No. 19-1835

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NEW HAMPSHIRE LOTTERY COMMISSION; NEOPOLLARD INTERACTIVE LLC; POLLARD BANKNOTE LIMITED,

Plaintiffs-Appellees,

v.

WILLIAM P. BARR, Attorney General; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of New Hampshire

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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SUMMARY OF ARGUMENT

In 2018, the Office of Legal Counsel (OLC) opined that the gambling prohibitions in the Wire Act, 18 U.S.C. § 1084(a), are not uniformly limited to gambling on sporting events. OLC did not address whether, and if so how, the Wire Act would apply to State lotteries or their vendors. The Deputy Attorney General specifically instructed officials *not* to attempt enforcement action against State lottery systems until the Department can address that question. Nonetheless, plaintiffs—a state lottery commission and its vendors—demand that Article III courts issue an advisory opinion and "set aside" internal Executive Branch advice with which they disagree.

Plaintiffs' response briefs fail to support those demands. Plaintiffs have not shown that Wire Act enforcement against them—or any other State lottery—is "imminent." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (*SBA List*). Indeed, plaintiffs can identify no prosecutions against State lotteries in the entire sixty-year history of the statute. Because plaintiffs lack standing and their suit is unripe, they cannot satisfy Article III; in any event, the district court erred in granting declaratory relief absent any clear need.

The district court compounded its error in ruling that the Wire Act is uniformly limited to sports gambling. The phrase on which plaintiffs rely—"assisting in the placing of bets or wagers on any sporting event or contest"—appears only once in Section 1084(a), within the second of its four offenses. Plaintiffs offer no persuasive

reason, textual or otherwise, why that phrase should sweep both forward and backward to other distinct prohibitions.

Finally, even if declaratory relief were appropriate, the district court erred in taking the remarkable step of "setting aside" OLC's opinion. When an agency takes action relying upon OLC's advice, that action generally is reviewable if "final." 5 U.S.C. § 704. In that instance, however, it is the *agency action* that is reviewed, not OLC's opinion. Here, the Department has taken no final agency action with respect to plaintiffs, and there certainly was no basis for invalidating OLC's internal advice.

ARGUMENT

I. THE DISTRICT COURT ERRED IN EXERCISING JURISDICTION

A. "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). As previously explained (U.S. Br. 15-20), plaintiffs' demand for pre-enforcement interpretation of a criminal statute implicates two Article III doctrines: standing and ripeness. To have standing, a plaintiff must show that a "threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *SBA List*, 573 U.S. at 158. To establish ripeness, the plaintiff must show there is a live controversy between "adverse" parties "of sufficient immediacy and reality" to warrant immediate adjudication. *Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Healey*, 844 F.3d 318, 326 (1st Cir. 2016). Those requirements are not mere procedural hurdles; they safeguard "the proper—and

properly limited—role of the courts in a democratic society.'" *DaimlerChrysler Corp.*, 547 U.S. at 341.

In a preenforcement dispute like this one, both doctrines require a "credible threat of prosecution." *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999). Plaintiffs have failed to make that showing. They have not established that they were subject to past enforcement, that they have been threatened with future enforcement, or that similarly situated parties have been prosecuted for analogous conduct. U.S. Br. 18-19. Instead, plaintiffs cite only their fear that their conduct could be viewed as unlawful. That is not enough.

If the 2018 OLC Opinion had opined that the Wire Act extends beyond sports gambling but does *not* apply to State lotteries and their vendors, plaintiffs clearly would face no threat of prosecution and would lack standing to litigate the sports-gambling issue. That conclusion is not altered where instead, as explained (U.S. Br. 22-24), the Department *has not resolved* "whether the Wire Act applies to State lotteries and their vendors," ADD.91, and the Deputy Attorney General has expressly instructed Department personnel to refrain "from applying Section 1084(a) to State lotteries and their vendors, if they are operating as authorized by State law," *id.* The distinction between an express determination by the Department that State lottery systems are not covered under the statute, and an express proclamation that the Department has not yet taken an official position one way or the other, is legally immaterial to whether plaintiffs have established Article III standing, because

uncertainty about the existence of the alleged injury cuts *against*, not in favor of, Article III standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (injury must be "actual or imminent, not conjectural or speculative").

Furthermore, the Deputy Attorney General has directed that, even if the Department later "determines that the Wire Act does apply to State lotteries or their vendors," it still would not prosecute those parties for past conduct. *Id.* Rather, it would provide a further forbearance to allow them time to "conform their operations to federal law." *Id.* Plaintiffs therefore face *no* threat of prosecution (much less a *credible* threat) for what they have previously done, are currently doing, or may do in the immediate future.

