No. 19-1835

IN THE 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 OF *AMICI CURIAE* COALITION TO STOP INTERNET GAMBLING AND NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL

Charles J. Cooper
David H. Thompson
Brian W. Barnes
J. Joel Alicea
Nicole Frazer Reaves
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600

December 24, 2019

Counsel for Amici Curiae Coalition to Stop Internet Gambling and National Association of Convenience Stores

CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and FED. R. CIV. P. 7.1, the Coalition to Stop Internet Gambling (CSIG) and the National Association of Convenience Stores (NACS), submit the following disclosure statement:

CSIG and NACS, not-for-profit corporations, have no parent corporations. No publicly held corporation owns 10% or more of CSIG's stock, and no publicly held corporation owns 10% or more of NACS's stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Legislative Materials

Other Authorities

STATEMENT OF INTERESTS OF AMICI CURIAE

Amicus Coalition to Stop Internet Gambling ("CSIG") is a public policy organization dedicated to protecting society's most vulnerable populations from the dangers of internet gaming. With over sixty member organizations, CSIG regularly publishes policy papers and other information to assist courts and lawmakers assessing the risks inherent in online gaming.

Amicus National Association of Convenience Stores ("NACS") is a trade association representing the interests of 2,100 retailer and 1,750 supplier members from more than fifty countries. In addition to advocating for the interests of its members before governmental bodies, NACS conducts research and marketing, and it offers industry-specific reports and programs that define the industry's performance.

Online gaming has devastating effects on the vulnerable individuals whom CSIG strives to protect and on the national network of convenience stores whom NACS represents. CSIG and NACS therefore have a strong interest in ensuring that the Wire Act be correctly interpreted as prohibiting not only sports-related gaming but non-sports-related gaming as well. States today are already struggling to prevent children from accessing online casinos on mobile devices. As a former state attorney general explained in testimony to Congress, "technological advances, and the ease of access to the Internet by children, makes the challenges imposed on states where

Internet gambling is illegal even greater today," and "states simply do not have the legal authority or the resources to protect our citizens, including children" from illegal online casinos. *Post-PASPA: An Examination of Sports Betting in America: Hearing before the Crime, Terrorism, and Homeland Security and Investigations Subcomm. of the H. Judiciary Comm.*, 115TH CONG., (Sept 27, 2018) (written testimony of Jon C. Bruning at 5), *available at* https://bit.ly/2ZNDXAN. States that operate lotteries for profit face an inherent conflict of interest when enforcing regulations that restrict online access to their gaming websites, and exempting the States from all federal gaming regulation would create a race to the bottom in which the State with the laxest gaming regulations and most generous pay-outs would generate the most revenue from online gaming activities and effectively set internet gaming policy for the entire nation. Amici's arguments will help the Court avoid these results by correctly interpreting the Wire Act—as prohibiting non-sports-related gaming such as online lotteries.

Given their strong interest, amici respectfully request that the Court grant them ten minutes of oral argument time. *See* FIRST CIR. LOCAL RULE 29(a)(8). The court below granted amici both briefing privileges and oral argument time and found amici's oral presentation helpful. *See* Transcript of Oral Argument Before the Honorable Paul J. Barbadoro, Afternoon Session 48:2–5 (April 11, 2019).

All parties have consented to the filing of this brief, which is the source of Amici's authority to file. *See* FED. R. APP. P. 29(a)(2).

No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief, and no person other than Amici or their counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The federal government has long struck a careful balance when it comes to the regulation of lotteries and gaming, allowing States that wish to do so to embrace certain types of gaming within their borders, while respecting and assisting other States' decisions to adopt more restrictive gaming policies. But New Hampshire and NeoPollard's proposed reading of the Wire Act, if adopted by this Court and applied to other federal gaming laws that use similar language, will upend this careful balance—allowing a single State that wants to permit gaming as broadly as possible to export that policy to every other State.

