The Consequences of Federal Attempts to Regulate State Gaming Policy— PASPA and the Wire Act as Two Sides of the Same Coin

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I. Introduction

As the Supreme Court of the United States recently observed, the legalization of sports gambling requires an important policy choice, but that policy choice has been one made by the states in the absence of Congressional action.[1] The Supreme Court made this observation in the context of *Murphy v. National Collegiate Athletic Association*,[2] a case in which the Court held that the federal Professional and Amateur Sports Protection Act ("PASPA") violated the anticommandeering provision of the Tenth Amendment of the Constitution.[3] PASPA, as written, prohibited state legislatures from enacting laws permitting state-authorized sports wagering.[4]

This observation by the Court is consistent with what has been the longstanding approach to gambling in the United States—specifically, that the legalization of gambling in its various forms has been left to the states. In determining that PASPA was unconstitutional, the Court reiterated this principle—while noting that Congress could, if it chose, regulate sports wagering directly.[5]

Congress has regulated gambling in other ways: by making gambling related crimes that violate state law and have an element of interstate travel violations of federal law,[6] and by regulating payment systems to require those systems to take steps to prohibit unlawful internet gaming transactions.[7] With these laws, the underlying conduct giving rise to the federal regulation is conduct that is derivative of state law. And this method is also consistent with the traditional deference Congress has given to the states in allowing states to set their own policy with respect to gambling. But one federal criminal statute from 1961 runs contrary to this general paradigm and, after being of little interest for many years, has been the source of two Department of Justice ("DOJ") interpretations in the last decade and a high-profile case in the United States Court of Appeals for the First Circuit.[8] This statute, the

[1] *See* Murphy v. NCAA, 138 S. Ct. 1461, 1484-85 (2018).

[2] Murphy v. NCAA, 138 S. Ct. 1461.

[3] *Id*. at 1478; 28 U.S.C. § 3701 *et seq*.

[4] *Murphy*, 138 S. Ct. at 1478; 28 U.S.C.S. § 3701 *et seq.*

[5] *See Murphy*, 138 S. Ct. 1483-85.

[6] *See*, *e.g.*, Travel Act, 18 U.S.C. § 1952; Wagering Paraphernalia Act, 18 U.S.C. § 1953.

[7] Unlawful Internet Gaming Enforcement Act, 31 U.S.C. § 536 *et seq.*

[8] N.H. Lottery Comm. v. Rosen, 986 F.3d 38, 44 (1st Cir. 2021) (*citing Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C., at *23, 2018 WL 7080165, at *14 (Nov. 2, 2018); *Whether the Wire Act Applies to Non-Sports Gambling*, 35 Op. O.L.C. 134, 151 (2011).

Interstate Wire Wager Act—known more commonly as the Wire Act—operates outside of this normal paradigm under which Congress has deferred to the states in setting gambling policy.[9] As it exists today, the Wire Act does not require an underlying violation of state law, and acts to prohibit the transmission of sports bets across state lines even if those bets are legal in the states where transmitted and received.[10]

This Article will review these two unusual federal statutes—PASPA and the Wire Act—to examine the implications that arise when Congress acts to regulate gambling activity that is otherwise permissible under state law. In the PASPA case the Supreme Court determined that the manner in which Congress chose to regulate was unconstitutional.[11] In regards to the Wire Act, the DOJ's attempt to interpret its provisions to apply not only to sports betting, but to all forms of gaming—regardless of its legality under state law—resulted in a significant reexamination of the Wire Act, and a narrow construction.[12] But the Wire Act—enacted in 1961, long before online sports wagering was ever contemplated—still imposes a limit on conduct otherwise permitted by the states.[13] This Article will compare and contrast the reasoning behind PASPA and the Wire Act and will consider the implications of each of these statutes on the future expansion of legalized gambling.

