

NO. 19-1835

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellees,

v.

WILLIAM P. BARR, Attorney General; UNITED STATES DEPARTMENT OF
JUSTICE; UNITED STATES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

**BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS
AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES**

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Wis. Admin. Code § Tax 20.043

STATEMENT OF INTEREST

The Pennsylvania Lottery is a bureau within the Pennsylvania Department of Revenue, which is an executive branch agency of the Commonwealth of Pennsylvania (the “Pennsylvania Lottery” or the “Lottery”). The Pennsylvania Lottery is authorized by law to sell multiple types of lottery games through its network of over 9,700 retailers and in conjunction with numerous government vendors. It offers a series of different game platforms, each of which involves the use of wire transmissions in varying degrees. In fact, its iLottery platform was created in specific reliance on an opinion issued by the United States Department of Justice (the “USDOJ”) in 2011 (the “2011 Opinion”), which opinion the USDOJ reversed in 2018, giving rise to the present litigation (the “2018 Opinion”).

The Pennsylvania Lottery has had a tremendous impact on the Commonwealth and its citizens. 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. Since its inception in 1971, the Pennsylvania Lottery has contributed over \$30 billion to benefit programs for older Pennsylvanians. For the 2019 Fiscal Year (July 1, 2018 – June 30, 2019), the Pennsylvania Lottery recorded sales of more than \$4.5 billion, from which more than \$2.9 billion in prizes was paid—and more than \$1 billion went to support programs benefitting older

Pennsylvanians.

Given the use of wire transmissions for Pennsylvania Lottery games, the broadest interpretation of the 2018 Opinion, which the USDOJ has refused to renounce, could result in the suspension of most, if not all, state lottery sales, leading to an immediate annual loss of over \$1 billion in Lottery proceeds that benefit older Pennsylvanians, as well as additional expenses that would be incurred in complying with the 2018 Opinion. It would also jeopardize the jobs and livelihoods of countless Pennsylvania citizens.

* * *

Pursuant to Federal Rule of Appellate Procedure 29(a)(8), *amicus curiae*, the Commonwealth of Pennsylvania, respectfully requests that the Court grant it five minutes of oral argument. This litigation involves crucial questions of law, and it is likely to impact state-run lotteries across the nation. In particular, the result of this case will substantially impact the Commonwealth's budget and its benefit programs supporting older Pennsylvanians. The Commonwealth respectfully requests that this argument time be in addition to the time allotted to Plaintiffs-Appellees.

INTRODUCTION AND ARGUMENT SUMMARY

State-run lottery systems have become integral, not only in public culture—the collective excitement when the MegaMillions jackpot reaches more than \$500 million—but also to state budgets and public programs. Many states, like New

Hampshire, use lottery profits to bolster education budgets. Br. for New Hampshire Lottery Commission at 3. Wisconsin directs proceeds back to taxpayers through a property tax credit. Wis. Admin. Code § Tax 20.04. The Commonwealth of Pennsylvania is the only state that directs all net lottery profits to benefit programs that support older citizens. 72 P.S. § 3761-301.

The Pennsylvania Lottery, which dates back to the early 1970s, has since grown into a billion-dollar revenue generator, supplying more than two percent of the Commonwealth's general operating budget. Over time, the Lottery's system has grown to depend on transmissions of data to ensure accuracy, prevent fraud, and insure against disruptions caused by natural disasters. After the USDOJ published its 2011 Opinion, stating that the federal Wire Act does not prohibit interstate transmissions of bets and wagers, or information in support thereof (unrelated to sports gambling), the Pennsylvania General Assembly authorized the Lottery to launch a new program, iLottery, that would allow participants to play lottery games via the internet. The Lottery began developing this program in 2017, making substantial investments of both time and money to develop technology and procedures that would provide legal, fair, and safe platforms for Pennsylvania players. Since its 2018 launch, iLottery has yielded more than \$31 million of revenue that will go toward public benefit programs supported by the Lottery.

This lawsuit arose from the USDOJ's abrupt reversal of its long-standing

position that the Wire Act is limited to sports gambling, not only risking the Pennsylvania Lottery's investments in and future revenue from the iLottery platform, but also risking the traditional games that have relied on data transmissions for more than 30 years. The compelling reasons why the Court should categorically reject the USDOJ's newly developed interpretation of the Wire Act have been addressed thoroughly and thoughtfully in the Appellees' Briefs and by *amicus curiae*, the Michigan Bureau of State Lottery ("Michigan Lottery"). The Pennsylvania Lottery offers this brief to demonstrate to the Court the disastrous impact that the USDOJ's abrupt change in position will have on the Commonwealth of Pennsylvania and its citizens, particularly given the Commonwealth's reliance on the USDOJ's prior—and correct—position.