The district court seriously erred in giving no weight to the Deputy Attorney General's instructions. When the government publicly announces that it will not prosecute certain conduct unless and until further conditions are met, and none of those "precondition[s] to enforcement" have been satisfied, that entity faces no imminent threat of prosecution. *Reddy v. Foster*, 845 F.3d 493, 502 (1st Cir. 2017). Nothing more is required to resolve the jurisdictional analysis here.

Moreover, even if (contrary to fact) State lottery systems expressly fell within the scope of Section 1084(a), that still would not be enough for standing. "For preenforcement challenges to a criminal statute not burdening expressive rights," courts generally demand "more than a credible statement by the plaintiff of intent to

commit violative acts and a conventional background expectation that the government will enforce the law." *Seegars v. Gonzales*, 396 F.3d 1248, 1253 (D.C. Cir. 2005). Plaintiffs must identify a particularized basis for fearing prosecution.[1]

B. Plaintiffs make little effort to grapple with these principles. Plaintiffs theorize that jurisdiction exists because the government has not "unambiguously disclaimed" that plaintiffs are "exempt from prosecution." NeoPollard Br. 20; NHLC Br. 35. And they urge that the Deputy Attorney General's April 2019 Memo, which makes clear that plaintiffs face no current or impending threat of enforcement, does not "moot this case" because "[t]he government" has not shown "that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" NeoPollard Br. 30-31; *see* NHLC Br. 37.

Plaintiffs overlook that it is *their* obligation—not the government's—to satisfy Article III in the first instance. Federal courts never "presume the existence of subject matter jurisdiction." *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 712 (1st Cir. 1998). Rather, an "affirmative[]" showing of a case or controversy must be made by "the party asserting federal jurisdiction." *DaimlerChrysler*, 547 U.S. at 342 n.3. Thus, it

[1] NeoPollard urges this Court to follow a different "out-of-circuit case[]" which assertedly "held that 'the existence of a statute' alone 'implies a threat to prosecute.'" Br. 25 (quoting *Bauer v. Shepard*, 620 F.3d 704, 780 (7th Cir. 2010)). But *Bauer* was a First Amendment challenge, for which a relaxed standard applies. *See* U.S. Br. 19 n.1; *New York Republican State Comm. v. SEC*, 799 F.3d 1126, 1135 (D.C. Cir. 2015) (noting "relax[ed] standing requirements" for "pre-enforcement First Amendment claims").

is plaintiffs' burden to show a "credible threat of prosecution," *SBA List*, 573 U.S. at 159, not the government's burden to categorically disclaim future enforcement.

Plaintiffs' invocation of mootness doctrine crystallizes their misunderstanding. The voluntary-cessation principle applies when a defendant engages in allegedly unlawful conduct; the plaintiff establishes standing to challenge that conduct; and the defendant then ceases the conduct during litigation. In those circumstances, the case is moot only if the defendant conclusively establishes that it will not later resume the challenged conduct. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). But this case arises in a pre-enforcement posture. Plaintiffs seek to prevent conduct—criminal prosecution—that has never occurred; the April 2019 Memo is not an instance of the government "stop[ping] [conduct] when sued." *Id.* The voluntary-cessation doctrine accordingly does not apply.

Plaintiffs' invocation of voluntary-cessation doctrine also mistakenly assumes the existence of an Article III case or controversy in the first place. When a plaintiff brings a preenforcement challenge, the plaintiff must establish standing regardless of whether the government contests jurisdiction or makes representations concerning future enforcement. Plaintiffs' suggestion that the jurisdictional burden should shift to the government simply because it has made an enforcement representation would have the anomalous effect of making it easier for a plaintiff to sue for speculative future injury on the very basis of evidence that corroborates the injury's speculative nature.