II. Background: State Regulation of Gambling

State authorization of gambling—specifically lotteries—goes back to the colonial era. In 1776, several lotteries operated in the colonies, often being used to finance public works projects such as streets.[14] But following massive lottery scandals, most forms of gambling were outlawed by the states beginning in the 1870s.[15] The Constitution of 1844, in its text, specifically prohibited lotteries and the buying and selling of lottery tickets in the state.[16] In 1897, the Constitution was amended, further prohibiting "pool-selling, book-making, or gambling of any kind […]"[17] But in 1939, the Constitution was amended to allow

9 18 U.S.C. § 1084.
10 *Id.*
11 *Murphy*, 138 S. Ct.
12 42 Op. O.L.C., at *23, 2018 WL 7080165, at *14
13 18 U.S.C. § 1084.
14 National Gambling Impact Study Commission Final Report (1999), at 2-1.
15 *Id.*
16 N.J. CONST. of 1844, art. IV, § VII (1897).
17 *Id.*

pari-mutuel wagering on horse races.[18] The rewritten Constitution of 1947 continued this philosophy of restriction on gambling, stating that,"[n]o gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions, and control thereof" had been approved in a referendum.[19] This constitutional provision has been amended several times, including to authorize casino gambling and sports wagering.[20]

It was not until 1931 that Nevada—long known as the epicenter of legalized gambling in the United States—authorized gambling on a statewide basis.[21] In 1945, the Nevada Tax Commission became the regulatory body with oversight over the gaming industry, replaced by the Gaming Control Board in 1955.[22] Other states have followed suit in authorizing particular forms of gaming, which are typically regulated by state agencies.[23] With few exceptions, the federal government has not been involved in deciding what forms of gaming states may authorize or how those states go about regulating gaming. The result has been a wide variety of policy choices made by state governments—with some choosing to authorize expansive forms of gaming, some more narrow forms, some lotteries, and some authorizing virtually no gaming at all.

III. PASPA: Congress Gets Involve In A Specific Form of Gaming

PASPA was introduced in the United States Senate on February 22, 1991.[24] Former professional athlete and then-Senator from New Jersey, Bill Bradley, was one of the prime sponsors of the bill and testified in its favor.[25] Representatives of the major professional sports leagues also testified in its favor, and the bill was ultimately passed and signed by the President.[26] Testimony in favor of the bill centered around the perceived risks that legal sports wagering presented to the integrity of

18 N.J. CONST. art. IV, § VII, para. 2. (1939).

19 N.J. CONST. art. IV, § VII, para. 2. (1947).

20 *Id*.

21 Robert D. Faiss & Gregory R. Gemignani, *Nevada Gaming Statutes: Their Evolution and History*, CTR. FOR GAMING RESEARCH, Sept. 2011, at 1.

22 *Id.* at 2-3.

23 See, e.g., 4 Pa. C.S. 1202 (granting Pennsylvania Gaming Control Board sole regulatory authority over conduct of gaming in Pennsylvania); La. R.S. 27:15 (same with respect to Louisiana).

24 Amateur Sports Protection Act, S. 474, 106 Stat. 4227 (1992), reprinted in 1992 U.S.C.C.A.N. 3553, 3554 [hereinafter PASPA hearing].

25 *Id.*

26 *Id.*

games.[27] Then-NFL Commissioner Paul Tagliabue stated: "With legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing."[28] Commissioner Tagliabue further stated that with wide legalization of sports gambling would come suspicion about controversial plays and beliefs that games were fixed whenever a team did not beat a point spread.[29]

The Senate Judiciary Committee observed that in 1991, thirty-two states had some form of gambling, and that many were considering the possibility of sports betting.[30] The Committee further went on to infer that once one state legalized sports betting, it would be hard for other states to resist, thereby resulting in an "irreversible momentum" in favor of sports betting legalization.[31]

Senator Chuck Grassley, a member of the Judiciary Committee, published a minority statement opposing PASPA.[32] Senator Grassley began by reiterating the principle that wagering has traditionally been within the control of the states rather than the federal government.[33] According to Senator Grassley, "[t]he Federal Government has never sought to regulate purely intrastate wagering activities."[34] He also commented that any concerns about the integrity of games could be monitored and addressed by the states through their regulatory systems.[35] The DOJ also indicated that PASPA created significant federalism concerns.[36]

Nevertheless, PASPA was enacted by Congress and signed by the President. Interestingly, however, despite its stated legislative goals PASPA did not actually prohibit sports wagering. Instead, it regulated the conduct of the state:

> It shall be unlawful for . . . a governmental entity to sponsor, operate, advertise, promote, license or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more

27 *Id.* at 3555.
28 *Id.*
29 *Id.* at 3556.
30 PASPA hearing, *supra* note 24, at 3556.
31 PASPA hearing, *supra* note 24, at 3556.
32 PASPA hearing, *supra* note 24, at 3562.
33 PASPA hearing, *supra* note 24, at 3562.
34 PASPA hearing, *supra* note 24, at 3563.
35 PASPA hearing, *supra* note 24, at 3566.
36 PASPA hearing, *supra* note 24, at 3563.

> competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.[37]

As discussed previously in the illustration of New Jersey state constitutional law, gambling authorization is a function of state law. Moreover, because of the historical fear of undue influence or corruption permeating the gaming industry, gaming regulatory statutes have as part of their purpose the need to impose strict state regulation on the industry and its participants.[38] The use of the terms "license" or "authorize by law" in PASPA was, therefore, a direct effort by Congress to prohibit the use of gaming regulatory structures—so clearly a part of the regulatory powers exercised by states that have legalized gaming—to regulate sports betting.

Another interesting aspect of PASPA was its "grandfathering" of conduct that states had previously approved or engaged in. Cognizant of the fact that Nevada's casinos offered sports wagering and that Delaware, Montana, and Oregon had offered sports betting through their state lotteries, PASPA contained carve-outs. First, Section 3704 specifically provided that PASPA does not apply to "a lottery, sweepstakes, or other betting, gambling or wagering scheme . . . to the extent that the scheme was conducted by that State . . . at any time during the period beginning January 1, 1976 and ending August 31, 1990."[39] The "conducted by that State" language clearly applied to state lotteries, so the sports lottery games offered by Delaware, Montana, and Oregon were "conducted" by the state by virtue of being lottery games. Thus, here, PASPA evaluated conduct specifically engaged in by an arm of the state and determined that conduct to be exempt from the overall federal ban on state conduct set out in Section 3702. Second, PASPA exempted "a lottery, sweepstakes, or other betting, gambling or wagering scheme . . . where . . . such scheme was authorized by a statute as in effect on October 2, 1991" and actually offered pursuant to that statute.[40] This applied to sports betting in Nevada, which had been statutorily authorized for many years and was offered under the regulatory authority of the Nevada Gaming Commission and State Gaming Control Board.[41] Here, therefore, Congress specifically permitted conduct authorized and regulated by a state to continue.

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37 28 U.S.C. § 3702.

38 *See, e.g.*, Casino Control Act, N.J.S.A. 5:12-1b.

39 28 U.S.C. 3704(a)(1).

40 28 U.S.C. 3704(a)(2).

41 N.R.S. 463.160.

Finally, PASPA had a very unusual grandfathering provision—one that essentially prospectively grandfathered conduct. PASPA allowed a betting, gambling, or wagering scheme "conducted exclusively in casinos located in a municipality" if that scheme was authorized within one year after the enactment of PASPA.[42] And if commercial casinos were in operation in the municipality for a 10-year period prior to the effective date of PASPA "pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality."[43] This legislative labyrinth only offered one option: Atlantic City. In other words, PASPA allowed a single state to prospectively use its state legislative authority to legislate its way out of complying with a federal statute. Again, unusual. New Jersey did not take advantage of the window and was thus subject to PASPA's prohibitions.

In a 2011 referendum the voters of New Jersey authorized an amendment to the state Constitution that would allow the Legislature to authorize sports wagering at casinos and racetracks; in 2012 the Legislature did exactly that.[44] The major professional sports leagues promptly sued, arguing that New Jersey's sports wagering law violated PASPA.[45] The state countered that PASPA was unconstitutional, but both the District Court and the Third Circuit Court of Appeals disagreed.[46] New Jersey then tried a different approach—rather than "authorize," as prohibited by PASPA, it partially repealed its criminal prohibitions on sports wagering to the extent that those prohibitions applied to bets placed at a racetrack or Atlantic City casino by persons age 21 or older.[47] The sports leagues again sued, asserting that this partial repeal amounted to an "authorization" squarely prohibited by PASPA, and, again, both the District Court and Third Circuit agreed.[48] The Supreme Court granted certiorari and on May 14, 2018, determined that PASPA was unconstitutional.[49]

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42 28 U.S.C. 3704(a)(3).

43 28 U.S.C. 3704(a)(3).

