

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

NEW HAMPSHIRE LOTTERY
COMMISSION, NEOPOLLARD
INTERACTIVE, LLC, and POLLARD
BANKNOTE LIMITED,

Plaintiffs,

COMMONWEALTH OF
PENNSYLVANIA, acting by and through,
DEPARTMENT OF REVENUE,
SECRETARY C. DANIEL HASSELL, and
BUREAU OF LOTTERY,

Plaintiff-Intervenor,

v.

WILLIAM BARR, in his official capacity as
Attorney General, THE UNITED STATES
DEPARTMENT OF JUSTICE, and THE
UNITED STATE OF AMERICA,

Defendants.

C.A. No. 1:19-cv-00163-PB

**PROPOSED-INTERVENOR COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF REVENUE’S MEMORANDUM OF LAW IN SUPPORT OF ITS
EMERGENCY MOTION TO INTERVENE**

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I. PRELIMINARY STATEMENT / BACKGROUND

Proposed-Intervenor, Commonwealth of Pennsylvania, acting by and through the Department of Revenue, Secretary C. Daniel Hassell, and the Bureau of Lottery (the “Pennsylvania Lottery”), hereby respectfully submits this Memorandum of Law in support of its Emergency Motion to Intervene (“Motion”), pursuant to Rule 24 of the Federal Rules of Civil Procedure, in the action recently filed by the New Hampshire Lottery Commission (“New Hampshire Lottery”) against the U.S. Attorney General William Barr, the U.S. Department of Justice (the “USDOJ”), and the United States of America (collectively, the “Defendants”).

The Pennsylvania Lottery seeks to intervene in order to seek declaratory and injunctive relief declaring that the Wire Act, 18 U.S.C. § 1084, does not prohibit the use of a wire communication facility to transmit in interstate commerce bets, wagers, receipts, money, credits, or any other information related to any type of gaming other than gaming on sporting events and contests, such as state lotteries.

Through its action, the New Hampshire Lottery challenges the legality of a 2018 opinion issued by the USDOJ’s Office of Legal Counsel (“OLC”). That opinion changed the USDOJ’s longstanding position concerning the scope of the Wire Act, 18 U.S.C. § 1084. *See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, Office of Legal Counsel*, 42 Op. O.L.C. (Nov. 2, 2018), <https://www.justice.gov/sites/default/files/opinions/attachments/2018/12/20/2018-11-02-wire.pdf> (“2018 Opinion”). And the opinion laid the groundwork for the USDOJ’s ensuing threat to prosecute those that fail to come into compliance by April. *See Memorandum from Rod Rosenstein, Deputy Attorney General* (January 15, 2019), <https://www.justice.gov/file/1124286/download> (“Rosenstein Memo”). In this litigation, USDOJ has issued a further memo extending the 90-day period for an additional 60 days. *See* Dkt. No. 23.

Notably, the 2018 Opinion breaks from an earlier 2011 OLC opinion, which concluded that the Wire Act prohibited only sports gambling. *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, Office of Legal Counsel*, 35 Op. O.L.C. 1, 1–2 (Sept. 20, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf> (“2011 Opinion”). According to the 2018 Opinion, certain aspects of the Wire Act apply beyond sports betting to all forms of betting or wagering.

The New Hampshire Lottery has therefore sued, challenging the USDOJ’s interpretation of the Wire Act and seeking a declaration that the act “does not apply to state-conducted lotteries.” Dkt. No. 1 (“Compl.”) at 21. NeoPollard Interactive LLC and Pollard Banknote Limited (collectively, “NeoPollard”) similarly have sued as service providers to these lotteries in a suit that has been consolidated with the New Hampshire Lottery case. *See* No. 1:19-cv-00170 (filed Feb. 15, 2019).

As set forth more fully below, the Pennsylvania Lottery is entitled to intervene as a matter of right pursuant to Rule 24(a)(1) because 28 U.S.C. § 2403(b) provides the Pennsylvania Lottery with an unconditional, statutory right to intervene in this action. Accordingly, the Pennsylvania Lottery respectfully requests that its Motion be granted, that Exhibit A be docketed as the Pennsylvania Lottery’s Complaint, and that Exhibit B be docketed as the Pennsylvania Lottery’s Motion for Summary Judgment.

II. PENNSYLVANIA LOTTERY IS ENTITLED TO INTERVENE AS OF RIGHT

The Pennsylvania Lottery is entitled to intervene as a matter of right under Rule 24(a)(1) of the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 24 provides for intervention either as a matter of right or permissively at the discretion of the Court. Fed. R. Civ. P. 24(a), (b). Rule 24(a) provides for intervention as a matter of right:

On *timely motion*, the court *must* permit anyone to intervene who: *(1) is given an unconditional right to intervene by a federal statute*; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a) (emphasis added). Under Rule 24(a)(1), a party seeking to intervene must only show that its motion was timely and that it has a statutory basis to intervene. *Id.* As explained below, the Pennsylvania Lottery is entitled to intervene, per Rule 24(a)(1), because it has made a timely Motion and is statutorily authorized to intervene pursuant to 28 U.S.C. § 2403(b).¹

1. The Pennsylvania Lottery's Motion Is Timely

As a threshold matter, the Pennsylvania Lottery satisfies the first prong of Rule 24(a)(1) because its Motion is plainly timely. The timeliness inquiry is fact sensitive, with the litigation status at the time of the motion being “highly relevant.” *R&G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009) (citing *Banco Popular v. Greenblatt*, 964 F.2d 1227 (1st Cir.1992)). “Four factors inform the timeliness inquiry: (i) the length of time that the putative intervenor knew or reasonably should have known that his interests were at risk before

¹ The Pennsylvania Lottery also is entitled to intervene as a matter of right under the traditional four-prong analysis of Rule 24(a)(2). The Pennsylvania Lottery's Motion is clearly timely. The Pennsylvania Lottery has a strong interest in this dispute, as the matter will resolve questions as to the viability of Pennsylvania Lottery games and potentially impact thousands of older Pennsylvanians. Disposing of the matter in a manner that is adverse to Pennsylvania will impede the Pennsylvania Lottery's ability to protect its interests. And, finally, the existing parties do not adequately represent Pennsylvania's interests. Indeed, as a sovereign state, Pennsylvania has the constitutional and sole obligation and right to represent the public interest of the citizens of the Commonwealth. 28 U.S.C. § 2403(b). And, for the same reasons, the Pennsylvania Lottery should also be permitted to intervene pursuant to Rule 24(b).

he moved to intervene; (ii) the prejudice to existing parties should intervention be allowed; (iii) the prejudice to the putative intervenor should intervention be denied; and (iv) any special circumstances militating for or against intervention.” *Id.*

Each of these factors clearly supports a finding that the Pennsylvania Lottery’s Motion is timely. As an initial matter, this lawsuit commenced only three weeks ago. The Pennsylvania Lottery did not have advance notice that this litigation was forthcoming and only learned of it on February 15, 2019, when the suit was filed. Moreover, there will be no prejudice to the existing parties to this litigation. Pending before the Court are motions for summary judgment filed by the New Hampshire Lottery and Neopollard. The Pennsylvania Lottery is including with its motion to intervene a motion for summary judgment that rests on the legal arguments aptly presented by New Hampshire Lottery and Neopollard. The Pennsylvania Lottery will file its reply brief consistent with the briefing schedule set by the Court. Therefore, the scheduling order will therefore not be negatively impacted. For these reasons, the Pennsylvania Lottery’s Motion is timely.

2. The Pennsylvania Lottery Has An Unqualified Statutory Right To Intervene

The Pennsylvania Lottery also satisfies the second prong of Rule 24(a)(1) because it has an unconditional right to intervene pursuant to 28 U.S.C. § 2403(b).

Section 2403(b) provides that where the constitutionality of a state statute is called into question in an action, that state is permitted to intervene in that action as a matter of statutory right:

In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if

evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

28 U.S.C. § 2403(b); *see also Fordyce v. City of Seattle*, 55 F.3d 436, 441 (9th Cir. 1995) (citing 28 U.S.C. § 2403(b)); *In re Stewart*, 246 B.R. 134, 136 (Bankr. D.N.H. 2000); *cf. Int'l Paper Co. v. Jay*, 887 F.2d 338, 340 (1st Cir. 1989).

The Supreme Court of the United States has made clear that for Section 2403(b) to apply, the action need not involve a claim seeking to invalidate the state statute in question; rather, the position of one or more parties must merely “draw in question” the constitutionality of the state statute. *Int'l Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 58 S. Ct. 875, 879 (1938) (“To make that provision applicable it is enough that a question as to the constitutionality of an Act . . . is involved, however it may arise. The question may be raised by any party and the section is not limited to cases where an injunction is sought to restrain the enforcement of the Act”; interpreting Section 2403(b)’s predecessor statute).

Here, the Pennsylvania Lottery is statutorily authorized to intervene because the constitutionality of at least one Pennsylvania statute is plainly “drawn in question” by the Defendants’ position in this case – 4 Pa.C.S. §§ 501-503 (the “iLottery Statute”).² The iLottery Statute authorizes the Pennsylvania Lottery to operate “iLottery games” and sell “traditional lottery products over the Internet.” 4 Pa.C.S. §§ 502. “iLottery game” is defined by the iLottery Statute as “Internet instant games and other lottery products offered through iLottery.”³

As set out in the 2018 OLC Opinion, the USDOJ’s newly adopted position is that “selling lottery tickets via the Internet” is prohibited by the Wire Act. *See* 2018 OLC Opinion, at 22.

² Given the sweeping nature of the USDOJ’s position in the 2018 OLC Opinion, the constitutionality of Pennsylvania’s general state lottery law (61 Pa. C.S. § 801, et seq.) is also called into question.

³ *Id.* “iLottery” is similarly defined as “[a] system that provides for the distribution of lottery products through numerous channels that include, but are not limited to, web applications, mobile applications, mobile web, tablets and social media platforms that allows players to interface through a portal for the purpose of obtaining lottery products and ancillary services, such as account management, game purchase, game play and prize redemption.” *Id.*

Thus, the USDOJ's proffered interpretation of the Wire Act pits Pennsylvania's iLottery Statute—which authorizes selling lottery tickets via the internet – in direct conflict with the purported prohibitions of the Wire Act. Because a state statute that conflicts with a federal statute is unconstitutional under the Supremacy Clause of the Constitution,⁴ the USDOJ's position calls into question the constitutionality of the iLottery Statute. Thus, 28 U.S.C. § 2403(b) provides the Pennsylvania Lottery with the unqualified statutory right to intervene in this action.

III. CONCLUSION

For the foregoing reasons, the Pennsylvania Lottery respectfully requests that the Court grant its Motion and order that the Pennsylvania Lottery is entitled to intervene in this action as of right pursuant to Fed. R. Civ. P. 24(a)(1) in order to seek declaratory and injunctive relief declaring that the Wire Act, 18 U.S.C. § 1084, does not prohibit the use of a wire communication facility to transmit in interstate commerce bets, wagers, receipts, money, credits, or any other information related to any type of gaming other than gaming on sporting events and contests, such as state lotteries.

