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

NEW HAMPSHIRE LOTTERY COMMISSION, **NEOPOLLARD INTERACTIVE, LLC**, and **POLLARD BANKNOTE LIMITED**, Plaintiffs, **iDEVELOPMENT AND ECONOMIC ASSOCIATION**, Plaintiff-Intervenor, v. **WILLIAM BARR**, in his official capacity as Attorney General; **UNITED STATES DEPARTMENT OF JUSTICE,** and **UNITED STATES OF AMERICA** Defendants.	Civil Case No. 19-cv-00163-PB

PROPOSED-INTERVENOR iDEVELOPMENT AND ECONOMIC ASSOCIATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS EMERGENCY MOTION TO INTERVENE

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Proposed-Intervenor iDevelopment and Economic Association ("**iDEA**") respectfully submits this Memorandum of Law in Support of its Emergency Motion to Intervene ("**Motion**") pursuant to Federal Rule of Civil Procedure 24.

PRELIMINARY STATEMENT

iDEA respectfully seeks emergency intervention to ensure that its interests, and the interests of its nearly two dozen member-organizations, are adequately represented in the action recently filed by the New Hampshire Lottery Commission ("**New Hampshire Lottery**") against the U.S. Attorney General William Barr and the U.S. Department of Justice (collectively, "**DOJ**"). Through its action, the New Hampshire Lottery challenges the legality of a 2018 opinion issued by the DOJ's Office of Legal Counsel ("**OLC**"). That opinion changed the DOJ'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 DOJ'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**").

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 In-State 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 DOJ's interpretation of the Wire Act and seeking a declaration that the act "does not apply to ***state-conducted lotteries***." ECF No. 1 ("**Compl**.") at 21(A) (emphasis added). 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).

The import of this challenge, however, extends well beyond state-conducted lotteries and their service providers. The DOJ's reversal in position has sent chills rippling across every sector. As one of the leading trade associations for the increasingly popular internet gaming and entertainment industry, commonly referred to as the "iGaming" industry, iDEA represents the interests of nearly two dozen member-organizations from virtually every sector of the iGaming community, including operations, development, supply, technology, marketing and payment processing. Among the iGaming businesses that iDEA members operate and support are games such as online poker, online bingo, and online casinos in States whose laws permit the relevant activities. Like the New Hampshire Lottery, these businesses—after being acknowledged as safely outside the prohibition of the Wire Act—suddenly find themselves on the wrong side of the DOJ and its threat of prosecution under the Wire Act, despite having poured millions of dollars into technology and infrastructure to establish legally compliant, state-licensed iGaming operations in reliance on the DOJ's earlier 2011 opinion. Facing peril as the DOJ's April deadline approaches, iDEA respectfully moves to intervene for the sake of protecting its members' interests and advancing separate and distinct legal rights and interests of private parties operating outside the specific context of state lotteries.

FACTUAL BACKGROUND

A. The Rise Of Regulated iGaming In The United States

On December 23, 2011, the OLC published a legal opinion regarding the scope of the

Wire Act. *See* 2011 Opinion.. The 2011 Opinion concluded that "interstate transmissions of wire communications that do not relate to a 'sporting event or contest' . . . fall outside of the reach of the Wire Act." *Id.* at 1. That is, the Wire Act applied only to ***sports*** gambling activity conducted over the wires. Consistent with the 2011 Opinion, several States legalized various forms of non-sports related online gambling activity, including online casinos and online poker.

In 2013, after online gambling was legalized by state legislatures, online poker and online casinos launched in New Jersey and Delaware, and online poker launched in Nevada. In enacting iGaming legislation, these States developed tight statutory and regulatory frameworks permitting gaming companies to apply for licenses in order to operate interactive gaming platforms. The state laws also required Internet gambling providers to be licensed by the State and to limit gambling activity to the geographic confines of the State where they are located. More recently, Pennsylvania enacted legislation enabling online gambling, with activity commencing in 2019. Collectively, these four States have issued a substantial number of licenses to various iGaming companies and businesses. As a result, the iGaming industry has experienced exponential growth in recent years. Today, iGaming is a multi-billion dollar industry that offers customers dozens of safe, well-developed, and highly-regulated gaming options.

