lead to an absurd result. *United States v. Ryan*, 284 U. S. 167, 175 (1931) ("A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose.").

B. **Online Peer-To-Peer Poker Also Does Not Violate The Wire Act.**

The Wire Act is codified at 18 U.S.C. § 1084; it provides, in pertinent part:

> 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 entitled 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.

18 U.S.C. § 1084(a).

1. **The Wire Act Applies Only To Sports Betting.**

The Wire Act does not purport to reach every form of wagering. Rather, Congress targeted a specific problem -- sports betting -- and only those entities that actually take those bets. *See In Re MasterCard Int'l Inc. Internet Gambling Litig.*, 313 F.3d 257, 263 (5th Cir. 2002) ("[T]he Wire Act does not prohibit non-sports internet gambling . . . ."); *In re Mastercard Int'l, Inc*, Nos. Civ.A.00MD-1321, 00-1322, 2003 WL 21783301, at *6 (E.D. La. Jul 30, 2003) ("[T]here is no possibility that plaintiffs can prevail on their claim that the defendants violated state law by 'gambling over the Internet.'").

(A) **The Plain Text Demonstrates That The Wire Act Applies Only To Sports Betting.**

The plain text of the Wire Act reaches "bets or wagers or information assisting in the placing of bets or wagers *on any sporting event or contest*." 18 U.S.C. §1084(a) (emphasis added). The Wire Act does not define "bet" or "wager." Any uncertainty as to the meaning of "bet" or "wager" should thus be resolved by reference to the words around it. *Gustafson*, 513 U.S. at 575. Consequently, one must read the first appearance of the term "bets or wagers" in light of the term of limitation -- "on any sporting event or contest" -- that follows. Likewise, the canon *ejusdem generis* holds that a specific term informs the meaning of an adjacent general term. Thus, even if one attempted to separate the provision into a specific component -- i.e., "bets or wagers on any sporting event or contest" -- and a general one -- i.e., "bets or wagers" -- the former provision would inform what constitutes a "bet or wager." *See Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated").

Interpreting "on any sporting event or contest" to modify only the second "bets or wagers" would have the effect of categorically prohibiting the transmission of all money related to bets or wagers -- without regard to the legality of the underlying bet or wager. One district court, in a case involving sports betting, has suggested – in dicta -- that the Wire Act prohibits the *use* of the wires only for betting on *sports* events and contests, but that it prohibits the *transmission* of monies resulting from betting or wagering on *any* event or contest. *See United States v. Lombardo*, No. 2:07-CR-286, 2007 WL 4404641, *5 (D. Utah Dec. 13, 2007) (rejecting *In re Mastercard Internet Gambling Litigation* and applying the Wire Act to non-sports betting and wagering). By reading the first "bets or wagers" in total isolation, the *Lombardo* court's interpretation, however, runs contrary to the interpretive canons above and the rule that statutory phrases should not be read in isolation, *Beecham* v. *United States*, 511 U.S. 368, 372 (1994). At the same time, such an interpretation would expand § 1084's reach far beyond what Congress intended by criminalizing every transaction associated with indisputably lawful wagering.[42]

Most significantly, the error of the *Lombardo* court's reasoning is demonstrated by the limitation it would impose on the exception in 18 U.S.C. § 1084(b). Section 1084(b) exempts the transmission of information only "for use in news reporting of *sporting events or contests*, or for the transmission of information assisting in the placing of bets or wagers on a *sporting event or contest* from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal." 18 U.S.C. §1084(b) (emphasis added). But if the prohibitions of § 1084(a) are read to apply to transmission of a wire communication which entitles the recipient to receive money or credit as a result of *any bets or wagers*, or for information assisting in the placing of *any bets or wagers*, while the exceptions apply only to sports betting, the federal government could prosecute any transmissionthat entitles the recipient to receive money as a result of information assisting in the placement of *lawful* non-sports bets or wagers -- like lottery tickets or bingo cards. For example, under the *Lombardo* reading, if a state lottery wires money in interstate commerce to a vendor who printed lawfully state-issued lottery tickets, that vendor would be receiving the transmission of a wire communication which entitles him to receive money or credit as a result of information assisting in the placing of bets or wagers. Similarly, a payment to a bingo card printer that is sent in interstate commerce would also be unlawful. That is clearly not what Congress intended. Because the exceptions in 18 U.S.C. § 1084(b) are limited to information assisting in the placement of lawful bets and wagers on sporting events, the prohibitions were intended to be similarly limited.