⁴ See *Maryland v. Louisiana*, 451 U.S. 725, 101 S. Ct. 2114, 2129 (1981) (“[A] state statute is void to the extent it conflicts with a federal statute.”); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 98 S. Ct. 988, 994 (1978) (“Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void [under the Supremacy Clause of the Constitution] to the extent that it actually conflicts with a valid federal statute.”); *Hagans v. Lavine*, 94 S. Ct. 1372, 1377 n.5 (1974) (recognizing “that a suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict *cannot succeed without ultimate resort to the Federal Constitution – ‘to be sure, any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution.’*”) (emphasis added); *United States v. Bd. of Cty. Comm'rs of Otero*, 184 F. Supp. 3d 1097, 1139 (D.N.M. 2015) (ordering that “Section 4-36-11 of New Mexico Statutes Annotated is in conflict with federal law, that the statute violates the Supremacy Clause of the United States Constitution, and that the statute therefore is unconstitutional and invalid.”); *Charlesgate Nursing Ctr. v. Rhode Island*, 723 F. Supp. 859, 864 (D.R.I. 1989) (explaining that the Supremacy Clause of the Constitution “prevents states from enacting laws that conflict with federal statutes or interfere with the accomplishment of their purposes”).

Respectfully submitted,

COMMONWEALTH OF
PENNSYLVANIA, acting by and through,
DEPARTMENT OF REVENUE,
SECRETARY C. DANIEL HASSELL, and
BUREAU OF LOTTERY

By Its Attorneys,

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Dated: March 8, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

/s/ Patrick J. Queenan

Patrick J. Queenan

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

NEW HAMPSHIRE LOTTERY
COMMISSION, NEOPOLLARD
INTERACTIVE, LLC, and POLLARD
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Plaintiffs,

COMMONWEALTH OF
PENNSYLVANIA, acting by and through,
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SECRETARY C. DANIEL HASSELL, and
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Plaintiff-Intervenor,

V.

WILLIAM BARR, in his official capacity as
Attorney General, THE UNITED STATES
DEPARTMENT OF JUSTICE, and THE
UNITED STATE OF AMERICA,

Defendants.

C.A. No. 1:19-cv-00163-PB

COMPLAINT IN INTERVENTION

The intervenor plaintiff, Commonwealth of Pennsylvania, acting by and through the Department of Revenue, Secretary C. Daniel Hassell and the Bureau of Lottery (the “Pennsylvania Lottery”), seeks declaratory and injunctive relief against the defendants, William Barr, in his official capacity as the Attorney General of the United States Department of Justice (“USDOJ”), and the USDOJ under the Declaratory Judgment Act, 28 U.S.C. § 2201, and for violations of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706. In support thereof, the Pennsylvania Lottery states as follows:

INTRODUCTION

1. This is an emergency action brought by the Pennsylvania Lottery. The Bureau of Lottery is a bureau within the Pennsylvania Department of Revenue that is responsible for the management and operation of a state lottery within the Commonwealth of Pennsylvania. 72 P.S. §§ 3761-101 et seq. This action is brought to prevent the USDOJ from enforcing the Wire Act, 18 U.S.C. § 1084, in an unlawful manner that, unless stopped, will directly harm the Pennsylvania Lottery and the citizens of Pennsylvania, particularly senior Pennsylvanians.

2. The Wire Act is a federal criminal law that prohibits certain types of gambling activity conducted over the domestic and international wire systems. Passed by Congress in 1961, the Wire Act provides, in relevant 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 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.

18 U.S.C. § 1084(a).

3. The Wire Act was long-interpreted by the USDOJ as applying *only* to sports gambling activity conducted over the wires. In fact, USDOJ—in 2011—rendered an opinion confirming this conclusion. 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*, 35 Op. O.L.C. (2011) (“2011 OLC Opinion”).

4. In reliance on the 2011 OLC Opinion (as well as settled federal appellate law), the Pennsylvania Lottery and its vendors have made significant expenditures to develop internet gaming and lottery platforms. In no small part, these operations were launched and

developed in reliance on the 2011 OLC Opinion and the case law and legislative history upon which that opinion relied. But now, after being acknowledged as safely outside the prohibition of the Wire Act, the Pennsylvania Lottery and its vendors find themselves threatened with prosecution under the Wire Act.

5. Specifically, on January 14, 2019, the USDOJ announced a *new* interpretation of the Wire Act that departs from its previous, long-held view that the Act applies *only* to sports gambling. *See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. (Nov. 2, 2018) (“2018 OLC Opinion”). Now, according to the USDOJ, certain aspects of the Wire Act apply to *all* forms of gambling activity, including state lotteries. The USDOJ reached this conclusion notwithstanding the fact that the only two federal appeals courts to have considered the scope of the Wire Act concluded that it applies only to *sports gambling* activity, a view that was recently echoed by the United States Supreme Court. *See Murphy v. Nat’ Collegiate Athletic Ass’n*, ___ U.S. ___, ___, 138 S. Ct. 1461, 1483 (2018). *See also United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014) (“The Wire Act applies only to ‘wagers on any sporting event or contest,’ that is, sports betting.”) (quoting 18 U.S.C. § 1084(a)); *In re MasterCard Int’l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002) (“Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal.”).

6. Moreover, the Deputy Attorney General, on January 15, 2019, instructed all United States Attorneys, the Assistant Attorneys General, and the Director of the Federal Bureau of Investigation that the USDOJ’s new interpretation of the Wire Act now governs throughout the USDOJ. Memorandum from Rod Rosenstein, Deputy Attorney General, <https://www.justice.gov/file/1124286> (January 15, 2019) (“Rosenstein Memo”). Deputy

Attorney General Rosenstein made clear, moreover, that criminal prosecutions under this new interpretation of the Wire Act will begin in the near future. *See* Rosenstein Memo.

7. The effect of the 2018 OLC Opinion is to extend criminal liability under 18 U.S.C. § 1084 far beyond betting on sporting events to include virtually any conceivable form of gambling, including the Pennsylvania Lottery.

8. USDOJ's new construction of the Wire Act is not faithful to its text, structure, purpose, or the legislative history of that law. This is particularly so where, as here, Title 18 of the U.S. Code, Chapter 61, already contains specific provisions that: (1) restrict lotteries; (2) regulate interstate commerce with respect to lottery ticket transmissions; (3) exempt lottery activity "conducted by a State" from certain of its prohibitions; and (4) define a "lottery" to specifically not include "the placing or accepting of bets or wagers on sporting events or contests." 18 U.S.C. §§ 1301-1308. In the face of these existing laws that explicitly exempt state-run lotteries from the federal lottery proscriptions, the Wire Act's general prohibition pertaining to sports betting cannot be read to criminalize state-lottery operations and, thereby, nullify—by stealth—provisions of 18 U.S.C. §§ 1301-1308.

9. The 2018 Opinion's interpretation of the Wire Act also intrudes upon the sovereign interests of the Commonwealth of Pennsylvania without unmistakably clear language demonstrating that Congress intended such a result. Consequently, the interpretation runs afoul of the United States Supreme Court's Tenth Amendment jurisprudence as set forth in *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), which mandates that a clear statement of congressional intent before a statute is susceptible of an interpretation that alters the state-federal balance. As egregiously, the Opinion effectively calls into question the constitutionality of the Commonwealth's lottery statutory regime, in whole or in part.

10. In addition, the defendants' interpretation of the Wire Act as extending far beyond betting or wagering on sports events to encompass state-conducted lottery activity is arbitrary, capricious, an abuse of discretion, and inconsistent with the mandates of the APA.

11. In sum, the USDOJ's new interpretation of the Wire Act, and threatened enforcement thereof, is contrary to law and unsustainable. The 2018 OLC Opinion exposes the Pennsylvania Lottery to potential criminal violations for merely continuing its established business practices that have been sanctioned by state and federal law to date. The Pennsylvania Lottery, therefore, respectfully seeks a declaratory judgment and preliminary and permanent injunctive relief in order to ensure that it may continue its operations to the benefit of older Pennsylvanians.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-2202, as this action presents a case and controversy under the Declaratory Judgment Act.

13. Venue lies in this district under 28 U.S.C. § 1391(e)(1) and § 1391(e)(2) in that the United States Department of Justice is a United States agency, at least one of the plaintiffs, the New Hampshire Lottery Commission (the "New Hampshire Lottery"), resides in New Hampshire, and no real property is involved in this action.

PARTIES

14. The Commonwealth of Pennsylvania is a sovereign state in the United States of America. The Bureau of Lottery is a bureau within the Department of Revenue, which is an executive branch agency of the Commonwealth. Lottery headquarters are located at 1200 Fulling Mill Road, Suite 1, Middletown Pennsylvania 17057. The Department of Revenue is

overseen by a Secretary of Revenue. *See generally*, 71 P.S. § 661, 72 P.S. § 201. The Secretary of Revenue has been vested with specific authority to operate and administer the Lottery. 61 Pa. Code § 803.11. This includes the authority to appoint an executive director of the Lottery to carry out the Secretary's mandated obligations. 61 Pa. Code §§ 803.21, 803.22.

15. Plaintiff the New Hampshire Lottery is an executive branch agency of the State of New Hampshire located at 14 Integra Drive, Concord, New Hampshire. The agency is overseen by three commissioners who are appointed and confirmed by the Governor and Executive Council of the State. N.H. Rev. Stat. § 284:21-a. The Executive Director is appointed by the Commission and is responsible for the day to day operations of the agency. N.H. Rev. Stat. 284:21-b, II.

16. On information and belief, Plaintiff NeoPollard Interactive, LLC (NeoPollard) is North America's leading provider of iLottery systems and technologies. NeoPollard's online gaming technology has been successfully deployed in Michigan, Virginia, and New Hampshire. Plaintiff Pollard BankNote Limited (Pollard) is the 50% joint owner of NeoPollard and is a leading supplier of gaming services to lotteries and charitable gaming organizations around the world. On February 15, 2019, NeoPollard and Pollard filed a lawsuit in this Court against USDOJ raising substantially similar claims as those asserted by the New Hampshire Lottery. *See NeoPollard Interactive LLC et al v. Barr, et al.*, 1:19-cv-00170-SM (D.N.H.). That lawsuit was consolidated with this action on February 22, 2019. NeoPollard and Pollard are, therefore, plaintiffs in this action, together with the New Hampshire Lottery.

17. Defendant William Barr is the Attorney General for the United States and he is sued in his official capacity. Barr is a federal officer and the USDOJ is a federal agency that is located at 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001. Pursuant to 28

U.S.C. § 510, the Attorney General has delegated to the Office of Legal Counsel within the USDOJ the responsibility for rendering formal and binding decisions to the heads of the various organizational units within USDOJ including the Criminal Division. Those units are required to follow these binding opinions and the 2018 Opinion is one such opinion.

