ 706(2)(A) & (C);
- D. Permanently enjoining the defendants and their agents from acting under or pursuant to the interpretation of 18 U.S.C. § 1084 advanced by the 2018 Opinion and endorsed by the 90-Day Memo; and
- E. Granting such further relief as the court deems just and equitable

Respectfully submitted,

NEW HAMPSHIRE LOTTERY
COMMISSION

By its attorney,

GORDON J. MACDONALD
ATTORNEY GENERAL

Date: February 15, 2019

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Certificate of Service

I hereby certify that a copy of the Motion for Summary Judgment, Memorandum of Law in Support of the Motion for Summary Judgment, and Declaration of Charles McIntyre and Declaration of Anthony Galdieri were served this 15th day of February, 2019, on all counsel of record, via the ECF System.

/s/ Anthony J. Galdieri
Anthony J. Galdieri