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Testimony of Ira C. Gubernick, Esq. on behalf of the Coalition for a Safe and Regulated Internet

Good afternoon Chairmen Scavello, Farnese, Petri, Harkins and members of the committees.

It is a pleasure to be here today. Thank you for the opportunity to speak on this important matter. My name is Ira Gubernick. I am a partner with the law firm Cozen O'Connor, and I am here today to testify on behalf of the Coalition for a Safe and Regulated Internet. Unfortunately, my partner, Tad Decker, who drafted the opinion that we have shared with the committee, is unavailable to be here today. As you may know, Tad served as the first chairman of the Pennsylvania Gaming Control Board.

My past experience includes representing several clients on Pennsylvania gaming matters dating back to the Gaming Act's passage in Pennsylvania in 2004. Along with Tad, I also served as special counsel to the State of Delaware in drafting the first-ever Multistate Internet Gaming Agreement entered into between the States of Delaware and Nevada.

I am here today to explain why there are no legal obstacles to this State Legislature's ability – and right – to pass House Bill 392, and to refute any suggestions to the contrary.

There are three primary reasons why this State Legislature has the absolute right and ability to pass House Bill 392 without any basis to fear criminal punishment or sanction by the federal government.

First, it is highly unlikely (historically, less than a three percent chance) that the Office of Legal Counsel, called OLC, will reverse its 2011 finding that the federal Wire Act applies only to sports-based gambling activities.

Second, regardless of the effectiveness of the 2011 OLC opinion, this State Legislature has the right and authority to pass legislation authorizing online gaming.

Third, even if a federal law is passed that generally prohibits online gaming, this legislature would never face criminal sanctions for passing House Bill 392. Frankly, any suggestion to the contrary is outrageous, and completely disregards the Tenth Amendment to the United States Constitution, and our well-established laws respecting states' rights.

With respect to the first point, the existing 2011 Office of Legal Counsel opinion provides guidance that the federal government would not consider prosecuting online gaming unless it involves sport-based gambling activities. Historically, the OLC has reversed its position in less than three percent of its issued opinions, making a reversal highly unlikely. This is entirely consistent with internal OLC guidance. For example, the July 2010 OLC Best Practices Memorandum states that “OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question.”

Additionally, even if the new Administrations’ Office of Legal Counsel were to reverse the 2011 OLC Opinion, that reversal would not affect the validity or enforceability of state laws that authorize online gaming. The two federal appellate courts addressing whether federal law criminalizes online gaming have held that the federal Wire Act criminalizes only online sports betting. These federal appellate opinions are the controlling legal authority on the application of the Wire Act under federal law. The Wire Act is the only federal law that independently criminalizes online gaming. I point out that the Unlawful Internet Gambling Enforcement Act, UIGEA, does not make gambling a crime. Rather, UIGEA only criminalizes acts of online gaming that are made criminal under another, independent state or federal law.

On a related note, OLC opinions do not create or change federal law. While an OLC opinion provides value for guidance to federal prosecution, and as a reference tool for a Court, an OLC opinion does not constitute a law or binding legal precedence on any Court.

Finally, there is no history of the DOJ criminally prosecuting state officials for passing a law that is later found to be preempted by federal law. Any such federal prosecution would raise serious concerns under the First Amendment and the powers reserved for the states and the people in the Tenth Amendment. It is irresponsible for anyone to suggest that the federal government would prosecute state legislators for the mere act of passing a law. Everyone in this room knows that is not how our democracy or our legal system works.

Thank you again for the opportunity to be here with you today.