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**Questions for the Record to Andrew Moylan
Executive Director, R Street Institute**

**"H.R. 707, the Restoration of America's Wire Act"
Hearing of the U.S. House Committee on the Judiciary
Subcommittee on Crime, Terrorism, Homeland Security and Investigations**

Question 1: Have you, or any member of your family or household, been in the employ of any entity involved in gambling, Internet gambling, or financial or other services related to Internet gambling? If so, please provide details.

Answer: No. I have no financial association with gambling entities, nor do any members of my family or household.

Question 2: Has the organization on whose behalf you testified before the Subcommittee received any funds or other support directly, or indirectly, from any entity involved in gambling, Internet gambling, or financial or other services related to Internet gambling? If so, please provide details.

Answer: No. The R Street Institute is not now, nor has it ever been, a recipient of support from gambling entities.

Question 3: Do you believe the Wire Act does not extend to bets or wagers placed over the Internet which originate and terminate in the same state?

Answer: Despite some overly broad interpretations of the statute's reach, the Wire Act was not intended to assert federal jurisdiction over bets or wagers that originate and terminate in the same state. The plain language of the statute specifically exempts transmissions relating to "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. "¹ In other words, bets or wagers conducted entirely in a state or foreign country where such activity is legal are expressly beyond federal reach.

The Internet obviously didn't exist in 1961, and so H.R. 707, "Restoration of America's Wire Act, " seeks in part to update the Wire Act's definitions to include Internet transmissions. The bill adds language specifying that "wire communication" includes "any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise. "² Worryingly, those last three words, "incidentally or otherwise, " mean that using the Internet to transact a bet in a state in which the activity is legal could be subject to federal reach if a state line is crossed incidentally between the origination and termination of the transaction, i.e., if the path of the electronic signal happens to cross a state border in the process of completing the transaction.

This issue of "intermediate routing" was specifically addressed in the 2006 UIGEA statute to prevent it from extending to legal intrastate betting. H.R. 707 does not include such a restraint and thus threatens to expand federal power beyond what was envisioned in the Wire Act or UIGEA.

Question 4: Do you believe those states which are permitted, under the Professional and Amateur Sports Protection Act of 1992, to offer betting on sporting events or contests, can, under the Wire Act, offer online wagering on all sporting events, including amateur sporting events, to the extent the bets originate and terminate in that particular state?

Answer: If the view expressed in the 2011 Justice Department Office of Legal Counsel memo holds, the answer would appear to be yes. That memo clarified two important points: that the Justice Department interprets the original Wire Act as applying to sports betting (as opposed to the broad range of gambling and games of chance), and that intermediate routing of transaction data between entities in a single state where the conduct was legal under state law is not interstate in nature and thus not subject to Wire Act regulation. Thus if the sports wagers in question originate and terminate in a state where that activity is legal under the Professional and Amateur Sports Protection Act (PASPA) and other relevant state law, OLC's interpretation would hold that there is no crime under the Wire Act.

If H.R. 707 were to become law, however, the answer would appear to be no. Because RAWA asserts authority over transactions that are intermediately routed across a state line, it would render illegal even bets originating and terminating in a state where the conduct was legal under PASPA and other relevant state law.

¹ 18 US Code. §1084, "Transmission of wagering information; penalties," Retrieved Mar. 24, 2015 <https://www.law.cornell.edu/uscode/text/18/1084>

² H.R. 707, Restoration of America's Wire Act, Feb. 15, 2015, <https://www.congress.gov/bill/114th-congress/house-bill/707/text>

Question 5: What guarantees do the Governors and law enforcement agencies in states which have not authorized Internet gambling have that sites taking sporting bets will not solicit or accept bets from residents of their states, and who will enforce those guarantees?

Answer: As with any statute, governors and law-enforcement agencies have no guarantees of compliance and must work with legislators to craft a body of law that is effective and enforceable. For activity conducted entirely within their borders, most states have a well-established system of law for regulating gambling. They are free to regulate gambling at both an individual and institutional level. States are free to choose to place a higher or lower emphasis on such regulation, based on an assessment of their own law-enforcement priorities. While illegal gambling can be difficult to enforce, that difficulty stems not from a lack of appropriate law but from an unwillingness to prioritize such enforcement.

For activity conducted across state lines, there is ample federal law already on the books allowing states to work with federal law enforcement to address the behavior in question. The combined effects of the Wire Act, UIGEA and the 1992 Professional and Amateur Sports Protection Act essentially render all interstate gambling activity illegal, including processing of payments for services. These tools allow the federal government to assist states in enforcing their own laws in a manner consistent with the Commerce Clause and principles of federalism.

To answer the question more directly, if a state in which gambling is illegal believes that an out-of-state site is conducting business with its residents, it can follow two tracks to address the behavior. It can work with federal law enforcement officials to identify and prosecute businesses conducting interstate gambling activity that violates federal law or it can work with its own law-enforcement officials to identify and prosecute residents who have engaged in activity that violates state law. Sufficient tools exist to prosecute such behavior without the addition of new federal law.

Question 6: Under your reading of the 10th Amendment, was enactment by Congress of the Professional and Amateur Sports Protection Act of 1992, which bars all but a handful of states from authorizing gambling on sporting events, an improper exercise of Congressional power or extension of federal jurisdiction?