18. Defendant the United States Department of Justice is an executive agency of the United States of America. Its principal address is 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001.

19. Defendant the United States of America encompasses the government agencies and departments responsible for the implementation of the Wire Act under the laws and Constitution of the United States

BACKGROUND

A. Pennsylvania Lottery System

20. The Pennsylvania General Assembly established the Pennsylvania Lottery in 1971.

21. All Pennsylvania Lottery net proceeds are utilized for the benefit of older Pennsylvanians, through programs such as property tax relief, rent rebates, free and reduced-fare transit, the low-cost prescription drug programs PACE and PACENET, long-term living services, and the 52 Area Agencies on Aging, including full- and part-time senior centers across Pennsylvania. 72 Pa. Stat. § 3761-301. The Lottery was further established to provide a means through which “to curb illegal gambling operations in Pennsylvania.” Id .

22. Since its inception in 1971, the Pennsylvania Lottery has contributed over \$29 billion to benefit these programs.

23. For the 2018 Fiscal Year (July 1, 2017-June 30, 2018), the Pennsylvania Lottery recorded sales of more than \$4.2 billion, from which more than \$2.7 billion in prizes was paid and more than \$1 billion went to support programs benefitting older Pennsylvanians.

24. The Pennsylvania Lottery is authorized by law to sell multiple types of lottery games through the Lottery's network of over 9,600 retailers.

25. In order to operate the lottery games and support its retailer network, the Pennsylvania Lottery contracts with a lottery services vendor, Scientific Games International, Inc. ("SciGames").

26. SciGames provide a central gaming system ("CGS") that manages Pennsylvania's Lottery games through Point of Sale terminals (POS) and a connected back office system to manage inventory and sales data.

27. Each Lottery retailer is provided with at least one lottery POS, which is a computer device that connects the retailer to SciGames' CGS and back-office systems through a number of types of transmissions.

28. These methods of transmission include IP cellular modems on a private network; Very Small Aperture Terminal ("VSAT"), i.e., satellite communications, on a private network; Multiprotocol Label Switching ("MPLS") Circuits, i.e., point-to-point wire circuits; DSL circuits; cable modems; or Integrated Services Digital Network ("ISDN") using the traditional public switched telephone network.

29. The vast majority of Pennsylvania Lottery communications operate on IP cellular modems and VSAT. Because these are private networks, the Pennsylvania Lottery has no ability to control how these companies route or transmit information.

30. Based on the type of game being played, the terminal sends and receives different types of data from the CGS and POS.

31. Pursuant to industry regulation and best practice, lotteries are required to have duplicate CGS locations so that they can continue to operate in the event that one system fails.

32. Frequently, these duplicate systems will be sited in different states to create sufficient geographic diversity to continue operations in the event of a natural disaster.

33. Lotteries are required through industry regulation to operate out of their back-up/disaster recovery servers at least twice per year.

34. For traditional Pennsylvania lottery products sold through retailers (commonly referred to as “bricks and mortar retailers”), SciGames’ primary CGS servers are currently located at Lottery headquarters in Middletown, Pennsylvania. The back-up/disaster recovery CGS servers are currently located in Alpharetta, Georgia.

35. For data administration related to non-traditional and/or iLottery products, such as Keno, virtual sports, gift cards and play at the pump, SciGames also uses servers in Atlanta, Georgia, and Las Vegas, Nevada.

36. As outlined below, the types of lottery games that the Pennsylvania Lottery offers include instant ticket games, terminal draw based games, multi-jurisdictional draw based games, and iLottery games, which allow players to purchase and play instant tickets through their mobile device, personal computer or tablet. As explained below, each type of lottery game may involve, to some extent, the transmission of data, information, or monies across state lines.

1. Instant Ticket Games

37. As noted above, one type of game that the Pennsylvania Lottery offers is an “instant” or “scratch” game, in which a player purchases pre-printed tickets and scratches the ticket to reveal the result of the play and any associated prize.

38. Generally, these tickets are purchased with cash and the purchaser is physically present in the retail location; however, certain retailers within Pennsylvania allow for purchase of instant tickets with debit cards.

39. Though the ticket is pre-printed with a pre-determined outcome, the result of the ticket is also stored in the CGS. Further, before instant tickets can even be sold at a retail location, the ticket must be “activated” by the retailer which requires the retailer to interface with the CGS.

40. Accordingly, a retailer will use the POS to activate the ticket book, validate the results of the instant ticket when presented for a prize claim, and ultimately record the sale and payment of prizes paid.

41. This data is transferred from the individual sale location in Pennsylvania to the CGS and POS servers in Pennsylvania, with a replication of the data then sent to the vendor’s disaster recovery data center in Georgia.

42. Pennsylvania Lottery has relied on the use of transmitting data from its retailers to its vendors via some form of wire communication since at least the 1980’s.

2. Terminal Draw Based Games

43. In addition to instant or scratch games, the Pennsylvania Lottery sells a variety of “draw based” or “terminal-based” games.

44. In a draw game, a player purchases a play in the form of a set of numbers for a draw that will be conducted at some point in the future.

45. At the designated time and place, numbers are drawn either physically or through the use of a random number generator.

46. The object for the player is to match as many numbers chosen by the player against the draw results.

47. Draw games are purchased from a lottery retailer through the use of the POS terminal.

48. The retailer terminal will request a wager transaction from the CGS based on the type of bet made by the player.

49. The CGS will then generate a wager in the system and send the information about the transaction to the terminal.

50. The terminal prints a record of the wager which is given to the player.

51. The route of data transmission depends on the location of the retailer. Often, the data is transferred from the individual sale location in Pennsylvania to the CGS and POS servers in Pennsylvania, with a replication of the data then sent to the vendor's disaster recovery data center in Georgia.

52. Pennsylvania Lottery sells Keno, in which draws occur every four minutes between 5:15 a.m. and 1:40 a.m. every day. The Pennsylvania Lottery also sells a variety of other Commonwealth-specific draw games, including Pick 2, Pick 3, Pick 4, Pick 5, Wild Ball, Cash 5, Match 6, and Treasure Hunt.

3. Multi-Jurisdictional Games

53. In 2002, Pennsylvania joined the consortium of states operating Powerball. In 2010, the Pennsylvania Lottery added sales of Mega Millions to its stable of multi-jurisdictional games. Finally, in 2015, the Pennsylvania Lottery joined the Cash4Life group.

54. All 3 multi-jurisdictional games are draw-based games that require a player to select numbers within a set range and match the same to those drawn by game officials.

55. The Pennsylvania Lottery remains a member of the Multi-State Lottery Association (“MUSL”), which permits the Lottery the ability to sell Powerball and Mega Millions. These games are each played twice a week.

56. Sales of multi-jurisdictional games in Pennsylvania occur through the communications of the POS and the CGS.

57. Due to the multi-state nature of Powerball and Mega Millions, however, additional actions must be taken to ensure the successful operation of the game.

58. First, regarding Powerball, member states report sales by game (which includes value-added product such as prize multipliers) to MUSL daily. Following each draw conducted by MUSL, the member states must reconcile sales revenue with prize liability for the lower seven prize levels, and allow MUSL to sweep the remaining prize liability into a MUSL account in Iowa. The member states pay the in-state prizes for the lower seven prize levels. The member state where the top two prize levels are won request payment of the remaining prize amounts from MUSL. MUSL then transfers the money to the member state which then makes the payment to the player.

59. Regarding Mega Millions, fund flow remains the same as that described above related to Powerball, except that, for Mega Millions, one state (Virginia) plays the role of MUSL for purposes of prize pool funding administration.

60. All data related to ticket sales, prize funding, reconciliation, and prize claims flow through the CGS. This data is transferred from the individual sale location in

Pennsylvania to the CGS and POS servers in Pennsylvania, with a replication of the data then sent to the vendor's disaster recovery data center in Georgia.

61. Additionally, general sales and total transactions must be shared with the member states so that the jackpot amount can be accurately calculated and to reconcile the number of wagers and monies wagered. Currently, this information is also transferred through the internet to the multi-jurisdictional association running the game.

62. Finally, once a jackpot is won, the participating lotteries will transfer their portion of the jackpot to the jurisdiction that sold the winning ticket, either directly or through the association that runs the game.

63. This is typically accomplished through a wire transfer of funds or an automated clearing house ("ACH") process.

64. These multi-jurisdictional draw games, which involve up to 48 states and territories, have operated on the interstate transfer of data and prize money through the telephone, internet, and wire transactions for well over thirty (30) years.

4. iLottery Games

65. In 2017, the Pennsylvania General Assembly authorized the sale of lottery tickets through the use of mobile applications or web-based platforms. 4 Pa.C.S. § 503.

66. In May 2018, the Pennsylvania Lottery launched its "iLottery" platform, which allows players to play digital instant tickets through their mobile device, personal computer, or tablet. Specifically, the iLottery Statute authorizes the Pennsylvania Lottery to operate "iLottery games" and sell "traditional lottery products over the Internet." 4 Pa.C.S. §§ 502. "iLottery game" is defined by the iLottery Statute as "Internet instant games and other lottery products offered through iLottery."

67. The iLottery platform is operated through SciGames, which utilizes data centers in Las Vegas Nevada and Atlanta Georgia.

68. Prior to registering with the Pennsylvania lottery, depositing funds or placing a wager on the internet platform, a player must provide personal data that is then vetted to ensure that the person is an eligible player.

69. The Lottery and its vendor utilize industry standard geo-location data from the player's PC or mobile device to ensure that the player can only make a wager when they are physically located within Pennsylvania. Additionally, the Lottery and SciGames utilize age verification controls to ensure that the player is of lawful age.

70. iLottery games can be played on the internet platform in essentially the same manner as traditional scratch tickets.

71. iLottery games have pre-determined outcomes that are revealed when a player interacts with the screen. This is usually done by the player clicking on a square so that a symbol, image, or number is revealed, but can also take the form of the player clicking on a "play" button that will allow images to be revealed.

72. Players pay for the game through a digital wallet, which may be funded through VISA, Mastercard, PayNearMe, or ACH; however, players may only make deposits when they are physically located within Pennsylvania.

73. The Pennsylvania Lottery cannot guarantee, however, that intermediate routing of data or information ancillary to the transactions do not cross state lines.

74. In 2018, the Pennsylvania Lottery generated over \$23.8 million in iLottery gross gaming revenue.

75. Thus far, in the current 2019 Fiscal Year (July 1, 2018-June 30, 2019) the Pennsylvania Lottery has recognized over \$30 million in gross gaming revenue.

5. Advertising and Customer Interaction

76. As authorized by statute, the Pennsylvania Lottery advertises its products by engaging in traditional media marketing, direct e-mail campaigns, and social media interactions with its customers. This includes offers and promotions for both traditional retail sales and iLottery purchases.

