VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF GREENSVILLE

SADLER BROTHERS OIL COMPANY, d/b/a SADLER TRAVEL PLAZA, SLIP-IN FOOD MART, INC. and CHN, LLC	)	
Plaintiffs,	)	
v.	)	Case No. CL21-207
THE COMMONWEALTH OF VIRGINIA, RALPH NORTHAM, in his official capacity as Governor of the Commonwealth of Virginia, MARK HERRING, in his official capacity as Attorney General for the Commonwealth of Virginia, and THE VIRGINIA ALCOHOLIC BEVERAGE CONTROL AUTHORITY,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR UPDATED MOTION FOR TEMPORARY INJUNCTION

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INTRODUCTION

Plaintiffs request a temporary injunction pursuant to Va. Code § 8.01-620 restraining the enforcement of the ban on skill games encompassed in Chapters 1217 and 1277 of the 2020 Acts of Assembly ("the Skill Game Ban" or "SB 971") with respect to skill games that were previously regulated and taxed by the Virginia ABC. The relevant facts of this case are not in dispute, as demonstrated by the documentary evidence presented herein and the evidence that will be presented at the temporary injunction hearing on December 6, 2021. The Skill Game Ban is an unconstitutional infringement upon free speech and due process rights guaranteed in the Virginia Constitution. *See* Ex. 1, SB 971.

At the last two hearings before this Court on September 20 and October 12, Defendants (collectively referred to as "the Commonwealth") have attempted to change the subject by setting up strawman arguments and suggesting that an injunction would lead to a parade of horribles that are simply not true. At the outset of this brief, Plaintiffs would like to clarify what this case is about and what it is not about.

This case is not about whether the Commonwealth can lawfully regulate games of skill or games of chance. That is certainly within the Commonwealth's police power, but it cannot do so in a manner that is contrary to the free speech and due process guarantees in the Virginia Constitution.

This case is not a challenge to any limit on the type or amount of prizes that can be awarded by skill games. This lawsuit challenges the outright *ban* on skill games, which prohibits Plaintiffs from operating all "skill games" regardless of the type or amount of prize.

This case is not an attempt to legalize video slot machines. Video slot machines are games of chance, which have always been illegal in Virginia and would remain illegal after

the issuance of Plaintiffs' requested temporary injunction. If Plaintiffs' injunction is granted, Virginia will not become the wild west. To the contrary, law enforcement would benefit from jettisoning the confusing and unenforceable Skill Game Ban, thus allowing police and prosecutors to resume enforcement against illegal gambling devices based on the longstanding and well-understood common law distinction between games of chance and games of skill.

This case is not an attempt to ban carnival or arcade games or disparage retail establishments like Dave & Busters and Chuck E. Cheese. But if carnival or arcade-style skill games are legal, then so too are video-based skill games. And the Commonwealth cannot discriminate against retail businesses based on how they speak about themselves.

This case is not about whether a particular game – coin pusher, crane game, or the video games taxed and regulated by the ABC as "skill games" – are actually games of skill or games of chance. That issue has already been decided. Long ago the Attorney General issued formal opinions declaring crane games and coin pushers legal games of skill.[1] And more recently ABC, with assistance from the Attorney General, determined that certain video skill games were also legal games of skill.[2] Again, as explained above, Plaintiffs are not asking the Court to legalize any games of chance. Such games are illegal and would remain illegal.

This case is not about re-writing the Skill Game Ban to make it clearer or more defensible. That is the job of the Legislature. This Court can only interpret statutes, as

[1] 1987-88 Va. A.G. Op. 284, 287 (Attorney General opinions concluding that crane games and coin pushers are legal games of skill).
[2] Ex.2, July 7, 2017 Letter from ABC; Ex. 3, April 26, 2017 Email from James Flaherty to Chris Curtis.

written by the General Assembly, and then determine whether that statute, as written, violates the Virginia Constitution.

This case is not about the definition or meaning of the terms "gray games" or "hybrid games" or "gambling skill games" or "carnival skill games." Such terms do not exist under Virginia law, whether in the Skill Game Ban or elsewhere. The Court should reject the Attorney General's attempt to insert those terms or concepts into the statute.

This case is not about whether video games are entitled to free speech protection. The United States Supreme Court has already addressed that issue and determined that, of course, video games are protected speech. Similarly, this case is not about the relative expressive content of some video games versus others. Just like some books are more literary that others or some movies more cinematic, some video games may have more story lines, characters, and interactive content than others. But that does not mean that the Commonwealth can dictate which books people can read, movies people can watch, or video games people can play. That type of aesthetic judgment is not for the Government or this Court to make.[3]

This case is not about whether Virginia small businesses have standing to bring free speech or due process claims under the Virginia Constitution. While the Attorney General initially asserted such a defense, the Attorney General quickly withdrew its objection to Plaintiffs' standing. The only affirmative defense asserted in the Commonwealth's Answer is sovereign immunity.[4]

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[3] *Brown v. Entm't Merchants Ass'n,* 564 U.S. 786, 791 (2011) ("*Brown*"). ("Under our Constitution, esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.") (quotation omitted).

[4] *See* Ex. 13, Defs. Ans., ¶ 93.

Despite this assertion of sovereign immunity, this case is not really about sovereign immunity because the law is clear that the Commonwealth is not immune from constitutional claims seeking only injunctive and declaratory relief. [5] And courts routinely issue temporary injunctions to preserve the status quo and prevent constitutional violations, which are considered per se irreparable harm.[6]

None of those issues are in question in this case. So what is this case about? This case is about treating similarly situated businesses and games equally and fairly under the law and ensuring that constitutional guarantees are protected. The issues for the Court to decide at the injunction hearing are (1) whether the content-based speech restrictions in the text and enforcement of the Skill Game Ban can be justified under the heightened bar of strict scrutiny; and (2) whether a law that is so vague and confusing that the Attorney General struggles to explain it and the ABC and Commonwealth Attorneys decline to enforce it is consistent with due process.

As will be demonstrated at the December 6 hearing and shown in this brief, the answer to both questions is a resounding NO. As a result, Plaintiffs respectfully request that the Court issue a temporary injunction order enjoining the Commonwealth from enforcing the Skill Game Ban against skill games that were taxed and regulated prior to July 1, thus restoring the status quo as of the filing of this Complaint.

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[5] "[S]overeign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the Constitution of Virginia." *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 137 (2011). *See also* Pls. Reply to Defs. Br. Supporting Demurrer, pp. 19-22.

[6] *See Elhert v. Settle*, 105 Va. Cir. 544 (2020); *Lynchburg Range & Training LLC v. Northam*, 105 Va. Cir. 402 (2020); *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976).

Such relief will clarify the law and restore the common law distinction between games of skill and games of chance. Such clarity will help – not hurt – law enforcement efforts to crack down on illegal gambling. Such relief will protect small businesses like Sadler Travel Plaza who take seriously their obligation to follow the law. And granting the injunction will give the General Assembly another chance to reconsider how to regulate skill games in a manner that is consistent with due process, equal protection, and free speech.

FACTUAL BACKGROUND

A. Plaintiffs Rely on Skill Games in Truck Stops and Restaurants to Support its Businesses, Employees, and Community.

For decades in Virginia, and until July 1 of this past year, skill games have been very popular with the customers of Plaintiffs and other truck stops, convenience stores and restaurants. As shown by the Declaration of Hermie Sadler ("Sadler Dec."), Mr. Sadler is a Vice President for Sadler Brothers Oil Company d/b/a Sadler Travel Plaza, Slip-In Food Mart, Inc., and CHN, LLC (collectively "Plaintiffs" or "Sadler"). Ex. 4, Sadler Dec. Sadler is the owner of truck stops in Southside Virginia known as Sadler Travel Plaza ("the Truck Stop") that have offered its patrons skill games for decades. The Truck Stop has been operating for forty (40) years and serves an estimated nearly three million customers every year. *Id.*

Beginning in 1980, the Truck Stop operated a variety of skill games, including electronic skill games, traditional arcade games, claw machines, pinball machines etc., providing local Emporia citizens and out-of-state travelers a welcomed source of entertainment. *Id.* Sadler, like many other Virginia businesses with skill games, has

reinvested the revenue that skill games generated by hiring new employees, renovating, and maintaining current employees, especially during the pandemic. *Id.*

Skill games are typically a type of currency-operated mechanical or video game in which the player performs a task, solves puzzles, or plays video games to maximize his or her score or credits. There are many different types: traditional video arcade games like Pac Man or Galaga, car racing games, puzzle solving or matching games with different game themes, sports-themed games like Golden Tee, skee ball, crane games, coin pushers, pinball machines, and basketball shooting games are all examples of skill games that exist in retail establishments throughout Virginia. *See* Ex. 5, Pictures of Skill Games. Players use strategy, knowledge, physical dexterity and experience to play the game and potentially win free replays or other prizes based on how skillfully they play the game. Some skill games have the visual aesthetic of traditional arcade video games, some have sporting themes, and some have a more adult visual aesthetic reminiscent of a slot machine with spinning reels, matching rows of fruit, or video poker themes. *Id.* Regardless of the visual theme or content of the game, skill games are different from slot machines or other types of games of chance because the outcome of a skill game is based on the skill of the player—and is not based on chance. *See, e.g.*, Va. Code § 18.2-325 (defining "illegal gambling" as "the making, placing, or receipt of any … consideration … made in exchange for a chance to win a … thing of value, dependent upon the result of any game, contest, or any other event the outcome of which is uncertain or a matter of chance"); Va. Code § 18.2-333.