In light of substantial reason to doubt that pro-gaming States are able and willing to police even the basic confines of their own internet-based gaming systems, federal law should not be watered down. Nor can it be, because on its plain terms the Wire Act bars the very conduct that New Hampshire and NeoPollard hope to engage in. Amici agree with the United States that this Court does not have Article

III jurisdiction over this pre-enforcement challenge, that the Wire Act is not limited to sports-related gaming, and that there is no final agency action that can be set aside under the Administrative Procedure Act. Amici write separately to explain that the Wire Act applies to the States, state employees, and state vendors, a question that the court below did not reach, *see* Order and Op. Granting Mot. for Summ. J., Doc. 81 at 23 n.6 (June 3, 2019), but that this Court may be forced to consider if it agrees with the United States that the Wire Act is not limited to sports gaming. As laid out in detail below, interpreting the Wire Act not to apply to States would upend all federal gaming regulation, because that reading would exempt *all* States from *all* major federal gaming statutes. What is more, the presumption that the term "whoever" does not include States is inapplicable; the Wire Act's context clearly indicates that it governs States. Similarly, other federal gaming statutes apply to States—which indicates that the Wire Act should be interpreted to apply to States as well. Legislative history points the same way. And in any event the Wire Act undoubtedly applies to state employees and vendors—even assuming (incorrectly) that it does not govern States.

ARGUMENT

I. Interpreting the Wire Act Not To Apply to the States Would Upend Federal Gaming Regulation Because It Would Compel the Conclusion that the States Are Exempt from All Major Federal Gaming and Lottery Statutes.

The Wire Act applies to "[w]hoever" is "engaged in the business of betting or wagering" and participates in certain activities. 18 U.S.C. § 1084(a). New Hampshire and its amici argued in the trial court that, as used in the Wire Act, the term "whoever" does not apply to States, state agencies and employees, or a state's vendors. But the Court must not lose sight of the fact that the logic of this argument applies with equal force to every major federal gaming statute. *See* 18 U.S.C. §§ 1301, 1302, 1304, 1952, 1953, 1955 (prohibitions apply to "whoever" engages in specified conduct); 31 U.S.C. § 5363 (prohibition applies to any "person engaged in the business of betting or wagering"). None of these statutes define the terms "whoever" or "person," yet they have long played a crucial part in the federal approach to gaming regulation *because* they apply to States. These statutes work together to allow States that wish to embrace gaming to do so within their borders while preventing pro-gaming States from adopting policies that abuse the channels of interstate commerce and thwart enforcement of other States' gaming prohibitions. As the Supreme Court explained in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993), a key goal of federal regulation of lotteries is "to accommodate

non-lottery States' interest in discouraging public participation in lotteries, even as they accommodate the countervailing interests of lottery States."

If States are exempt from the Wire Act because they do not fit within the term "whoever," it necessarily follows that they are also exempt from all of these other statutes that use the same term and have a related purpose. But if the term "whoever" in these statutes does not include States, there is *nothing* in federal law preventing a State from exploiting the channels of interstate commerce to undermine the gaming laws of other States. New Hampshire could sell its lottery tickets by mail to people in Alabama or offer online slot machines accessible from computers in Kansas. As NeoPollard conceded at oral argument in the trial court, " 'whoever' is throughout the United States Code," and a ruling in New Hampshire's favor on this issue would have "ramifications that will ripple out far beyond the Wire Act." Transcript of Oral Argument Before the Honorable Paul J. Barbadoro, Morning Session 60:25–61:4 (April 11, 2019) ("Morning Session Tr."). A ruling from this Court holding that the term "whoever" in the Wire Act does not include States would upend the entire federal system of gaming regulation and undermine the strong and long-established federal interest of preserving the ability of States to chart their own course when it comes to gaming—but only gaming entirely confined to their own borders.

II. The Presumption that Terms Such as "Person" and "Whoever" Do Not Include the Sovereign Is Inapplicable to the Wire Act.

In arguing that they are exempted from the Wire Act, New Hampshire and its amici in the district court cited the "presumption" that "the word *person* traditionally excludes the sovereign." *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 273 (2012). But the "presumption" is not a set-in-stone rule and must yield in the face of contextual evidence to the contrary; and the relevant context here plainly indicates that the Wire Act applies to the States.

As an initial matter, and as the Supreme Court has emphasized time and again, the presumption is not absolute; there "is, of course, *not* a hard and fast rule of exclusion." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) (quotation marks omitted; emphasis added); *see United States v. Cooper Corp.*, 312 U.S. 600, 604–05 (1941); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979). This is not a platitude to which the Court pays lip service and then ignores. Rather, on numerous occasions the Court has concluded that the term "person" *includes* States. For example, in *California v. United States*, 320 U.S. 577, 585 (1944), the Court held that the phrase "any person not included in the term 'common carrier by water' " who furnishes docking-related facilities includes States that own wharves and piers. The Court reasoned that States own a "large . . . portion of the nation's dock facilities" and that reading the statute to exclude them "would have defeated the very purpose" of the statutory scheme. *Id.* at 585–86.