44 Murphy v. NCAA, 138 S.Ct. 1461, 1471 (2018).

45 *Id.*

46 NCAA v. Christie, 926 F.Supp.2d 551, 554 (D.N.J. 2013), *aff'd*, 730 F.3d 208 (3d Cir. 2013).

47 *Murphy*, 138 S. Ct. at 1472.

48 NCAA v. Christie, 61 F.Supp.3d 488, 508 (D.N.J. 2014), *aff'd*., 832 F.3d 389 (3d Cir. 2016).

49 *Murphy*, 138 S. Ct. at 1484-5.

A. ANTI-COMMANDEERING AND THE SUPREME COURT

PASPA's awkward method of regulating the legislative function of the state—rather than the underlying activity of sports betting itself—proved to be its undoing. New Jersey argued, and the Supreme Court agreed, that PASPA violates the "anticommandeering" principle of the Tenth Amendment.[50] "Conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the States."[51] The Court noted that the anticommandeering jurisprudence was relatively recent, where in *New York v. United States*[52] the Court held unconstitutional a federal statute that required a state to either regulate radioactive waste or "take title" to it.[53] The Court concluded that this was impermissible because Congress cannot "command a state government to enact *state* regulation."[54] The *New York* Court added that where a federal interest is strong enough for Congress to be involved it must directly legislate rather than conscript state governments to do so.[55]

The Court confronted a similar analytical situation in *Printz v. United States*,[56] where a federal statute required state and local law enforcement officers to perform background checks under a gun control law.[57] The *Printz* court concluded that this system was unconstitutional because the federal government may not command state officers to administer or enforce a federal regulatory program.[58] The Court concluded that this applies to all state officers—not just policymakers.[59]

Applying these concepts to PASPA, the Court held that PAPSA violated the anticommandeering principle.[60] The issue the Court had to confront and refine its jurisprudence on was whether an affirmative command and a negative prohibition were the same concept, analytically, for Tenth Amendment purposes. As the Court observed, no party asserted that Congress could compel a state to enact legislation.[61] But PASPA did not actually require states to do anything—its phrasing is that "it shall be unlawful for a government agency *to*" and then lists

50 *Id.* at 1476.
51 *Id.* at 1476.
52 New York v. United States, 505 U.S. 144 (1992).
53 *Id.* at 175.
54 *Id.* at 178 (emphasis in original).
55 *Id.*
56 Printz v. United States, 521 U.S. 898 (1997).
57 *Id.* at 923.
58 *Id.* at 935.
59 *Id.*
60 *Murphy*, 138 S. Ct. at 1475, 1485.
61 *Id.* at 1478.

the prohibited acts.[62] *New York* and *Printz* each involved situations where Congress told the states they *must* do something, not that they *could not* do something.[63] But the Court concluded that there was no functional distinction between these two concepts: "This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded 'affirmative' action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event."[64] Finding no distinction between affirmative commands and negative prohibitions when state legislative powers are implicated, the Court concluded that PASPA commandeered the states to maintain the illegality of conduct that would otherwise be within the state's power to regulate.[65] "PASPA regulate[s] state governments' regulation of their citizens . . . The Constitution gives Congress no such power."[66] The Court reiterated that while sports betting legalization is an important policy choice, that policy choice was one reserved to Congress if it chose to regulate directly.[67] Congress could not, however, command the state legislatures to make a particular policy choice.[68]

B. PASPA AS AN EXERCISE OF FEDERAL REGULATORY AUTHORITY OVER STATE POLICY

One theme of the cases and of gaming law in general, as discussed previously, is that decisions about gaming policy are traditionally left to the states. The legislative history of PASPA indicates that Congress believed federal regulation of sports betting was necessary despite the fact that sports betting had been conducted in several states under state regulation without incident for many years.[69] Congress then made two decisions: to restrict sports betting and to do so in a manner that required the states to continue their bans on sports wagering. This federal intrusion into an area traditionally reserved to the states was an issue unto itself as it allowed *some* states to continue regulating gambling activity while it excluded other states from making that same policy choice. Worse, however, was the manner in which Congress chose to regulate. Rather than regulate sports wagering itself, Congress

62 28 U.S.C.S. 3702 (LexisNexis 2021).
63 *New York*, 505 U.S. 144; *Printz*, 521 U.S. 898.
64 *Murphy*, 138 S. Ct. at 1478.
65 *Id.* at 1477-78.
66 *Id.* at 1485 (citation omitted).
67 *Id*.
68 *Id.*
69 PASPA hearing, *supra* note 24.

decided to order the states in their capacity as sovereign entities to carry out Congress' legislative priority. The combination of the intrusion into state policy and the awkward way in which Congress did so led to PASPA's undoing, and the restoration of the states' authority to regulate gaming policy.

