

# DOJ'S AMICI HINDER EFFORT TO EXTEND THE WIRE ACT TO ALL WAGERING

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**E**ditor's Note: *Gaming Law Review* invited Ifrah Law to provide a counterpoint to the Coalition to Stop Internet Gaming and the National Association of Convenience Stores amicus brief in the *New Hampshire Lottery Commission v. Barr* case.

The Department of Justice (DOJ) may be learning the hard way the age-old lesson that “sometimes you can’t pick your friends.” In litigation regarding the scope of the federal Wire Act, 18 U.S.C. § 1084, initiated by the New Hampshire Lottery Commission (NHLC) in federal court in New Hampshire, the same amici that supported DOJ in the district court—the Coalition to Stop Internet Gaming (CSIG) and the National Association of Convenience Stores (NACS)—are once again appearing as amici on the government’s side now that the case is on appeal to the First Circuit. But this time around, rather than follow the typical amicus brief approach of filing a brief that supports and adds on to arguments made by the party the amicus is supporting, CSIG and NACS have mounted a longshot effort to try to get the First Circuit to rule on an issue that DOJ has not put before the court on appeal. Not only is this strategy highly

unlikely to succeed, but as discussed herein, certain of the arguments raised by CSIG and NACS may have actually presented a roadblock to DOJ’s efforts on appeal.

Last June, the U.S. District Court for the District of New Hampshire entered an order in *New Hampshire Lottery Commission (NHLC) v. Barr* finding that the federal Wire Act, which criminalizes certain transmissions in interstate commerce related to gambling, applies only to transmissions related to sports wagering, and not to other forms of wagering.<sup>1</sup> The court’s decision set aside the opinion issued by the DOJ’s Office of Legislative Counsel (OLC) in 2018 (and released by DOJ in 2019) which stated that the Wire Act applied not just to sports, but to all forms of wagering.<sup>2</sup> The 2018 OLC Opinion reversed course from a 2011 opinion that it issued in response to a request from state lotteries seeking to make lottery products available over the Internet.<sup>3</sup> The 2011 OLC Opinion stated that the Wire Act’s application was, in fact, limited solely to sports wagering.

DOJ has appealed the district court’s ruling to the First Circuit. And just as was the case before the district court, DOJ has found support from CSIG and NACS, which jointly submitted an amicus brief to the First Circuit.<sup>4</sup> Curiously, rather than submit a brief regarding the issue on appeal before the First Circuit—whether or not the Wire Act applies to sports wagering—CSIG and NACS opted to submit a brief arguing an issue that the First Circuit is unlikely to reach on appeal: whether or not the Wire Act applies to states, state agencies (such as state lottery commissions), and their vendors. This argument is especially unpersuasive given that before the district court, in an effort to deprive it of jurisdiction, DOJ asserted that the Wire Act may not apply to states and their vendors, to suggest that NHLC and its service provider did not face a realistic threat of prosecution.<sup>5</sup> Thus, although they claim to be

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<sup>1</sup>386 F. Supp. 3d 132 (D.N.H. 2019).

<sup>2</sup>See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling (Nov. 2, 2018), available at <https://www.justice.gov/olc/file/1121531/download> (last visited Jan. 13, 2020) (“2018 OLC Opinion”).

<sup>3</sup>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 Violate the

Wire Act, available at <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf> (“2011 OLC Opinion”).

<sup>4</sup>See Brief of Amicus Curiae Coalition to Stop Internet Gaming and National Association of Convenience Stores in Support of Defendants and Supporting Reversal, Doc. No. 00117531221, at 3–4, *New Hampshire Lottery Commission (NHLC) v. Barr*, No. 19-1835 (filed Dec. 24, 2019) (“CSIG Amicus”).

<sup>5</sup>*NHLC*, 386 F. Supp. 3d at 143.

supporting the government's argument, CSIG and NACS spend the majority of their amicus brief essentially arguing against the government's suggestion that the Wire Act may not even apply to lotteries overseen by state governments.

Although CSIG and NACS's amicus strategy is curious enough, their brief makes multiple additional points that are either disingenuous at best, or, at worst, fully undermine the DOJ's position in the case. As an initial matter, NACS's position in the case is a curious one. NACS is a trade association that represents 2,100 convenience store retailers and 1,750 suppliers.<sup>6</sup> Of course, the most common wagering products these retailers are likely to sell are lottery products from lotteries overseen by state governments. Thus, NACS's presence in the case seems to fortify the state of New Hampshire's concern that—in spite of the government hedging its bets on the point somewhat—lotteries and their vendors are very likely to be implicated by the Wire Act, should it be interpreted to apply beyond sports wagering. Therefore, NACS's presence as an amicus, if anything, serves to buttress NHLC's assertion that the 2018 OLC Opinion presents a realistic threat of prosecution to it and its vendors, thus supporting the district court's finding that it had standing to bring its lawsuit. Of course, as both NACS and NHLC were likely well aware, given that the 2011 OLC Opinion dealt specifically with lotteries, any suggestion that the 2018 OLC Opinion (which explicitly reversed the 2011 OLC Opinion) did not serve to bring lotteries within the Wire Act's crosshairs seems questionable.