Other cases are similar. For instance, in *Georgia v. Evans*, 316 U.S. 159, 161–63 (1942), the Court ruled that a State is a "person" for purposes of the Sherman Act and is entitled to sue for treble damages. In *Green v. United States*, 76 U.S. 655, 657–58 (1869), the Court held that civil rules that apply to "witnesses" and "parties" include the United States in those terms. And *Nardone v. United States*, 302 U.S. 379, 380–82 (1937), held that a federal law providing that "no person" shall engage in wiretapping "comprehends federal agents." Numerous other cases come out the same way. *See, e.g.*, *United States v. Persichilli*, 608 F.3d 34, 37–39 (1st Cir. 2010) (holding that a statute prohibiting acts taken "for the purpose of obtaining anything of value from any person" includes States within the sweep of the term "person") (quotation marks omitted)); *see also United States v. California*, 297 U.S. 175 (1936) (discussed below); *Jefferson Cty. Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150 (1983) (discussed below).

As these cases show, when determining whether a statute should be interpreted to include a sovereign, "much depends on the context." *Wilson*, 442 U.S. at 667; *see California v. United States*, 320 U.S. at 585. Under the contextual approach required by the Supreme Court, there are numerous reasons to conclude that the presumption either does not apply to the Wire Act at all or is overcome by countervailing considerations.

A. The Presumption Does Not Apply When a State Is Acting in a Business Capacity.

The presumption is inapplicable where a State is acting in a business capacity and being subjected to general regulations—which alone disposes of the presumption here. As the Supreme Court explained in *United States v. California*, 297 U.S. at 186:

> [w]e can perceive no reason for extending [this presumption] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action.

The Court has relied on and endorsed this principle on multiple occasions. For example, in *California v. Taylor*, 353 U.S. 553, 562–63 (1957), the Court held that the Railway Labor Act applies to a state-run railroad—and quoted *United States v. California en route* to finding that although "Congress apparently did not discuss the applicability of the Railway Labor Act to a state-owned railroad," the presumption was inapplicable. *See also Abbott Labs.*, 460 U.S. at 161 n.21 (endorsing the language quoted above from *United States v. California*); *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 318 (1978) (holding, in the context of the Sherman Act, that the term "person" includes foreign sovereigns and rejecting the presumption because "[w]hen a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or a domestic State").

The Wire Act and related statutes covering gaming are "all-embracing in scope," "national in [their] purpose," and "as capable of being obstructed by state as by individual action" (such as by a State launching a gaming operation that transcends state borders). *See United States v. California*, 297 U.S. at 186. The text of the Wire Act buttresses the conclusion that the presumption should not apply for this reason; it applies to "[w]hoever *being engaged in the business* of betting or wagering." 18 U.S.C. § 1084(a) (emphasis added). When running their gaming businesses, States are engaging in quintessential business activities. Thus, the term "whoever" includes state-run gaming—and no presumption suggests otherwise.[*]

B. Other Aspects of the Wire Act's Context Demonstrate that the Presumption Does Not Apply Here.

Numerous additional contextual factors reinforce the conclusion that Congress meant to include the States within the term "whoever" in the Wire Act.

First, when another, related statute has already been interpreted to include a State, the instant statute should be interpreted the same way. In *Abbott Labs.*, 460

[*] New Hampshire and its amici argued below that *United States v. California*'s relevant analysis is no longer good law, citing *New York v. United States*, 326 U.S. 572 (1946), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). But those cases only limited *California* to the extent it spoke to intergovernmental immunity; they did not cut back on the proposition that when the sovereign is acting in a business capacity and is subject to general regulations there is no presumption against including the sovereign within the term "person." Indeed, the Supreme Court endorsed the *California* proposition decades after issuing its decision in *New York*. *See Abbott Labs.*, 460 U.S. at 161 n.21.

U.S. at 154–57, the Supreme Court reasoned that because it had previously found that the general term "person" included States in the Sherman Act and Clayton Act, that term in another federal antitrust statute (the Robinson-Patman Act) should be interpreted the same way. *California v. Taylor*, 353 U.S. at 562, applied the same principle, finding that where "federal statutes regulating interstate railroads, or their employees, have consistently been held to apply to publicly owned or operated railroads"—although "none of these statutes referred specifically to public railroads as being within their coverage"—the prior interpretation of related statutes cut in favor of interpreting the Railway Labor Act as applying to state-owned railroads. As discussed in detail below, *see infra* Sections III and IV, Congress amended other federal statutes that regulate gaming—18 U.S.C. §§ 1301–07 and 18 U.S.C. § 1953—on the clear assumption that those statutes include States in their default definition of the term "whoever," which means that the Wire Act should be interpreted the same way.