In any event, regardless of whether plaintiffs could have satisfied Article III at some earlier time, the Court cannot ignore subsequent developments. Plaintiffs "must satisfy [Article III] throughout the litigation, not just at the moment when the complaint is filed." *New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) (citing *Steffel v. Thompson*, 415 U.S. 452, 569 n.10 (1974)). In particular, ripeness requires consideration of "the situation now rather than the situation at" an earlier time. *Anderson v. Green*, 513 U.S. 557, 559 (1995) (per curiam) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974)). Indeed, in *Reddy*, this Court held certain claims to be unripe where, *inter alia*, the State "affirmatively disavowed prosecution … unless and until" preconditions were satisfied. 845 F.3d at 502.[2]

Plaintiffs also fail to accurately characterize the governments' representations. Plaintiffs suggest that the April 2019 Memo imposes a "temporary moratorium" on the Department's enforcement. NeoPollard Br. 31; NHLC Br. 38. But that Memo does not merely delay the prosecution of identified statutory violations. Rather, it confirms that the Department has not determined plaintiffs' conduct to be unlawful

[2] The Lottery Commission's assertion that this case involves only "undisputed 'matters of historical fact,'" Br. 30, is plainly incorrect. Plaintiffs' claims are not about past conduct, but hypothetical future prosecution. Ripeness requires a "substantial controversy[] between parties having adverse legal interests," *Reddy*, 845 F.3d at 500, and here, there is no such adversity because the Department has not even formed a position as to whether plaintiffs' conduct is unlawful.

in the first place. *See* ADD.91 ("The OLC opinion did not address whether the Wire Act applies to State lotteries and their vendors.").[3]

Plaintiffs do not advance their argument by citing factually dissimilar cases. Like the district court, plaintiffs rely on *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1 (1st Cir. 2000), in which the plaintiffs sought a declaration that they could cultivate cannabis for industrial use without a federal license. NHLC Br. 31-32; NeoPollard Br. 28-29. Suit was brought after a DEA official publicly testified that such cultivation was "the manufacture of marijuana and therefore illegal under federal law (absent federal licensing)." *Hemp Council*, 203 F.3d at 3. This Court concluded that the plaintiffs faced a credible threat of prosecution only because the government "made clear" that the proposed conduct was illegal; there was "[no] reason to doubt the government's zeal in suppressing any activity it regards as fostering marijuana use"; and there was no other apparent way "to resolve the legal correctness [of the government's] position" prior to criminal prosecution. *Id.* at 5.[4] As previously explained (U.S. Br. 27-28), none of those circumstances exist here: there is no

[3] Contrary to NeoPollard's suggestion (Br. 35 n.6), the government has not "stake[d] out an 'emphatic position'" on plaintiffs' conduct—it has not staked out any position at all. And the Lottery Commission's assertion (Br. 38) that "[t]he district court asked the defendants to commit to a position on this very issue, but they refused," simply underscores the current absence of any ripe controversy.

[4] *Cf. Monson v. DEA*, 589 F.3d 952 (8th Cir. 2009) (same result as *Hemp Council* on similar facts); *Seals v. McBee*, 898 F.3d 587 (5th Cir. 2018) (credible threat existed where plaintiffs were previously arrested and government maintained that their conduct was unlawful, even as it disclaimed any immediate intention to bring charges).

history—"zeal[ous]" or otherwise—of enforcing the Wire Act against State lottery systems; the Department does not currently take the position that the Wire Act applies to them; and, if that changes, plaintiffs will have an opportunity to pursue preenforcement review.

Holder v. Humanitarian Law Project, 561 U.S. 1 (2010), similarly fails to advance plaintiffs' argument. After raising the issue of standing *sua sponte*, the Supreme Court found a "credible threat of prosecution" because the challenged statute indisputably applied to the plaintiffs' conduct and the government had previously charged "150 persons with violating" the statute. *Id.* at 15-16. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 120-21 (2007), is even further afield. There, the Court held that where a patent licensee "allege[d] (without contradiction) a threat by [the patent holder] to enjoin sales if royalties [were] not forthcoming," the licensee was not required to breach its agreement before it could challenge the relevant patent as invalid. The Court reasoned that it does not defeat standing or ripeness if "*the party seeking declaratory relief is himself* preventing the complained-of injury from occurring." *Id.* at 128 n.8 (emphasis added). Here, the jurisdictional issue arises not because plaintiffs have stopped short of engaging in certain conduct for fear of prosecution if they proceed; rather, it is that they currently face no credible threat of prosecution for that conduct in the first place.

Rhode Island Association of Realtors v. Whitehouse, 199 F.3d 26 (1st Cir. 1999), also is materially different. The Court there found that "equivocal" statements made by

the State's Attorney General did not render the case unripe or moot. *Id.* at 36. But the Court only found standing in the first instance because the plaintiff challenged the constitutionality of a state law prohibiting the use of public records for commercial solicitation, reasoning that "when First Amendment values are at risk, courts must be especially sensitive to the danger of self-censorship." *Id.* at 31. As noted, the relaxed preenforcement standard for First Amendment claims is not implicated here.