In addition, reading the statute this way would also render nearly all of UIGEA superfluous. The Wire Act's prohibition on "transmission[s] of wire communication[s] which entitle[] the recipient to receive money or credit'" 18 U.S.C. §1084(a), would have captured the activities undertaken by the processors of funds derived from online betting or wagering, and there would have been no need for UIGEA. That cannot be the case. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("[I]t is 'a cardinal principle of statutory construction' that 'a statute ought,

[42] In any case, *Lombardo* involved sports betting. 2007 WL 4404641, at *4. Any suggestion in that decision that the Wire Act applies to other forms of betting is therefore mere *dicta* -- in an unpublished decision, no less.

upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or significant.'") (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

(B) **The Legislative History Of The Wire Act Demonstrates That It Applies Only To Sports Betting.**

The Wire Act's legislative history confirms that Congress intended to limit application of the Wire Act to sporting contests and events. Indeed, Congress specifically targeted individuals "dependent upon telephone service for the placing of bets and for layoff betting *on all sporting activities*," because "the availability of wire communication facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that *a sporting event begins*." H.R. Rep. No. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2632 (emphasis added). There is no reason to believe Congress would pass a statute prohibiting all transmission of funds related to all gambling, regardless of whether it is legal under state law, without a word of legislative explanation about the effect of the statute. Instead, the legislative history repeatedly bears witness to Congress' efforts "'to assist the various States, territories and possessions of the United States, and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking and like offenses and to aid in the suppression of organized gambling activities.'"[43] Congress never suggested it was supplanting state law by banning all interstate transmission of all forms of bets and wagers without regard to underlying state law. Rather, the testimony in support of the bill was intensely focused only on sports wagering. As then Attorney General Robert Kennedy stated in his testimony, "In addition to the unique transmission system in the field of commercialized horse race betting, the gamblers also have moved into large scale betting operations of such amateur and professional sports events such as baseball, basketball, football and boxing."[44]

Thus, as the district court explained in *Mastercard*, the "recent legislative history" reinforces what is plain on the face of the statute, "that [I]nternet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084." *In re MasterCard Int'l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff'd*, 313 F. 3d 257 (5th Cir. 2003). If betting on a game of chance is permissible, certainly betting on a game of skill like poker is as well. Congress has since declined the opportunity to bring poker under the Wire Act while considering UIGEA by rejecting proposed amendments to the Wire Act that would have redefined the Act to expressly bring online poker within the scope of that statute in H.R. 4411 (which was never passed by the Senate) and H.R. 4777 (which was never passed by either the House or the Senate). In short, Congress deliberately targeted only sports betting in the Wire

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[43] *Martin v. United States*, 389 F.2d 895, 898 n.6 (5th Cir. 1968) (quoting H.R. Rep. No. 87-967, *reprinted in* 1961 U.S.C.C.A.N. 2631, 2633 (Apr. 6, 1961 letter from Attorney General Robert F. Kennedy to Speaker of the House of Representatives)), *cert. denied*, 391 U.S. 919 (1968); *see United States v. McDonough*, 835 F.2d 1103, 1105 n.7 (5th Cir. 1988).

[44] Legislation Related to Organized Crime, Hearings Before SubCommittee No. 5 of the Committee on the Judiciary, House of Representatives, 87th Cong.1st Sess. 26 (May 17, 1961) (statement of Attorney General Robert Kennedy)

Act, and it later rejected an invitation to transform that Act into a tool for regulating online gaming.[45]

(C) **The Rule Of Lenity Prohibits Reading The Wire Act To Impose Criminal Liability Beyond Sports Betting.**

In practice, the Wire Act has been applied almost exclusively to sports betting cases. *See, e.g., United States v. Betonsports PLC*, No. 4:06CV01064 CEJ, 2006 WL 3257797, at *1 (E.D. Mo. 2006) (explaining that 98% of money taken in was taken as "sports wagers"). Any attempt to stretch the terms of the Wire Act further to reach online poker would meet yet another potent obstacle. It well settled that "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008); *see Bell v. United States*, 349 U.S. 81, 83 (1955); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (the rule of lenity applies regardless whether the court encounters the statute in a criminal or noncriminal proceeding). If it is a "textbook case for application of the rule of lenity" where the "text of [the statute] is ambiguous, the structure leans in the defendant's favor, the purpose leans in the Government's favor, and the legislative history does not amount to much," *United States v. Hayes*, 129 S. Ct. 1079, 1093 (2009) (Roberts, C.J., dissenting), then the rule undoubtedly applies here. That is because *all* of those indicia -- text, structure, purpose, and legislative history -- "lean" squarely in favor of a narrower interpretation of the Act. Thus, the Wire Act must be interpreted as restricting only sports-related gambling and not online poker.