As iGaming grew, industry businesses and stakeholders looked to form an association to support the development of the nascent online gaming industry. Towards that end, iDEA was formed in 2016. iDEA is a trade association that seeks to create jobs and expand the iGaming industry in the United States through advocacy and education. iDEA itself does not engage in electronic gaming by and through the Internet, but collects and disseminates information, research, and advice regarding such services to its members and the public through various

media, including speech, print, and the Internet. As of today, iDEA has nearly two dozen members from all sectors of the iGaming industry. *See Who We Are*, https://ideagrowth.org/who-we-are/ (last visited Feb. 18, 2019). These member-organizations have relied in good faith on the 2011 Opinion and have collectively invested millions of dollars to develop markets and create online gaming products compliant with state and federal laws.

B. Problems Now Faced By iDEA's Members

In its 2018 Opinion, the OLC disregarded uniform appellate jurisprudence, as well as its own prior position, in concluding that its 2011 Opinion was wrong and that certain aspects of the Wire Act apply beyond sports betting to include the same casino-style gambling activity that many iDEA members have long offered or supported, as authorized by the States where they operate. Following issuance of the 2018 Opinion, the Deputy Attorney General instructed all United States Attorneys, Assistant Attorneys General, and the Director of the Federal Bureau of Investigation that the OLC's new opinion now governs throughout the DOJ; that they should "refrain from applying Section 1084(a) in criminal or civil actions to persons who engaged in conduct violating the Wire Act in reliance on the 2011 OLC opinion" for a period of ninety (90) days following January 15, 2019; and that this "90-day window will give businesses that relied on the 2011 OLC opinion time to bring their operations into compliance with federal law," as "an internal exercise of prosecutorial discretion." Rosenstein Memo. As of mid-April, therefore, several iDEA members face the looming specter of criminal penalties just for continuing their established businesses—businesses that have been repeatedly blessed by the relevant States, alongside the DOJ, while being subject to extensive oversight and licensing.

Notably, the DOJ's reversal in position threatens intrastate online gambling platforms, such as online poker and online casino gaming, to the extent they entail interstate aspects that might implicate the Wire Act. Players seeking to play online poker or online casino games via

services operated by iDEA members do so while physically located in the State where the iGaming activity has been legalized. iDEA members utilize geolocation technology to ensure that players utilizing their iGaming services comply with this geographic requirement. This technological structure was developed pursuant to state regulations that were in turn developed in reliance on the 2011 Opinion, combined with case law and legislative history supporting that interpretation. To the extent that individuals attempt to access the games from outside of the relevant legal jurisdiction, their access will be denied, pursuant to technology developed by iDEA members and approved by state regulators.

iDEA members also offer online poker services and related services subject to a shared liquidity agreement entered into by the States of Delaware, Nevada, and New Jersey. *See Interstate Compact Takes Effect May 1st Tying DE-NV-NJ Poker Platforms*, https://www.geocomply.com/press/interstate-compact-de-nv-nj-poker/ (last visited Feb. 18, 2019). Operators conducting business pursuant to that agreement utilize geolocation technology to ensure that players are physically within the borders of those three States when playing; at the same time, the player pools in the three States enable participation in games with one another. In the case of online poker activity that takes place pursuant to the interstate agreement, gaming activity still begins and ends in a State where the underlying activity is legal, but data necessarily travels between the three States subject to the agreement. The software necessary for the operation of the interstate agreement was tested and approved by state regulators. *See* Richard N. Velotta, *Nevada Pokers Players Can Now Play Online Against New Jersey Players*, LAS VEGAS REVIEW JOURNAL, May 1, 2018, https://www.reviewjournal.com/business/casinos-gaming/nevada-pokers-players-can-now-play-online-against-new-jersey-players/ (last visited Feb. 18, 2019).

Because its members face the threat of criminal prosecution just for continuing their

established businesses, iDEA respectfully seeks to intervene in order to advance the interests, perspectives, and arguments of its members relative to the Wire Act and the DOJ's interpretation thereof.