Prior to July 1, 2021, Plaintiffs offered a variety of skill games at its truck stops and gas stations. Some were traditional arcade games, some were coin pusher or crane game devices, and others were video games with more adult aesthetic reminiscent of casino or

slot machine gaming. The latter type of games at Plaintiffs' establishments provide numerous motifs, themes and visual aesthetics, including casino simulations, pirate adventures, ghost stories, western scenes, automobile racing and repair, voodoo fortune tellers, matching games, and pinball games. Ex. 5, Pictures.

On July 7, 2017, the Virginia ABC issued a letter analyzing a video-based skill game manufactured by Pace-O-Matic and later marketed as the Queen of Virginia Skill game ("QVS game"). The ABC described the QVS game as involving a "tic tac toe" game that requires "pattern recognition," a "shooter game" that involves manual dexterity and hand-eye coordination, and a memory game called "Follow Me," which was reminiscent of the Simon Says mechanical game. Ex. 2, July 7, 2017 Letter from ABC. These games came in different styles with different game themes, motifs, characters, music, video displays, animations, and aesthetics. Ex. 5, Pictures. After consulting with the Attorney General, the ABC determined that "skill is the predominant factor in the [QVS] game rather than chance." Ex. 2; Ex. 3.[7] Accordingly, ABC announced that it did not consider the QVS game to be a gambling device. Ex. 2. After the issuance of that letter, other game manufacturers developed their own versions of video skill games, which had different styles, characters, themes, animations, etc. The Sadler Truck Stops offered a variety of different types of games like this, including the QVS game and other skill games from Banilla Games, as well as more traditional mechanical and arcade skill games.

[7] Exhibit 3 is an email from the Attorney General's Office to the ABC concluding that "these three elements 1) pattern recognition, 2) hand eye coordination, and 3) memory game are sufficient to say that skill predominates the [QVS] game rather than chance." For ease of reading, the second page of Exhibit 3 is a clearer transcription of the text of the Attorney General's email.

B. The Skill Game Ban with a "Family Entertainment Center" Exception Is Passed During the 2020 Legislative Session and Is Later Amended to Grant One-Year Reprieve.

During the 2020 General Assembly Legislative Session, the Governor directed his deputy policy director to work with lawmakers to introduce legislation to tax and regulate skill games. *See* Ex. 6, Clark Mercer Dep., 13:12-17; Ex. 7, Carter Hutchinson Dep., 18:12-15, 19:11-13; Ex. 8, Kevin Hall Dep., 23:23-25, 44:1-5, 116:13-16. The Lottery did not want to ban skill games and instead favored the taxation and regulation of skill games. The Lottery was "aligned with the Governor's Office intent to pursue the policy decision to regulate and allow the devices to continue." Ex. 8, Hall Dep., 118:9-13.

Several senators with antipathy toward the operators and players of skill games, however, pursued a ban of the skill games because some of the games bore an aesthetic resemblance to casino games or slot machines. As justifications for the proposed ban, Senator Janet Howell called skill games "unseemly" and "sleazy." Ex. 9, April 22, 2020 Senate Session Tr., p. 2. Senator Tommy Norment repeatedly called the Skill Game Ban the "anti-Ali Baba bill" and referred to convenience store owners, many of whom are of Middle Eastern or South Asian descent, as "remind[ing] [him] of Ali Baba." *Id.* at p. 3. And Senator Barbara Favola paternalistically argued that "people who are willing to risk their dollars . . . on a reward, are oftentimes those who are least able to spend their dollars. As a commonwealth, we should set some type of criteria or standards . . . to at least control and monitor who might be playing these machines." Ex. 10, February 11, 2020 Senate Session Tr., p.5. *See also* Ex. 11, April 7, 2021 Senate Session Tr., p. 11 (Senator David Marsden juxtaposes low income skill game users with the "people who go to casinos [who] can at least afford to do it").

These opponents of skill games proposed SB 971, which purported to ban "skill games" subject to an exception for skill games at "family entertainment centers." Pursuant to the bill, a definition of "skill game" was added as subsection 6 to Va. Code § 18.2-325, providing:

> "Skill game" means an electronic, computerized, or mechanical contrivance, terminal, machine, or other device that requires the insertion of a coin, currency, ticket, token, or similar object to operate, activate, or play a game, the outcome of which is determined by any element of skill of the player and that may deliver or entitle the person playing or operating the device to receive cash; cash equivalents, gift cards, vouchers, billets, tickets, tokens, or electronic credits to be exchanged for cash; merchandise; or anything of value whether the payoff is made automatically from the device or manually.

Ex. 1. The definition of "illegal gambling" at subsection 1 of Va. Code § 18.2-325 was also amended to add "'[i]llegal gambling' also means the playing or offering for play of any skill game." *Id.* The bill defined "family entertainment center" as an establishment that (i) is located in a building that is owned, leased, or occupied by the establishment for the primary purpose of providing amusement and entertainment to the public; (ii) offers coin-operated amusement games **and skill games** pursuant to the exemption created by this section; and (iii) **markets its business to families with children."** *Id.* (emphasis added.) The bill allows "a person operating a family entertainment center" to "make skill games available for play" under certain circumstances, but flatly prohibits the operation of "skill games" outside of family entertainment centers. *Id.* On March 18, 2020, SB 971 passed in both the House and Senate.

On April 11, 2020, after the Commonwealth began to experience the initial fiscal impacts of the early COVID-19 pandemic, the Governor proposed a substitute to SB 971, which would delay the effective date of the skill game ban and add a one-year period in which skill games would be allowed in all ABC-licensed establishments and taxed and

regulated through June 30, 2021. Governor Northam's substitute bill for SB 971 was approved by the General Assembly and enacted on April 22, 2020.

Pursuant to SB 971, skill games were to be taxed and regulated by the ABC for one year, and then banned. As noted by Governor Northam during his 2021 State of the Commonwealth Address:

> [Skill games] bring in a lot of money. Upwards of $90 to $100 million dollars in revenue from these taxes. That could double the amount of small employers who get help and, for many, that could mean surviving instead of going under.[8]

In contrast to the ban on skill games, during the last two years, the General Assembly has greatly increased casino gaming, historic horseracing, charitable gaming, and sports wagering. In fact, on April 22, 2020, the same day the Governor signed SB 971 to ban skill games effective July 2021, he simultaneously enacted HB 4, which welcomed casinos and expanded historical horse racing gaming in the Commonwealth, and HB 896, which legalized online sports betting in the Commonwealth.

The purported justification for banning skill games was that the games were too much like gambling (despite the fact that there are clear differences). Notably, several lawmakers and commentators and many citizens criticized SB 971 as being based on discriminatory, unfair, and paternalistic rationales. *See* Ex. 10, February 11, 2020 Senate Session Tr., at pp. 2, 4 (noting hypocrisy in effort to "exclude one type of gambling in favor of another type of gambling"); Ex. 9, April 22, 2020 Senate Session Tr., at p. 6 (noting inconsistency that "these machines are bad if they're in quick marts and gas stations but

[8] Available at https://www.governor.virginia.gov/newsroom/all-releases/2021/january/headline-891383-en.html.

they're good if they're in casinos."), p. 9 ("this sort of neon lights flashing is okay, but putting it in the Qwik E Mart is not okay").

C. Skill Games Are Subject to Discriminatory Taxation and Regulation from 2020–2021.

After passage of SB 971, skill games were regulated and subject to a $1,200 per month per device tax for a one-year period beginning July 1, 2020 and ending June 30, 2021. Ex. 1. Under regulations promulgated by the ABC, skill game operators and distributors were required to register their Skill Games with the ABC (3VAC5-80-50), to make Monthly Skill Game Reports to the ABC detailing revenue earned by skill games and prizes awarded (3VAC5-80-50), to obtain from the ABC labels to be affixed to each Skill Game (3VAC5-80-60), to show proof of bond to the ABC (3VAC5-80-100), and to comply with the ABC's regulations regarding relocating Skill Games (3VAC5-80-80).