ARGUMENT

A. THE WIRE ACT PROHIBITS INTERSTATE TRANSMISSIONS OF COMMUNICATIONS AND WIRES RELATED TO SPORTS-BETTING.

The District Court was correct to hold that the Wire Act's prohibitions on certain gambling-related communications and wires apply only to sports betting. The Wire Act provides, in 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). As the District Court and Appellees have explained correctly, the provision contains two clauses and delineates four offenses. Mem. Op. & Order, ECF No. 81 (June 3, 2019), reported at *N.H. Lottery Comm’n v. Barr*, 386 F. Supp. 3d 132 (D.N.H. 2019).

The first clause prohibits “the transmission . . . of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest.” 18 U.S.C. § 1084(a). The phrase “on any sporting event or contest” applies to both offenses in the first clause. The second clause prohibits “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.” 18 U.S.C. § 1084(a).

The structure and context of the Act demand that the sports-gambling qualifier apply to both offenses here as well. Appellees and *amicus curiae* Michigan Lottery have detailed the many reasons the District Court’s analysis is correct, and the Commonwealth wholly agrees and adopts that rationale.

In fact, until 2018, the USDOJ, too, had so concluded. In 2011, the Office of Legal Counsel (“OLC”) responded to a state inquiry whether in-state lottery sales via the internet would violate the Wire Act. The OLC clearly concluded, in its 2011 Opinion, that “the Act’s prohibitions relate solely to sports-related gambling

activities in interstate and foreign commerce.” *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. 1, 12 (Sept. 20, 2011), ECF Doc. No. 2-4.

Despite this clear pronouncement that in-state lottery sales via the internet are legal under the Wire Act, and the lack of any factual or legislative changes since 2011, in 2018, the USDOJ did a complete about-face and published the 2018 Opinion, concluding the opposite: that the Wire Act’s prohibitions apply to all types of bets and wagers, except with respect to the second offense in the first clause, which immediately precedes the sports-gambling qualifier. *See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. (2018), ECF Doc. No. 2-5.

But, during the intervening seven years, the Pennsylvania Lottery—like state lotteries in New Hampshire, Michigan, and many other states—has continued to invest billions of dollars in enhancing its existing lottery offerings and in developing new, internet-based lottery platforms. Although the 2018 Opinion provided a purported “safe harbor” that would allow time to halt any newly prohibited activities in order to comply with this surprisingly new enunciation of the law, that “safe harbor” provision is woefully inadequate because it discounts both the impact of substantial future public revenues the States would lose and other substantial

investments that had already been made by state lotteries and their vendors as a result of the new 2018 Opinion.

B. IF THE USDOJ’S POSITION PREVAILS, THE COMMONWEALTH, ITS CITIZENS, AND COUNTLESS BUSINESSES WILL SUFFER DUE TO THEIR RELIANCE ON THE 2011 OPINION.

Agencies “must be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2120 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). Here, although the USDOJ paid lip service to reliance interests in the 2018 Opinion, it failed to recognize the extent to which its change in policy would affect not only state governments but also the vendors and retailers that contract with those governments and the citizens who benefit from governmental programs that are supported by lottery revenues.

1. The Pennsylvania Lottery sells a variety of lottery games that have relied on wire transmissions of communications for decades.

Each of the games offered by the Pennsylvania Lottery involves the use of wire transmissions, even when the sale and transaction are strictly in-state. The Lottery offers a series of traditional game platforms, including instant scratch-off games, draw-based games, and multi-jurisdictional games (*e.g.*, Powerball and MegaMillions), as well as its iLottery platform. Decl. of Drew Svitko in Supp. of Proposed-Intervenor Commonwealth of Pennsylvania’s Mot. for Summ. J. at ¶¶ 18,

24, 33–35, 53, ECF Doc. No. 32-3.

Like the New Hampshire Lottery, the Pennsylvania Lottery engages with a vendor that provides a central gaming system (“CGS”), which manages the games through point-of-sale terminals (“POS”), and an interconnected back-office system that handles inventory and sales data. *Id.* at ¶ 10. Duplicate CGS locations are located in Pennsylvania and Georgia, and data administration facilities are located in Nevada, to create sufficient geographic diversity to continue operations in case of a natural disaster. *Id.* at ¶¶ 11–13. Retailers connect with these systems through various interstate transmissions, including MPLS circuits, DSL circuits, and cable modems. *Id.* at ¶¶ 14–15. Depending on the type of game being played, the terminal sends and receives different types of data from CGS. *Id.* at ¶ 16.