ARGUMENT

Federal Rule of Civil Procedure 24 provides for intervention either as a matter of right or permissively at the discretion of the Court. iDEA respectfully submits that it satisfies the requirements for both intervention as of right and permissive intervention, and respectfully asks that its motion be granted and that Exhibit A (attached hereto) be docketed as iDEA's Complaint.

I. iDEA IS ENTITLED TO INTERVENE AS OF RIGHT UNDER RULE 24(A)

Under Rule 24(a), intervention as of right should be granted if a putative intervenor establishes: "(i) the timeliness of its motion to intervene; (ii) the existence of an interest relating to the property or transaction that forms the basis of the pending action; (iii) a realistic threat that the disposition of the action will impede its ability to protect that interest; and (iv) the lack of adequate representation of its position by any existing party." *R&G Mortg. Corp. v. Federal Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009). Courts in the First Circuit do not apply these factors mechanically. Rather, in applying these factors, the First Circuit has adopted "a commonsense view of the overall litigation." *Pub. Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998). "Because small differences in fact patterns can significantly affect the outcome, the very nature of a Rule 24(a)(2) inquiry limits the utility of comparisons between and among published opinions." *Id.* As described herein, iDEA meets the requirements for intervention as of right under Rule 24(a).

A. <u>iDEA's Motion To Intervene Is Timely</u>

First, iDEA's Motion is timely. "A motion to intervene is timely if it is filed promptly after a person obtains actual or constructive notice that a pending case threatens to jeopardize his

rights." *R & G Mortg. Corp.* 584 F.3d at 8. "In conducting a timeliness inquiry, there are no ironclad rules about just how celeritously, in terms of days or months, a person must move to protect himself after he has acquired the requisite quantum of knowledge." *Id.* At its core, the "timeliness inquiry centers on how diligently the putative intervenor has acted once he has received actual or constructive notice of the impending threat." *Id*. Here, there is no serious question that iDEA's Motion is timely.

iDEA filed its Motion a mere 10 days after the New Hampshire Lottery sued. To date, the DOJ has not yet filed an answer, nor has it filed an opposition to the New Hampshire Lottery's Motion for Summary Judgment. Nor has the Court entered a Scheduling Order or otherwise ruled on the New Hampshire Lottery's Motion for Speedy Hearing, although the Court asked the parties at a telephonic conference to file a proposed schedule by Friday, March 1, 2019. However, iDEA's intervention will not cause any delay to this proceeding, which remains in its earliest stages. Nor will iDEA's intervention prejudice the existing parties. *See, e.g.*, *Navieros Inter-Americanos, S.A. v. M/V Vasilia Exp.*, 120 F.3d 304, 321–22 (1st Cir. 1997) (intervention motion timely when filed "two weeks after the start of trial and the day on which the district court issued its memorandum and order"); *Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 65 (1st Cir. 2008) (nine-month delay in moving to intervene reasonable in particular circumstances); *The Travelers Indem. Co. v. Bastianelli*, 250 F.R.D. 82, 85 (D. Mass. 2008) (motion to intervene timely where "the Intervenors contacted the parties within 30 days after learning about the existence of the present action in order to seek assent to their intervention"). Indeed, in order to accommodate an expedited schedule, if DOJ does not extend the forbearance period before it initiates enforcement activities related to the 2018 OLC Opinion, iDEA is prepared to rest on the summary judgment motion papers filed by NeoPollard. However, if DOJ extends the

forbearance such that the Court can order a longer schedule, iDEA would file its own summary judgment papers by March 8, or consistent with any schedule entered by the Court.

B. iDEA Has A Substantial Interest In This Action

Second, iDEA has a substantial "interest relating to the property or transaction that forms the basis of the pending action." *R&G Mortg. Corp.*, 584 F.3d at 7. "It is black-letter law that an aspiring intervenor's claim 'must bear a sufficiently close relationship to the dispute between the original litigants.'" *Ungar v. Arafat*, 634 F.3d 46, 51 (1st Cir. 2011) (quoting *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 638 (1st Cir. 1989)). "To satisfy the 'interest' requirement, the [aspiring intervenor] would have to assert, at a minimum, that it has something at stake in the underlying action[.]" *Id.* at 52. On this point, too, the basis for intervention is clear, for iDEA most assuredly has "something at stake in the underlying action." *Id.*

