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

NEW HAMPSHIRE LOTTERY COMMISSION, Plaintiff, v. WILLIAM BARR, in his official capacity as Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, Defendants.	Civil Action No. 1:19-cv-00163
NEOPOLLARD INTERACTIVE LLC, POLLARD BANKNOTE LIMITED, Plaintiffs, v. WILLIAM P. BARR, in his official capacity as Attorney General of the United States of America, THE UNITED STATES DEPARTMENT OF JUSTICE, THE UNITED STATES OF AMERICA, Defendants.	Civil Action No. 1:19-cv-00170 (consolidated)

NEOPOLLARD INTERACTIVE LLC AND POLLARD BANKNOTE LIMITED'S REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM

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INTRODUCTION

While the Department of Justice says it is "currently reviewing whether the Wire Act applies to State lotteries and their vendors," it evidently knows enough to maintain that the arguments advanced by the New Hampshire Lottery Commission for why the Wire Act does not apply "fail[] to demonstrate its entitlement to a declaratory judgment at this time." Def. Supp. Mem. 1–2. But as for "the viability of other potential theories that the Lottery Commission has not asserted," the Department "express[es] no view at this time." *Id.* So, maybe the Wire Act applies to State lotteries and their vendors, or maybe it doesn't.

This charade must end. The Wire Act is a criminal statute that imposes severe penalties—including lengthy terms of imprisonment—on violators. Violations of the Act also can serve as predicates for criminal prosecution under the Racketeer Influenced and Corrupt Organizations ("RICO") Act , which carries even longer prison sentences, and, if that is not enough, civil liability including treble damages. There is no dispute that Plaintiffs NeoPollard and Pollard Banknote ("NeoPollard") are "honest business[es]," and they are entitled to know today—not whenever the Justice Department resolves to make up its mind anew—whether they are subject "to criminal penalties well known for their severity and inflexible administration." *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000).

Plaintiffs did not bring this lawsuit on a lark. The Department's 2018 opinion took aim at and tore down a 2011 Opinion that was issued specifically in response to questions posed by State lotteries whether, under the Wire Act, they could sell lottery tickets over the Internet. In 2005, the Department had said no, but in 2011, the Department authorized that conduct. How could Plaintiffs possibly construe the 2018 Opinion's razing of that 2011 decision other than as a revocation of the 2011 Opinion's authorization and a resurrection of the 2005 enforcement position that selling lottery tickets over the Internet violates the Wire Act? The notion that the Department, as it

was formulating its 2018 Opinion, simply did not consider the Wire Act's application to State lotteries is implausible in the extreme. The Department might have miscalculated the impact and misjudged the legal and political reaction, but the Act's application to State lotteries surely did not escape the Department's attention. *See Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 22 (2018) ("We acknowledge that . . . [s]ome States . . . began selling lottery tickets via the Internet after the issuance of our 2011 Opinion.").

The plain truth is that—whatever the Department might later conclude—there is no definitive case law to conclude that vendors to State lotteries such as NeoPollard can be categorically removed from the ambit of the Wire Act. NeoPollard is a "person" and therefore is likely covered by the Wire Act's term "[w]hoever." And numerous courts have rejected the argument that a person must stake a bet in order to be "in the business of betting or wagering" within the meaning of the Act. The only path forward for NeoPollard is that charted by the Department's 2011 Opinion: a conclusion that the Wire Act is limited to sports betting. And the Department's recent interpretive gymnastics make clear that only a declaratory judgment from this Court—not further discretionary forbearance from prosecution, and certainly not a new opinion from the Office of Legal Counsel—can relieve NeoPollard from the threat of criminal liability and the many collateral consequences that flow from that.

ARGUMENT

I. This Court Should Resolve NeoPollard's Claim For A Declaratory Judgment That The Wire Act Does Not Apply Beyond Sports Gambling.

The Department opens its Supplemental Memorandum by renewing its argument that all Plaintiffs lack standing because, two months after the filing of this lawsuit, the Deputy Attorney General instructed federal prosecutors to forbear from prosecuting State lotteries and their vendors (and presumably also the employees of each, though that is not stated in the memorandum) until

the Department completes its review of the question whether the Wire Act applies to State lotteries and their vendors. Def. Supp. Mem. 1–2. But this Court has already rejected that argument. *See* Order, Dkt. 64 (Apr. 12, 2019).