Second, the Supreme Court often declines to apply the presumption to any sovereign other than the sovereign that enacted the law. As explained in *United States v. Fox*, 94 U.S. 315, 319 (1876), "the principle that 'the king is not bound by any act of Parliament, unless he be named therein by special and particular words' . . . only extends to the sovereign by or under whom the law was enacted." This is not an ancient principle that has worn thin over time; more than a century later, in

1983, the Supreme Court highlighted its validity yet again. In *Abbott Labs.*, 460 U.S. at 162 n.21, the Court explained that "this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders" and reasoned that in the context of a federal antitrust statute, cases in this area "support[], at the most, an exemption for the *Federal* Government's purchases"—not a State's. Here, because the federal government enacted the Wire Act, States cannot rely on the presumption to avoid the reality that they are covered by the Wire Act.

Third, the legislative history of the Wire Act, which this Court should consider as part of the contextual inquiry, *Wilson*, 442 U.S. at 667, points in the same direction, *see infra* Section IV.A. And *fourth*, the additional "context" provided by related statutes and their legislative history clearly indicates that the Wire Act applies against States. Even were the Court to ignore all of the considerations laid out above, the context provided by related statutes and their legislative history, *see infra* Section IV.B, mandates this reading.

In sum, all of this context differentiates the Wire Act from the statute that the Court confronted in *Vermont Agency*, a case upon which New Hampshire and its amici relied below. Although in that case the Court referenced the "presumption" against reading the term "person" to include a sovereign, the Court then engaged in a careful study of the statute in question, the False Claims Act ("FCA"). The Court

examined its "historical context," subsequent "housekeeping change[s]," the "current statutory scheme," and a related provision in the federal code. 529 U.S. at 780–87. In the case of the FCA, all of these considerations pointed to the conclusion that Congress did not intend the term "person" to include "sovereign." In contrast and as laid out below, those same considerations point the opposite direction for the Wire Act.

The Wire Act's context similarly distinguishes this case from the Supreme Court's recent decision in *Return Mail, Inc. v. United States Postal Service*, 139 S. Ct. 1853, 1861 (2019). There, the Court reiterated that a party "need not cite to an express . . . definition" to demonstrate that a government entity falls within the definition of a "person"; there must just be "*some* indication in the text or context of the statute that affirmatively shows Congress intended to include the Government." *Id.* at 1863 (quotation marks omitted; emphasis added). The Court went on to find that a federal agency is not a "person" able to seek certain types of review of issued patents, but the Court did so only after carefully reviewing the context of the provision that was at issue. *Id.* at 1863–68. Notably, the Court found that the term "person" was used inconsistently within the statute (sometimes including the government, sometimes not); there was no longstanding historical practice indicating that the government could initiate the relevant types of proceedings; and there was no serious asymmetry created by the exclusion of the government from

the term "person." *Id.* But the same sorts of considerations cut the opposite direction when it comes to the Wire Act—where there is far more than "some indication in the text or context of the statute that affirmatively shows Congress intended to include" States. *See id.* at 1863 (quotation marks omitted).

C. No Contextual Clues Suggest that "Whoever" Does Not Include States Here.

Below, New Hampshire and its amici made much of the fact that the Dictionary Act does not include States within its definitions of the words "person" and "whoever." *See* 1 U.S.C. § 1. But the Dictionary Act only applies "unless the context indicates otherwise," *id.*, and " '[c]ontext' here means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts," *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993). As explained throughout this brief, the context here clearly indicates that the Wire Act *includes* States within the term "whoever."

Indeed, when faced with arguments based on the Dictionary Act in cases similar to this one, courts do not treat the Dictionary Act as dispositive. For example, in *Persichilli*, 608 F.3d at 37–38, this Court considered a Dictionary Act argument, noted that "with or without a presumption, context still controls," and found that "person" in the statute in question *included States*. Other cases are of a piece. *See, e.g.*, *United States v. Mei Juan Zhang*, 789 F.3d 214, 216–17 (1st Cir. 2015) (holding that the context indicated that the Dictionary Act's definition of "person" did not

apply and the federal government was a "victim" for the purposes of 18 U.S.C. § 3663A).