As discussed, iDEA is a trade association that represents the interests of nearly two dozen member-organizations spanning all sectors of the iGaming industry. Although iDEA does not itself engage in or provide direct electronic gaming opportunities to consumers, several of its member-organizations do. These particular members use technology to provide superior gaming and entertainment to large networks of consumers through online and mobile poker and casino games, and related services that operate pursuant to shared liquidity agreements amongst the states. These organizations relied in good faith on the DOJ's 2011 Opinion, investing tens of millions of dollars to develop iGaming or related systems and platforms that were designed and configured in accordance with State-mandated specifications and requirements. As a result, these members now employ thousands of people around the world and generate hundreds of millions of dollars in annual revenue. The 2018 Opinion, however, has now imperiled these organizations' established businesses, notwithstanding their good-faith reliance on the 2011 Opinion and their assiduous adherence to governing law.

For example, the 2018 Opinion states that the Wire Act bars anyone in the gambling business from knowingly using a wire-communication facility in interstate commerce to transmit "bets or wagers." Although iDEA's member-organizations have invested millions of dollars in geolocation technology to ensure that iGaming activity such as online casino gaming and online poker is limited to States where such activity is lawful, certain members transmit or provide bets or wagers across Delaware, Nevada, and New Jersey, all of which have entered into an interstate agreement expressly authorizing such activity. Under these circumstances, iDEA should be permitted to intervene and protect its members' substantial interests.

Trade associations like iDEA are customarily permitted to intervene in matters that could adversely and materially impact their members. *See e.g.*, *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994) (reversing denial of intervention of trade associations of purchasers and processors of timber in case alleging violations of the Wilderness Act, the Endangered Species Act, and the National Environmental Policy Act when they had legally protectable property interests in existing timber contracts that could be threatened by an injunction against logging); *New York Pub. Interest Research Grp., Inc. v. Regents of the Univ. of the State of New York*, 516 F.2d 350 (2d Cir. 1975) (allowing association of pharmacists to intervene in action challenging state regulation prohibiting the advertising of drug prices "since the validity of a regulation from which its members benefit is challenged"); *Ctr. for Biological Diversity v. United Stated Forest Serv.*, 2017 WL 4349028, at *1 (S.D. Ohio Sept. 29, 2017) (finding that trade "[a]ssociation has demonstrated that its members have a substantial legal interest in this litigation" because resolution of the "case impacts its members' existing leases, support services on existing leases, and future leases").

C. Disposition Of This Action Could Impair iDEA's Ability To Protect Its Interests And The Interests Of Its Members

Third, absent intervention, the interests of iDEA and its members are at risk. For this element, Rule 24(a) requires only that "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest." FED. R. CIV. P. 24(a)(2). As discussed, if the DOJ's revised interpretation persists, many iDEA members would be pressured to modify their United States business operations dramatically or cease operating entirely. For example, members may have to reconfigure their online poker businesses, potentially eliminating their ability to create shared liquidity across New Jersey, Delaware, and Nevada. Thus, if the DOJ's revised interpretation of the Wire Act is upheld, it would have an immediate and profound impact on iDEA's members' businesses, thereby satisfying the requirements for intervention of right under Rule 24(a). *See Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F. 2d. 39, 41 (1st Cir. 1992) (granting intervention where private entities "seeking intervention are the real targets of the suit and are the subjects of the regulatory plan" and "[c]hanges in the rules will affect the proposed intervenors' business, both immediately and in the future.").

Beyond its practical consequences, an adverse ruling would carry important legal consequences that would impair iDEA's ability to protect its members' interests. In evaluating whether disposition of an action may impair the movant's interests, courts regularly consider the *stare decisis* effect of an adverse ruling as establishing practical impairment. *See, e.g., Stone v. First Union Corp.*, 371 F.3d 1305, 1309–10 (11th Cir. 2004) ("the potential for a negative *stare decisis* effect 'may supply that practical disadvantage which warrants intervention of right'") (emphasis omitted); *Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Dept. of Interior*, 100 F.3d 837, 844 (10th Cir. 1996) ("the *stare decisis* effect of the district court's