77. While these advertisements are always targeted for the purposes of creating lottery sales within Pennsylvania, these communications may, by the nature of the media, cross state lines.

78. The Pennsylvania Lottery maintains a website that advertises lottery games, posts draw results, and provides information on where games can be played, game rules, odds, and prizes. The website also has information and demonstrations of Pennsylvania's iLottery product. While iLottery transactions are not permitted outside of the state, this website is not walled off to Pennsylvania and is available to any person with internet access.

79. The Pennsylvania Lottery also engages in e-mail marketing with individuals who have signed up for the Lottery's VIP program or have created a Pennsylvania Lottery iLottery account. These e-mails provide information on lottery games and may contain offers or promotions for lottery products. While sales of Lottery's products may only occur within the state, e-mails may be routed to Pennsylvania residents who are temporarily out of state or to individuals who set-up an account in Pennsylvania but reside in other locations.

80. In recent years, the Pennsylvania Lottery has also used various social media channels including Facebook, Twitter, Instagram, and YouTube to advertise products,

hold promotional contests, and post draw results. These channels are open to the platform's users worldwide and are not limited to Pennsylvania.

81. The Pennsylvania Lottery also engages in traditional television, radio, print, digital, and out-of-home marketing to advertise its product and mission. While the Pennsylvania Lottery buys advertisements from Pennsylvania media outlets, these broadcasts may cross state lines.

B. The Wire Act

82. The Wire Act, 18 U.S.C. § 1084, is a federal criminal law passed in 1961 that prohibits certain types of gambling activity conducted over interstate or foreign wires.

83. The Wire Act sets forth, 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 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.

18 U.S.C. § 1084(a).

84. By its terms, the Wire Act prohibits only transmissions concerning sports-related wagering.

85. Indeed, the Wire Act's legislative history confirms that Congress's overriding goal in the Act was to stop the use of wire communications for *sports* gambling. Congress was focused principally on off-track betting on horse races, but also expressed concern about other sports-related events or contests, such as baseball, basketball, football, and boxing. The House Judiciary Committee Report, for example, explains:

Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present, the immediate receipt of information as to results of a horserace permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events. 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 particular sporting event begins.

H.R. Rep. No. 87-967 at 2, *reprinted in* 1961 U.S.C.C.A.N. at 2631-32 (reprinted report entitled “Sporting Events—Transmission of Bets, Wagers, and Related Information”).

86. Legislative history from the Senate similarly indicates that Congress’s motive in enacting the Wire Act was to combat sports-related betting. The Explanation of S. 1656, Prohibiting Transmission of Bets by Wire Communications, provided by Chairman Eastland during the Senate debate, describes the problem addressed by the legislation this way:

Information essential to gambling must be readily and quickly available. Illegal bookmaking depends upon races at about 20 major racetracks throughout the country, only a few of which are in operation at any one time. Since the bookmaker needs many bets in order to operate a successful book, he needs replays, including money on each race. Bettors will bet on successive races only if they know quickly the results of the prior race and the bookmaker cannot accept bets without the knowledge of the results of each race. Thus, information so quickly received as to be almost simultaneous, prior to, during, and immediately after each race with regard to starting horse, scratches of entries, probable winners, betting odds, results and the prices paid, is essential to both the illegal bookmaker and his customers.

107 Cong. Rec. 13,901 (1961).

87. Although Congress was most concerned about horse racing, testimony during the hearings also highlighted the increasing importance of rapid wire communications to “large-scale betting operations” involving other professional and amateur sporting events, such as baseball, basketball, football, and boxing. *See* Statement of the Hon. Robert F. Kennedy,

Attorney General of the United States, Before Subcommittee No. 5 of the House Committee on the Judiciary, In Support of Legislation To Curb Organized Crime and Racketeering (May 17, 1961).

88. The only two federal appeals courts to have considered the scope of the Wire Act have held that the limiting phrase “on any sporting event or contest” applies to all prohibitions set forth in Section 1084(a). *See United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014) (“The Wire Act applies *only* to ‘wagers on any sporting event or contest,’ that is, sports betting.”) (quoting 18 U.S.C. § 1084(a)) (emphasis added); *In re MasterCard Int’l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002) (“Because *the Wire Act does not prohibit non-sports internet gambling*, any debts incurred in connection with such gambling are not illegal.”) (emphasis added).

C. The Department of Justice Office of Legal Counsel’s 2011 Memorandum

89. To resolve questions about the scope of the Wire Act, officials from the New York State Division of the Lottery and the Office of the Governor of the State of Illinois sought USDOJ’s views regarding their respective state’s plans to use the internet and out-of-state transaction processors to conduct lottery business by selling lottery tickets to adults within their states.

90. Both States submitted to the USDOJ that the Wire Act was inapplicable to such interstate transmissions of electronic data, whether incidental or intentional.

91. On December 23, 2011, the USDOJ responded favorably to the 2009 inquiries from the States of Illinois and New York and affirmed the legality of their proposals. *See* 2011 OLC Opinion.

92. While agreeing with the States as to the bottom line, the 2011 OLC Opinion did not answer the precise question posed by the States regarding the lawfulness of selling lottery tickets over the internet to in-state adults using out-of-state transaction processors.

The 2011 OLC Opinion concluded that it need not resolve this question because “interstate transmissions of wire communications that do not relate to a ‘sporting event or contest’ . . . fall outside of the reach of the Wire Act.” *Id.* at 1–2. Because the proposed New York and Illinois lottery proposals did not involve wagering on sporting events or contests, the 2011 OLC Opinion concluded that “the Wire Act does not . . . prohibit them.” *Id.*

93. In reaching its conclusion that the Wire Act applied only to sports gambling activity, the OLC thoroughly examined the terms of the Wire Act, as well as legislative history surrounding it and settled federal appellate law. *See id.* at 3–11.

D. The Department of Justice Office of Legal Counsel’s 2018 Memorandum

94. In the time since the 2011 OLC Opinion, no court has found in any published opinion that the Wire Act applies to any gambling other than to sporting events.

95. Indeed, in 2014, the First Circuit agreed that the 2011 OLC Opinion was confined to gambling on “any sporting event or contest.” *Lyons*, 740 F.3d at 718.

96. The 2018 OLC Opinion was also issued after the U.S. Supreme Court decided *Murphy v. Nat’ Collegiate Athletic Ass’n*, __ U.S. __, 138 S. Ct. 1461 (2018).

97. Although *Murphy* was decided on other grounds, it explained that the Wire Act “outlaws the interstate transmission of information that assists in the placing of a bet on a *sporting event*” and applies “only if the underlying gambling is illegal under state law.” *Id.* at 1483 (emphasis added).

98. The Supreme Court in *Murphy* found there to exist a “coherent federal policy” that “respect[s] the policy choices of the people of each State on the controversial issue of gambling.” *Id.*

99. Notwithstanding that judicial precedent, the OLC reversed the 2011 OLC Opinion, concluding that its prior 2011 opinion was wrong and that certain aspects of the Wire

Act applied beyond sports betting to other forms of betting or wagering. *See* 2018 OLC Opinion at 1.

100. As it did in 2011, the OLC looked to the text of the statute and its legislative history. *See id.* at 6–17. This time, however, the OLC adopted the exact opposite position it had in the 2011 OLC Opinion—arriving at a position that has been squarely rejected by the only two federal courts of appeals to have addressed this question. *See Lyons*, 740 F.3d at 718; *see also In re MasterCard*, 313 F.3d at 262–63.

101. The 2018 OLC Opinion states that it constitutes “binding legal advice within the Executive Branch.” *Id.* at 19.

102. The 2018 OLC Opinion further specifies that, although both States and private actors took action in reliance on the 2011 OLC Opinion, “we do not believe that such reliance interests are sufficient to justify continued adherence to the 2011 opinion.” *Id.* at 22–23.

103. On January 15, 2019, the USDOJ issued a memorandum to all United States Attorneys, Assistant Attorneys General, and the Director of the Federal Bureau of Investigation informing them of 2018 OLC Opinion that certain activities under the Wire Act apply to non-sports gambling activity. *See* Rosenstein Memo.

104. The Rosenstein Memo instructed federal prosecutors to refrain from applying the new interpretation of the Wire Act for a period of 90 days, but it characterized the 90-day period as “not a safe harbor for violations of the Wire Act,” but instead reflecting “an internal exercise of prosecutorial discretion.” *Id.* As a result, any present conduct that does not conform to the 2018 OLC Opinion is, according to the USDOJ’s interpretation, in violation of the Wire Act and subject to prosecution.

105. Thus, according to the Rosenstein Memo, upon the expiration of the 90-day period in April, criminal prosecutions flowing from the 2018 OLC Opinion can commence.

106. In connection with this litigation, USDOJ has issued a further memo extending the 90-day period for an additional 60 days. Regardless, without judicial intervention providing the relief requested by the various plaintiffs in this litigation, there is a reasonable likelihood of criminal prosecution at the end of that time.

107. Thus, on February 5, 2019, the Attorney Generals of the Commonwealth of Pennsylvania and the State of New Jersey wrote to the USDOJ condemning its recent about-face regarding the applicability of the Wire Act to state lottery systems, and explaining the grave consequences that the 2018 OLC Opinion may cause. Indeed, the Attorney Generals' letter explained that the USDOJ's new opinion "suggests that criminal charges can be brought even where the interstate transmission of information is merely incidental to betting that is otherwise entirely lawful under state law." The letter also made clear that the breadth of the opinion "casts doubt not only on traditional online gaming, but also multi-state lottery drawings . . . and online sales of in-state lottery tickets," "puts jobs and livelihoods at risk for the thousands of people who work in the online gaming industry," and "jeopardizes critical state funding for the public good that is generated by lottery sales" within Pennsylvania.

E. Harm to the Pennsylvania Lottery and Older Pennsylvanians

108. As with all other industries, the lottery business has adopted the use of modern communications technology, including the internet, to conduct its business.

109. In doing so, the Pennsylvania Lottery has relied on the specific statutory authorizations granted by the Pennsylvania General Assembly and Congress, including authorizations to join multi-state compacts and to sell multi-jurisdictional games. *See generally*, 72 P.S. § 3761-308, 61 Pa. Code §§ 871.1 et seq. 18 U.S.C. §§ 1301-1308.

110. The Pennsylvania Lottery has further relied on the uninterrupted practice for several decades of utilizing interstate communications for the purposes of operating high profile multi-jurisdictional lottery games.

111. The USDOJ's reversal of the 2011 Opinion, coupled with statements that depart from long-standing non-use of the Wire Act to prohibit state-run lottery activity, now subject the Pennsylvania Lottery and its employees and agents to criminal liability and prosecution.