In the trial court, New Hampshire also pointed to the fact that the Wire Act defines the word "State," arguing that "State" cannot include the terms "whoever" and "person" because it is defined separately from those terms. This argument is illogical: the Wire Act does not define the term "whoever," and looking to a definition of a different word ("State") does not reveal anything about the interpretation of "whoever." What is more, the Wire Act's definition of "State" does not in any way indicate that it is addressing whether a State is within the meaning of "whoever"; rather, it merely clarifies that "State" includes the District of Columbia and the United States' commonwealths, territories, and possessions. *See* 18 U.S.C. § 1084(e).

III. Other Federal Statutes that Regulate Gaming Clearly Indicate that, as a Default, Terms Such as "Person" and "Whoever" Include States.

Numerous federal gaming and lottery statutes use terms such as "whoever" and "person," and both courts and legislatures have consistently read these statutes to include States within these terms' ambit. A careful consideration of these statutes and their longstanding interpretation compels the conclusion that the Wire Act, too, includes States, because "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have

the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005); *see* SCALIA & GARNER, *supra*, at 172–73; *Rowland*, 506 U.S. at 199 (explaining that "the texts of other related congressional Acts" are context that may indicate that the Dictionary Act's default definitions do not apply).

A. Sections 1301–07 of Title 18 Apply to States.

Sections 1301 through 1307 of title 18 include broad prohibitions on transmissions related to lotteries, and numerous sections that fall within this range use the term "whoever" when barring lottery-related activities. Although as originally enacted these provisions *did not explicitly define "whoever" to include States*, they were widely interpreted to do just that. In *New York State Broadcasters Association v. United States*, 414 F.2d 990, 995–96 (2d Cir. 1969), for example, the Second Circuit upheld a decision by the Federal Communications Commission that Section 1304 "appl[ies] to legal state conducted lotteries as well as to lotteries that violate state law," finding that "[t]here can . . . be no doubt that Congress intended to prohibit broadcast of lottery information *regardless of the legality of the lottery* under local law" (emphasis added).

A subsequent legislative enactment modifying these sections supports the same conclusion: the term "whoever" in these sections included States by default. In 1975, Congress amended these sections to add Section 1307—which includes

limited exemptions for communications and other activities related to state-run lotteries. For example, Section 1307(a) provided that

> [t]he provisions of sections 1301, 1302, 1303, and 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law . . . contained in a newspaper published in that State, or . . . broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery.

Act of January 2, 1975, Pub. L. No. 93-583, 88 Stat. 1916, 1916 (1975). As the Supreme Court explained, "[t]his exemption was enacted to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States." *Edge Broad. Co.*, 509 U.S. at 422–23 (citation and quotation marks omitted).

The limited carveouts in Section 1307 confirm that *absent* the exemptions for cabined state-related activities in this section, the State is subject to the limits on lotteries laid out in Sections 1301, 1302, and 1304—and thus *is* included in the term "whoever." *See Smith*, 544 U.S. at 233; *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100–01 (1991) (Scalia, J.) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law."). Similarly, the limited carveouts would be superfluous if States were entirely exempted from Section 1307, which again indicates a default rule including States. *See Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058

(2019) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." (quotation marks omitted)). In short, the text and history of Section 1307 clearly indicate that, as a default rule, terms such as "whoever" and "person" in federal gaming statutes *include States, absent a clear legislative enactment to the contrary.*

Of course, when the Wire Act was enacted in 1961, it was adopted against the background of this default rule. Like the term "whoever" in other federal gaming statutes, the same term in the Wire Act should be interpreted to include States.

B. Section 1953 of Title 18 Applies to States.

This provision, called the Paraphernalia Act and originally enacted on the same day as the Wire Act, generally applies to ban interstate transportation of items related to gaming; it covers "whoever" ships certain gaming-related materials in interstate commerce. The Paraphernalia Act has always been understood to apply to States. For example, in *United States v. Fabrizio*, 385 U.S. 263, 268 (1966), a defendant argued that the Paraphernalia Act did not apply to items related to New Hampshire's lottery. The Supreme Court rejected this argument. "Although at least one State had legalized gambling activities at the time the bill was passed, and the Congress was certainly aware of legal sweepstakes run by governments in other countries, Congress did not limit the coverage of the statute to 'unlawful' or 'illegal' activities." *Id.* at 268. The Court thus held that "[i]t is clear that the lottery statutes

apply to state-operated as well as illegal lotteries, and that § 1953 was introduced to strengthen those statutes . . . ." *Id.* at 269.