judgment is sufficient impairment for intervention under Rule 24(a)(2)"); *Anderson Columbia Envtl., Inc. v. United States*, 42 Fed. Cl. 880, 882 (1999) ("The potential *stare decisis* effect of a decision often supplies the 'practical impairment' required by Rule 24(a)."). Thus, even if iDEA members would not be bound by an adverse judgment in this case, the negative precedent created would significantly hamper iDEA's ability to protect its members' interests in a separate challenge. *See Citizens For An Orderly Energy Policy v. County of Suffolk*, 101 F.R.D. 497, 501 (E.D.N.Y. 1994) (while party attempting to intervene could still raise the same issues in a later action, "the principle of *stare decisis* would undoubtedly impair [the party's] ability to protect its interest were it prevented from intervening").

Furthermore, permitting iDEA to intervene is consistent with 28 U.S.C. § 1391(e), upon which the New Hampshire Lottery bases venue. *See* ECF No. 1 ¶ 13. Section 1391(e) addresses venue in actions, like this one, that are brought against the United States. The purpose of § 1391(e) is "to make suits by citizens against government agencies and their officials more convenient for plaintiffs." *Dow Chem., U.S.A. v. Consumer Prod. Safety Comm'n.*, 459 F. Supp. 378, 384 n. 4 (W.D. La. 1978). Intervention here would further that purpose by allowing iDEA to join its claims against the DOJ to an already-filed lawsuit. If, on the other hand, iDEA were forced to separately litigate its claims, that "would frustrate this objective, and encourage multiple litigation[s] involving similar disputes by disparate parties in the already overburdened federal courts." *Id.* Especially considering that iDEA's members have activities at stake specifically in New Hampshire, *see* Ex. A, Compl. ¶ 14, there should be no doubt that it is properly intervening here, even as the legal questions posed carry larger import across the United States.

D. The New Hampshire Lottery and NeoPollard Will Not Adequately Represent iDEA's Interests

Finally, the New Hampshire Lottery and NeoPollard cannot be expected to adequately represent iDEA's interests in this action. To be sure, their counsel and argumentation are beyond reproach. But counsel and argumentation are necessarily focused on state-lottery interests, which are distinct from those iDEA seeks to advance. "Typically, an intervenor need only make a 'minimal' showing that the representation afforded by a named party would prove inadequate." *B. Fernández & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 545 (1st Cir. 2006). "One way for the intervenor to show inadequate representation is to demonstrate that its interests are sufficiently different in kind or degree from those of the named party." *Id.* at 546. And, as is the case here, a private party "seeking to intervene on the side of a government agency has a lower burden than another government entity or a public interest group to show that the existing government party, which represents the public interest, does not adequately represent her interest." *Resolution Tr. Corp. v. City of Boston*, 150 F.R.D. 449, 453 (D. Mass. 1993).

In *Conservation Law Foundation*, the First Circuit noted that other circuits have been suspicious of how well a government entity can represent any individual's interests. For instance, the court in that case discussed how in *Dimond v. District of Columbia*, 792 F.2d 179, 192–93 (D.C. Cir. 1986), the D.C. Circuit "pointed out [that] a governmental entity charged by law with representing the public interest of its citizens might shirk its duty were it to advance the narrower interest of a private entity." *Conservation Law Foundation*, 966 F.2d at 44–45; *see also, e.g.*, *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1259 (11th Cir. 2002) ("We do not believe that a federal defendant with a primary interest in the management of a resource has interests identical to those of an entity with economic interests in the use of that resource."); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) ("[W]hen an agency's views are

necessarily colored by its view of the public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden [to demonstrate inadequate representation] is comparatively light."); *see also Animal Prot. Inst. v. Martin*, 241 F.R.D. 66, 70 (D. Me. 2007). Similar distinctness exists here insomuch as the New Hampshire Lottery's interests focus, almost exclusively, on how the 2018 Opinion bears specifically on state-run lotteries.