And rightly so. While the Department attempts to frame the issue as "lack of standing," the question is one of mootness, because the "intervening circumstance" to which the Department points—the Deputy Attorney General's recent memorandum—arose after the lawsuit began. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013). That memorandum, however, does not come close to making this case moot. A case can become moot "only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party," whereas "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (emphasis added).

Here, the declaratory judgment NeoPollard seeks would provide "effectual relief" in at least two ways: (1) it would protect NeoPollard in the event that the Deputy Attorney General withdraws the forbearance from prosecution now being afforded under its memorandum; and (2) it would protect NeoPollard from the many collateral consequences of the Department's declaration of criminality, including the threat of being disconnected from the Internet under 18 U.S.C. § 1084(d), and the specter of possible civil or criminal liability under the RICO Act, *see id.* § 1964(c); *see also id*. § 1961(1) (Wire Act violations constitute "racketeering activity")

Moreover, the Deputy Attorney General's recent memorandum is a paradigmatic example of the voluntary cessation exception to mootness. "[A] defendant may not render a case moot by voluntarily ceasing the activity of which the plaintiff complains; were the opposite true, a defendant could immunize itself from suit by altering its behavior so as to secure a dismissal, and then immediately reinstate the challenged conduct afterwards." *Brown v. Colegio de Abogados de*

Puerto Rico, 613 F.3d 44, 49 (1st Cir. 2010). A voluntary cessation of challenged conduct that is *permanent*—when "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000)—can moot a case. But when a defendant "retains authority to reassess the challenged policy at any time," then "a defendant does not meet its burden of demonstrating mootness." *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 192 (4th Cir. 2018). Thus, it is the Department that bears the "heavy burden of making *absolutely clear* that it *could not* revert to its [former] policy." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (emphases added). The Department has done nothing to carry this "heavy burden." There is no doubt that the Deputy Attorney General retains the authority to rescind his forbearance at any time. His most recent forbearance memorandum therefore is incapable of mooting this case.

Nor should there be any doubt that the 2018 Opinion's criminalizing of Plaintiffs' business, *see Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 22–23 & n.19 (2018), caused them an Article III injury in fact. After years of lawful business operations, Plaintiffs were abruptly exposed to the potential of criminal prosecution. And under controlling case law, because the government has not "unambiguous[ly] disclaim[ed]" an intent to prosecute Plaintiffs, their claim for redress of the threat of prosecution is ripe for review. *New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 15–16 (2010) (threat of prosecution is "credible" where the "Government has not argued . . . that plaintiffs will not be prosecuted if they do what they say they wish to do"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) ("[T]he State has not disavowed any intention of invoking the criminal penalty provision," and therefore plaintiffs are "not without some reason in fearing prosecution.").

Indeed, while the Department maintains that "there is no credible threat of prosecution," Def. Supp. Mem. 2, its Supplemental Memorandum argues that the Department possesses the power to bring those very prosecutions. *See, e.g.*, Def. Supp. Mem. 7–8 (defending the right of the Department to prosecute state employees based on actions taken in their official capacity). The Department takes the position that vendors such as NeoPollard are covered by the Wire Act's term "Whoever." *Id.* at 2–3. And after rejecting all of the arguments raised by the New Hampshire Lottery Commission as to why the state and its employees are not covered by the Wire Act, the government concludes that "vendor liability would follow *a fortiori* from employee liability." *Id.* at 10. The Department's Supplemental Brief itself is thus further evidence that NeoPollard's business is in danger of being subjected to federal prosecution in the future. This Court accordingly possesses Article III jurisdiction to address NeoPollard's claim for declaratory judgment.

II. There Is No Support For Excluding State Vendors From The Wire Act's Sweep.

There is no definitive case law holding that the Wire Act categorically excludes state vendors from its sweep. The Department has rebutted the arguments raised by the New Hampshire Lottery Commission, and, as shown below, the "other potential theories" that the Department may or may not now be considering lack any foundation in case law. There accordingly is no firm ground on which the Court might avoid confronting the Plaintiffs' claim for a declaratory judgment that the Wire Act is limited to sports betting.