IV. The Wire Act: A Combination Of Federal Regulation of State Policy, And A Vague Statute

Another unusual instance of federal regulation in the area of state gaming policy came from recent controversies surrounding the Wire Act.[70] The Wire Act is a federal criminal statute arising out of the Kennedy administration's efforts to be more aggressive in combatting organized crime.[71] But a combination of statutory ambiguity and the DOJ's inconsistent interpretations of the statute has again led to confusion over permissible state policy and to a judicial interpretation that favors the rights of states to regulate their own gaming policy.

The Wire Act states:

> 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 not more than two years, or both.[72]

There are several federal criminal laws that relate to illegal gambling. A common element among these laws is that they are derivative of state gambling law. For example, the Travel Act prohibits interstate travel related to "unlawful activity."[73] Unlawful activity is defined, in part, as any gambling activity conducted in "violation of the

[70] 18 U.S.C. § 1084.

[71] David Schwartz, *Not Undertaking the Almost-Impossible Task: The 1961 Wire Act's Development, Initial Applications, and Ultimate Purpose*, Gaming Law Review and Economics: Regulation, Compliance, and Policy, 14(7), 533, 534.

[72] 18 U.S.C. § 1084.

[73] 18 U.S.C. § 1952

laws of the State" in which the activity takes place.[74] The Interstate Transportation of Wagering Paraphernalia Act prohibits the transportation across state lines of paraphernalia used for wagering, unless that paraphernalia is used for the placing of wagers where the form of gambling is legal under the laws of the affected state.[75] The Illegal Gambling Business Act makes it a federal crime to operate an "illegal gambling business" across state lines, but defines such business as one which operates in violation of the laws of a state in which it is conducted.[76]

Notably absent from the Wire Act is any provision relating to state law violations. Of course, in 1961, when Congress enacted the Wire Act, the concept of interstate legal sports wagers or internet gaming was beyond the scope of what the legislature contemplated; ostensibly, the only gambling activity taking place across state line was illegal. Thus, it does not seem that Congress would have had reason to consider carving out conduct that is legal under the laws of multiple states where bets or wagers pass between those states. Here, rather than affirmatively commandeer the state legislatures, Congress was simply silent on an area of traditional state regulatory policy. Once more states made the decision to implement legal gaming—and to allow it over the internet—Congress' omission led to several conflicting interpretations and still leads to a federal restriction on state gaming policy today

A. DOJ INTERPRETATIONS OF THE WIRE ACT'S APPLICABILITY TO STATE REGULATED INTERNET GAMING

The Wire Act's impact on legal state gaming activity did not become an issue until states contemplated using the internet for gaming transactions. In 2009 and 2010, the New York and Illinois Lotteries approached the DOJ to ask whether the Wire Act affects their ability to sell lottery tickets over the internet when using out of state payment processors.[77] In September 2011, the DOJ opined that the Wire Act does not impede states' abilities to do so.[78]

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74 18 U.S.C. § 1952(b).

75 18 U.S.C. § 1953.

76 18 U.S.C. § 1955.

77 Whether the Wire Act Applies to Non-Sports Gambling, 35 Op. O.L.C. 134, 135 (2011) US Department of Justice, Office of Legal Counsel Opinion, September 20, 2011 [hereinafter Seitz 2011 Op.].

78 *Id.*

1. DOJ's 2011 Opinion Clarifies The Wire Act In A Manner To Give States Regulatory Authority

The DOJ's Office of Legal Counsel ("OLC") first noted that the DOJ's Criminal Division took the position that legal, intrastate lottery transactions may in fact violate the Wire Act because, in the Criminal Division's view, the Wire Act applied to any form of gaming.[79] The Criminal Division, rather strikingly, also took the position that even if a wagering transaction was initiated and received within the same state, the interstate commerce element of a Wire Act violation could be satisfied if the transaction crossed a state line at any point in the process.[80] The Criminal Division's interpretation, therefore, meant that a state could not use the internet for any gaming transaction—even one the state itself engages in as the operator of a state lottery.[81] Here, therefore, the Criminal Division specifically stated that a state could not conduct even a form of gaming authorized by the state. The Criminal Division recognized the potential incongruity of applying a federal statute to criminalize conduct that was clearly permitted under state law.[82]