During this year, the Commonwealth unevenly enforced skill game taxes and regulations, favoring certain types of games and establishments over others and specifically discriminating against certain ethnic and religious groups.[9] For example, certain skill games in certain stores—including the truck stops and restaurants owned by Plaintiffs—were required to pay the $1,200 tax. Ex. 1, SB 971. However, the Commonwealth did not enforce the tax against other types of skill games, like crane games, coin pushers, or arcade games. Ex. 12, October 12, 2021 Hrg. Tr., 10:5-7 ("We didn't attempt to register and tax Galaga, Golden Tee, pinball, what have you."). In fact, the ABC inspected Plaintiffs' businesses and required that taxes be paid and stickers be affixed to all of the video style skill games, but did ***not*** subject the mechanical skill games, like coin pushers, to any taxes

[9] *See Jimmy L. Jackson, III v. Commonwealth of Virginia, et al.*, E.D. Va. Case No. 2:20-cv-00359 (challenging skill game regulations on behalf of Muslim convenience store owners).

or regulations. Nor did the Commonwealth regulate or enforce the tax against ***any*** type of skill game located in national franchises, such as Chuck E. Cheese and Dave & Busters. *See, e.g.*, *Skill Game FAQs*, Virginia ABC[10] (stating that "all skill games that are registered have to have been available for play in an active Virginia ABC Retail Licensed establishment or truck stop on June 30, 2020" but purporting to distinguish skill games in "family entertainment centers"); *see also Skill Games*, Virginia ABC.[11] The exception for "family entertainment centers," however, was not part of the Code of Virginia during the previous one-year period of taxation and regulation. In fact, the "family entertainment center" exception did not become effective until July 1, 2021, the same date as the ban on all skill games outside of family entertainment centers. Ex. 1 (adding new Va. Code § 18.2-334.5 effective July 1, 2021). Yet, Dave & Busters and Chuck E. Cheese were and remain allowed to operate their skill games with impunity and without regulation or taxation.

Based on the text of the statute, mechanical games like crane games, coin pushers, skee ball games, and other carnival-style games meet the definition of "skill game" in SB 971. Players insert money into the machines, play a game the outcome of which is based on the skill of the player, and win cash, prizes or tickets redeemable for prizes based on the result of the game.

Similarly, arcade-style video games, such as Pac Man and Galaga, also appear to fall within the definition of "skill game" because they reward a skillful player with additional rounds of game play or free replays. If a Pac Man game costs a quarter to play one round, then a prize of an additional round of play or a free replay is also worth a quarter

[10] Available at https://www.abc.virginia.gov/licenses/retail-resources/skill-games/skill-games-faqs.
[11] Available at https://www.abc.virginia.gov/licenses/retail-resources/skill-games.

and therefore constitutes "a thing of value." The definition of "skill game" does not exclude free replays from being "a thing of value," which is different from how the Virginia Code defines "gambling devices."[12]

Moreover, there are other types of arcade-like skill games operating in Virginia that award cash prizes. For example, Golden Tee is a very popular video game in which the player participates in a simulation golf game and can win cash prizes based on how skillfully he plays the game. *See* Ex. 5, Pictures; *see also* https://www.goldenteefan.com/contestsandprizes/prize-mode/ (describing operation of and prizes awarded by Golden Tee golf skill game).

Despite the fact that all of these games appear to fall within the definition of "skill game," none of them were taxed or regulated during the year when ABC regulated skill games. Moreover, the mechanical skill games (like crane games and coin pushers) and arcade style skill games (like Pac Man, Galaga and Golden Tee) continue to operate in Virginia at restaurants, bars, and truck stops even after the Skill Game Ban went into effect. In this litigation, the Commonwealth seeks to defend the current unequal enforcement of the Skill Game Ban by denying that mechanical carnival-style skill games or arcade-style skill games fall within the Skill Game Ban.[13]

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[12] Compare the definition of "skill game" in SB 971 with the definition of "gambling device" in Va. Code § 18.2-325, which specifically exempts free replays from the definition of "something of value." No such limiting language appears in SB 971. Thus, based on the text of the statute itself, the General Assembly appears to have banned all video arcade games that reward a player with a free replay.

[13] Compare Compl., ¶ 22 *with* Ex. 13, Ans., ¶ 22 (denying the allegation that skill games include "traditional video arcade games like Pac Man or Galaga, car racing games, puzzle solving or matching games with different game themes, sports-themed games like Golden Tee, skee ball, crane games, pinball machines, and basketball shooting games."). *See also* Ex. 6, Mercer Dep., 37:23-40:15; Ex. 7, Hutchinson Dep., 12:20-17:6; Ex. 8, Hall Dep. 59:2-15, 67:5-6, 68:5-21; Ex. 12, October 12, 2021 Hrg. Tr., 6:19-21, 10:5-7, 46:25.

Convenience stores, bars, restaurants and truck stops operating video skill games that had adult themes that may have *looked like* slot machines (even though they were legal games of skill) were subjected to intense regulation and hefty taxes by the Commonwealth of Virginia. After the ban went into effect on July 1, it was only enforced against those types of skill games like QVS or Banilla games. The ABC told operators they had to cut off the "skill games" that had been taxed and regulated by the ABC or face prosecution by the Attorney General and local Commonwealth Attorneys. Ex. 14, May 14, 2021 Letter from ABC to Skill Game Distributors. Following the lead of the ABC and Attorney General, local law enforcement and government officials sent their own warnings telling businesses to shut down their skill games or fact prosecution. Plaintiffs received two such letters from Emporia and Petersburg. *See, e.g.,* Ex. 15, October 28, 2021 Letter from Petersburg City Manager (letter from municipal city manager to Plaintiffs advising that city would "ensure compliance" with the Skill Game Ban); Ex. 16, June 24, 2021 Email from Matthew Culbreath, Planning and Zoning Project Manager for City of Emporia (warning against continued operation of "skill games" beyond July 1, 2021). But mechanical carnival-style skill games (like crane games and coin pushers) and arcade-style video games (like PacMan, Galaga and Golden Tee) were allowed to operate.

The Skill Game Ban has had a deleterious effect on law enforcement's ability to prohibit illegal games of chance. Law enforcement has struggled to enforce the new law with its vague definitions, and, as a result, more illegal games have flooded the market.

There is a real and serious confusion about what a "skill game" is, even among the Commonwealth's own witnesses. Lottery Director Kevin Hall testified that skill games are "[e]lectronic games that include some element of skill that engages with the player," and

that skee-ball games and crane games are games of skill. Ex. 8, Hall Dep., 59:2-15, 67:5-6, 68:5-21. Meanwhile, Governor Northam's chief of staff testified that arcade games, pinball games, skee-ball games, coin pushers, and crane machines were ***not*** "skill games" under SB 971. Ex. 6, Mercer Dep., 37:23-40:15. And Governor Northam's former deputy policy director, who helped draft skill game legislation, either denied, or would not say one way or the other whether such games were "skill games." Ex. 7, Hutchinson Dep., 12:20-17:6.[14] Three different opinions from three different government officials.

In addition to confusion among the Commonwealth's own witnesses, the Commonwealth's discovery responses and representations to this Court also demonstrate not only confusion but also an impermissible content-based distinctions based on how the video games look. In doing so, the Commonwealth illustrates of the risk of selective enforcement that arises out of the vagueness and overbreadth of the Skill Game Ban, which flatly prohibits "the playing or offering for play of ***any*** skill game." Ex. 1, SB 971; Va. Code § 18.2-325(1) (emphasis added).

Several examples stand out. At the September 20 hearing on the Commonwealth's motion to transfer venue, the Commonwealth argued tautologically that the "ban on skill games is simply a ban against illegal gambling devices." Ex. 17, September 20 Hearing Transcript, 8:1-3. Later, at the October 12 hearing on its demurrer, the Commonwealth argued that SB 971 "*appears* to carve out a subset of skill games" and that it prohibits "gambling device skill games," "hybrid machines" and "gray machine games"—terms that

[14] Notably, the Attorney General's office previously opined that coin pushers and crane games are games in which "skill, rather than chance, primarily determines whether a player is able to win a prize." 1987-88 Va. A.G. Op. 284, 287. The Commonwealth favorably cited this advisory opinion in its demurrer memorandum. *See* Defs. Br. dated September 30, 2021, at 3 n.3.

are neither used nor defined in the statutory scheme. Ex. 12, October 12, 2021 Hrg. Tr., 6:20-7:4, 7:19, 9:2-3, 10:5-6, 11:2-4, 11:25, 16:5-7, 44:18, 46:25. The Commonwealth has described these games as simply "lining up cherry, cherry, cherry . . . symbols on a machine," a reference to the visual display and aesthetic of some skill games that use the spinning reels commonly found in slot machines. *Id.*, 12:1-4. By contrast, the Commonwealth has argued that crane games and coin pushers are still legal. Defs. Br. on Demurrer dated September 30, 2021, at 3 n.3. *See also* Ex. 18, Commonwealth's Opposition to Motion for Injunction in Patel v. Commonwealth, Case No. CL21-6527, Norfolk Cir., ¶¶ 4-5 (arguing that "gray machines" operated between "legal children's arcade skill games and illegal video slot machines" and "resembl[e] video slot machines").

The Commonwealth openly acknowledges that the statutory language is "not the clearest," "very confusing," "not super clear," and "ambiguous," but despite this, somehow argues that the statute is not "unconstitutionally ambiguous." Ex. 12, October 12, Hrg. Tr., 6:18-19, 8:21-22, 9:7-9, 10:24, 16:5-7.