Going beyond standing issues, and to the merits of the Wire Act's scope (which CSIG and NACS essentially do not address in their brief), CSIG and NACS make another fatal error that serves to severely undermine the government's argument that the Wire Act applies beyond sports wagering. Namely, in support of their argument that the statutory terms "person" and "whoever" include state governments and their vendors, CSIG and NACS argue that the First Circuit should look to other federal gaming legisla-

tion to find that states are contemplated as being within all such statutes' reach.<sup>7</sup> CSIG and NACS argued that this is appropriate "because 'when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.'"<sup>8</sup> Part and parcel to this argument, CSIG and NACS attempt to draw comparison to the Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953 ("Paraphernalia Act"), to essentially argue that because that statute—which was passed on the same day as the Wire Act—had previously been held to apply to state lotteries (before an exception was added in an amendment), the same reasoning should apply to the application of the Wire Act to states.<sup>9</sup>

Although CSIG and NACS's analysis with respect to the Paraphernalia Act is questionable, their invocation of the Paraphernalia Act is incredibly (and seemingly inadvertently) problematic for DOJ when it comes to the actual merits of whether the Wire Act applies to beyond sports wagering. That is because the Paraphernalia Act, in addition to criminalizing conduct related to "bookmaking" or "wagering pools with respect to a sporting event," explicitly restricts paraphernalia used "in a numbers, policy, bolita, or similar game."<sup>10</sup> This language is far more inclusive than the "bets or wagers on any sporting event or contest" language found in the Wire Act.<sup>11</sup>

Thus, even if CSIG and NACS are able to convince the First Circuit that it should look to the language of the Paraphernalia Act in order to reach the conclusion that the Wire Act does, in fact, apply to states, this would likely represent a Pyrrhic victory. That is because if the First Circuit was persuaded to look to the language of the Paraphernalia Act in making determinations regarding the meaning of the Wire Act, it would almost definitively look to the language of the Paraphernalia Act—which contains far more expansive language than the "sporting event or contest" language in the Wire Act—to find that the Wire Act is limited to sports wagering. If Congress

<sup>6</sup>CSIG Amicus, at 1.

<sup>7</sup>*Id.* at 15–16.

<sup>8</sup>*Id.* (quoting *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005)).

<sup>9</sup>*Id.* at 18–19.

<sup>10</sup>18 U.S.C. § 1953(a).

<sup>11</sup>18 U.S.C. § 1084(a).

had intended for the Wire Act to cover anything beyond sports gambling, it could have employed the *exact same language* that the Paraphernalia Act utilized to reach such non-sports gambling activity, given that the Paraphernalia Act was signed into law on the *exact same day*. Congress's decision *not* to include such language in the Wire Act should not be seen as a mistake; clearly, Congress's intent was to limit the Wire Act to sports gambling activity, while crafting the Paraphernalia Act to extend more broadly.

CSIG and NACS also make passing reference to the Illegal Gambling Business Act, 18 U.S.C. § 1955 (IGBA), in support of their suggestion that the First Circuit examine the Wire Act in the context of other federal gaming statutes.<sup>12</sup> Although IGBA was not passed contemporaneously with the Wire Act (potentially rendering a comparison to it less persuasive than one to the Paraphernalia Act), IGBA is similar to the Paraphernalia Act and wholly different from the Wire Act in that it contains a definition of "gambling" stating that it "includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice

tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein."<sup>13</sup> Thus, like with the Paraphernalia Act, even if CSIG and NACS successfully invoke IGBA in support of their argument that the Wire Act applies to states, these arguments should ultimately be self-defeating, as IGBA and the Paraphernalia Act both clearly indicate that Congress had the ability to explicitly define the Wire Act to extend beyond sports wagering, but declined to do so.

In short, especially when viewed in the context of the Paraphernalia Act and IGBA, Congress clearly chose to limit the Wire Act's application to sports wagering, and Congress's decision (and the district court's ruling) should not be disturbed on appeal. Thus, by attempting to support the government by invoking these statutes, CSIG and NACS have advanced reasoning that—if the First Circuit compared their full text to that of the Wire Act—should result in a finding that the Wire Act applies only to sports wagering, rendering the question of whether or not it applies to states irrelevant to the NHLC litigation.

<sup>12</sup>CSIG Amicus, at 20.

<sup>13</sup>18 U.S.C. § 1955(b)(4).