112. As a result, the Pennsylvania Lottery is confronted with the uncertainty of whether or to what extent it needs to cease its operations because all of its lottery-related activities use the internet or wires incidentally. Indeed, it appears that the defendants' position in this matter is that the Wire Act applies to *all* state lottery activities. During a February 22, 2019 scheduling conference, when asked whether it is the defendants' position that "all state lottery operations are criminal activities now because they necessarily involve the use of interstate wires," counsel for the defendants responded that the 2018 OLC Opinion speaks for itself.

113. Such an interpretation could result in the suspension of all state lottery sales, resulting in an immediate annual loss of over \$1 billion in Pennsylvania Lottery proceeds that benefit older Pennsylvanians, as well as additional expenses to try to comply with the 2018 Opinion.

114. More narrow interpretations of the opinion could still cause hundreds of millions of dollars in revenue loss. For example, the suspension of multi-jurisdictional games and compacts would deprive Pennsylvania of approximately \$425 million in annual revenue.

115. To the extent the 2018 Opinion seeks only to enjoin the sale of lottery tickets directly over the internet, this action would be inconsistent with the prior actions of the

United States Congress, federal court decisional law, and the prior opinion of the Department of Justice. The Pennsylvania Lottery has relied on each of these legal authorities in launching an iLottery platform.

116. The USDOJ's reversal of the 2011 Opinion, without any further action or explanation, is also likely to have a chilling effect on banks accepting and processing these lottery-related transactions, which can effectively shut down this sales channel.

COUNT I
Declaratory Judgment
28 U.S.C. § 2201(a)

117. The plaintiff realleges and incorporates by reference the foregoing allegations as if set forth herein.

118. The reasoning of the 2018 Opinion is deeply flawed. Despite the holdings of two federal courts of appeals and its own prior logic, the OLC is now insisting that the text of the Wire Act reaches conduct other than gambling on sporting events.

119. The OLC ignored key structural features of the statute, all of which indicate a limited scope. It is not only "improbable," 2018 Opinion at 15, but absurd to conclude that Congress sought to prohibit all direct betting and wagering across state lines, but specifically prohibited only the transmission of "information" related to bets and wagers on sporting events or contests. There is no conceivable legislative logic underlying such a scheme.

120. The OLC also neglected the substantial legislative history of the Wire Act, all of which points to a narrow understanding and purpose of the Act. The great weight of this history shows that members of Congress, at the time of the Wire Act's enactment, understood that the Act was limited to gambling on sporting events.

121. The interpretation of the Wire Act set forth in the 2018 Opinion is wrong as a matter of law. It also interferes with Pennsylvania's Tenth Amendment right to operate a

lottery, given that the Wire Act contains no plain statement that Congress intended to alter the usual balance between federal powers and powers reserved for the states. The Opinion also effectively calls into question the constitutionality of the Commonwealth's lottery statutory regime, in whole or in part.

122. As a result of the 2018 Opinion, there is an actual controversy between the parties as to the proper scope of the Wire Act, that controversy is immediate and real, and in light of all the attendant circumstances, the Pennsylvania Lottery faces sufficient hardship to justify a finding that the dispute is ripe for declaratory judgment.

123. The impact of the 2018 Opinion is sufficiently direct and immediate to create an adversity of interest between the Pennsylvania Lottery and Defendants.

124. The USDOJ's reversal of the 2011 Opinion, coupled with statements that depart from long-standing non-use of the Wire Act to prohibit state-run lottery activity, now subject the Pennsylvania Lottery and its employees and agents to criminal liability and prosecution. The threat of impending criminal prosecution poses a severe hardship to Plaintiffs' current operations.

125. As a result, the Pennsylvania Lottery is confronted with the uncertainty of whether or to what extent it needs to cease its operations because all of its lottery-related activities use the internet or wires incidentally. Indeed, it appears that the defendants' position in this matter is that the Wire Act applies to *all* state lottery activities.

126. Such an interpretation could result in the suspension of all state lottery sales, resulting in an immediate annual loss of over \$1 billion in Pennsylvania Lottery proceeds that benefit older Pennsylvanians, as well as additional expenses to try to comply with the 2018 Opinion.

127. More narrow interpretations of the opinion could still cause hundreds of millions of dollars in revenue loss. For example, the suspension of multi-jurisdictional games and compacts would deprive Pennsylvania of approximately \$425 million in annual revenue.

128. To the extent the 2018 Opinion seeks only to enjoin the sale of lottery tickets directly over the internet, this action would be inconsistent with the prior actions of the United States Congress, federal court decisional law, and the prior opinion of the Department of Justice. The Pennsylvania Lottery has relied on each of these legal authorities in launching an iLottery platform.

129. The USDOJ's reversal of the 2011 Opinion, without any further action or explanation, is also likely to have a chilling effect on banks accepting and processing these lottery-related transactions, which can effectively shut down this sales channel.

130. As a result of the 2018 Opinion, the Pennsylvania Lottery faces a real and immediate threat that it will be subject to liability under 18 U.S.C. § 1964 (RICO), given that violations of the Wire Act are a RICO predicate act.

131. No adequate remedy exists at law to remedy the harm facing the Pennsylvania Lottery as a result of the 2018 OLC Opinion.

132. The Pennsylvania Lottery therefore requests that this Court declare that the Wire Act does not prohibit the use of a wire communication facility to transmit in interstate commerce bets, wagers, receipts, money, credits, or any other information related to any type of gaming other than gambling on sporting events and contests.

COUNT II
Violation of 5 U.S.C. § 702(2)(A), (C)

133. The Pennsylvania Lottery realleges and incorporates by reference the foregoing allegations as if set forth herein.

134. The USDOJ is an agency within the meaning of 5 U.S.C. § 701(b)(1).

135. The 2018 Opinion’s interpretation of 18 U.S.C. § 1084, as adopted by the 90-Day Memorandum, is “final agency action for which there is no other adequate remedy.” 5 U.S.C. § 704.

136. The interpretation formally adopted by the USDOJ is binding on the USDOJ and its agents, marks the consummation of the USDOJ’s decision-making process, and exposes the plaintiff and its agents to significant criminal and civil penalties if they fail to conform to it in the operation of their lottery activities.

137. The Pennsylvania Lottery is, as a result, a “person aggrieved” within the meaning of the APA. 5 U.S.C. §§ 551(2), 702.

138. The interpretation of 18 U.S.C. § 1084 contained in the 2018 Opinion and endorsed by the 90-Day Memo is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.

139. The interpretation of 18 U.S.C. § 1084 contained in the 2018 Opinion and endorsed by the 90-Day Memo is also in excess of statutory jurisdiction, authority, or short of statutory right.

140. 18 U.S.C. § 1084 does not, by its plain terms, extend to state-conducted lotteries and, in fact, applies solely to betting or wagering on sporting events or contests.

141. The plain language of the statute, its structure, its purpose, and its legislative history uniformly support that construction of the statute.

142. United States Supreme Court and First Circuit precedent also dictate that conclusion.

143. Nonetheless, even if 18 U.S.C. § 1084 applies to betting or wagering on non-sporting events or contests—a result that makes no sense based on the safe harbor provision contained in 18 U.S.C. § 1084(b)—18 U.S.C. § 1084 does not extend to state-conducted lotteries for the reasons explained previously.

144. The existence of 18 U.S.C. §§ 1301-1308, which expressly govern lotteries, allows the States to enter into agreements permitting lottery activity between them, and creates other exemptions for the use of the wires with respect to state-conducted lottery activity, are the more specific statutes, which control over 18 U.S.C. § 1084 and which 18 U.S.C. § 1084 cannot displace through creative interpretation.

145. Interpreting 18 U.S.C. § 1084 so broadly as to criminalize state-run lottery activity is therefore inconsistent with how similar criminal laws within Title 18 of the United States Code operate.

146. Additionally, by their plain language, the federal lottery statutes seek to advance a coherent federal policy of respecting the policy choices of the people of each State on the controversial issue of lottery gambling and have as their purpose assisting the States create, operate, and enforce their lottery gambling laws. The 2018 Opinion interprets 18 U.S.C. § 1084 in a manner that undermines this well-considered Congressional regime.

147. Consequently, the defendant's interpretation of 18 U.S.C. § 1084 as extending far beyond betting or wagering on sports events or contests to encompass state-conducted lottery activity is arbitrary, capricious, an abuse of discretion, and not in accordance with law, 5 U.S.C. § 706(2)(A), as well as “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C).

148. The interpretation of 18 U.S.C. § 1084 advanced by the 2018 Opinion and endorsed by the 90-Day Memo must therefore be vacated and set aside under the APA and the defendants enjoined from employing its interpretation.

149. No other adequate remedy at law exists to remedy the harm the Pennsylvania Lottery and other state lottery commissions across the country face in the wake of the 2018 Opinion.

WHEREFORE, the Pennsylvania Lottery respectfully requests that this Court issue an order:

- a. Declaring that the Wire Act, 18 U.S.C. § 1084, does not prohibit the use of a wire communication facility to transmit in interstate commerce bets, wagers, receipts, money, credits, or any other information related to any type of gaming other than gaming on sporting events and contests, such as state-conducted lotteries;
- b. Vacating and setting aside the interpretation of 18 U.S.C. § 1084 advanced by the 2018 Opinion and endorsed by the 90-Day Memo under the APA as in violation of 5 U.S.C. §§ 706(2)(A) & (C);
- c. Permanently enjoining the defendants and their agents from acting under or pursuant the interpretation of 18 U.S.C. § 1084 advanced by the 2018 Opinion and endorsed by the 90-Day Memo;
- d. Declaring that Pennsylvania's iLottery Statute and other gambling-related statutes are not unconstitutional under the Supremacy Clause of the United States' Constitution; and
- e. Granting such further relief as the court deems just and equitable.

Respectfully submitted,

COMMONWEALTH OF
PENNSYLVANIA, acting by and
through, DEPARTMENT OF REVENUE,
SECRETARY C. DANIEL HASSELL,
and BUREAU OF LOTTERY

By Its Attorneys,

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Dated: March 8, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

/s/ Patrick J. Queenan

Patrick J. Queenan

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

NEW HAMPSHIRE LOTTERY
COMMISSION, NEOPOLLARD
INTERACTIVE, LLC, and POLLARD
BANKNOTE LIMITED,

Plaintiffs,

COMMONWEALTH OF
PENNSYLVANIA, acting by and through,
DEPARTMENT OF REVENUE,
SECRETARY C. DANIEL HASSELL, and
BUREAU OF LOTTERY

Plaintiff-Intervenor,

v.

WILLIAM BARR, in his official capacity as
Attorney General, THE UNITED STATES
DEPARTMENT OF JUSTICE, and THE
UNITED STATE OF AMERICA,

Defendants.