Answer: PASPA is questionable, at best, from a constitutional perspective. It contains several potential infirmities, including the federal exercise of a power generally reserved to the states and non-uniform application among the states. While I will discuss my view briefly here, I would commend to your attention two law review articles that examine the issue in much greater depth: a *Marquette Sports Law Review* piece by Jeffrey Roeske ("Doubling Down on Sports

Gambling: Why PASPA Would Fail A Constitutional Challenge")³ and a *University of Nevada Las Vegas Gaming Law Journal* piece by Thomas L. Skinner III ("The Pendulum Swings: Commerce Clause and Tenth Amendment Challenges to PASPA")⁴.

The general police power to regulate conduct like gambling rests with the states. The federal government legislates only on truly national or interstate matters. By enacting what amounts to a blanket ban on sports betting in all but a few states, PASPA may overstep the bounds of federal power. The structure of the ban is problematic, as well, since it functions as a prohibition on state efforts to legalize and regulate gambling, rather than as the creation of a federal crime for individuals engaged in such behavior. While the Commerce Clause may be used to justify occasional federal pre-emption of state laws, it should be limited to those measures needed to maintain free and open commerce between states, not to coercing states into enacting the federal government's policy preferences.

PASPA may also face challenges based on its non-uniform treatment of states. As written, the law carved out certain gambling activities in the states of Delaware, Montana, Nevada and Oregon, while giving New Jersey the option to secure grandfathered status within a year of PASPA's passage. In doing so, it explicitly imposes non-uniform application of the law's prohibitions across the several states. While uniformity challenges are rare and difficult to sustain, given the degraded state of modern judicial review, PASPA is blatant in allowing some states to continue licensing gambling while other states are prohibited from doing so.

Challenges to PASPA to date have failed largely on procedural grounds. Several key questions of its constitutionality have yet to be litigated at the highest levels. While it is far from clear that the statute would be invalidated if given a comprehensive review, it certainly faces serious questions that merit further investigation.

Question 7: Georgia's lottery is unique in that it funds the HOPE scholarship, a program that has helped millions of Georgians. My priority in reviewing this legislation is to ensure that Georgia's lottery continues to be able to undertake the same activities they were able to prior to the 2011 DOJ decision. Based on your reading of the bill, would H.R. 707 allow Georgia's lottery to continue functioning as it did prior to the 2011 DOJ decision? Would it create restrictions on certain activities that were permissible under the Wire Act even before the DOJ decision?

³ Jeffrey Roeske, "Doubling Down on Sports Gambling: Why PASPA Would Fail a Constitutional Challenge," *Marquette Sports Law Review*, Vol. 24 Issue 2, 2014.

<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1624&context=sportslaw>

⁴ Thomas L. Skinner III, "The Pendulum Swings: Commerce Clause and Tenth Amendment Challenges to PASPA," *University of Nevada Las Vegas Gaming Law Journal*, Vol. 2, 2012.

<http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1027&context=glj>

Answer: While I claim no expertise on the specific function of Georgia's lottery, my understanding is that the state is among a small handful that currently operate real-time games via Internet sales. Georgia sells tickets to the multistate Powerball and Mega Millions games, as well as its own Fantasy 5 and KENO! games. If H.R. 707 were to become law, these online sales likely would become illegal.

As I covered in my answers to Questions 3 and 4, the key provision of RAWA that would appear to invalidate all online sales is its treatment of so-called "intermediate routing" of a transaction as inherently interstate, even if the bet in question originates and terminates in a state that has legalized such behavior. This expansive definition essentially means that all sales via the Internet would be prohibited, including the several games for which Georgia sells tickets online.

Question 8: Should H.R. 707 be enacted, will Georgia's state-licensed computer-generated retail lottery sales be affected? What affect would the enactment of the bill have on Georgia's lottery system and other similar systems?

Answer: The effect of enacting H.R. 707 on Georgia's lottery would be to take its sales off the Internet. As discussed in my answer to Question 7, RAWA effectively would prohibit online sales for any game. While lotteries could continue to sell tickets in person in brick-and-mortar establishments, they would be unable to use the modern communication system of the Internet to transact any business, even if that business is explicitly legal under state law.

Question 9: Millions of dollars each year are generated for the HOPE Scholarship and Pre-K programs through the existing Internet sales distribution channel and current lottery game offerings by the Georgia lottery. Given the educational scholarships that rely on funding from the state lottery, do you believe it would be appropriate to create a mechanism in the legislation to ensure the scholarship program in Georgia and other similar programs wouldn't lose funding streams for those programs? Please explain.

Answer: It is undoubtedly true that states like Georgia would face the prospect of diminished revenue if H.R. 707 were to pass, forcing them to contemplate policy responses to offset the loss of portions of their budget. But while many states will have revenue-related reasons to be concerned about the impact of RAWA, I believe the federalism concerns regarding the delicate balance of power between national and state governments are equally important.

As written, RAWA is a problematic use of Commerce Clause power that threatens to substitute the judgment of the federal government for that of states, which are the rightful holders of the power to regulate intrastate activity. If limited government and federalism are to have any meaning in the 21st century and beyond, Congress must exercise restraint in claims of such

power. This would help protect the Internet and the citizens who use it from unwise government intrusions, helping to make real the "new federalism" that so briefly flourished two decades ago.