



State of New Jersey

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Honorable Matthew G. Whitaker
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Rod J. Rosenstein
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February 5, 2019

Dear Acting Attorney General Whitaker and Deputy Attorney General Rosenstein:

We, the undersigned State Attorneys General of New Jersey and Pennsylvania, write to express our 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 this country. That new opinion, “Reconsidering Whether the Wire Act Applies to Non-Sports Gambling,” reverses the Department of Justice’s 7-year-old position expressly allowing online gaming to proceed. This about-face is wrong and raises significant concerns in our states. We ask that DOJ withdraw its opinion altogether or assure us that DOJ will not bring any enforcement actions against companies and individuals engaged in online gaming in our states—where it is appropriate under state law.

States and the gaming industry have been relying on DOJ’s advice for years to develop online gaming. Almost ten years ago, two states proposed using the Internet or using out-of-state transaction processors to sell lottery tickets to in-state adults. DOJ asked OLC whether the proposals violated the Wire Act, 18 U.S.C. § 1084, which places limits on interstate transmission of certain kinds of online gambling information. In 2011, OLC announced that these proposals—and others just like them—were lawful because the Act’s criminal prohibitions only applied to interstate transmission of information *relating to sports wagering* and did not apply to other forms of online gaming.¹ Following that opinion, online lotteries and other forms of online gaming sprouted up in states across the country.

¹ To be clear, the Wire Act only “outlaws the interstate transmission of information that assists in the placing of a bet on a sporting event ... if the underlying gambling is illegal under state law.” *Murphy v. NCAA*, 138 S.Ct. 1461, 1482 (2018). Because sports wagering is lawful in New Jersey and Pennsylvania, the Wire Act does not outlaw it in our states.

Indeed, our states' online gaming industries began to develop in reliance on DOJ's clear advice. Since 2013, New Jersey has worked hard to keep its online betting in state, where it is lawful, and to prevent it from occurring in other states, where it is not. That industry now generates \$352.7 million in annual revenue and \$60 million in direct gaming taxes—key both to New Jersey and to Atlantic City's vitality. Similarly, the New Jersey Lottery has annual sales of approximately \$3 billion, and contributes approximately \$1 billion of its revenue to the State. The New Jersey Lottery is the fifth largest source of revenue to the State, following four different taxes.

Pennsylvania legalized online gambling and an Internet lottery (iLottery) in 2017. Since its launch in May 2018, the iLottery has generated \$23.8 million in gross gaming revenue. Pennsylvania is especially unique in that the Lottery Fund is completely dedicated to benefit older Pennsylvanians. Since 1972, the Pennsylvania Lottery has generated nearly \$28 billion in funding to support programs for older residents, including the Property Tax Rent Rebate Program, the free and reduced-fare transit program, and long-term living services.

But DOJ now contends that transmission of information relating to *any kind of online wagering* can violate federal criminal law. And the new opinion suggests that criminal charges can be brought even where the interstate transmission of information is merely incidental to betting that is otherwise entirely lawful under state law. The potential breadth of this opinion is deeply troubling. The opinion casts doubt not only on traditional online gaming, but also multi-state lottery drawings (such as Power Ball and Mega Millions) and online sales of in-state lottery tickets. While regulators and the industry are reviewing the full range of impacts this opinion may have, each potential implication is of concern. This decision puts jobs and livelihoods at risk for the thousands of people who work in the online gaming industry and jeopardizes critical state funding for the public good that is generated by lottery sales and other Internet activity that is legal within our states.

We can see no good reason for DOJ's sudden reversal. First, it runs contrary to plain language of the Wire Act.² Second, DOJ has recognized that it should “employ considerable caution in departing from ... prior opinions,” in light of the “strong interests in efficiency, institutional credibility, and the reasonable expectations of those who have relied on our prior advice.”³ Here, however, DOJ acknowledges that states were relying on its prior advice and did not provide any intervening facts or information to justify such a major departure. Press reports instead indicate that this new advice followed substantial lobbying by outside groups that have long been unhappy with the 2011 opinion—but who were unable to convince Congress of the merits of their view. That is not a good enough reason to trample over the law and states' rights, and to upend the settled expectations on which we have been relying for nearly a decade.

² 18 U.S.C. § 1084(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 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[.]” (emphasis added)); *see, e.g., 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.”); *In re MasterCard Int'l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002) (“[A] plain reading of the statutory language [of the Wire Act] clearly requires that the object of the gambling be a sporting event or contest.” (quoting *In re MasterCard Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001))).

³ Slip. Op. at 19.

DOJ's latest reversal is wrong, and it undermines the values of federalism and reliance that our states count on. We request that you withdraw the OLC opinion or, in the alternative, guarantee that DOJ will not bring enforcement actions against companies in our states that are acting lawfully under state statutes.

Sincerely,



Gurbir S. Grewal
Attorney General of New Jersey



Josh Shapiro
Attorney General of Pennsylvania