

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

_____	)	
New Hampshire Lottery Commission,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 1:19-cv-00163-PB
	)	
William Barr, in his official capacity	)	
As Attorney General;	)	
	)	
United States Department of Justice,	)	
	)	
Defendants.	)	
_____	)	
NeoPollard Interactive, LLC,	)	
	)	
Pollard Banknote Limited,	)	
	)	
Plaintiffs	)	
	)	
v.	)	
	)	
William Barr, in his official capacity	)	
As Attorney General;	)	
	)	
United States Department of Justice,	)	
	)	
The United States of America,	)	
	)	
Defendants.	)	
_____	)	

**MEMORANDUM OF LAW IN SUPPORT OF ASSENTED-TO MOTION FOR LEAVE  
TO FILE AMICUS CURIAE MEMORANDUM IN SUPPORT OF  
PLAINTIFFS’ MOTIONS FOR SUMMARY JUDGMENT ON BEHALF OF MICHIGAN  
BUREAU OF STATE LOTTERY**

The Michigan Bureau of State Lottery (“Michigan Lottery” or “*Amicus*”) seeks leave to file the accompanying Proposed Memorandum of Law of *Amicus Curiae* to provide this Court with additional perspective on the erroneous nature of the Department of Justice’s (DOJ) 2018

Opinion and the detrimental impact it has on the forty-seven (47) jurisdictions nationwide that rely on lottery revenues to fund vital services.

The Michigan Lottery hereby represents that the Kentucky Lottery Corporation, the Tennessee Education Lottery Corporation, the Virginia Lottery, the Rhode Island Lottery, the Colorado State Lottery Division, the North Carolina Education Lottery, the State of Delaware, the State of Idaho, the State of Vermont, the State of Mississippi, the State of Alaska, and the District of Columbia all support this motion and the requested relief.

### **ARGUMENT**

District courts have discretion whether to grant leave to file an *amicus* brief. *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008); *see also Stuart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013) (noting that non-parties have the option to file *amicus* briefs in district court proceedings and that such *amicus* “often make useful contributions to litigation”). No Federal Rule of Civil Procedure applies to motions for leave to appear as *amicus curiae* in district court, so district courts often look for guidance to Fed. R. App. P. 29, which applies to *amicus* briefs in federal appellate cases. *See, e.g., Am. Humanist Ass’n v. Maryland Nat’l Capital Park & Planning Comm’n*, 147 F. Supp. 3d 373, 389 (D. Md. 2015). Rule 29 provides that prospective amici must file along with the proposed brief, a motion that states “the movant’s interest” and “the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3).

## I. INTEREST OF THE *AMICUS*

The interest of the *Amicus* in this case is threefold. First, each lottery<sup>1</sup> and state supporting the *Amicus*, (aside from Mississippi and Alaska) has entered into at least one multi-jurisdictional agreement with Plaintiff New Hampshire Lottery Commission governing sales of multi-jurisdictional lottery games, such as Mega Millions, Powerball, or Lucky for Life. Nationwide, these three games generated a reported \$7.8 billion in revenues in 2017.<sup>2</sup> In fiscal year 2017 alone, reported revenues for the forty-seven government-operated lotteries nationwide exceeded \$80 billion,<sup>3</sup> providing critical support for preK-12 education, college scholarships, environmental protection, senior citizens, first responders, and infrastructure projects, among other things. Second, the lotteries have contracted with various vendors—including, in some cases, Plaintiff Pollard Banknote—to provide services that are potentially implicated by the 2018 Opinion. Third, the lotteries are now faced with choosing between losing millions of dollars in funding for vital public services or potentially facing criminal liability. Although each lottery employs geolocation and other technology to ensure that lottery wagers are placed only within the applicable jurisdiction, lottery communications covered by the Wire Act may cross state lines.