The OLC disagreed with the Criminal Division but did not delve far into the nuance of whether the Wire Act was intended to, or did, apply to state-authorized gaming activity.[83] Instead, the OLC used statutory construction to resolve the issue. It concluded that the "on any sporting event or contest" modifier in the Wire Act applies to both the "bets or wagers" and "information assisting in the placing of bets or wagers" clauses in the Wire Act, and, therefore, the Wire Act only applies to prohibit passing sports bets or wagers across state lines.[84] Of course, this was before the implementation of sports wagering on a more nationwide basis in 2018, and, thus, the OLC did not take a position on whether sports betting authorized by a state would create an issue under the Wire Act.

In reaching its conclusion that the Wire Act only applies to sports wagering, the OLC opined that the more natural reading of the statutory language was to apply the "on any sporting event or contest" language to the "bets or wagers" provision.[85] The OLC concluded that it made little sense for Congress to have intended to prohibit all "bets or

79 *Id.* at 136.
80 *Id.*
81 *Id.*
82 *Id.* at 137.
83 Seitz 2011 Op., *supra* note 77, at 137.
84 Seitz 2011 Op., *supra* note 77, at 140.
85 Seitz 2011 Op., *supra* note 77, at 140.

wagers," but only address "the transmission of information assisting bets or wagers concerning sports[.]"[86] Moreover, the OLC observed that the legislative history of the Wire Act supported this conclusion.[87] The OLC noted that the Wire Act, as originally drafted, was written more clearly before the introduction of subsequent amendments that made the language less clear. Those amendments and did not have the purpose of expanding the Act's reach beyond bets or wagers on sporting events.[88] "The Wire Act's legislative history reveals that Congress's overriding goal in the Act was to stop the use of wire communications for sports gambling in particular."[89]

The OLC observed that reading the statute to apply only to sports wagering made the statute cohesive and applied its prohibitions to the same conduct.[90] "Reading [the statute]…to contain some provisions that apply solely to sports-related gambling activities and other prohibitions that apply to all gambling activities…would create a counterintuitive patchwork of prohibitions."[91] As a result, the OLC concluded that the Wire Act only prohibits sports wagering, and therefore does not apply to lotteries that were legal under state law.[92]

While by its terms the Wire Act still applies to sports gambling, this clarification greatly assisted in growing the sale of lottery tickets over the internet and internet gaming.[93] These state-regulated activities were considered safe from violations of the Wire Act because of the OLC's clear guidance that the Wire Act did not apply at all to lotteries and internet gaming. Moreover, gone was the concern about "intermediate routing"—the concept of an inadvertent violation of federal law if a wager passed across state lines in the course of it traveling through information systems. This certainty contributed to the growth of the sales of lottery tickets over the internet in addition to the growth of online casino gaming, which began in New Jersey in 2013.

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86 Seitz 2011 Op., *supra* note 77, at 140-44.

87 Seitz 2011 Op., *supra* note 77, at 141-43.

88 Seitz 2011 Op., *supra* note 77, at 141-42.

89 Seitz 2011 Op., *supra* note 77, at 141.

90 Seitz 2011 Op., *supra* note 77, at 141.

91 Seitz 2011 Op., *supra* note 77, at 144.

92 Seitz 2011 Op., *supra* note 77, at 151.

93 Howard Stutz, *Online Lotteries Flourish After 2011 Change in Wire Act*, available at https://www.cdcgamingreports.com/commentaries/online-lotteries-flourish-after-2011-change-in-wire-act/; Christine Reilly & Nathan Smith, *Internet Gambling: An Emerging Field of Research, National Center for Responsible Gaming*, available at https://www.icrg.org/sites/default/files/uploads/docs/white_papers/ncrg_wp_internetgambling_final.pdf.