Finally, plaintiffs are wrong that perceived "uncertain[ty]" concerning the possibility of future prosecution supports their demand for jurisdiction. NHLC Br. 38-39; NeoPollard Br. 34. As noted, uncertainty about injury refutes Article III standing; it is not enough to posit a "Scylla" and "Charybdis," because "plaintiffs must still demonstrate a credible threat of prosecution." *Elend v. Basham*, 471 F.3d 1199, 1211 (11th Cir. 2006).

C. Even if plaintiffs could satisfy Article III, the district court nonetheless erred in adjudicating their declaratory claims. The Declaratory Judgment Act confers a "unique and substantial discretion" on courts, *MedImmune*, 549 U.S. at 136, which should not be exercised "'unless the need is clear, not remote or speculative,'" *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 494 (1st Cir. 1992). As explained in our opening brief (U.S. Br. 24-25), the district court should not have chosen to pass upon the parties' rights in circumstances where the government does not even contend that plaintiffs' conduct violates the statute. Plaintiffs offer no persuasive response.

II. THE WIRE ACT IS NOT UNIFORMLY LIMITED TO SPORTS GAMBLING

A. On the merits, the district court erred in ruling that the sports-gambling modifier applies to every prohibition in the Wire Act. As discussed (U.S. Br. 3-4, 29-30), Section 1084(a) is a divisible statute that sets forth four distinct offenses:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce **[1]** of bets or wagers or **[2]** 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 **[3]** as a result of bets or wagers, or **[4]** for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1084(a) (numbering added). The phrase at issue—"on any sporting event or contest"—appears in Offense 2, directly after the phrase "information assisting in the placing of bets or wagers."

Because the sports-gambling modifier appears only within Offense 2—and because the "default rule" is that a "'limiting clause or phrase'" is "'read as modifying only the noun or phrase that it immediately follows,'" ADD.73 (quoting *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016))—the modifier properly applies only to that offense. As the 2018 OLC Opinion noted, "[i]t would take a considerable leap for the reader to carry that modifier both backward to the first prohibition of the first clause, then forward across the entire second clause." ADD.77.

The district court's interpretive leap is particularly implausible with respect to Offenses 3 and 4, which are in a second clause that is grammatically independent of

the phrase containing the sports-gambling modifier. "There is no reference to 'any sporting event or contest' in that [second] clause." ADD.77.

The absence of sports-gambling language within the text of Offenses 1, 3, and 4 is particularly noteworthy given Congress' repetition of such language in the very next subsection. Section 1084(b) contains three clauses and refers to "sporting event[s] or contest[s]" in each. 18 U.S.C. § 1084(b). "When Congress includes particular language in one section of a statute but omits it in another," a court presumes that "Congress intended a difference in meaning." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (brackets omitted). Moreover, because Section 1084(b) delineates exceptions to Section 1084(a), Congress's express limitation of those exceptions to conduct relating to "sporting event[s] or contest[s]" would be superfluous if Section 1084(a) did not apply beyond sports gambling in the first place.[5]

Plaintiffs' arguments fail to come to terms with the text and structure of Section 1084(a). Plaintiffs expend considerable effort in arguing that the "series-qualifier" principle should be used to extend the sports-gambling modifier to Offense 1. NeoPollard Br. 40-41; NHLC Br. 43. But that principle applies only when listed items are "simple and parallel without unexpected internal modifiers or structure." *Lockhart*, 136 S. Ct. at 963; *see* Scalia & Garner, *Reading Law: The Interpretation of Legal*

[5] The Lottery Commission's assertion that the 2018 OLC Opinion "creates inconsistency" between Sections 1084(a) and (b), NHLC Br. 23, overlooks that a difference in meaning is precisely what is inferred when disparate language is used.

Texts 150 (2012) (discussing series-qualifier principle and noting that it is "highly sensitive to context" and "perhaps more than most[] … subject to defeasance by other canons"). As explained (U.S. Br. 40), the series-qualifier principle has its place in Section 1084(a): for example, in the phrase "any sporting event or contest," the word "sporting" modifies both "event" and "contest." But the first clause of Section 1084(a) as a whole is not the kind of "simple and parallel" list to which the series-qualifier principle applies.