C.A. No. 1:19-cv-00163-PB

**PLAINTIFF-INTERVENOR COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF REVENUE'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, Plaintiff-Intervenor, the Commonwealth of Pennsylvania, acting by and through, Department of Revenue, Secretary C. Daniel Hassell, and Bureau of Lottery (the "Pennsylvania Lottery") respectfully moves for summary judgment as to all claims asserted in its Complaint in Intervention. In support of its Motion, the Pennsylvania Lottery refers the Court to its Memorandum of Law filed in Support of its Motion for Summary Judgment (and exhibits attached thereto).

WHEREFORE, for the reasons set forth in the Memorandum of Law in Support of the Pennsylvania Lottery's Motion for Summary Judgment, there are no disputed issues of material fact and the Pennsylvania Lottery is entitled to judgment as a matter of law. The Court should grant this motion, enter judgment for the Pennsylvania Lottery and grant the Pennsylvania Lottery any further relief this Court deems just and proper.

Respectfully submitted,

COMMONWEALTH OF
PENNSYLVANIA, acting by and through,
DEPARTMENT OF REVENUE,
SECRETARY C. DANIEL HASSELL, and
BUREAU OF LOTTERY

By Its Attorneys,

SHEEHAN PHINNEY BASS & GREEN

Dated: March 8, 2019

By: /s/ Robert R. Lucic
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/s/ Patrick J. Queenan

Patrick J. Queenan

ATTACHMENT A

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

NEW HAMPSHIRE LOTTERY
COMMISSION, NEOPOLLARD
INTERACTIVE, LLC, and POLLARD
BANKNOTE LIMITED,

Plaintiffs,

COMMONWEALTH OF
PENNSYLVANIA, acting by and through,
DEPARTMENT OF REVENUE,
SECRETARY C. DANIEL HASSELL, and
BUREAU OF LOTTERY,

Plaintiff-Intervenor,

v.

WILLIAM BARR, in his official capacity as
Attorney General, THE UNITED STATES
DEPARTMENT OF JUSTICE, and THE
UNITED STATE OF AMERICA,

Defendants.

C.A. No. 1:19-cv-00163-PB

**PROPOSED-INTERVENOR COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF REVENUE’S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

I. PRELIMINARY STATEMENT

The Pennsylvania Lottery agrees with Plaintiffs that the Office of Legal Counsel's ("OLC's") reversal of its 2011 Opinion regarding the scope of the Wire Act, 18 U.S.C. § 1084, is arbitrary, contrary to the plain meaning of the Wire Act, and inconsistent with directly applicable precedent. The Pennsylvania Lottery writes separately only to describe facts specific to the structure of Pennsylvania Lottery and to inform the Court of the negative impact of the OLC's about-face on Pennsylvanians—specifically older Pennsylvanians—who are the beneficiaries of Pennsylvania Lottery revenue.

II. STATEMENT OF MATERIAL FACTS

In addition to the facts set forth in the Memoranda of Law in Support of the New Hampshire Lottery Commission's Motion for Summary Judgment (Dkt. No. 2) and the Motion for Summary Judgment of Neopollard Interactive LLC and Pollard Banknote Limited (Dkt. No. 10), which are incorporated herein by reference, the Pennsylvania Lottery presents the following additional facts:

A. Pennsylvania Lottery Background and Structure

The Pennsylvania Lottery is a bureau within the Pennsylvania Department of Revenue, which is an executive branch agency of the Commonwealth of Pennsylvania. *See* Declaration of Drew Svitko in Support of Proposed-Intervenor Commonwealth of Pennsylvania's Motion For Summary Judgment ("Svitko Dec") at ¶ 4. Pursuant to 72 P.S. § 3761-301, all Pennsylvania Lottery net proceeds are utilized for the benefit of older Pennsylvanians, through programs such as property tax relief, rent rebates, reduced fare transit and prescription drug benefits. *Id.* at ¶ 5.

Since its inception in 1971, the Pennsylvania Lottery has contributed over \$29 billion to benefit these programs. *Id.* at ¶ 6. For the 2018 Fiscal Year (July 1, 2017-June 30, 2018), the Pennsylvania Lottery recorded sales of more than \$4.2 billion, from which more than \$2.7 billion

in prizes was paid and more than \$1 billion went to support programs benefitting older Pennsylvanians. *Id.* at ¶ 7. In 2018, the Pennsylvania Lottery generated over \$23.8 million in iLottery (described below) gross gaming revenue alone. *Id.* at ¶ 8. Through the current Fiscal Year 2018/2019 the Pennsylvania Lottery has recognized over \$30 million in gross gaming revenue. *Id.* at ¶ 9.

The Pennsylvania Lottery is authorized by law to sell multiple types of lottery games through the Lottery's network of over 9,600 retailers. *Id.* In order to operate the lottery games and support its retailer network, the Pennsylvania Lottery contracts with a lottery services vendor, Scientific Games International, Inc. ("SciGames"), to provide a central gaming system ("CGS") which manages the games through Point of Sale terminals ("POS") and a connected back office system to manage inventory and sales data. *Id.* at ¶ 10.

As is the case with the New Hampshire Lottery, the Pennsylvania Lottery has duplicate CGS locations, situated in different states to create sufficient geographic diversity to continue operations in the event of a natural disaster, and it must operate out of its disaster recovery site at least twice per year. *Id.* at ¶ 1.

SciGames' CGS servers for traditional retailer (commonly referred to as "bricks and mortar") based lottery products are currently located at Lottery headquarters in Middletown Pennsylvania, as well as a back-up location in Alpharetta, Georgia. *Id.* at ¶ 12. Additionally, SciGames utilizes Atlanta, Georgia and Las Vegas, Nevada for data administration related to non-traditional and/or iLottery products such as keno, virtual sports, gift cards and play at the pump. *Id.* at ¶ 13.

A Lottery retailer will be provided at least one lottery POS which is a computer device that connects the retailer to the vendor's CGS and back-office systems through a number of types

of transmissions. *Id.* at ¶ 14. These include IP cellular modems on a private network, VSAT on a private network, MPLS Circuits, DSL Circuits, cable modems, or ISDN. *Id.* at ¶ 15. Based on the type of game being played, the terminal sends and receives different types of data from the CGS and BOS. *Id.* at ¶ 16.

B. Types of Games

As with the New Hampshire Lottery, the Pennsylvania Lottery offers a series of different game platforms that make varying degrees of use of interstate wire transmissions. *Id.* at ¶ 17.

C. Instant/Scratch Games

Instant scratch off tickets are purchased with cash and the purchaser is physically present in the retail location, however, certain retailers within Pennsylvania allow for purchase of instant tickets with debit cards. *Id.* at ¶ 18. Though the ticket is pre-printed with a pre-determined outcome, the result of the ticket is also stored in the CGS. *Id.* at ¶ 19. Further, before instant tickets can even be sold at a retail location, the ticket must be “activated” by the retailer which requires the retailer to interface with the CGS. *Id.* at ¶ 20. Accordingly, a retailer will use the POS to activate the ticket book, validate the results of the instant ticket, and ultimately record the sale and payment of prizes paid. *Id.* at ¶ 21. This data is transferred from the individual sale location in Pennsylvania to the CGS and BOS servers in Pennsylvania with a replication of the data then sent to the vendor’s disaster recovery data center in Georgia. *Id.* at ¶ 22. Pennsylvania Lottery has relied on the use of transmitting data from its retailers to its vendors via some form of wire communication since at least the 1980’s. *Id.* at ¶ 23.

D. Terminal Draw Based Games

In a draw game, a player purchases a play in the form of a set of numbers for a draw that will be conducted at some point in the future. *Id.* at ¶ 24. At the designated time and place numbers are drawn either physically or through the use of a random number generator. *Id.* at ¶

25. The object for the player is to match as many numbers chosen by the player against the draw results. *Id.* ¶ 26. With the exception of iLottery purchases, draw games are purchased from a lottery retailer through the use of the terminal. *Id.* at ¶ 27. The retailer terminal will request a wager transaction from the CGS based on the type of bet made by the player. *Id.* at ¶ 28. The CGS will then generate a wager in the system and send the information about the transaction to the terminal. *Id.* at ¶ 29. The terminal prints a record of the wager which is given to the player. *Id.* at ¶ 30. This data travels through the means discussed above, dependent on the location of the retailer. *Id.* at ¶ 31. Pennsylvania Lottery sells Keno, in which draws occur every four minutes between 5:15 a.m. and 1:40 a.m. every day and sells a wide variety of multi-jurisdictional draw games, as set forth in detail below. *Id.* at ¶ 32.

E. Multi-Jurisdictional Games

In 2002, Pennsylvania joined the consortium of states operating Powerball. *Id.* at ¶ 33. In 2010, the Pennsylvania Lottery added sales of Mega Millions to its stable of multi-jurisdictional games. *Id.* at ¶ 34. Finally, in 2015, the Pennsylvania Lottery joined the Cash4Life group. *Id.* at ¶ 35. All three of these multi-jurisdictional games, are draw-based games that require a player to select numbers within a set range and match the same to those drawn by game officials. *Id.* at ¶ 36. The Pennsylvania Lottery remains a member of the Multi-State Lottery Association (“MUSL”) which permits the Lottery the ability to sell Powerball and Mega Millions. *Id.* at ¶ 37. Sales of multi-jurisdictional games in Pennsylvania occur through the communications of the POS and the CGS. *Id.* at ¶ 38.

Due to the multi-state nature of Powerball and Mega Millions, however, additional actions must be taken to ensure the successful operation of the game. *Id.* at ¶ 39. First, regarding Powerball, member states report sales by game (which includes value-added product such as prize multipliers) to MUSL daily. *Id.* at ¶ 40. Following each draw conducted by

MUSL, the member states must reconcile sales revenue with prize liability for the lower seven prize levels, and allow for MUSL to sweep the remaining prize liability into a MUSL account in Iowa. *Id.* at ¶ 41. The member states pay the in-state prizes for the lower seven prize levels. *Id.* at ¶ 42. The member state where the top two prize levels are won request payment of the remaining prize amounts from MUSL. *Id.* at ¶ 43. MUSL then transfers the money to the member state which then makes the payment to the player. *Id.* at ¶ 44.

Regarding Mega Millions, fund flow remains the same as that described above related to Powerball except that for Mega Millions one state (Virginia) plays the role of MUSL in connection with this game. *Id.* at ¶ 45. All data related to ticket sales, prize funding, reconciliation and prize claims flow through the CGS. *Id.* at ¶ 46. Additionally, general sales and total transactions must be shared with the member states so that the jackpot amount can be accurately calculated and to reconcile the number of wagers and monies wagered. *Id.* at ¶ 47. Currently, this information is also transferred through the Internet to the multi-jurisdictional association running the game. *Id.* at ¶ 48.