Like Sections 1301–06, an amendment to the Paraphernalia Act also indicates that the term "whoever" in these sections included States by default. In 1975—as part of the same law that amended Sections 1301–06—Congress adopted the exemption that appears in Section 1953(b), exempting interstate transportation of "equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law." Act of January 2, 1975, Pub. L. No. 93-583, 88 Stat. at 1916. Yet again, this exemption would not have been necessary if the word "whoever" did not include the States.

C. Other Federal Statutes Governing Gaming Apply to States.

Numerous other federal statutes apply to state-run lotteries. Take the Travel Act, Section 1952 of title 18, for example, which provides that "[w]hoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to" engage in various "unlawful activit[ies]" (including unlawful "business enterprise[s] involving gambling") is subject to penalties. This section was enacted to help prevent entities from exploiting interstate commerce to evade state laws—including state gaming laws. *See Perrin v. United States*, 444 U.S. 37, 45 (1979); *United States v. Nardello*, 393 U.S. 286, 290–91 (1969). But if New Hampshire is not subject to the Travel Act and the other federal gaming statutes,

there would be nothing to stop it from mailing gaming materials to people in other States where possession of the materials is illegal—in clear contravention of both the text and the purpose of federal gaming statutes.

Similar to Section 1952(a), Section 1955 of title 18 provides for penalties against "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business." This section was passed to manage issues similar to those that Section 1952 was crafted to address: "aid[ing] the enforcement of state law," *United States v. Farris*, 624 F.2d 890, 892 (9th Cir. 1980), regardless of whether the "underlying crime [was] typically associated with . . . organized crime," *United States v. Perrin*, 580 F.2d 730, 733 (5th Cir. 1978), *aff'd*, 444 U.S. 37. And, again similar to Section 1952, this section clearly includes States in the definition of "whoever": were they not so included, they could avoid other States' prohibitions on gaming. Other statutes are of a piece—carefully crafted by Congress to ensure that pro-lottery States cannot subvert other States' antigaming policies. *See, e.g.*, H.R. REP. NO. 109-412, pt. 1 at 11 (2006) (explaining that the Unlawful Internet Gaming Enforcement Act, 31 U.S.C. §§ 5361–67, which uses the term "person" for its coverage, "would leave intact the current interstate gambling prohibitions such as the Wire Act, federal prohibitions on lotteries, and the Gambling Ship Act so that casino and lottery games could not be placed on websites").

* * *

In sum, federal gaming and lottery statutes that use the terms "whoever" and "person" include States within those terms. Most notably, statutes such as Sections 1301–06 and 1953 have always been interpreted to apply to States—and the Wire Act was enacted against the backdrop of Sections 1301–06 and in tandem with Section 1953. *See Taylor*, 353 U.S. at 564 (finding that where there was a "consistent congressional pattern" in railroad-related legislation "to employ all-inclusive language of coverage" that included state-run railroads, the Railway Labor Act should be interpreted to include state-run railroads). The Wire Act—like all of these other statutes with the same language and similar purposes—itself applies to the States.

IV. Legislative History Indicates that the Wire Act Includes States in the Definition of "Whoever."

If all the above were not enough, the legislative history of the Wire Act and the legislative history surrounding the enactment of Section 1307 and Section 1953(b)(4) confirm that the Wire Act applies to States.

A. Legislative History Surrounding the Wire Act Indicates that it Applies Against States.

The Wire Act was enacted to help States enforce anti-gaming laws, and interpreting "whoever" as excluding States would undermine that purpose. As then-Attorney General Robert F. Kennedy explained when discussing the need for the

Wire Act, "[i]ts purpose is to assist the various States in enforcement of their laws pertaining to gambling and bookmaking" because "[t]he most diligent efforts of local law-enforcement officers are often frustrated by the ease with which information essential to gambling operations can be disseminated in interstate commerce." *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 5 (1961) (statement of Hon. Robert F. Kennedy, Attorney General (May 17, 1961)); *see also id.* at 6; S. REP. NO. 87-588, at 2 (1961) ("The purpose of the bill . . . is . . . to assist the several States in the enforcement of their laws pertaining to gambling . . . ."). In view of this purpose, Congress plainly did not intend to leave a loophole through which New Hampshire, its employees, and vendors could exploit the channels of interstate commerce free from federal regulation and thereby prevent other States from enforcing their laws against gaming.

B. Legislative History Surrounding the Enactment of Sections 1307 and 1953(b)(4) Indicates that, as a Default, Terms such as "Whoever" in Federal Gaming and Lottery Statutes Include States.