The Commonwealth confidently asserts that the Skill Game Ban "does not attempt to make all skill games gambling devices." *Id.*, 8:6-7. So what then are the criteria that distinguish a lawful skill game from an unlawful gambling device? The statutory definition of skill games effectively prohibits any skill game, not just "gray machines," "hybrid machines," or "gambling skill games," whatever they are. As demonstrated by the Commonwealth, in practice, the distinction is primarily based on the expressive message or aesthetics of the game. Video games that *look like* slot machines are banned. Mechanical games that *look like* traditional carnival games (like crane games or coin pushers) are permitted. And video games that *look like* traditional arcade games (like PacMan, Galaga,

and Golden Tee) are permitted. The Commonwealth characterizes this as a reading of the statute in "the most narrow way possible." *Id.,* 10:10-12. But in fact, the distinctions that the Commonwealth seeks to read into the statute reveal the viewpoint-based discrimination that animated the Skill Game Ban. The General Assembly passed SB 971 because some legislators thought the "neon light" games in convenience stores were "unseemly" and "sleazy." And the Commonwealth is currently defending SB 971 creating a content based distinction between the "gray games" or "*gambling device* skill games," with "cherry cherry cherry" themes on the one hand, and the mechanical, carnival or arcade style children's games on the other hand – despite the fact that these games operate in exactly the same way. As shown below, the Commonwealth's clumsy attempt to ban "skill games" other than in "family entertainment centers" is a discriminatory and an unlawful restriction upon Plaintiffs' constitutional rights.

TEMPORARY INJUNCTION STANDARD

The Virginia Code vests the circuit courts with jurisdiction to grant injunctions. Va. Code § 8.01-620 (2017). "A temporary injunction allows a court to preserve the status quo between the parties while litigation is ongoing." *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 18 (2019) (citation omitted). Virginia Courts apply the same four-factor test that is used in federal courts to assess whether a temporary injunction should be granted: (1) Is the movant likely to prevail on the merits of the case? (2) Will the movant suffer irreparable harm if not granted the preliminary injunction? (3) Does the balance of the equities favor the movant? and (4) Is granting the injunction in the public interest? *See, e.g.*, *CFM Va. L.L.C. v. MJM Golf, L.L.C.*, 94 Va. Cir. 404 (2016), *citing Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

ARGUMENT

I. THERE IS A SUBSTANTIAL LIKELIHOOD THAT PLAINTIFFS WILL SUCCEED ON THE MERITS.

A. The Skill Game Ban Violates the Free Speech Clause of the Virginia Constitution.

Plaintiffs will likely succeed on the merits of its free speech claim because (i) the Skill Game Ban is an impermissible content-based restriction on video games, which games are protected speech; (ii) the skill game ban and its "family entertainment center" exception discriminates against non-preferred speakers; (iii) the skill game ban constitutes compelled speech; and (iv) as a result, the skill game ban is subject to and fails the strict scrutiny test applicable in free speech cases, but also would be unconstitutional under any standard of review.

The Virginia Constitution emphatically preserves the freedom of speech as sacrosanct in the Commonwealth:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press…

Va. Const. Art. I §12 (emphasis added).

The first step of the analysis is for the Court to make an independent threshold determination as to whether any of the skill games subject to the challenged ban constitute expression bringing them within the ambit of constitutional free speech protection. The test for determining whether activity is or is not "speech" for constitutional purposes is whether the activity is "sufficiently imbued with elements of communication to fall within the scope

of the First and Fourteenth Amendments." *Spence v. State of Washington*, 418 U.S. 405, 409 (1974).[15]

In making this assessment, this Court must apply what is commonly called the "*Bose* standard," for the Supreme Court case that most famously declared that "in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984), *quoting New York Times Co. v. Sullivan*, 376 U.S. 284–86 (1964).

The *Bose* decision was a trade libel case, and the *Bose* standard is frequently invoked in defamation litigation, but it is by no means unique to defamation—it applies to *any* claim alleging unconstitutional abridgment of speech, across-the-board. *Bose* itself acknowledged as much, describing the obligation as a universal standard, applicable to determinations such as whether expression is or is not capable of being labeled unprotected obscenity, *see Miller v. California*, 413 U.S. 15, 23-24 (1973); or "fighting words," *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942); *Street v. New York*, 394 U.S. 576, 592 (1969); or incitement to produce imminent lawless action, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), *Hess v. Indiana*, 414 U.S. 105, 108-09, (1973). *Bose*, 466

[15] The Virginia Supreme Court has held that the Virginia Constitution's free speech clause "is coextensive with the free speech provisions of the federal First Amendment," and has relied on federal authorities in analyzing free speech cases arising under the Virginia Constitution. *Elliott v. Commonwealth*, 267 Va. 464, 473-74 (2004).

U.S. at 504. The *Bose* standard has often been acknowledged and applied by the Virginia Supreme Court. [16]

The *Bose* principle is important because it sets the prism through which this Court must view its initial obligation. Exercising the Court's *independent* judgement, unvarnished by any deference to the Virginia General Assembly, any interpretations or applications of Virginia administrative agencies, or any pejorative characterizations of the Commonwealth's legal advocates, this Court must determine *for itself* whether video skill games fall within the compass of the freedom of speech guaranteed under the Virginia Constitution.

Most critically, *it does not matter* how the Virginia General Assembly has defined what is in or out of legal protection. The Virginia General Assembly does not dictate policy when it comes to determining whether activity is or is not constitutionally protected expression. The Constitution already takes care of that, and courts as expositors and protectors of constitutional rights exercise independent review in determining whether activity is or is not constitutionally protected expression. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, (1978), *citing Pennekamp v. Florida*, 328 U.S. 331, 335 (1946).

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[16] *Jordan v. Kollman*, 269 Va. 569, 577 (2005) (Citing *Bose* and stating, "notwithstanding the jury's finding, we must make an independent review of the record"); *Shenandoah Publishing House, Inc. v. Gunter*, 245 Va. 320, 325 (1993) ("Upon review, the appellate court 'must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.'"), *quoting Bose* 466 U.S. at 514.

In short, it is for this Court, and this Court alone, to make the independent threshold determination at the crux of the free speech claims in this case: do these video skill games qualify for constitutional free speech protection?

By design, modern constitutional free speech jurisprudence sets a deliberately permissive standard for determining what activity is constitutionally protected. And as in baseball, where ties go to the runner, close calls go the challenger. If in doubt, don't throw it out.

Superficial labels and categories do not matter. Underlying substance does. *See National Institute of Family & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2375 (2018), *citing* Rodney Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67, 68 (2016). The Supreme Court "has stated that 'a State cannot foreclose the exercise of constitutional rights by mere labels.'" *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), *quoting NAACP v. Button*, 371 U.S. 415, 429 (1963).

The constitutional term "speech" is intentionally latitudinous, to avoid the elitism and discrimination that would ensue if it were not. "The word 'speech' for First Amendment purposes clearly does encompass a wide range of symbolic activity, and 'is not construed literally, or even limited to the use of words.'" Rodney Smolla, 1 *Smolla & Nimmer on Freedom of Speech* § 11:30 (2021 Update Edition), *quoting Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 (3d Cir. 2002).

There are undoubtedly millions of Americans who have never played a video game—indeed millions who are not quite sure what exactly a video game is. There are also undoubtedly millions of Americans who cannot imagine living a day in which they do not play a video game—indeed who cannot imagine life without them. There are likely

generational trends at work here, at large in both culture and the bench and bar. There are likely lawyers and judges who have never played video games of any sort, including the video skill games at issue here. There are also likely lawyers and judges, particularly those among the more recent entrants to the bench and bar, who are well-familiar with video skill games and have played them growing up, while in law school, and after entering the profession.

The First Amendment, however, does not play generational favorites, or favorites of any kind. This Court must don its own independent free-speech-thinking-cap, checking its own preferences or experiences as to what is or is not attractive or familiar expression at the courthouse door. The threshold hurdle qualifying speech as "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments" is *low*. The bar is *purposefully* low, precisely because the First Amendment should not and does not play favorites.

And for good reason. Different people naturally turn to different forms of expression for intellectual stimulation, entertainment, distraction, amusement, or meaning. Different strokes for different folks. For those dwindling number who still get physical newspapers at their morning doorstep, some open the paper to the sports section, some to fashion, some to religion, some to arts, some to politics, some to the cartoons, and some to crossword puzzles. *See Smolla and Nimmer* at § 2:43, n. 1 ("Chief Justice Earl Warren was fond of explaining that he always read the sports pages first, for it is on the sports pages that man's achievements are recorded; the news pages merely record man's failures."). The First Amendment protects every section of the paper equally, as it protects the entertainment as well as the informing. There "is no doubt that entertainment, as well as

news, enjoys First Amendment protection," and that it "is also true that entertainment itself can be important news." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977).