Moreover, this interpretation of the Wire Act contributed to the 2015 development of the Multi-State Internet Gaming Agreement, a first-of-its-kind agreement among New Jersey, Nevada, and Delaware whereby the states shared poker liquidity.[94] The growth of online poker presents unique challenges because an online poker game can only proceed if there are a sufficient number of players logged in at the same time willing to play at various stakes. Otherwise, joining players will find no games available. In a small state, such as Delaware, this can be a challenge, and thus, a strategy of sharing players among states has the potential to expand the growth of online poker. With the Multi-State Internet Gaming Agreement, states set their own gaming policies and then coordinated those policies, and so were able to contribute to the growth of the industry when the OLC removed this clouded interpretation of federal law.

Additionally, as other states moved toward the development of internet gaming, states looked for ways to make operations more efficient from an online gaming perspective. Pennsylvania's regulations on internet gaming allowed operators to locate equipment outside of the state, subject to certain restrictions.[95] Given the amount of infrastructure required to develop an online gaming system, sharing those resources with locations in other states that already had it in place—such as New Jersey—was a proactive way to help the industry grow efficiently.

2. DOJ's 2018 Opinion Reverses Its Prior Position And Throws The Existing Industry Into Disarray

On November 2, 2018, the OLC issued a new opinion, "Reconsidering Whether the Wire Act Applies to Non-Sports Gambling."[96] After conceding that the OLC does not lightly depart from its precedents, the OLC nevertheless receded from the 2011 Opinion and concluded that the Wire Act applies to *all* forms of wagering.[97] The 2018 Opinion came to the opposite conclusion of the 2011 Opinion and found that the phrase "on any sporting event or contest" modifies only the

[94] *See generally Multi-State Internet Gaming Agreement*, STATE OF NEW JERSEY OFFICE OF THE GOVERNOR 1, 4, 5, 12 (Feb. 25, 2014), available at https://www.nj.gov/oag/ge/2017news/MSIGA%20signed%20by%20all.pdf.

[95] 58 PA. CODE § 809.3 (2016).

[96] *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 1, 1 (Nov. 2, 2018) [hereinafter 2018 Op.], available at https://www.justice.gov/sites/default/files/opinions/attachments/2018/12/20/2018-11-02-wire-act.pdf.

[97] *Id.* at 1.

"information assisting on the placing of bets or wagers" language.[98] The OLC further concluded—again, completely opposite to its 2011 opinion—that the language of Section 1084(a) is clear and unambiguous.[99] Moreover, applying the "last antecedent" canon of statutory construction, the OLC determined that the phrase "on any sporting event or contest" can not be applied to the entire clause.[100] In addition, the OLC argued that Congress could have simply placed commas in the statute if it wanted to make clear that the "on any sporting event or contest" language applied throughout.[101] The OLC conceded that in 2011 it found that the Congressionally-intended result "improbable," but "improbable is not absurd."[102] The OLC also addressed the obvious reliance that several parties, such as state lotteries, placed on the 2011 Opinion.[103] The OLC dismissed those concerns, however, concluding that the plain language of the statute outweighed any such reliance interests.[104] The OLC added that Congress could, if it chose, amend the Wire Act to clarify the scope of its reach.[105]

This change had the effect of immediately stopping Pennsylvania casinos' efforts to allow operators to take advantage of infrastructure that was in place in other states.[106] The Pennsylvania Gaming Control Board, feeling constrained by the new Wire Act interpretation, directed its licensees to reconsider their online gaming implementation plan.[107] As a result of the new interpretation, the Board directed all licensees to ensure that their operations were "entirely intrastate," thus requiring redesign and redundancy as a result of this shift in federal policy as applied to legal, regulated state conduct.[108]

Seeking clarification, the New Hampshire Lottery—one of a number of states offering online lottery games—sued the DOJ, seeking to have the 2018 Opinion declared void.[109] Both the District of New

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98 *Id.* at 7.

99 *Id.*

100 *Id.* at 8.

101 *Id.* at 10.

102 2018 Op., *supra* note 96, at 15.

103 2018 Op., *supra* note 96, at 22-23.

104 2018 Op., *supra* note 96, at 22-23.

105 2018 Op., *supra* note 96, at 23.

106 Eric Ramsey, *Regulators to Pennsylvania Online Gambling Operators: 'Comply With Wire Act'*, Online Poker Report, Jan. 18, 2019, https://www.onlinepokerreport.com/34501/pa-online-gambling-wire-act-compliance/.