As explained by the New Hampshire Lottery, once a jackpot is won, the participating lotteries will transfer their portion of the jackpot to the jurisdiction that sold the winning ticket, either directly or through the association that runs the game. *Id.* at ¶ 49. This is typically accomplished through a wire transfer of funds or an automated clearing house (“ACH”) process. *Id.* at ¶ 50. These multi-jurisdictional draw games, which involve up to 48 states and territories have operated on the interstate transfer of data and prize money through the telephone, internet, and wire transactions for well over thirty (30) years. *Id.* at ¶ 51.

F. iLottery Games

In 2017, the Pennsylvania General Assembly authorized the sale of lottery tickets through the use of mobile applications or web-based platforms. 4 Pa.C.S. § 503. *Id.* at ¶ 52. In May

2018, the Pennsylvania Lottery launched its “iLottery” platform which allowed players to play digital instant tickets through their mobile device, personal computer or tablet. *Id.* at ¶ 53. The iLottery platform is operated through SciGames that utilizes data centers in Las Vegas Nevada and Atlanta Georgia. *Id.* at ¶ 54.

Prior to registering with the Pennsylvania lottery, depositing funds or placing a wager on the Internet platform, a player must provide personal data which is then vetted to ensure that the person is an eligible player. *Id.* at ¶ 55. The Lottery and its vendor utilize industry standard geo-location data from the player’s PC or mobile device to ensure that the player can only make a wager when they are physically located within Pennsylvania. *Id.* at ¶ 56. Additionally, the Lottery and SciGames utilize age verification controls to ensure that the player is of lawful age. *Id.* at ¶ 57.

iLottery games can be played on the internet platform in essentially the same manner as traditional scratch tickets. *Id.* at ¶ 58. iLottery games have pre-determined outcomes that are revealed when a player interacts with the screen. *Id.* at ¶ 59. This is usually done by the player clicking on a square so that a symbol, image or number is revealed but can also take the form of the player clicking on a “play” button that will allow images to be revealed. *Id.* at ¶ 60. Players pay for the game through a digital wallet which may be funded through VISA, Mastercard, PayNearMe or ACH; however, players may only make deposits when they are physically located within Pennsylvania. *Id.* at ¶ 61. The Pennsylvania Lottery cannot guarantee, however, that intermediate routing of data or information ancillary to the transactions does not cross state lines. *Id.* at ¶ 62.

G. Advertising and Customer Interaction

As authorized by statute, the Pennsylvania Lottery advertises its products by engaging in traditional media marketing, direct e-mail campaigns, and social media interactions with its

customers. *Id.* at ¶ 63. This includes offers and promotions for both traditional retail sales and iLottery purchases. *Id.* at ¶ 64. While these advertisements are always targeted for the purposes of creating lottery sales within Pennsylvania, these communications may, by the nature of the media, cross state lines. *Id.* at ¶ 65. The Pennsylvania Lottery maintains a website which advertises lottery games, posts draw results, provides information on where games can be played, game rules, odds, and prizes. *Id.* at ¶ 66. The website also has information and demonstrations of Pennsylvania's iLottery product. *Id.* at ¶ 67. While iLottery transactions are not permitted outside of the state, this website is not walled off to Pennsylvania and is available to any person with internet access. *Id.* at ¶ 68.

The Pennsylvania Lottery also engages in e-mail marketing with individuals who have signed up for the Lottery's VIP program or have created a Pennsylvania Lottery iLottery account. *Id.* at ¶ 69. While sales of Lottery's products may only occur within the state, e-mails may be routed to Pennsylvania residents who are temporarily out of state or to individuals who set-up an account in Pennsylvania but reside in other locations. *Id.* at ¶ 70.

In recent years, the Pennsylvania Lottery has also used various social media channels including Facebook, Twitter, Instagram, and YouTube to advertise products, hold promotional contests, and post draw results. *Id.* at ¶ 71. These channels are open to the platform's users worldwide and are not limited to Pennsylvania. *Id.* at ¶ 72. The Pennsylvania Lottery also engages in traditional television, radio, print, digital, and out-of-home marketing to advertise its product and mission. *Id.* at ¶ 73. While Lottery buys advertisements from Pennsylvania media outlets these broadcasts may, by their nature, cross state lines. *Id.* at ¶ 74.

H. Impact of the OLC's Reversal

Given the use of wire transmissions for Pennsylvania Lottery games as described above, the broadest interpretation of the 2018 Opinion could result in the suspension of all state lottery

sales, resulting in an immediate annual loss of over \$1 billion in Lottery proceeds that benefit older Pennsylvanians, as well as additional expenses to try to comply with the 2018 Opinion. *Id.* at ¶ 75.

More narrow interpretations of the opinion could still cause hundreds of millions of dollars in revenue loss. *Id.* at ¶ 76. For example, the suspension of multi-jurisdictional games and compacts would deprive Pennsylvania of approximately \$425 million in annual revenue. *Id.* at ¶ 77. These losses would be devastating to the programs funded by Lottery revenue. *Id.* at ¶ 78.

III. ARGUMENT

The Pennsylvania Lottery joins in the arguments set forth in the Memoranda of Law in Support of the New Hampshire Lottery Commission's Motion for Summary Judgment (Dkt. No. 2) and the Motion for Summary Judgment of Neopollard Interactive LLC and Pollard Banknote Limited (Dkt. No. 10) and incorporates those arguments as though fully set forth herein.

In addition, the facts set forth above substantiate the extent to which Pennsylvania Lottery games may involve wire transmissions potentially within the scope of the Wire Act if the OLC's 2018 Opinion were to stand, as well as the extent to which Pennsylvania will be harmed if the federal government's threatened enforcement of its new interpretation of the Wire Act is not enjoined.

Respectfully submitted,

COMMONWEALTH OF
PENNSYLVANIA, acting by and through,
DEPARTMENT OF REVENUE,
SECRETARY C. DANIEL HASSELL, and
BUREAU OF LOTTERY

By Its Attorneys,

SHEEHAN PHINNEY BASS & GREEN

Dated: March 8, 2019

By: /s/ Robert R. Lucic

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Patrick J. Queenan

EXHIBIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

NEW HAMPSHIRE LOTTERY
COMMISSION, NEOPOLLARD
INTERACTIVE, LLC, and POLLARD
BANKNOTE LIMITED,

Plaintiffs,

COMMONWEALTH OF
PENNSYLVANIA, acting by and through,
DEPARTMENT OF REVENUE,
SECRETARY C. DANIEL HASSELL, and
BUREAU OF LOTTERY,

Plaintiff-Intervenor,

v.

WILLIAM BARR, in his official capacity as
Attorney General, THE UNITED STATES
DEPARTMENT OF JUSTICE, and THE
UNITED STATE OF AMERICA,

Defendants.

C.A. No. 1:19-cv-00163-PB

**DECLARATION OF DREW SVITKO IN SUPPORT OF PROPOSED-INTERVENOR
COMMONWEALTH OF PENNSYLVANIA'S MOTION FOR SUMMARY JUDGMENT**

DREW SVITKO, being of full age, hereby declares as follows:

1. I, Drew Svitko, make the following declaration upon my own personal knowledge.
2. I currently serve as the Executive Director of the Pennsylvania State Lottery (the "Lottery"). I have held that position since January 2015;
3. Based on over twenty (20) years of experience in the lottery industry, I have personal knowledge of the operation of the Pennsylvania Lottery and multi-jurisdictional lottery games;

4. The Pennsylvania Lottery is a bureau within the Pennsylvania Department of Revenue, which is an executive branch agency of the Commonwealth of Pennsylvania.

5. Pursuant to 72 P.S. § 3761-301, all Pennsylvania Lottery net proceeds are utilized for the benefit of older Pennsylvanians, through programs such as property tax relief, rent rebates, reduced fare transit and prescription drug benefits.

6. Since its inception in 1971, the Pennsylvania Lottery has contributed over \$29 billion to benefit these programs.

7. For the 2018 Fiscal Year (July 1, 2017-June 30, 2018), the Pennsylvania Lottery recorded sales of more than \$4.2 billion, from which more than \$2.7 billion in prizes was paid and more than \$1 billion went to support programs benefitting older Pennsylvanians.

8. In 2018, the Pennsylvania Lottery generated over \$23.8 million in iLottery (described below) gross gaming revenue alone.

9. Through the current Fiscal Year 2018/2019 the Pennsylvania Lottery has recognized over \$30 million in gross gaming revenue. The Pennsylvania Lottery is authorized by law to sell multiple types of lottery games through the Lottery's network of over 9,600 retailers.

10. In order to operate the lottery games and support its retailer network, the Pennsylvania Lottery contracts with a lottery services vendor, Scientific Games International, Inc. ("SciGames"), to provide a central gaming system ("CGS") which manages the games through Point of Sale terminals ("POS") and a connected back office system to manage inventory and sales data.

11. As is the case with the New Hampshire Lottery, the Pennsylvania Lottery has duplicate CGS locations, situated in different states to create sufficient geographic diversity to

continue operations in the event of a natural disaster, and it must operate out of its disaster recovery site at least twice per year.

12. SciGames' CGS servers for traditional retailer (commonly referred to as "brick and mortar") based lottery products are currently located at Lottery headquarters in Middletown Pennsylvania, as well as a back-up location in Alpharetta, Georgia.

13. Additionally, SciGames utilizes Atlanta, Georgia and Las Vegas, Nevada for data administration related to non-traditional and/or iLottery products such as keno, virtual sports, gift cards and play at the pump.

14. A Lottery retailer will be provided at least one lottery POS which is a computer device that connects the retailer to the vendor's CGS and back-office systems through a number of types of transmissions.

15. These include IP cellular modems on a private network, VSAT on a private network, MPLS Circuits, DSL Circuits, cable modems, or ISDN.

16. Based on the type of game being played, the terminal sends and receives different types of data from the CGS and BOS.

17. As with the New Hampshire Lottery, the Pennsylvania Lottery offers a series of different game platforms that make varying degrees of use of interstate wire transmissions.

18. Instant scratch off tickets are purchased with cash and the purchaser is physically present in the retail location, however, certain retailers within Pennsylvania allow for purchase of instant tickets with debit cards.

19. Though the ticket is pre-printed with a pre-determined outcome, the result of the ticket is also stored in the CGS.

20. Further, before instant tickets can even be sold at a retail location, the ticket must be “activated” by the retailer which requires the retailer to interface with the CGS.

21. Accordingly, a retailer will use the POS to activate the ticket book, validate the results of the instant ticket, and ultimately record the sale and payment of prizes paid.

22. This data is transferred from the individual sale location in Pennsylvania to the CGS and BOS servers in Pennsylvania with a replication of the data then sent to the vendor’s disaster recovery data center in Georgia.

23. Pennsylvania Lottery has relied on the use of transmitting data from its retailers to its vendors via some form of wire communication since at least the 1980’s.

24. In a draw game, a player purchases a play in the form of a set of numbers for a draw that will be conducted at some point in the future.

25. At the designated time and place numbers are drawn either physically or through the use of a random number generator.