First, NeoPollard likely cannot benefit from any general statutory presumption excluding sovereigns—such as states—from the Wire Act's use of the term "Whoever." Multiple courts of appeals have already declined to extend that presumption to independent contractors doing business with governments. *See Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 812 (3d Cir. 2016); *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135–36 (2d Cir. 2008).

Nor is there any precedent to support the conclusion that NeoPollard is not in "the business of betting or wagering" under 18 U.S.C. § 1084(a). Rather, such a reading of the statute would conflict with numerous cases that have defined "the business of betting or wagering" much more broadly than simply the entities that take bets or wagers. *See, e.g.*, *United States v. Scavo*, 593 F.2d 837, 841 (8th Cir. 1979); *United States v. Corrar*, 512 F. Supp. 2d 1280, 1286–87 (N.D. Ga. 2007); *Kelly v. Illinois Bell Tel. Co.*, 210 F. Supp. 456, 466 (N.D. Ill. 1962), *aff'd*, 325 F.2d 148 (7th Cir. 1963). For example, the Eighth Circuit found no error with the following jury instruction:

> An individual engages in the business of betting or wagering [under 18 U.S.C. § 1084(a)] if he regularly performs a function which is an integral part of such business. The individual need not be exclusively engaged in the business nor must he share in the profits or losses of the business. He may be an agent or employee for another person's business, but the function he performs must provide a regular and essential contribution to that business.

Scavo, 593 F.2d at 842–43. Similarly, the Ninth Circuit has held that an entity may be "'engaged in the business of betting or wagering' within the meaning of 18 U.S.C. § 1084(a), even though [it] accepted wagers in 'behalf of someone else,' rather than as a principal." *Cohen v. United States*, 378 F.2d 751, 757 (9th Cir. 1967). As the court concluded, Section 1084 "makes no distinction between those engaged in the business of gambling on their own behalf and those engaged in that business on behalf of others," and it is logical to "impos[e] the duties and penalties upon those who would use communications facilities in the day-to-day operation of the gambling business, and who would therefore be best able to comply." *Id.* at 758. Still another court has observed that "[i]nsisting that 'the business of betting and wagering' is conducted solely by those individuals who actually accept bets is like saying that 'the business of movie making' is conducted solely by camera men. Yet, actors, directors, and producers clearly have important roles in the film industry." *Corrar*, 512 F. Supp. 2d at 1286–87. Narrowing the definition of "engaged in the business

of betting or wagering" thus may create conflicts with other courts, and may also affect state-run gaming operations other than lotteries.

Ultimately, there are no decisions concluding that third-party vendors such as NeoPollard are categorically exempt from the Wire Act. And even if the Department were to take that position, it would still be subject to reinterpretation and reversal at any time. Nor could Plaintiffs have confidence that such an interpretation would withstand close scrutiny by courts. The viability of NeoPollard's business model therefore hinges on this Court's resolution of the critical statutory interpretation question regarding the application of the Wire Act to non-sports betting.

* * *

Whether or not and in whatever way the Court addresses the ancillary matter of state liability under the Wire Act, Plaintiffs urge the Court to reach the core question in this proceeding: whether the Wire Act applies to non-sports gambling. Plaintiffs brought a declaratory judgment action on this single merits issue, seeking a declaration 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." Complaint at 19–20, *NeoPollard Interactive LLC et al. v. U.S. Attorney General et al.*, No. 19-CV-170 (D.N.H. Feb. 15, 2019), ECF No. 1. Plaintiffs have standing to seek that relief, and their claim is ripe. Therefore, there is nothing preventing adjudication of the merits in this case. Ruling that the Wire Act does not apply to states and their employees and vendors without addressing the core issue of this case would deny Plaintiffs the relief they have asked for. Absent a valid objection on standing or the merits, Plaintiffs are entitled to their requested remedy.

CONCLUSION

NeoPollard has sought a declaratory judgment that the Wire Act covers only sports gambling, and they are entitled to that relief. To the extent the Court shares the New Hampshire Lottery Commission's views that sovereigns—such as States—are excluded from the Wire Act's sweep, it should enter such a holding in the alternative. But in any event, this Court should issue a declaratory judgment stating that the Wire Act does not cover non-sport gambling.

Dated: May 2, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on May 2, 2019, I served the foregoing document via ECF electronic transmission in accordance with the Court's Administrative Procedures for ECF to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non-registered participants, if any.

Dated: May 2, 2019

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