Pennsylvania has relied on transmitting data from its retailers to its vendors via some form of wire communication since at least the 1980s. *Id.* at ¶¶ 23, 51. Instant scratch-off tickets, draw games, and multi-jurisdictional games employ the CGS system. *Id.* at ¶¶ 19, 28–31, 38. Multi-jurisdictional draw games in particular require interstate transmissions of data and wires, given flows of money among the states involved and the requisite data sharing to operate games across the country. *Id.* at ¶¶ 36–49. Other data transmissions may include retailers accepting debit cards as payment and the Lottery advertising through e-mail or social media. *Id.* at ¶¶ 18, 63. The USDOJ’s 2018 Opinion conflicts with the 30 years of precedent permitting

these activities, on which the Pennsylvania Lottery has relied while building and investing in its structure, technology, and market.¹

2. The Pennsylvania Lottery specifically relied on the 2011 Opinion when it invested in developing new, internet-based iLottery games.

As discussed above, in 2017, in direct reliance on the 2011 Opinion, the Pennsylvania General Assembly authorized the new iLottery platform. 4 Pa.C.S. § 503. This platform allows consumers to purchase lottery tickets over the internet, as permitted by the 2011 Opinion. Since the new platform’s authorization in 2017, and in reliance on the 2011 Opinion, the Pennsylvania Lottery and vendors have expended a significant amount of time and money in development costs.

The iLottery platform, launched in May 2018, involves selling “traditional lottery products over the internet.” 4 Pa.C.S. § 502. Players may play digital instant lottery tickets through their mobile device, personal computer, or tablet.

During development of the platform, both the Pennsylvania Lottery and its iLottery vendor incurred upfront investments. Developers created technology to ensure the player is in-state and meets age requirements, prevent cheating and fraud, and curb problem gambling. Players have an option to set deposit, loss, and time limits on themselves, establish a “cooling off period” up to 30 days, or add their name to a self-exclusion list. The Lottery incurred approximately \$3.1 million in

¹ See, e.g., *U.S. v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014); *In re MasterCard Intern. Inc.*, 313 F.3d 257, 263 (5th Cir. 2002); *U.S. v. Marder*, 474 F.2d 1192, 1194 (5th Cir. 1973).

costs to develop the platform. Br. for Commonwealth of Pennsylvania as *Amicus Curiae* in Supp. of Pls.’ Mots. For Summ. J. at 4, ECF Doc. No. 40.²

3. The Commonwealth and its citizens would suffer substantially under the USDOJ’s 2018 Opinion.

The devastating impact that this change by USDOJ would have on the Commonwealth of Pennsylvania’s budget cannot be overstated. The Pennsylvania Lottery plays a vital role in the lives of Commonwealth citizens. By law, all net profits of the Pennsylvania Lottery must support benefits for older Pennsylvanians. 72 P.S. § 3761-301. Since its inception in 1971, the Lottery has contributed over \$30 billion to programs benefitting older Pennsylvanians such as property tax relief, rent rebates, reduced fare transit and prescription drug benefits. PENNSYLVANIA LOTTERY, BENEFITS GUIDE 1 (2018–2019), *available at* https://www.palottery.state.pa.us/PaLotteryWebSite/media/PA-Lottery-Reports/Profit/PAL_

² The Pennsylvania General Assembly also authorized the interactive gaming platform (“iGaming”) in reliance on the 2011 Opinion. 4 Pa.C.S. § 13B11. iGaming involves selling licenses to provide non-sports-related games to participants via the internet. *Id.* Pennsylvania launched the iGaming program in the summer of 2018 and began accepting applications. At the time of this filing, Pennsylvania has granted at least four iGaming Operator Licenses and 16 iGaming Manufacturer Licenses, and additional license applications remain pending. PA. GAMING CONTROL BD., IGAMING OPERATORS ELIGIBILITY LIST (Feb. 28, 2020), *available at* https://gamingcontrolboard.pa.gov/files/licensure/reports/igaming_operator_eligibility_list.pdf (last visited Feb. 28, 2020); PA. GAMING CONTROL BD., IGAMING MANUFACTURERS ELIGIBILITY LIST (FEB. 28, 2020), *available at* https://gamingcontrolboard.pa.gov/files/licensure/reports/igaming_manufacturer_Eligibility_List.pdf (last visited Feb. 28, 2020). These licenses authorize the licensee either to offer interactive games to participants through the internet or to manufacture such games. Considerable time and resources have been expended to develop this platform and the licensees/applicants have incurred substantial costs in developing and launching their programs.