In any event, the series-qualifier principle could not justify reading the sports-gambling modifier into Offenses 3 and 4. Plaintiffs offer no textual justification for that maneuver; they simply assert that it is "natural[]" (NeoPollard Br. 21, 48) to copy an express limitation from one part of the statute and paste it elsewhere. But that is not how statutory interpretation works. *Cf. Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (applying presumption that "'Congress acts intentionally and purposely in the disparate inclusion or exclusion'" of language across sections of the same Act). As previously explained (U.S. Br. 32), the conclusion that the sports-gambling modifier does not apply to the second clause is independently sufficient to reverse the judgment—an observation with which plaintiffs apparently do not quarrel.

Plaintiffs seek to justify carrying over the sports-gambling modifier to the second clause by analogizing it to the jurisdictional element within the first clause ("in interstate or foreign commerce"), which they assume carries over. NeoPollard Br. 51-52; NHLC Br. 50. As previously explained (U.S. Br. 37-38), it is not clear that

plaintiffs' assumption is correct.[6] But even if the jurisdictional element is properly read to carry over, it does not follow that the sports-gambling modifier does the same. The jurisdictional element is an introductory phrase preceding all four offenses, while the sports-gambling modifier is nested within Offense 2. And "Congress uses substantive and jurisdictional elements for different reasons and does not expect them to receive identical [interpretive] treatment." *Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016).

Plaintiffs also fail to engage with the obvious point (U.S. Br. 32) that it would make no sense for Congress to place the sports-gambling modifier where it did if it intended the modifier to apply throughout all of Section 1084(a). Rather, Congress would have expressly repeated the limitation in each clause (as it did in Section 1084(b)) or included it in a prefatory clause. "'[J]ust as Congress' choice of words is presumed to be deliberate' and deserving of judicial respect, 'so too are its structural choices.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018); *see also, e.g.*, *Nken v. Holder*, 556 U.S. 418, 431 (2009) ("[T]he Court frequently takes Congress's structural choices into consideration when interpreting statutory provisions.").

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[6] Contrary to NeoPollard's suggestion (Br. 52), *United States v. Bass*, 404 U.S. 336 (1971) did not resolve this question. There, the Court cited Section 1084 within a list of federal statutes in which an interstate-commerce modifier purportedly extended beyond the most immediately adjacent referent. *Id.* at 341 n.8. The Court may have had in mind the fact that the jurisdictional element in Section 1084(a) applies throughout the whole first clause, without considering whether it also extends to the second clause. Regardless, the Court's inclusion of the statute in a footnoted string citation was hardly a square holding on that question.

At bottom, plaintiffs simply insist that it would be more "coherent" or "harmonious" for the sports-gambling modifier to apply throughout the entire Act. NHLC Br. 42; *see* NeoPollard Br. 47. But as our opening brief explained, there are reasons why Congress may have wanted to confine Offense 2 to sports gambling without imposing a similar limitation on the rest of Section 1084(a). U.S. Br. 35-37. In any event, the "harmonious-reading canon" is about avoiding *contradictions*, *see* Scalia & Garner at 180; it is not a license to simplify or smooth over textual differences between distinct statutory provisions. A court must give effect to "the words [Congress] chose." *Murphy v. Smith*, 138 S. Ct. 784, 788 (2018). And as even plaintiffs acknowledge (NeoPollard Br. 45), the government's interpretation is not absurd, so there is no justification for departing from the text.

B. The proper application of the sports-gambling modifier is discernible from the statute's text and structure, so there is no need to resort to other considerations. In any event, plaintiffs' other arguments do not overcome the meaning indicated by the statutory text.

As an initial matter, plaintiffs are mistaken that prior judicial decisions compel their interpretation. NeoPollard asserts (Br. 35) that this Court "already held" in *United States v. Lyons*, 740 F.3d 702 (1st Cir. 2014), that "[t]he Wire Act applies only to wagers on any sporting event or contest." 740 F.3d at 718 (quotation marks omitted). But as the district court acknowledged, *see* ADD.28-29, that question was not disputed in *Lyons* and it had no bearing on the outcome. U.S. Br. 34 n.5. A court's statement

of law is not a holding when the statement is not "germane to the eventual resolution of the case." *Berhe v. Gonzales*, 464 F.3d 74, 83 (1st Cir. 2006).