For many Americans, the mental, emotional, and psychological fulfillment, escape, relaxation, or amusement that comes from playing a video skill game may be every bit as important as what might for others come from reading a literary masterpiece viewing an award-winning film. Some may want their Leo Tolstoy or Orson Welles, others their John Madden NFL video game. Yet "[e]ven if Madden NFL is not the expressive equal of Anna Karenina or Citizen Kane, the Supreme Court has answered with an emphatic 'yes' when faced with the question of whether video games deserve the same protection as more traditional forms of expression." *Brown v. Electronic Arts, Inc.*, 724 F.3d 1235, 1241 (9th Cir. 2013).

Plaintiffs in their argument and evidentiary submissions to this Court will demonstrate that, just like other video games that the Supreme Court has recognized as protected speech, the video skill games at issue here fall squarely within the ambit of constitutionally protected expression. This triggers strict scrutiny review, requiring that the Commonwealth's ban advance a compelling interest and be narrowly tailored to achieve that interest. *See, e.g., Sable Communications of California, Inc.* v. FCC, 492 U.S. 115, 126 (1989). And once the activity is deemed protected by the First Amendment, the burden shifts to the Commonwealth to demonstrate that the law is narrowly tailored to effectuate its proffered compelling interests. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon*

v. FEC, 572 U.S. 185, 210 (2014). Applying this standard, the Commonwealth cannot possibly prevail.

Most importantly, the Commonwealth cannot prevail because its asserted justifications are fatally infected with elitist and paternalistic moral and aesthetic judgments that are *never* properly credited as sufficient to justify the abridgment of freedom of speech. "Under our Constitution, 'esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.'" *Brown,* 564 U.S. at 790 (2011), *quoting United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000). "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

1. The Skill Game Ban Is a Content-Based Restriction Subject to Strict Scrutiny.

"We begin our analysis by noting the self-evident: video games are protected as expressive speech under the First Amendment.... [and] as a result, [video] games enjoy the full force of First Amendment protections." *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 148 (3d Cir. 2013). As such, courts have routinely struck down government efforts to ban video games on free speech grounds. *See Brown,* 564 U.S. at 790–91.[17] In *Brown,* the United

[17] *See also American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) (finding video games entitled to First Amendment protection and rejecting argument that government regulation of video games should be subject to greater leeway because video games are "interactive," noting that "[a]ll literature … is interactive; the better it is, the more interactive."); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954

States Supreme Court held that, like protected literature, video games are entitled to free speech protection. *Id.*, at 790. The Court explained:

> Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, "esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). And whatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different medium for communication appears. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 503, 72 S.Ct. 777, 96 L.Ed. 1098 (1952).

Id. A game need not have a "narrative" or tell a story in order to be protected speech. The United States Supreme Court observed, in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995), that non-narrative expression like the abstract art of Jackson Pollock, or the music of Arnold Schoenberg, is entitled to protection under the First Amendment and held that "a narrow, succinctly articulable message is not a condition of constitutional protection."

A government action that is "based on the content of speech," rather than being generally "applicable to all speech irrespective of content," is content-based and subject to

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(8th Cir. 2003) (finding video games constituted protected speech because "the first amendment protects entertainment as well as political and ideological speech and … a particularized message is not required for speech to be constitutionally protected") (internal quotes and citations removed); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp.2d 1180 (W.D. Wash. 2004) ("Because the video and computer games at issue in this litigation are expressive speech that is entitled to full protections of the First Amendment, strict scrutiny applies."); *Candy Lab Inc. v. Milwaukee County*, 266 F. Supp. 3d 1139 (E.D. Wis. 2017) (extending First Amendment protection to a poker-themed video game called "Texas Rope 'Em" that "immerses the player in a Western-themed virtual environment, complete with a Texas-themed game title, color scheme, and graphics" and "conveys ideas related to the Wild West and scavenger hunting").

strict scrutiny. *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980) (citations and internal quotation marks omitted). A law that "singles out" one particular type of speech "for regulatory attention" is content-based. *Washington Post v. McManus*, 944 F.3d 506, 513 (4th Cir. 2019). Laws that "impose[] a financial disincentive only on speech of a particular content" are "presumptively inconsistent with the First Amendment." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

The Skill Game Ban constitutes content-based discrimination because some types of skill games are banned, but other types are not banned. During the past year when skill games were taxed and regulated, the Commonwealth and law enforcement treated one type of skill game different than others, declining to enforce the tax against games that looked like traditional arcade games, carnival games, and sports games. Devices like coin pushers and crane games, despite falling within the definition of "skill game," were tolerated and allowed to operate outside of the "skill game" taxation and regulation scheme. Video skill games, like some of the games operated by Plaintiffs, with more adult themes, especially those that looked similar to slot machines, spinning wheels, matching fruit games, or video poker, were heavily regulated as "skill games" and were required to pay the hefty $1,200 per month tax. This disparate treatment was based on the speech of the game itself, i.e. its visual aesthetic. There is nothing in the statute itself that allows crane games, coin pushers, or video arcade games, but prohibits Plaintiffs' skill games.

The discriminatory treatment has been exacerbated in the period since the Skill Game Ban went into full effect. Certain games are banned and other games allowed to operate, not based on a clearly defined legitimate distinction *in the statute*, but instead

based on the look and feel of the game, i.e. content of its speech. Given that video games are recognized as protected free speech, this constitutes an unlawful content-based restriction on free speech and unlawful viewpoint discrimination. The Commonwealth has, without any basis in the statute, construed the Skill Game Ban as prohibiting only "gambling skill games," "hybrid machines" and "gray machine games"—categories of games that are not used or defined in the Skill Game Ban. Ex. 12, October 12, Hearing Transcript, 6:20-7:4, 7:19, 9:2-3, 10:5-6, 11:2-4, 11:25, 16:5-7, 44:18. The Commonwealth distinguishes these games from those skill games that are not banned based on their expressive content: "gray machine games" display "cherry, cherry, cherry . . . symbols on a machine," or have the aesthetic of a slot machine or casino game. *Id.*, 12:1-4. But the more family friendly "arcade" or "midway" games are somehow allowed, even if outside of a family entertainment center. *Id.*, 10:25-11:7. In other words, the Commonwealth has manufactured a content-based distinction in its own interpretation of the Skill Game Ban.

A decade or so ago, there arose great public concern over children playing violent video games. To address this problem, states and localities enacted various laws that banned the sale of violent video games, prevented minors from purchasing or renting such games, required certain disclosures and warnings be placed on such games, and otherwise attempted to restrict the sale of violent video games. The problem was that a ban on violent video games necessitated content-based distinctions to classify what constituted a violent video game. Accordingly, courts around the country uniformly struck down these laws as impermissible restrictions on free speech, notwithstanding the legitimate concerns with children playing video games with pervasive and sometimes alarming violent imagery. *See, e.g., Entertainment Software Association v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006),

aff'd 519 F.3d 768 (8th Cir. 2008) (enjoining regulations directed at violent video games). *Accord Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005). *See also* the cases cited above, at footnote 17. One of these cases went all the way to the U.S. Supreme Court, where it was confirmed that video games constitute protected free speech and that content-based regulation of such games is unconstitutional viewpoint discrimination. *Brown,* 564 U.S. at 790–91.

Brown and its progeny have consistently held that laws that distinguish or regulate the aesthetics of video games violate the First Amendment. In a subsequent case with similar facts to those here, an Eastern District of Wisconsin Court preliminarily enjoined the enforcement of a county ordinance requiring certain video game operators or developers to apply for event permits before offering the game in the county. *Candy Lab*, 266 F. Supp. 3d at 1141. The ordinance imposed these requirements on certain "virtual and location-based augmented reality games" involving "an artificial world of images and sounds." The law gave the county broad discretion to issue a permit based on a variety of factors, including public safety. *Id.* at 1143. The Plaintiffs developer created a game called "Texas Rope 'Em," in which players travel to game stops in a virtual world, collect cards via animations "reminiscent of 'rustling up' cards like a cowboy would with cattle" and use the collected cards to play a variant of Texas Hold 'Em poker in an immersive "Western-themed virtual environment, complete with a Texas-themed game title, color scheme, and graphics" that "conveys ideas related to the Wild West and scavenger hunting." *Id.* at 1142.

In granting plaintiff's motion for a preliminary injunction, the *Candy Lab* court first held that Texas Rope 'Em was entitled to First Amendment protection and it dismissed the

county's argument that the game lacked sufficient expressive elements to be protected speech, noting that the

> game immerses a player in a Western-themed virtual environment, complete with a Texas-themed game title, color scheme, and graphics, allowing the player to corral favorable playing cards using an animated lasso. The game conveys ideas related to the Wild West and scavenger hunting to lend an air of excitement and novelty to a traditional card game. Moreover, what Candy Lab's game lacks in compelling literary tropes, it makes up for by employing "features distinctive to the medium (such as the player's interaction with the virtual world)."