107 *Id.*

108 *Id.*

109 N.H. Lottery Comm'n v. Barr, 386 F. Supp. 3d 132 (D.N.H. 2019), *aff'd sub nom.* N. H. Lottery Comm'n v. Rosen, 986 F.3d 38 (1st Cir. 2021).

Hampshire and the First Circuit agreed with New Hampshire and invalidated the 2018 Opinion by way of declaratory judgment.[110]

In its analysis, the First Circuit noted that the Wire Act had been in force for forty years before courts began to consider its applicability to internet transactions. .[111] The Court then analyzed the question that the DOJ changed its mind on in its 2018 Opinion: how to apply the phrase "on any sporting event or contest."[112] The Court discussed the canons of statutory construction, finding that the results of applying two different canons, unsurprisingly, could lead to two different results.[113] The "last antecedent" rule, here, conflicts with the "series qualifier" rule, leading to no definitive result. Under the "last antecedent" rule, where a limiting clause modifies the noun immediately before it, the "on any sporting event or contest" modifier would apply only to modify "information assisting."[114] Under the "series qualifier" rule, where a modifier can be read to apply to an entire series, it applies to the entire series.[115] Under that rule, therefore, the "on any sporting event or contest" language applies to modify "bet or wager."[116] The Court also concluded that looking to punctuation was not particularly helpful to the analysis.[117]

The Court ultimately relied on finding "the most natural reading" of the statute.[118] The Court found that applying the "any sporting event or contest" language solely to the "information assisting" prong leads to an "unharmonious oddit[y]" that is avoided by reading the entire prohibition to apply only to sporting events or contests.[119] "If Clause One is limited to sports betting…why in the world would Congress in the very next clause outlaw telling the winning lottery participant that he is entitled to payment?"[120] The Court looked at the remainder of the context and concluded that the OLC's 2018 interpretation made little logical sense.[121] As a result, the Court affirmed the District Court's entry of a declaratory judgment voiding the 2018 Opinion.

110 *Barr*, 386 F. Supp. 3d; *Rosen*, 986 F.3d.
111 *Rosen*, 986 F.3d at 45.
112 *Id.* at 54-55.
113 *Id.* at 56.
114 *Id.* at 55.
115 *Id.* at 56.
116 *Id.*
117 *Rosen*, 986 F.3d at 55-56.
118 *Id.* at 58.
119 *Id.* at 58.
120 *Id.* at 59.
121 *Id.* at 59-60.

B. THE WIRE ACT'S IMPACT

The Wire Act's impact on state-authorized gaming has been twofold. First, the Wire Act's prohibitions still apply to interstate sports wagering, thus applying a federal policy from long before the birth of online, state-regulated sports wagering to conduct that states wish to regulate—and traditionally have regulated. That issue, today, acts as an external regulatory constraint on state policy. Second, the DOJ's reversal created uncertainty, and its proposed reading in the 2018 Opinion would have had significant impacts on online gaming had it been allowed to stand. Indeed, as discussed above, Pennsylvania set specific policy regarding the location of online gaming equipment, only to have to backpedal when the DOJ changed its interpretation of the Wire Act and affected how the state could regulate online gaming. Although the Wire Act is not a direct command to the states in their capacity of sovereign entities, its—perhaps unintended consequences of disallowing an exception for state-regulated conduct presents similar policy concerns about its appropriateness as applied to state-regulated conduct.

V. Conclusion

PASPA and the Wire Act both had the effect of regulating, in different ways, conduct that has traditionally been within the policy competence of state legislatures. In both cases, the results of that federal encroachment have led to significant curtailment of that federal effort by the courts. In the case of PASPA, the Court set aside Congress' entire attempt to prohibit states from authorizing sports wagering. In the case of the Wire Act, dated language that, on its face, regulated state-authorized conduct was read expansively by the federal government—and was curtailed by the courts. While the question of the applicability of the Wire Act to state-authorized conduct in the sports betting space is yet to be addressed, one wonders whether a court would conclude that when the policy implications underlying the Wire Act are considered, a reading that the Act does not apply to state-authorized conduct would be sensible. Concluding that the Wire Act does not apply to state regulated conduct is particularly sensible when recent reaffirmations by courts of the states' authority to make decisions regarding gambling policy is taken into account. Until then, however, the Wire Act remains as a limitation on state governments' authority to set policy, should they choose the policy decision of sharing sports bets across state lines.