Plaintiffs similarly overstate matters in asserting that the 2018 OLC Opinion is inconsistent with "the opinions of nearly every federal court to consider the Act's scope." NeoPollard Br. 2. Unlike OLC, few courts have addressed the question in any depth. The Fifth Circuit in *In re MasterCard Int'l, Inc.*, 313 F.3d 257 (5th Cir. 2002), summarily endorsed a district court's conclusion in a private suit (not involving the government) that "[a] plain reading" of Section 1084(a) "clearly requires that the object of the gambling be a sporting event or contest." *Id.* at 262 & n.20 (quoting *In re MasterCard Int'l, Inc.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001)). Similarly, the district court in *United States v. DiCristina*, 886 F. Supp. 2d 164 (E.D.N.Y. 2012), *rev'd*, 726 F.3d 92 (2d Cir. 2013), remarked in passing that "[t]he [Wire] Act applies only to wagering on sporting events," citing only the since-abrogated 2011 OLC Opinion. *Id.* at 215. And in *United States v. Lombardo*, 639 F. Supp. 2d 1271 (D. Utah 2007), the district court "concluded that § 1084(a) is *not* confined entirely to wire communications related to sports betting or wagering," insofar as the sports-gambling modifier does not extend to the second clause. *Id.* at 1281 (emphasis added).

Legislative history also does not favor plaintiffs' position. NeoPollard asserts that "[t]hroughout the legislative debates, the Department of Justice repeatedly advised that [the bill] was limited to *sports* betting." NeoPollard Br. 4; *see id.* at 56. But that was the Department's understanding of the original bill text, which contained

materially different punctuation and lacked Offenses 3 and 4. As explained (U.S. Br. 41), the Senate committee chairman, Senator Kefauver, expressed various criticisms of that original bill—including that it was limited to sports gambling—and the bill was amended to address the chairman's concerns. NeoPollard suggests (Br. 58) that if this amendment were intended to broaden the bill beyond sports gambling, there would have been more extensive legislative comment. Even setting aside the oddity of plaintiffs' suggestion that Chairman Kefauver needed to trumpet his success in amending the bill, "silence in the legislative history, 'no matter how 'clanging," cannot defeat the better reading of the text and statutory context." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018). In any event, by the time the amended bill passed both Houses, the Department no longer understood it as limited to sports gambling. *See* U.S. Br. 42-43.

NeoPollard's effort to draw meaning from "post-enactment history" (Br. 59-60) further underscores the weakness of plaintiffs' position. "Failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Lockhart v. United States*, 546 U.S. 142, 147 (2005) (brackets omitted). That is because "a bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). Indeed, the proposals plaintiffs cite would *not* have clarified that the Wire Act carries the meaning described in the 2018 OLC Opinion; rather, they would have stricken the sports-gambling modifier entirely.

Plaintiffs' various attempts to narrow the Wire Act based on inferences drawn from other congressional enactments are also unavailing. Their observation (NHLC Br. 54-55; NeoPollard Br. 38) that Congress legislated with greater specificity about particular types of gambling (both sports- and non-sports-related) in the contemporaneous "Paraphernalia Act" is irrelevant for reasons already explained. U.S. Br. 41-42. The Lottery Commission's reliance on the Unlawful Internet Gambling Enforcement Act of 2006 (NHLC Br. 56-57) is mistaken for the reasons set forth in the 2018 OLC Opinion. ADD.83-84. Similarly, its argument about the federal lottery statute, 18 U.S.C. § 1301—for which a 1994 amendment permits individuals to sell State lottery tickets across State lines if authorized by interstate agreement (NHLC Br. 55-56)—has no evident bearing on the question whether Congress, in 1961, intended the Wire Act to apply only to sports gambling or to encompass all "bets or wagers."

As a final line of argument, NeoPollard asserts (Br. 45, 55) that the statute must be ambiguous because OLC previously took a different view and the rule of lenity requires resolving ambiguities in plaintiffs' favor. But a statute is not rendered ambiguous just because disagreement exists about its meaning. *See, e.g.*, *MRL Dev. I, LLC v. Whitecap Inv. Corp.*, 823 F.3d 195, 205 (3d Cir. 2016). Indeed, the Supreme Court routinely holds statutes to be unambiguous even in the presence of disagreement among appellate courts or the Justices themselves. *See, e.g.*, *SAS Inst.*, 138 S. Ct. at 1355.