As discussed previously, in 1975 Congress added Section 1307 to Sections 1301–06 to adopt limited exemptions for communications and other activities related to state-run lotteries. Prior to this 1975 amendment, the legislative history indicates,

"whoever" in Sections 1301–06 was fully understood to include state-run lotteries and gaming. (The same was true of Section 1953, which was amended in tandem.)

As the December 4, 1974, House Report on Section 1307 explained, "[p]resent Sections 1301, 1302, and 1303 of title 1[8] . . . *now bar any State conducting a lottery authorized by its laws from mailing any material concerning its lottery or any tickets*"—and, as the law then stood, "the policy determinations of some States in authorizing a lottery are inhibited by provisions of Federal law even though the lottery functions only within that State." H.R. REP. NO. 93-1517, at 3–5 (1974) (emphasis added). The Department of Justice likewise recognized that before the 1975 enactment, general lottery provisions applied against state-run lotteries. *See* Letter from William B. Saxbe, Attorney General, to Hon. Peter W. Rodino, Jr., Chairman of the H. Comm. on the Judiciary (Sept. 6, 1974), *in* H.R. REP. NO. 93-1517, at 12–13. This understanding appears to have been universal; for example, the New Jersey Governor testified that then-existing federal law "effectively prohibits the three States that are now operating a lottery from advertising in any news media that goes across State lines." *H.R. 2734 and Related Bills: Hearing Before the Subcomm. No. 2 of the H. Comm. on the Judiciary*, 92d Cong. 6 (1971) (statement of William T. Cahill, Gov., N.J.); *see also, e.g.*, *H.R. 668 and Companion Bills: Hearing Before the Subcomm. on Claims and Governmental Relations of the H.*

Comm. on the Judiciary, 93d Cong. 2 (1974) (statement of Rep. Findley); *id*. at 118 (statement of Rep. Roncallo).

There is thus no doubt that the "whoever" in gaming-related statutes such as Sections 1301–06 and Section 1953(b)(4) was widely understood to include States, absent an explicit exemption. This legislative history confirms the reality on the ground: States and the federal government knew that these general provisions applied to States—necessitating the limited 1975 amendments.

V. The Wire Act Applies to State Employees and State Vendors.

The Wire Act applies not only to the States but also to state employees and vendors. A private employee, business, or vendor is naturally included within the term "whoever." The Dictionary Act explicitly covers such entities: "the words 'person' and 'whoever' include corporations, companies, associations . . . as well as individuals." 1 U.S.C. § 1; *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708 (2014) (explaining that "unless there is something about [a statute's] context that 'indicates otherwise,' the Dictionary Act provides a quick, clear, and affirmative answer to the question whether . . . companies" are included in the term "person"). A straightforward reading of the Wire Act points in the same direction: it includes "[w]hoever being engaged in the business of betting or wagering." 18 U.S.C. § 1084(a). If an employee or vendor is engaging in one or more of the activities prohibited by the Wire Act—such as "us[ing] a wire communication

facility for the transmission in interstate or foreign commerce of bets or wagers"—that person has engaged in illegal activity, and thus is subject to penalties. *Id.* This conclusion in no way rests on an aiding and abetting theory, as New Hampshire suggested below. Rather, because employees and vendors are covered by the term "whoever," they are culpable as principals if they engage in conduct that the Wire Act prohibits; there is no need for the State or some other entity to have committed a predicate offense.

This logic is particularly strong when it comes to vendors; indeed, NeoPollard all but conceded multiple times below that it falls within the term "whoever" in the Wire Act. *See* NeoPollard Interactive LLC and Pollard Banknote Limited's Reply to Defs' Supp. Mem., Doc. 73 at 5 (May 2, 2019) ("NeoPollard likely cannot benefit from any general statutory presumption excluding sovereigns—such as states—from the Wire Act's use of the term 'Whoever.' "); Morning Session Tr. 35:17–19 (April 11, 2019). To put it another way, even assuming that New Hampshire and its employees were to somehow skirt inclusion in the term "whoever," because the Wire Act explicitly prohibits the activities in which these private vendors engage, those activities are still illegal. Unlike the other federal gaming statutes that Congress amended in 1975, the Wire Act contains no exception for gaming activities that are legal under state law. The status of vendors that engage in conduct prohibited by the Wire Act in connection with legal state lotteries is thus very similar to that of