26. The object for the player is to match as many numbers chosen by the player against the draw results.

27. With the exception of iLottery purchases, draw games are purchased from a lottery retailer through the use of the terminal.

28. The retailer terminal will request a wager transaction from the CGS based on the type of bet made by the player.

29. The CGS will then generate a wager in the system and send the information about the transaction to the terminal.

30. The terminal prints a record of the wager which is given to the player.

31. This data travels through the means discussed above, dependent on the location of the retailer.

32. Pennsylvania Lottery sells Keno, in which draws occur every four minutes between 5:15 a.m. and 1:40 a.m. every day and sells a wide variety of multi-jurisdictional draw games, as set forth in detail below.

33. In 2002, Pennsylvania joined the consortium of states operating Powerball.

34. In 2010, the Pennsylvania Lottery added sales of Mega Millions to its stable of multi-jurisdictional games.

35. Finally, in 2015, the Pennsylvania Lottery joined the Cash4Life group.

36. All 3 of these multi-jurisdictional games, are draw-based games that require a player to select numbers within a set range and match the same to those drawn by game officials.

37. The Pennsylvania Lottery remains a member of the Multi-State Lottery Association ("MUSL") which permits the Lottery the ability to sell Powerball and Mega Millions.

38. Sales of multi-jurisdictional games in Pennsylvania occur through the communications of the POS and the CGS.

39. Due to the multi-state nature of Powerball and Mega Millions, however, additional actions must be taken to ensure the successful operation of the game.

40. First, regarding Powerball, member states report sales by game (which includes value-added product such as prize multipliers) to MUSL daily.

41. Following each draw conducted by MUSL, the member states must reconcile sales revenue with prize liability for the lower seven prize levels, and allow MUSL to sweep the remaining prize liability into a MUSL account in Iowa.

42. The member states pay the in-state prizes for the lower seven prize levels.

43. The member state where the top two prize levels are won request payment of the remaining prize amounts from MUSL.

44. MUSL then transfers the money to the member state, which then makes the payment to the player.

45. Regarding Mega Millions, fund flow remains the same as that described above related to Powerball except that for Mega Millions one state (Virginia) plays the role of MUSL in connection with this game.

46. All data related to ticket sales, prize funding, reconciliation and prize claims flow through the CGS.

47. Additionally, general sales and total transactions must be shared with the member states so that the jackpot amount can be accurately calculated and to reconcile the number of wagers and monies wagered.

48. Currently, this information is also transferred through the Internet to the multi-jurisdictional association running the game.

49. As explained by the New Hampshire Lottery, once a jackpot is won, the participating lotteries will transfer their portion of the jackpot to the jurisdiction that sold the winning ticket, either directly or through the association that runs the game.

50. This is typically accomplished through a wire transfer of funds or an automated clearing house ("ACH") process.

51. These multi-jurisdictional draw games, which involve up to 48 states and territories have operated on the interstate transfer of data and prize money through the telephone, internet, and wire transactions for well over thirty (30) years.

52. In 2017, the Pennsylvania General Assembly authorized the sale of lottery tickets through the use of mobile applications or web-based platforms. 4 Pa.C.S. § 503.

53. In May 2018, the Pennsylvania Lottery launched its “iLottery” platform which allowed players to play digital instant tickets through their mobile device, personal computer or tablet.

54. The iLottery platform is operated through SciGames that utilizes data centers in Las Vegas Nevada and Atlanta Georgia.

55. Prior to registering with the Pennsylvania lottery, depositing funds or placing a wager on the Internet platform, a player must provide personal data which is then vetted to ensure that the person is an eligible player.

56. The Lottery and its vendor utilize industry standard geo-location data from the player’s PC or mobile device to ensure that the player can only make a wager when they are physically located within Pennsylvania.

57. Additionally, the Lottery and SciGames utilize age verification controls to ensure that the player is of lawful age.

58. iLottery games can be played on the internet platform in essentially the same manner as traditional scratch tickets.

59. iLottery games have pre-determined outcomes that are revealed when a player interacts with the screen.

60. This is usually done by the player clicking on a square so that a symbol, image or number is revealed but can also take the form of the player clicking on a “play” button that will allow images to be revealed.

61. Players pay for the game through a digital wallet which may be funded through VISA, Mastercard, PayNearMe or ACH; however, players may only make deposits when they are physically located within Pennsylvania.

62. The Pennsylvania Lottery cannot guarantee, however, that intermediate routing of data or information ancillary to the transactions does not cross state lines.

63. As authorized by statute, the Pennsylvania Lottery advertises its products by engaging in traditional media marketing, direct e-mail campaigns, and social media interactions with its customers.

64. This includes offers and promotions for both traditional retail sales and iLottery purchases.

65. While these advertisements are always targeted for the purposes of creating lottery sales within Pennsylvania, these communications may, by the nature of the media, cross state lines.

66. The Pennsylvania Lottery maintains a website which advertises lottery games, posts draw results, provides information on where games can be played, game rules, odds, and prizes.

67. The website also has information and demonstrations of Pennsylvania's iLottery product.

68. While iLottery transactions are not permitted outside of the state, this website is not walled off to Pennsylvania and is available to any person with internet access.

69. The Pennsylvania Lottery also engages in e-mail marketing with individuals who have signed up for the Lottery's VIP program or have created a Pennsylvania Lottery iLottery account.

70. While sales of Lottery's products may only occur within the state, e-mails may be routed to Pennsylvania residents who are temporarily out of state or to individuals who set-up an account in Pennsylvania but reside in other locations.

71. In recent years, the Pennsylvania Lottery has also used various social media channels including Facebook, Twitter, Instagram, and YouTube to advertise products, hold promotional contests, and post draw results.

72. These channels are open to the platform's users worldwide and are not limited to Pennsylvania.

73. The Pennsylvania Lottery also engages in traditional television, radio, print, digital and out-of-home marketing to advertise its product and mission.

74. While Lottery buys advertisements from Pennsylvania media outlets these broadcasts may, by their nature, cross state lines.

75. Given the use of wire transmissions for Pennsylvania Lottery games as described above, the broadest interpretation of the 2018 Opinion could result in the suspension of all state lottery sales, resulting in an immediate annual loss of over \$1 billion in Lottery proceeds that benefit older Pennsylvanians, as well as additional expenses to try to comply with the 2018 Opinion.

76. More narrow interpretations of the opinion could still cause hundreds of millions of dollars in revenue loss.

77. For example, the suspension of multi-jurisdictional games and compacts would deprive Pennsylvania of approximately \$425 million in annual revenue.

78. These losses would be devastating to the programs funded by Lottery revenue.

I DECLARE under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of March 2019.

A handwritten signature in blue ink, appearing to read 'Drew Svitko', is written above a horizontal line.

Drew Svitko

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

NEW HAMPSHIRE LOTTERY
COMMISSION, NEOPOLLARD
INTERACTIVE, LLC, and POLLARD
BANKNOTE LIMITED,

Plaintiffs,

COMMONWEALTH OF
PENNSYLVANIA, acting by and through,
DEPARTMENT OF REVENUE,
SECRETARY C. DANIEL HASSELL, and
BUREAU OF LOTTERY,

Plaintiff-Intervenor,

v.

WILLIAM BARR, in his official capacity as
Attorney General, THE UNITED STATES
DEPARTMENT OF JUSTICE, and THE
UNITED STATE OF AMERICA,

Defendants.

C.A. No. 1:19-cv-00163-PB

**PROPOSED-INTERVENOR COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF REVENUE’S EMERGENCY MOTION TO INTERVENE**

Pursuant to Federal Rule of Civil Procedure 24, Proposed-Intervenor, Commonwealth of Pennsylvania, acting by and through the Department of Revenue, Secretary C. Daniel Hassell and the Bureau of Lottery (the “Pennsylvania Lottery”), hereby files this Emergency Motion to Intervene (“Motion”). The Pennsylvania Lottery seeks to intervene as of right under Fed. R. Civ. P. 24 in order to seek declaratory and injunctive relief declaring that the Wire Act, 18 U.S.C. § 1084 does not prohibit the use of a wire communication facility to transmit in interstate commerce bets, wagers, receipts, money, credits, or any other information related to any type of

gaming other than gaming on sporting events and contests, such as state lotteries. As discussed in the accompanying Memorandum of Law in Support of the Pennsylvania Lottery's Emergency Motion to Intervene ("Memorandum"), the Pennsylvania Lottery satisfies all of the requirements for intervention as set forth in Rule 24.

Therefore, the Pennsylvania Lottery respectfully requests that its Motion be granted.

In support of its Motion, the Pennsylvania Lottery submits herewith:

- A Memorandum of Law in Support of the Pennsylvania Lottery's Emergency Motion to Intervene;
- A proposed Complaint setting forth the Pennsylvania Lottery's claims, as required by Fed. R. Civ. P. 24(c); and
- A proposed Motion for Summary Judgment that the Pennsylvania Lottery would file, if permitted to intervene in this action.

The Pennsylvania Lottery contacted counsel for Plaintiffs New Hampshire Lottery Commission ("New Hampshire Lottery"), Neopollard Interactive, LLC ("Neopollard"), Pollard Banknote Limited ("Pollard"), and Defendants William Barr, the Department of Justice, and the United States of America (collectively, "Defendants") to seek their position on the Motion.

The New Hampshire Lottery takes no position on the Motion.

Both Neopollard and Pollard do not oppose the Motion.

Defendants do not oppose the Motion provided that "(1) Pennsylvania will fill all its papers, including any motion for summary judgment, by March 8; (2) any motion for summary judgment filed by Pennsylvania rests upon the existing parties' legal argument; and (3) Pennsylvania's entry into the case does not otherwise affect the schedule agreed upon by the parties and adopted by the Court."

The Pennsylvania Lottery will abide by these conditions and not otherwise disrupt the Court's ordered briefing schedule. In support of its motion for summary judgment, the

Pennsylvania Lottery will rest on the legal arguments presented by Plaintiffs New Hampshire Lottery, Neopollard, and Pollard. The Pennsylvania Lottery will also strive to file a joint reply brief pursuant to the Court's briefing schedule.

For the foregoing reasons and for those discussed in the accompanying Memorandum, the Pennsylvania Lottery respectfully requests that the Court grant its Motion and enter an Order granting it intervention under Fed. R. Civ. P. 24, docketing Exhibit A, attached hereto, as the Pennsylvania Lottery's Complaint in Intervention, and docketing Exhibit B, attached hereto, as the Pennsylvania Lottery's Motion for Summary Judgment.

Respectfully submitted,

COMMONWEALTH OF
PENNSYLVANIA, acting by and through,
DEPARTMENT OF REVENUE,
SECRETARY C. DANIEL HASSELL, and
BUREAU OF LOTTERY

By Its Attorneys,

SHEEHAN PHINNEY BASS & GREEN

Dated: March 8, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

/s/ Patrick J. Queenan

Patrick J. Queenan