Even accepting some room for disagreement about Section 1084(a)'s meaning, the rule of lenity does not dictate that plaintiffs' interpretation must prevail. Lenity "applies only if, after using the usual tools of statutory construction, [the Court] is left with a 'grievous ambiguity or uncertainty in the statute,'" *Robers v. United States*, 572 U.S. 639, 646 (2014), such that it "must simply guess as to what Congress intended," *Abramski v. United States*, 573 U.S. 169, 188 n.10 (2014); *see, e.g.*, *United States v. Musso*, 914 F.3d 26, 32 n.3 (1st Cir. 2019) (declining to apply lenity absent "grievous uncertainty"). This is not a circumstance in which the Court "must simply guess" as to whether the Wire Act is limited to sports gambling; the statutory text and structure clearly favor the government's reading.[7]

III. THE DISTRICT COURT ERRED IN PURPORTING TO "SET ASIDE" OLC'S 2018 OPINION

Finally, regardless of whether the district court correctly interpreted Section 1084(a), the court erred in granting the Lottery Commission's request to "set aside" the 2018 OLC Opinion.

[7] Contrary to arguments by amici, the government's interpretation cannot be rejected on the theory that it did not sufficiently address reliance interests allegedly engendered by the 2011 OLC Opinion. Section 1084(a) is a criminal statute whose meaning is determined by courts, not agencies. *Abramski*, 573 U.S. at 191. The issue whether the government adequately considered reliance interests is therefore irrelevant. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (declining to afford *Chevron* deference to agency's interpretation where agency's "conclusory statements d[id] not suffice to explain its decision" given "the serious reliance interests at stake").

A. The Administrative Procedure Act does not authorize a plaintiff to demand judicial review of any legal interpretation by the government. Rather, review is available only for "final agency action." 5 U.S.C. § 704. Agency action is "final" only if it both "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). The 2018 OLC Opinion satisfies neither requirement.

OLC opinions are predecisional and deliberative documents, produced at the request of the President or an agency, containing candid legal advice to aid in a governmental decisionmaking process. *See* 28 C.F.R. § 0.25(a), (c). OLC's opinions, being "advice," carry no legal force for regulated parties. *See, e.g.*, *Electronic Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 8 (D.C. Cir. 2014). To be sure, after reviewing OLC's advice, an agency may ultimately take action affecting private persons. But in that instance, it is the ensuing agency action that is subject to APA review, not the OLC opinion—just as it is the district court's judgment that receives appellate review, and not the bench memorandum authored by the judge's law clerk.

Moreover, as specifically relevant here, the 2018 OLC Opinion fails to "mark the 'consummation' of the [Department's] decisionmaking process" with respect to whether, when, and how to enforce the Wire Act. *Bennett*, 520 U.S. at 178. Such enforcement decisions belong not to OLC, but to Department leadership with

supervisory authority over prosecutors. The lack of finality as to plaintiffs is particularly glaring: the 2018 OLC Opinion "*did not address* whether the Wire Act applies to State lotteries and their vendors." ADD.91 (emphasis added). As that statement makes clear, the 2018 OLC Opinion's observation that certain States had amended gambling laws and practices in reliance on the 2011 Opinion, ADD.88 & n.18, is not the same thing as a declaration that State lotteries are violating the Wire Act. The 2018 Opinion simply did not resolve the applicability of the Wire Act to State lotteries and their vendors, even as a matter of predecisional OLC advice. It thus does not amount to "the consummation of the agency's decisionmaking process" on any legal question that plaintiffs could have Article III standing to litigate.

As our opening brief further explained, the Deputy Attorney General's January 2019 Memo also does not qualify as final agency action. The Memo nowhere addresses State lottery systems, nor does it specify any policy for determining who *should* be the subject of enforcement. The Memo does instruct officials of the Department's view that the Wire Act is not uniformly limited to gambling on sporting events. But such an internal memorandum carries no legal force on regulated parties; at most, it simply provides guidance about the agency's position. A plaintiff cannot obtain facial review of a legal conclusion stated in an internal memorandum any more than it could of a definitive statement made in a speech by the Attorney General.

B. Plaintiffs offer no credible defense of the district court's decision to "set aside" internal predecisional advice within the Executive Branch. Though the court's

analysis was less than clear, *see* U.S. Br. 43-44, the Lottery Commission freely embraces the conclusion that the "district court set aside the 2018 Opinion and not also the [January 2019 Memo]," but then urges that that choice should be "inconsequential." NHLC Br. 24; *see id.* at 25 ("Setting aside one … is the equivalent of setting aside the other."); *id.* at 70 (similar). The APA does not permit such an imprecise approach to judicial review. *See, e.g.*, *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (emphasizing importance of the correct characterization of different agency pronouncements).