Profit-Report_FY17-18-and-FY18-19.pdf (last visited Feb. 28, 2020) [hereinafter BENEFITS GUIDE]. Last year, the Lottery recorded record-breaking sales of more than \$4.5 billion, of which approximately \$1.1 billion went to support programs benefitting older Pennsylvanians. 72 P.S. §§ 3761-301, 311 (requiring all net proceeds to be utilized to benefit older Pennsylvanians); PA. LOTTERY, PENNSYLVANIA LOTTERY PROFIT REPORT: 2018 AND 2019 5 (2019), *available at* https://www.palottery.state.pa.us/PaLotteryWebSite/media/PA-Lottery-Reports/Profit/PAL_Profit-Report_FY17-18-and-FY18-19.pdf (last visited Feb, 28, 2020) [hereinafter LOTTERY PROFIT REPORT] (showing net profits). For fiscal year 2019–2020, the Lottery projects that profits will reach \$1.22 billion, providing even more support for Pennsylvania’s older population. *Id.* at 9. Last year, older Pennsylvanians received 24,400 meals and 101,000 free and reduced rides each day, as well as long-term care services, low-cost prescription medications, and property-tax rebates. BENEFITS GUIDE 1–2.

Given the use of wire transmissions for the Pennsylvania Lottery, including instant scratch-off, draw, and multi-jurisdictional games, the broadest interpretation of the 2018 Opinion, which the USDOJ has refused to renounce, could cause the suspension of most, if not all, state lottery sales, resulting in an immediate annual loss of more than \$1.1 billion—*more than two percent of the Commonwealth’s total operating budget*—in Lottery proceeds that benefit older Pennsylvanians as well as

additional expenses incurred by compliance with the 2018 Opinion. *See* GOV’R TOM WOLF, EXECUTIVE BUDGET IN BRIEF 2019–2020 4 (Feb. 5, 2019), *available at* https://www.budget.pa.gov/PublicationsAndReports/CommonwealthBudget/Documents/2019-20%20Proposed%20Budget/2019-20_Budget_in_Brief_Web.pdf (last visited Feb. 28, 2020).

Even the narrowest interpretation of the 2018 Opinion could invalidate the iLottery platform. This program, although newly launched, has already yielded a substantial profit that is used to support benefit programs. In 2018–2019, iLottery netted more than \$31 million, and the Lottery projects that this year’s proceeds will reach nearly \$40 million. LOTTERY PROFIT REPORT 8. That is to say nothing of the millions of dollars that the Pennsylvania Lottery has spent on vendors and others to develop its iLottery platform—all in reliance on the 2011 Opinion—that will become valueless.³ The USDOJ’s newfound interpretation of the Wire Act does not sufficiently account for these considerable reliance interests.

CONCLUSION

For these reasons, and the reasons set forth in the briefs of New Hampshire

³ And iGaming collected more than \$94 million in licensing fees in 2018-19. PA. GAMING CONTROL BD., ANNUAL REPORT: 2018-2019 11 (2019), *available at* https://gamingcontrolboard.pa.gov/files/communications/2018-2019_PGCB_Annual_Report.pdf (last visited Mar. 3, 2020). A result in favor of the USDOJ would not only cause hundreds of millions of dollars in future lost revenues, but could potentially require the Commonwealth to refund more than \$100 million in licensing fees (including those collected in the prior and current fiscal periods) to applicants whose licenses are nullified.

Lottery Commission, Neopollard Interactive LLC and Pollard Banknote Ltd., and amicus curiae Michigan Bureau of State Lottery, the Pennsylvania Lottery respectfully requests that the District Court's decision be affirmed so that the interests of non-party state lotteries across the United States, including the Pennsylvania Lottery, will be protected.

Respectfully submitted this 4th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2921 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the type-style requirements of Fed. R. App. P. 32(a)(5)-6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

/s/ A. Michael Pratt

A. Michael Pratt

CERTIFICATE OF SERVICE

On 4th day of March, 2020, a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ A. Michael Pratt

A. Michael Pratt