broadcasters and other entities that worked with state lotteries prior to 1975 to violate other federal gaming statutes. *See New York State Broad. Ass'n*, 414 F.2d at 995–96 (holding that Section 1304 "appl[ies] to legal state conducted lotteries as well as to lotteries that violate state law" and noting that "[t]here can . . . be no doubt that Congress intended to prohibit broadcast of lottery information regardless of the legality of the lottery under local law"); *Fabrizio*, 385 U.S. at 268–69 (finding that the Paraphernalia Act applies to items related to the State of New Hampshire's lottery, noting that "Congress did not limit the coverage of the statute to 'unlawful' or 'illegal' activities," and holding that "[i]t is clear that the lottery statutes apply to state-operated as well as illegal lotteries, and that § 1953 was introduced to strengthen those statutes"). Indeed, the understanding that an entity closely tied to the State is covered by federal lottery laws has its roots in one of the earliest pieces of federal lottery legislation, which was enacted to cabin the Louisiana lottery—an entity that was closely tied to the State, was granted monopoly status by the State, and paid massive amounts of money to the State to conduct its lottery. *See Edge Broad. Co.*, 509 U.S. at 421–22 (describing the history of legislation targeted at the Louisiana lottery); *see also* Berthold C. Alwes, *The History of the Louisiana State Lottery Company*, 27 LA. HIST. Q. 4: 964–1118, at 975–76 (October 1944).

CONCLUSION

For the reasons given above and in the United States' brief, the judgment of the district court should be reversed.

Dated: December 24, 2019

Respectfully submitted,

/s/ Charles J. Cooper
Charles J. Cooper
David H. Thompson
Brian W. Barnes
J. Joel Alicea
Nicole Frazer Reaves
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 (fax)
ccooper@cooperkirk.com

Counsel for Amici Curiae Coalition to Stop Internet Gambling and National Association of Convenience Stores

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Amici Curiae Coalition to Stop Internet Gambling and National Association of Convenience Stores complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) and FED. R. APP. P. 32(a)(7)(B)(i) because it contains 6,499 words according to the count of Microsoft Word (excluding the portions of the brief exempted by FED. R. APP. P. 32(f)). The brief also complies with FED. R. APP. P. 32(a)(5)(A) and FED. R. APP. P. 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced serif font.

Dated: December 24, 2019

/s/ Charles J. Cooper

Counsel for Amici Curiae Coalition to Stop Internet Gambling and National Association of Convenience Stores

CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2019, I electronically filed the foregoing Brief of Amici Curiae Coalition to Stop Internet Gambling and National Association of Convenience Stores with the Clerk of Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. All parties' counsel, who are listed below, are registered CM/ECF users. Service will be accomplished by the Notice of Docket Activity sent by the appellate CM/ECF system to the email addresses listed below.

Jeffrey E. Sandberg
UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION
jeffrey.e.sandberg@usdoj.gov
Counsel for Appellants William P. Barr, Attorney General; United States Department of Justice; and United States

Anthony J. Galdieri
NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE, CIVIL BUREAU
anthony.galdieri@doj.nh.gov
Counsel for Appellee New Hampshire Lottery Commission

Glenn J. Moramarco
OFFICE OF THE NEW JERSEY ATTORNEY GENERAL
Glenn.Moramarco@law.njoag.gov
Counsel for Amicus State of New Jersey

Matthew D. McGill
Theodore B. Olson
Lochlan Francis Shelfer
Joshua M. Wesneski
GIBSON DUNN & CRUTCHER LLP
mmcgill@gibsondunn.com
tolson@gibsondunn.com
lshelfer@gibsondunn.com
jwesneski@gibsondunn.com
Counsel for Appellees NeoPollard Interactive LLC and Pollard Banknote Limited

Patrick J. Queenan
SHEEHAN PHINNEY BASS & GREEN
pqueenan@sheehan.com
A. Michael Pratt
GREENBERG TRAURIG, LLP
prattam@gtlaw.com
Counsel for Amicus Commonwealth of Pennsylvania

Kevin F. King
Rafael Reyneri
COVINGTON & BURLING LLP
kking@cov.com
rreyneri@cov.com
Counsel for Amicus Association of Gaming Equipment Manufacturers

A. Jeff Ifrah
Andrew J. Silver
IFRAH PLLC
jeff@ifrahlaw.com
asilver@ifrahlaw.com
Counsel for Amicus iDevelopment and Economic Association

Melinda A. Leonard
Donald S. McGehee
Mark G. Sands
MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
leonardm1@michigan.gov
mcgeheed1@michigan.gov
sandsm1@michigan.gov
Counsel for Amicus Michigan Bureau of State Lottery

Dated: December 24, 2019

/s/ Charles J. Cooper

Counsel for Amici Curiae Coalition to Stop Internet Gambling and National Association of Convenience Stores