Perhaps recognizing as much, the Lottery Commission's headlining argument (Br. 58, 61, 63) is instead that the government waived the APA's requirements by failing to anticipate the district court's error. The government was under no obligation to guard against the possibility that the district court would impose an improper remedy. As it happens, though, the government did exactly that: it expressly argued that even if the district court disagreed with our interpretation of the statute, the court could enter only declaratory relief, because "neither the 2018 OLC memorandum nor the Deputy Attorney General's memorandum adopting it constitutes final agency action." Dist. Ct. Dkt. No. 47, at 30 (Mar. 22, 2019). Nothing more was required to preserve the government's objection.

Plaintiffs' arguments on the substantive finality question are similarly weak. NeoPollard theorizes that the 2018 OLC Opinion constitutes final agency action because it "resolves the question it addressed" and was made "binding on the

Department." NeoPollard Br. 21; *see id.* at 63. But even a definitive bureaucratic opinion that the Wire Act extends beyond sports gambling does not constitute "final agency action" for regulated parties because it does not require prosecutors to bring suit against anyone. Decisions about enforcement policy belong to prosecutors (and their supervisors) in the exercise of prosecutorial discretion, not to OLC. *Cf. ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (observing that even a prosecutor's "publicly stated" view "that the law will not sustain a conviction" cannot be the subject to judicial review).

Moreover, the relevant question is whether the agency has consummated its decisionmaking process with respect to the rights or obligations of *plaintiffs*. "It is widely accepted that 'finality with respect to agency action is a party-based concept.'" *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994); *cf., e.g.*, *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003) (no final agency action where "the agency has not yet … issued any order imposing any obligation on [plaintiff], denying any right of [plaintiff], or fixing any legal relationship"). Here, as explained, the Department has not yet reached any view on whether plaintiffs' conduct is encompassed by Section 1084(a). *See* ADD.91. And as discussed (*supra* pp. 3-4), it is *that* question—not the abstract question whether the sports-gambling modifier extends beyond Offense 2—on which plaintiffs' standing depends.

The Lottery Commission's reliance on *Hawkes* reflects a similar error. In *Hawkes*, the Supreme Court considered a "jurisdictional determination" by the U.S. Army Corps of Engineers, directed specifically to the plaintiffs, that their property contained "waters of the United States." 136 S. Ct. at 1811. The Court concluded that the determination was final agency action because it consummated the "Corps' decisionmaking process" as to that particular "parcel of property." *Id.* at 1813; *cf. Frozen Food Express v. United States*, 351 U.S. 40, 43-44 (1956) (finding finality where an agency definitively ruled that the classes of commodities transported by the plaintiff were "nonexempt"). Here, by contrast, the Department has never rendered an opinion specific to plaintiffs or to the classes to which they belong.

The Lottery Commission urges (Br. 16, 24, 64-65) that the finality requirement should be relaxed because of "uncertainty" allegedly caused by the 2018 OLC Opinion and January 2019 Memo. As explained, however, the relevant question is whether the challenged agency action imposes "legal consequences," not merely "practical" ones. *Reliable Automatic Sprinkler Co.*, 324 F.3d at 732; *see* U.S. Br. 49. Courts take a "pragmatic" approach in considering which kinds of legal consequences are relevant, *Hawkes*, 136 S. Ct. at 1815, but that does not mean that the legal requirement of finality gives way to a purely equitable hardship analysis.

To the extent plaintiffs argue that the 2018 OLC Opinion—alone or in combination with the January 2019 Memo—has any "legal" consequences, they are mistaken. Plaintiffs echo the district court's suggestion that the 2018 OLC Opinion

had the legal effect of destroying a "reasonable reliance" defense to which plaintiffs were previously entitled. ADD.25-27; *cf.* NHLC Br. 67; NeoPollard Br. 64. As we have explained, however, an OLC opinion is merely internal Executive Branch advice and cannot, in itself, create or eliminate defenses to prosecution. U.S. Br. 50.

Similarly, plaintiffs are wrong that the 2018 OLC Opinion renders them subject to enforcement under a related provision providing that law enforcement officials may direct "any common carrier[] subject to the jurisdiction of the Federal Communications Commission" to discontinue service to subscribers who use it to transmit illegal gambling information. 18 U.S.C. § 1084(d). Again, the Department has not taken any position on whether plaintiffs' conduct violates the Wire Act, and the Deputy Attorney General specifically instructed Department personnel to "refrain from applying Section 1084(a) to State lotteries and their vendors" indefinitely. ADD.91. That instruction readily encompasses both criminal and civil means of enforcement.

CONCLUSION

The judgment should be vacated for lack of jurisdiction or, alternatively, reversed.

Respectfully submitted,

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[*] Assistant Attorney General Hunt is recused from this case.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,488 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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