Id. at 746 (quoting *Brown*, 564 U.S. at 791). The court then concluded that the plaintiffs established a sufficient likelihood that the ordinance violated the First Amendment. Although the court held that the ordinance was "content neutral" insofar as it applied only to the "functionalities" of games, rather than their content or viewpoint, it concluded that the ordinance did not "pass muster even under the more lenient standards" applicable to content-neutral restrictions because it lacked adequate standards to guide an official's decision and gave unbridled discretion to government officials in issuing permits, which could be exercised to suppress disfavored speech, and which could "lead to self-censorship." *Id.* at 1151.

The situation here is similar. Like the *Candy Lab* Texas Rope 'Em game, the skill games in Plaintiffs' Truck Stop contain expressive game themes (western themes, ghost stories, etc.) with game-titles, color schemes, graphics, music, characters, and animations that convey ideas related to the respective varied themes that "lend an air of excitement and novelty to a traditional" matching or tic-tac-toe-style game. *Id* at 746. Like the Texas Rope 'Em game, the skill games also contain medium-specific features like a player's interaction with the interface and the virtual world of the game. *See* Ex. 5, Pictures. Like

Texas Rope 'Em, the video skill games that the Commonwealth seeks to ban are protected speech.

With respect to the speech restriction at issue, the Skill Game Ban is even more offensive than the county ordinance in *Candy Lab*. Instead of distinguishing games based on functionality of the game, the Skill Game Ban was motivated by and is enforced based on the *aesthetics* of the game, *i.e.,* the "look and feel" of the game.

Just as it is unconstitutional for a state to ban the sale of a violent video game, as in *Brown*, or ban the Texas Rope 'Em game as in *Candy Lab*, it is also unconstitutional for the Commonwealth to ban the operation of video skill games based on the content or aesthetic of the game. Skill games that have adult themes or that "look and feel" like video poker or slot machines (even though they do not constitute gambling) cannot be treated differently than "family friendly" versions of the same video games or mechanical crane games and coin pushers because such a distinction is based on the expressive content of the video game itself. Yet that is exactly what the Commonwealth did when it subjected (some) skill games to taxation and regulation, and then banned that subset of skill games outright on July 1, 2021.

2. The Skill Game Ban Unconstitutionally Discriminates Against Non-Preferred Speakers.

In addition to discriminating against certain types of skill games based on the expressive content of the game itself, the "family entertainment exception" in SB 971 also constitutes impermissible viewpoint discrimination and unconstitutional compelled speech. While skill games are banned in convenience stores, truck stops, and bars and restaurants, such as those owned by Plaintiffs, the very same skill games are allowed in so-called "family entertainment centers." SB 971 makes it clear that only those who "market

its business to families with children" can qualify as a "family entertainment center," thus explicitly conditioning the operation of skill games on the speech of the proprietor of the business.[18]

The Commonwealth cannot infringe on someone's free speech by requiring them to cater to a family friendly clientele or only give such rights to preferred speakers that speak in a manner that pleases the government. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). "By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Speaker-based laws are reviewed under strict scrutiny. *Id.* "Because speech restrictions based on the identity of the speaker are all too often simply a means to control content, the Supreme Court has insisted that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015).

Courts have routinely struck down regulations that impinge on free speech where the purported justification of the regulation was to protect "family values" or "family

[18] This challenge to the family entertainment center exception is separate and distinct from the challenge to the types of skill games that are banned. In other words, even if the Court disagrees that skill games themselves are protected speech, there is no doubt that the family entertainment center exception discriminates on the basis of the speech of the retail establishment.

friendly" environments. *See e.g. New Mexico Top Organics-Ultra Health, Inc. v. Kennedy*, 2019 WL 211530 (D.N.M., Jan. 16, 2019) (State Fair's prohibition on medical cannabis display as conflicting with "family friendly atmosphere" violated First Amendment right to free speech); *NAACP v. City of Philadelphia*, 39 F. Supp. 3d 611 (E.D. Pa. 2014) (holding that city's refusal to allow NAACP's advertisement in Philadelphia airport violated First Amendment because it was not plausibly connected to City's stated goal of creating a "family friendly environment."); *Jankowski v. City of Duluth*, 2011 WL 7656906 (D. Minn. Dec. 20, 2011) (finding that declared interest in providing a "family-friendly, welcoming" environment at city festival "does not pass muster" under First Amendment analysis and was not a justification for restrictions on free speech); *Hodge v. Lynd*, 88 F. Supp. 2d 1234 (D.N.M. 2000) (prohibition on wearing a backwards-facing cap was not justified by county's purported interest in ensuring a "family-friendly" or "family-oriented" environment at county fair).

In *Bledsoe v. City of Jacksonville Beach*, 20 F. Supp. 2d 1317 (M.D. Fla. 1998), the court struck down a city ordinance that only allowed events that advertised or promoted "family values." The court correctly held that such a regulation was not content neutral, and was thus subject to strict scrutiny under the First Amendment. The ordinance at issue sought to promote a "family-oriented environment" which was defined as "safe, clean area with activities with encourage attendance by either families, children and senior citizens." *Id.* at 1320. The court explained that favoring businesses that advertised or promoted themselves to "families" may sound nice, but was antithetical to the free speech: "This type of content idea filtering, although quaint in a Mayberry R.F.D. aspirational way, takes on an Orwellian aspect when applied in the real world." *Id.* at 1324.

Likewise, the Commonwealth seeks to outlaw speech on the basis of whether it promotes messages consistent with "family entertainment centers." But the government may not ban speech in an attempt to protect some from engaging in certain leisure and entertainment activities, while giving preferred speakers—operators of "family entertainment centers"—additional rights. The Supreme Court has warned that courts should be "deeply skeptical of laws that distinguish among different speakers, allowing speech by some but not others," and leaving "unburdened those speakers whose messages are in accord with its own views." *Nat'l Inst. Of Fam. & Life Advocs.*, 138 S. Ct. at 2378. The family entertainment exception does exactly this. The Commonwealth admits that the purpose of the family entertainment center exception is to permit skill games at businesses "devoted to offering amusements to the public" but *not at* businesses that are not "family friendly" such as restaurants, bars, convenience stores, truck stops, or "strip clubs," which somehow the Commonwealth thinks are analogous to Plaintiffs' Truck stop. Ex. 12, October 12, 2021 Hearing Tr., 46:4-12. But there is no "vice" exception to the constitutional guarantee of freedom of speech. *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 513-14 (1996). Members of the General Assembly may think truck stops are "sleazy" and may use racist slurs against convenience store owners, but the Commonwealth cannot favor one group over another under the guise of the family entertainment center exception.

B. There Is No Compelling Governmental Interest for the Skill Game Ban, and the Ban Fails Under any Level of Scrutiny.

The Commonwealth has failed to identify a coherent justification for the Skill Game Ban's content-based discrimination. As explained above, the legislative history reveals that the authors and proponents of the Skill Game Ban were motivated by

paternalistic and aesthetic reasons. Not surprisingly, in this litigation, the Attorney General has shied away from the illegitimate rationales stated on the floor of the General Assembly. Instead, the Attorney General argues that the Skill Game Ban is justified because of the Commonwealth's police powers to regulate vice and gambling, because regulating skill games (instead of banning them) was too difficult, and because skill games allegedly depressed Lottery sales. *See* Ex. 19, Supp. A.G. Resp. to Pl. Interrogatories at Interrogatory 1. None of these purported justifications survive strict scrutiny or any level of constitutional review.

1. The Skill Game Ban Fails Strict Scrutiny or Any Level of Review.

To survive strict scrutiny analysis, a restriction on speech must "further[] a compelling interest and [be] narrowly tailored to achieve that interest." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quotation omitted). There is no compelling interest in favoring the free speech rights of "family entertainment centers," and the skill game ban cannot be justified based on a desire to prevent gambling or protect the Lottery.

- First, skill games are not gambling because they are not games of chance. Under Va. Code § 18.2-333, Virginia law *still* expressly exempts contests of skill from the Commonwealth's ban on gambling. The Commonwealth recognized as much when they sought to regulate and tax skill games during the past year. *See Skill Game FAQs*, Virginia ABC[19] ("**Are 'skill games' considered illegal gambling?** No, illegal gambling means the making, placing or receipt of any bet or wager in the Commonwealth of money or other

[19] Available at https://www.abc.virginia.gov/licenses/retail-resources/skill-games/skill-games-faqs

consideration of value, **made in exchange for a *chance* to win a prize** ...") (bold in original); *See also* Ex.2, July 7, 2017 Letter from ABC; Ex. 3, April 26, 2017 Email from James Flaherty to Chris Curtis (both confirming that QVS skill game was legal game of skill and not gambling).

- Second, the prohibition of gambling is not a "compelling governmental interest" under the strict scrutiny standard. *Dep't of Tex. VFW v. Tex. Lottery Comm'n*, 760 F.3d 427, 439-40 (5th Cir. 2014) ("While the Supreme Court has recognized regulating gambling as a substantial state interest, there is no authority suggesting that it is a compelling interest. Moreover, we fail to see how Texas's interest in regulating gambling is furthered by restricting [First Amendment] speech, which may or may not relate to gambling...") (quotations and citations omitted).

