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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 InState 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 is has made a timely Motion and is statutorily authorized to intervene pursuant to 28 U.S.C. § 2403(b).<sup>1</sup>

### **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

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<sup>1</sup> 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”).<sup>2</sup> 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.”<sup>3</sup>

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.

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<sup>2</sup> 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.

<sup>3</sup> *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,<sup>4</sup> 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.

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<sup>4</sup> 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,

SHEEHAN PHINNEY BASS & GREEN

Dated: March 8, 2019

By: /s/ Robert R. Lucic  
Robert R. Lucic, Esq.  
(NH Bar #9062)  
1000 Elm Street, 17th Floor  
Manchester, NH 03110  
603-627-8188  
[rlucic@sheehan.com](mailto:rlucic@sheehan.com)

/s/ Patrick J. Queenan  
Patrick J. Queenan, Esq.  
(NH Bar #20127)  
1000 Elm Street, 17th Floor  
Manchester, NH 03110  
603-627-8108  
[pqueenan@sheehan.com](mailto:pqueenan@sheehan.com)

-and-

PEPPER HAMILTON LLP

/s/ A. Michael Pratt  
A. Michael Pratt, Esq.  
(*pro hac vice* pending)  
3000 Two Logan Square  
Eighteenth and Arch Streets  
Philadelphia, PA 19103-2799  
215-981-4000  
[prattam@pepperlaw.com](mailto:prattam@pepperlaw.com)

/s/ Joanna J. Cline

Joanna J. Cline, Esq.  
(*pro hac vice* pending)  
3000 Two Logan Square  
Eighteenth and Arch Streets  
Philadelphia, PA 19103-2799  
215-981-4000  
[clinej@pepperlaw.com](mailto:clinej@pepperlaw.com)

/s/ Christopher B. Chuff

Christopher B. Chuff, Esq.  
(*pro hac vice* pending)  
1313 N. Market Street, Suite 5100  
Wilmington, DE 19801  
215-981-4000  
[chuffc@pepperlaw.com](mailto:chuffc@pepperlaw.com)

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