In 2011, the Department of Justice (DOJ) issued an opinion concluding that accepting bets and wagers on State sanctioned lottery games over the internet would not violate the Wire Act, 18 U.S.C. § 1084, because the statute encompasses only interstate wire communications of wagers related to a “sporting event or contest.” *See Whether Proposals by Illinois and New York*

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<sup>1</sup> The State of Alaska does not have a lottery. Its interest stems from an education raffle that is done through Alaska’s Permanent Fund Dividend program.

<sup>2</sup> Terri Markle, Bruce LaFleur, & Byron LaFleur, *LaFleur’s 2018 World Lottery Almanac*, 357 Tbl. *U.S. Lotteries’ Calendar 2017 Sales By Game* (26th ed. 2018).

<sup>3</sup> *Id.* at 243 Tbl. *FY 17 Consolidated U.S. Lottery Revenues, Prizes & Government Transfers by GDP* (26th ed. 2018).

*to use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violates the Wire Act*, 35 Op. O.L.C. (2011) (the 2011 Opinion).

But in 2018, the DOJ changed course and concluded, among other things, that the Wire Act applies to all types of bets and wagers. *See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. (2018) (the 2018 Opinion). The 2018 Opinion could be viewed as applying not only to internet sales but to other lottery functions.

## **II. THE MATTERS ASSERTED IN THE AMICUS BRIEF ARE USEFUL AND RELEVANT TO THE COURT'S REVIEW**

The proposed *amicus* brief is useful and relevant to the Court's review for two primary reasons: it emphasizes the erroneous nature of the 2018 Opinion's legal conclusions and it demonstrates the need for nationwide equitable relief to combat the 2018 Opinion's nationwide consequences. The brief will explain that the DOJ's 2018 Opinion is inconsistent with the statute's language and legislative history and contradicts decisions by the First and Fifth Circuit Courts of Appeals interpreting the Wire Act to apply only to sports gambling. It also will highlight that failing to harmonize the Wire Act with the Unlawful Internet Gambling Enforcement Act (UIGEA), 31 U.S.C. §§ 5361-5367, creates a confusing and inconsistent body of federal antigambling laws.

Additionally, the brief will explain why the Court should grant nationwide equitable relief in this case. First, in cases where a federal executive agency's decisions will be universally enforced, which is the case here, nationwide equitable relief is appropriate. *See, e.g., New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 677-78 (S.D.N.Y. 2019) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). The issue will be identical in every jurisdiction, and the harms will only vary in amount. Second, a nationwide injunction is

appropriate when necessary to grant the plaintiffs full relief. *See California v. Health & Human Servs.*, 351 F. Supp. 3d 1267, 1300 (citing *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018)); *see also Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987). Because the New Hampshire Lottery Commission is involved in multi-jurisdictional lottery games, as mentioned above, it will not obtain complete relief if the 2018 Opinion applies to its multi-jurisdictional partners. Similarly, NeoPollard provides services to other jurisdictions that will remain threatened by the 2018 Opinion even if it obtains relief in this jurisdiction.

### **III. REQUEST TO PARTICIPATE IN ORAL ARGUMENT**

If the Court grants the motion to file the proposed *amicus* brief, the Michigan Lottery also requests the Court's permission to participate in oral argument on the motions for summary judgment. Allowing oral argument will permit the Michigan Lottery to more fully explain the 2018 Opinion's harmful effects on government-operated lotteries nationwide and the essential nature of nationwide relief. Oral argument will be particularly beneficial here in light of the expedited nature of the briefing schedule necessary to having these crucial matters quickly resolved.

### **CONCLUSION**

For the foregoing reasons, the Michigan Lottery respectfully asks that this Court grant this Motion for Leave to File *Amicus Curiae* Memorandum, attached as **Exhibit A**, and, if granted, allow *Amicus* to participate in oral argument on the pending motions for summary judgment.

Respectfully submitted,

MICHIGAN BUREAU OF  
STATE LOTTERY

By Its Attorneys,

SHEEHAN PHINNEY BASS & GREEN

Dated: March 8, 2019

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