- Third, the skill game ban cannot be justified on basis of health, safety and welfare because the General Assembly allows skill games to operate in family entertainment centers. How can skill games be too dangerous for adults but safe for children to play? The family entertainment center exception contradicts the purported rationale of the ban and demonstrates its illogic.[20]

- Fourth, the skill game ban cannot be justified as a restriction on gambling-like games when the Commonwealth has opened its doors to all sorts of actual gambling in the form of casinos, sports books, charitable gaming, and historic horseracing.

[20] The ABC regulations also demonstrated this illogic because the ABC regulations prohibited "anyone younger than 18 years of age" from playing any skill game, 3VAC5-80-120, but SB 971 only allows skill games at family entertainment centers that cater to children.

- Fifth, also deficient are the paternalistic rationales given by some members of the General Assembly that those who play skill games are too ignorant or poor to be able to make decisions for themselves. This is not a proper basis for making laws.

- Sixth, nor can the skill game ban be justified on the grounds that skill games are unregulated or difficult to regulate. The Commonwealth's one-year experiment regulating and taxing skill games repudiates this justification. In fact, the ABC stated "[t]he primary advantage to the public and the Commonwealth is that the regulation provides a blueprint for the operation of these games that will allow them to continue to operate while ensuring the safety and wellbeing of the citizens of the Commonwealth." Ex. 20, Virginia ABC, Regulatory Town Hall, p. 4. Skill games were successfully regulated and taxed from July 1, 2020 to June 30, 2021. The program generated over $130 million in tax revenue for the Commonwealth in addition to revitalizing and supplementing the income of local businesses and creating new jobs.

- Seventh, the Skill Game Ban cannot be justified as protecting the Lottery's revenue stream. The Commonwealth contends that skill games competed with the Lottery for consumers' discretionary spending. But the same is true of any number of leisure activities: golf, drinking at bars, vacationing at the beach, gambling at casinos, sports betting. All of these types of discretionary spending could negatively impact Lottery sales. In fact, casino gaming and other forms of gambling have expanded over the past year. Only skill games have been banned. Moreover, it is patently false that skill games adversely affect Lottery revenue. During the one-year regulatory period, which coincided with the Lottery's 2021 fiscal year, skill games were fully operational and the Lottery achieved *record* profits of $765 million, based on $3.3 billion in sales, a 28.6% improvement over

the previous year. Ex. 21, Annual Virginia Lottery Profits Soar to $765 Million, Michael Martz July 21, 2021, Richmond Times Dispatch. Lottery Director Kevin Hall called it "the most significant and successful year in the history of the Virginia Lottery." *Id.* See also Ex. 8, Hall Dep. 30:6:9 (admitting the Lottery had a "record year" the year before skill games were banned). He also testified that fiscal year 2019 was the second best year for lottery sales in Virginia Lottery history. *Id.* 30:10-17, This was the year before the General Assembly passed SB 971, during which skill games proliferated throughout the Commonwealth. The only dip in Lottery revenue was in 2020, a year that included a global pandemic that depressed retail sales in all sectors of the economy. Moreover, during the 2020 legislative session when SB 971 was debated and passed, the Lottery did not advocate for the banning of skill games. To the contrary, the Lottery was "aligned" with the Governor's plan to tax and regulate the games, and Director Hall admitted in his deposition that "skill games could have been successfully taxed and regulated along with the successful lottery." *Id.*, 130:22-25.

- Moreover, the Commonwealth cannot infringe free speech rights simply because someone thinks it might improve Lottery sales. Such economic protectionism is not a compelling interest under strict scrutiny, and would fail even rational basis review. *See St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (finding that state law prohibiting the sale of hand-made caskets violated due process because it was improper economic protectionism not rationally related to a legitimate public interest). Crony capitalism, or the Commonwealth's self-interest as a market participant, is neither a compelling nor legitimate public interest.

Even if strict scrutiny did not apply and intermediate scrutiny or rational basis review applied instead, there is no rational basis that justifies the skill game ban. Under any standard of review, the government has an affirmative burden to present evidence that a challenged restriction is protecting the public from a real harm. Courts demand evidence that a law advances an asserted interest "in a direct and material way." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). To the extent the Commonwealth has an interest in regulating what it (wrongly) perceives as "gambling," there is no rational basis for the General Assembly to ban skill games in convenience stores, bars and truck stops, but allow the very same activity in establishments that market to families with *children*. This shows that the government cannot possibly be advancing its claimed interest in protecting certain groups in a manner adequate to justify the intrusion.

2. The Skill Game Ban Is Overbroad and Under-Inclusive.

In the free speech context, a law is unconstitutionally overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotations and citation omitted). *Accord Jaynes v. Commonwealth*, 276 Va. 443, 463 (2008). The Supreme Court has "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted). The Commonwealth seems to admit that the Skill Game Ban is overbroad by incoherently arguing that SB 971 should be interpreted to only bans certain types of skill games but not others. A truck stop owner accustomed to featuring a variety of skill games faces a substantial burden in deciphering which machines are legal before choosing to provide skills games at his business and may not have resources to fight the government to

make a fair determination. This overbreadth chills the types of games (and thus type of speech) that a truck stop owner would offer in his establishment.

The Skill Game Ban is also under-inclusive. A law is under-inclusive when "an exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (internal quotations and citation omitted). When "there is an arbitrary exemption from, or underinclusiveness of[,] the scheme chosen by the government [that] may well suggest . . . the asserted interests either are not pressing or are not the real objects animating the restriction on speech." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 493 (1997) (Souter, J., dissent). Indeed, courts have expressed doubt as to whether such an incoherent law could withstand even rational basis review.[21]

The Skill Game Ban is under-inclusive because it does not apply to skill games operating in "family entertainment centers" and because other types of gaming (which actually meet the traditional definition of gambling) are allowed to proliferate in casinos, historic horse racing facilities like "Rosie's," sports betting, and charitable gaming. As explained above, there is no rational basis for the General Assembly to ban skill games in convenience stores, bars and truck stops, but allow the very same activity in establishments

[21] *See Am. Ass'n of Pol. Consultants, Inc. v. FCC*, 923 F.3d 159, 170 (4th Cir. 2019), cert. granted sub nom. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 812 (2020), and aff'd sub nom. *Barr v. Am. Ass'n of Pol. Consultants, Inc*, 140 S. Ct. 2335 (2020) (condemning "content-based loophole" and noting that "underinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint") (internal quotations omitted); *Republican Party of Minnesota v. White*, 536 U.S. 765, 780, (2002) ("clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous").

that market to families with *children*. Such arbitrary application renders the skill game ban fatally under-inclusive and incoherent under any standard of review. It also renders the statute unconstitutionally vague, as it allows the Commonwealth and law enforcement in Virginia to exercise a virtually unconstrained "chancellor's veto" over speech it dislikes. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

3. The Compelled Speech in the "Family Entertainment Exception" of the Skill Game Ban Fails Strict Scrutiny.

The Free Speech clause imposes stringent limits on the Commonwealth's authority to either restrict or compel speech by private citizens and organizations. *See Texas v. Johnson*, 491 U.S. 397 (1989); *Wooley v. Maynard*, 430 U.S. 705 (1977); W*est Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Compelled speech "penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda that they do not set." *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Calif.*, 475 U.S. 1, 9 (1986). Content-based compelled speech is likewise subject to strict scrutiny. *Hatch*, 443 F. Supp. at 1071. "[T]he First Amendment guarantees 'freedom of speech,'" which includes "both what to say and what not to say." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

Just as laws requiring video game stores to post warnings about the dangers of violent video games or the penalties for underage purchase have been held unconstitutional compelled speech, *supra*, there is likewise no justification for this compelled speech. In *Blagojevich*, plaintiffs challenged a statute that would fine those under 17 years of age from renting or purchasing certain video games that were deemed violent under voluntary industry standards and required that store owners post certain signs. The court found that marketing, labeling and signage requirements for video game manufacturers and retailers

constituted unconstitutional compelled speech because it required the manufacturers and retailers to present messages to their customers "in a manner mandated by the State," of which the defendants "offer[ed] no independent defense." 404 F. Supp. 2d at 1082. Similarly, in *Hatch*, the court held that prohibiting video games unless the proprietor conforms to certain marketing or advertising constitutes unconstitutional compelled speech, a "forced declaration of an unenforceable law." *Hatch*, 443 F. Supp. 2d at 1072.

The same is true here. The statute at issue requires retailers to market and advertise their business to "families with children" in order to qualify as a "family entertainment center" that is able to operate skill games. In response to Plaintiffs' request for admissions, the Governor admitted that marketing to children requires speech. Ex. 22, Governor Resp. to Pl. Request for Admission, at Request 16. The requirement that a business market itself in a certain way in order to legally operate skill games is the same as requiring a store owner to post a sign warning customers about violent video games before selling video games. Unless Plaintiffs market and advertise their business in the particular manner mandated by the Commonwealth, they are not allowed to operate skill games. Such government compelled speech is not allowed under the free speech clause of the Virginia Constitution.