Indeed, the rule's application is especially appropriate here, because the DOJ has changed its position on the applicability of the Wire Act to non-sports betting. In 1998, for example, a senior DOJ official testified to Congress that "18 U.S.C. 1084 -- the Wire Communications Act -- currently prohibits someone in the business of betting and wagering from using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers on any sporting event or contest."[46] And that "anyone in the business of betting or wagering who transmits or receives bets and wagers on sporting events via the Internet is acting in violation of the Wire Communications Act." The DOJ said nothing about non-sports wagers being covered by 18 U.S.C. § 1084. In fact, the DOJ said the opposite -- that § 1084 "*may relate only to sports betting and not to the type of real-time interactive gambling (e.g., poker) that the Internet now makes possible for the first time*." The DOJ has since retreated from that position, arguing even in the face of *Mastercard* that the Wire Act is more broadly applicable. Not only does the government's shift in position serve as a clear indication that the issue is ripe for legislative

[45] Even if the Wire Act was held to cover more than just sports betting, there is no basis to conclude it would cover games of skill, rather than chance, where money is won by participants in the games.

[46] *Gambling On The Internet, Testimony Before the Subcomm. on Crime of the H. Comm. on the Judiciary* (June 24, 1998) (statement of Kevin V. Di Gregory, Deputy Assistant Attorney Gen, DOJ), *available at* http://www.usdoj.gov/criminal/cybercrime/kvd0698.htm; *Internet Gambling and Indian Gaming, Testimony Before the S. Comm. on Indian Affairs* (June 9, 1999) (statement of Kevin V. Di Gregory, Deputy Assistant Attorney Gen., DOJ), *available at* http://www.usdoj.gov/criminal/cybercrime/s692tst.htm

intervention, but it also undercuts the notion that the DOJ's more recent position is entitled to special deference. *See Fireman v. United States*, 44 Fed. Cl. 528, 538 (1999) ("[W]hen an agency changes its position, the agency's new interpretation is entitled to less deference."); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) ("[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

(D) **The Wire Act Applies Only To Actors "Engaged In The Business Of Betting Or Wagering."**

Even if the Wire Act could be read to reach more than sports betting, the Wire Act's prohibitions apply "only to persons who, in the normal context of the words, can be said to be 'engaged in the business of betting or wagering.'" *Kelly v. Ill. Bell Tel. Co.*, 210 F. Supp. 456, 466 (N.D. Ill. 1962), *aff'd*, 325 F.2d 148 (7th Cir. 1963). Thus, for online poker operators or processors to fall within this category two requirements would have to be met: (1) poker would have to be "betting or wagering", and (2) poker operators and processors would have to be "engaged in the business of betting or wagering." Neither of these requirements is met.

As demonstrated at length above (see Part III.A., *supra*), online poker is not "betting or wagering" under the ordinary meaning of that term. That is because the game is overwhelmingly one of skill, not mere chance. Unlike sports betting, where the player exerts zero influence over the outcome of the game and his corresponding financial gain or loss, the poker player retains almost complete control over his fate in almost every regard. He may not be able to control which cards are dealt, but the rules of the game are such that it seldom matters who has the best cards. And the poker player always controls how much to bet, so a player can all but eliminate his financial risk if he is dealt a bad hand. The sports bettor, by contrast, has irrevocably committed his wager--if luck intervenes and, say, a star player is injured, the bettor has no ability to influence his fate.

Moreover, poker site hosts and processors are not "engaged in the business of betting or wagering." The former merely provide a hosting service that allows individuals to play poker (again, a game of skill, not chance) against one another. Unlike the bookmakers and house-banked casino gaming operators targeted by the Wire Act, online poker providers are not a party to any bets, and they do not determine the customers' odds of winning or losing or the distribution of risk among customers. The hosts have no interest in the outcome of any hand, and they are compensated for hosting the game by charging a small "rake" for providing the opportunity for the players to play against each other. *See generally*, *Pic-A-State Pa.*, 1993 WL 325539, at *3 (finding business not in "'the business of wagering and betting'" because it did not set odds, accept wagers, or distribute risks like a professional bookmaker). This is a significant departure from archetypical "betting or wagering," in which the player and the game operator both are gambling on the outcome of the game. The payment processors are still further removed from any risk or element of chance. They merely distribute funds among the relevant participants according to contractual obligations. Even if one were to stretch the Wire Act