Indeed, the tight focus of the New Hampshire Lottery is evident from the face of New Hampshire Lottery's complaint. Specifically, in its prayer for relief, the New Hampshire Lottery seeks only a limited declaration from the Court that the Wire Act "does not apply to ***state-conducted lotteries***." Compl. at 21(A) (emphasis added). If the Court were inclined to grant that requested relief, it would still not resolve the more basic and fundamental question raised by the 2018 Opinion (and iDEA's proposed complaint-in-intervention)—namely, whether the Wire Act is, in fact, limited to sports betting activity, or if it applies more broadly to all betting and wagering activity. That the limited carve-out for state-run lotteries proposed by the New Hampshire Lottery would not resolve the larger, fundamental question confirms that the New Hampshire Lottery is not positioned to represent the broader, private commercial interests of iDEA and its member-organizations. Moreover, because the New Hampshire Lottery has indicated that its goal is to obtain a carve out for State-conducted lotteries, it is more than plausible that the current parties might reach a resolution that achieves that limited goal while leaving the private interests of iDEA's members unaddressed. Under these circumstances, iDEA's interests are not adequately represented. *See Tell v. Trs. of Dartmouth Coll.*, 145 F.3d 417, 419 (1st Cir. 1998) (stating that "without a perfect identity of interests, a court must be very

cautious in concluding that a litigant will serve as a proxy for an absent party").[1]

Relatedly, neither the New Hampshire Lottery nor the State of New Hampshire are members of an interstate agreement such as the one that allows players from Nevada, New Jersey, and Delaware to wager with one another in online poker parlors. As a result of the 2018 Opinion, these interstate agreements are now in legal jeopardy. Since New Hampshire has no specific interest in vindicating the legality of such interstate arrangements, it cannot adequately represent the interests of a party like iDEA, which seeks to vindicate the legality of these agreements along with the interests of member organizations that stand to benefit from them.

That NeoPollard also has filed suit does not change this analysis. Although they are private parties, not government actors, their interest by their own pleading lies exclusively in the treatment of state-sponsored lottery games under the statute. And, like the State of New Hampshire and the New Hampshire Lottery, NeoPollard is likewise not a party to an interstate online poker agreement such as the one described above. Any disposition that is confined to lotteries – such as that suggested by the New Hampshire Lottery in its pleadings – likely would resolve their concerns, leaving the broader iGaming considerations impacting iDEA members unaddressed.

II. iDEA IS ENTITLED TO PERMISSIVE INTERVENTION UNDER RULE 24(B)

Regardless of whether the Court deems intervention as of right is appropriate, permissive intervention should in any event be granted under Rule 24(b). On a timely motion, "the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b). In evaluating whether permissive

[1] Assuming suit by NeoPollard remains consolidated, as currently ordered, that brings private interests and broader relief into play here. Even so, NeoPollard is not adequately positioned to cover the broader interests of iDEA and its members, considering that it is the operator of New Hampshire's lottery and brings much the same focus.

intervention is appropriate, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* Unlike intervention as of right, permissive intervention does not require a showing that the proposed intervenor may not be adequately represented, nor does it require that the proposed intervenor's interests may be harmed. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 112–13 (1st Cir. 1999); *see also In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1024 n.7 (D. Mass. 1989) (standards under RULE 24(b) are "loosened"). Permissive intervention is "wholly discretionary," and the court may consider "almost any factor rationally relevant . . . .", in exercise of "very broad discretion." *Daggett*, 172 F.3d at 113; *see also Penobscot Nation v. Mills*, 2013 WL 3098042, at *3 (D. Me. June 18, 2013) (noting relatively "low standard" for permissive intervention).

As discussed, iDEA's intervention poses no delay for or prejudice to the present parties. Additionally, iDEA and its member-organizations maintain vital interests relating to the subject matter of this litigation. And those interests could be prejudiced by an adverse ruling. Finally, iDEA has an independent jurisdictional ground for permissive intervention, as its claims are brought under the Declaratory Judgment Act, 22 U.S.C. § 2201, and it is committed to proceed according to any schedule this Court may set and to make distinct arguments complementing (not duplicating) those of the New Hampshire Lottery and NeoPollard, so as to inform and facilitate this Court's ultimate decision. Therefore, even if the Court were not inclined to allow iDEA to intervene as of right, the Court should, nevertheless, exercise its broad discretion to allow it to intervene permissively.

CONCLUSION

For all these reasons, iDEA respectfully requests that the Court grant its Motion and permit the filing of its proposed complaint (Exhibit A).

Dated: February 25, 2019

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