The Commonwealth argues that the family entertainment center exception's requirement that such centers be "located in a building that is owned, leased, or occupied by the establishment for the primary purpose of providing amusement and entertainment to the public" demonstrates that the Skill Game Ban is not a restriction of *speech*. However, this requirement is in addition to the marketing requirement that compels the speech of businesses that wish to offer skill games. Moreover, determining the "primary purpose" of

a business in this context only gives further license to the Commonwealth to determine who is and who is not a preferred speaker. In other words, the "primary purpose" requirement (and its inherent vagueness) is yet another example of the law's content-based discrimination of speech.

Similarly, the prize requirement in the "family entertainment center" exception does not cleanse the statute of its infringement upon free speech. Plaintiffs and other similarly situated truck stops, restaurants, convenience stores, and gas stations are prohibited from offering *any* type of skill game, regardless of the value or type of prize awarded, because of the way Plaintiffs choose to speak about and operate their businesses. This is a clear violation of free speech rights.

C. The Skill Game Ban Also Violates the Due Process Clause of the Virginia Constitution.

The due process clause of the Virginia Constitution provides that "no person shall be deprived of his life, liberty, or property without due process of law." Va. Const. Art. I § 11.[22] Legislative enactments must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned,* 408 U.S. at 108. While this generally requires only that a statute provide "fair notice" of what is proscribed, where free speech concerns are implicated, "an even greater degree of specificity and clarity of laws is required." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). "The effects of such vagueness are particularly troublesome where First Amendment rights are implicated." *Maleng*, 325 F. Supp. 2d at 1191. "When speech is

[22] The Virginia Supreme Court has held that "[b]ecause the due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution, the same analysis will apply to both." *Shivaee v. Commonwealth*, 270 Va. 112, 119 (2005).

involved, rigorous adherence to those [due process] requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). Moreover, when raising an overbreadth challenge, the challenger has the right to argue the unconstitutionality of the law as to the rights of others, not just as the ordinance is applied to him. In other words, a plaintiff need not show that its own conduct is constitutionally protected, only that the law applies to constitutionally-protected speech and thus would "chill speech within the First Amendment's vast and privileged sphere." *Aschroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

1. The Vagueness of the Skill Game Ban Allows Unscrupulous Businesses to Operate Illegal Games but Prevents Law-Abiding Business Owners, Like Plaintiffs, From Operating Skill Games.

Regardless of any free speech concerns, the definitions of "skill game" and "family entertainment center" are impermissibly vague and overbroad in violation of the Due Process provision in Article I Section 11 of the Virginia Constitution. First, the legislation defines skill game to include any games that award "anything of value." *See* Ex. 1 (emphasis added); Va. Code § 18.2-325(6). The Act then amends the definition of "illegal gambling" to add that "[i]llegal gambling also means the playing or offering for play of ***any skill game***." *Id.*; Va. Code § 18.2-325(1) (emphasis added). Thus, on its face, the Skill Game Ban renders illegal any operation of a machine falling within the broad definition of "skill game." This would include pinball machines and essentially all video arcade games, many of which are skill-based and many of which reward the player with credits to replay the game or something else of value. A free replay is obviously "anything of value" because it would otherwise cost money in order to play the game again.[23] While a carve out for free

[23] Notably, the Commonwealth is at odds with itself with respect to what constitutes "anything of value." In response to Plaintiffs' Request for Admissions, the Attorney

replays appears to exist in subsection (3)(b) of Va. Code 18.2-325, which defines "gambling device," it is absent from the definition of "skill game" at subsection (6), and the Commonwealth's attempts to graft language from one definition onto another is an improper attempt to re-write the statute.

The Commonwealth admits to the selective enforcement of this overbroad statute by arguing that the ban only applies to a subset of skill games (i.e., "hybrid machines," "gambling skill games" or "gray machine games"). Ex. 12, October 12, Hearing Transcript, 6:20-7:4, 7:19, 9:2-3, 10:5-6, 11:2-4, 11:25, 16:5-7, 44:18. The Commonwealth concedes that the statutory language is "not the clearest," "very confusing," "not super clear," and "ambiguous" but somehow not "unconstitutionally ambiguous." *Id.*, 6:18-19, 8:21-22, 9:7-9, 10:24, 16:5-7. The Commonwealth even concedes that SB 971 "maybe" inadvertently made coin pushers illegal. *Id.*, 47:2-3. But the Commonwealth also asserts that it has not enforced SB 971 against coin pushers. *Id.*, 10:5-7. The Commonwealth's effort to redraft the statute, by either manufacturing distinctions of "hybrid machines" or "gambling skill games" that do not exist in the plain text, or attempting to graft language from the separate definition of "gambling device" onto the definition of "skill game" demonstrates that the statute itself is impossibly vague and "unconstitutionally ambiguous."

Similar ambiguities exist with respect to common carnival games that are coin-operated, based on skill, and reward the player with tickets, merchandise or something of value. Are all of these games illegal unless they fall within the "family entertain center"

General and Governor Northam admitted that a ticket redeemable for merchandise is "anything of value," but ABC denied it. *Compare* Ex. 23, Supp. A.G. Resp. to Pl. Request for Admissions, at Request 6; Ex. 22, Governor Resp. to Pl. Request for Admissions, at Request 6; Ex. 24, ABC Resp. to Pl. Request for Admissions, at Request 6.

exception? What about crane games or coin-pushers which are ubiquitous at truck stops and gas stations in Virginia and previously determined by the Attorney General to be legal? Are those games now illegal? They appear to fall within the definition of "skill game," yet these games were not taxed or regulated as "skill games" during the past year. Indeed, the Commonwealth denies that these games are "skill games" in this litigation and struggles to articulate a statutory interpretation that supports such a result. The Commonwealth's unreasonable statutory interpretation is nothing more than a post hoc justification for the selective enforcement of the Skill Game Ban.

Moreover, SB 971 is in derogation of centuries of common law jurisprudence, enshrined in the Virginia Code, and providing that in order to be gambling, a game or activity must satisfy three elements: (1) consideration; (2) prize; and (3) that the awarding of a prize be dependent upon chance. Under Va. Code § 18.2-333, Virginia law expressly exempts contests of skill from the Commonwealth's ban on gambling. And the Attorney General has opined that skill games like crane games and coin pushers are not gambling devices because chance is not a predominant factor in whether a player succeeds or fails. 1987-88 Va. A.G. Op. 284, 287. While SB 971 purports to ban all skill games, Section 18.2-333 remains the law of the land and the Attorney General has not rescinded its prior opinions about crane games and coin pushers.

All of this reveals that the definition of skill game is hopelessly vague and ambiguous and simultaneously encompasses numerous lawful games. If a person of ordinary intelligence cannot determine what is legal or illegal, and if the Commonwealth's capable counsel cannot reconcile the text of the Skill Game Ban with the manner in which it has been enforced or interpreted, then the statute is unconstitutional as a violation of due

process. The Commonwealth's haphazard upending of centuries-old principles distinguishing skill games from illegal gambling and replacing them with inscrutable, incoherent statutory definitions places almost unfettered discretion in the hands of law enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972). The vagueness of the Skill Game Ban allows for erratic, selective enforcement that "leave[s] citizens unsure if their actions will transgress a rule [and] facilitate[s] arbitrary enforcement based on *ad hoc,* subjective judgments by officials." *Draego v. City of Charlottesville, Virginia*, 2016 WL 6834025, at *22 (W.D. Va. Nov. 18, 2016) (citation omitted).

The vagueness of the Skill Game Ban also prevents effective enforcement of the laws against illegal gambling. In the past, law enforcement could determine what was a gambling device by distinguishing between games of chance and games of skill. The current statute, however, destroys this workable standard and historic distinction and replaces it with ambiguous and vague statutory language. As a result, law enforcement is not able to enforce the law. In fact, there has been an increase in illegal games in Virginia since July 1 because ABC and Commonwealth Attorneys are not able to enforce such a confusing law. Unscrupulous business owners are operating illegal games, while law-abiding business owners like Plaintiffs struggle to understand what games are legal or illegal. The vagueness and confusing nature of the Skill Game Ban clearly deprives Plaintiffs and other law abiding citizens of due process under the law.

2. The Family Entertainment Center Exception is Unconstitutionally Vague and Furthers Censorship.

Second, the statutory definition of "family entertainment center" is also unconstitutionally vague and subjects businesses to discriminatory enforcement. By allowing the Commonwealth to decide which skill game providers fall within the

ambiguous "family entertainment center" exception the Skill Game Ban "encourage[s] erratic administration" where "individual impressions become the yardstick of action." *Interstate Cir., Inc. v. City of Dallas*, 390 U.S. 676, 685 (1968).

The General Assembly's attempt to define "family entertainment center" only makes matters worse because it emphasizes that only an establishment that "markets its business to families with children" may have skill games. Ex. 1, SB 971 (establishing new Va. Code § 18.2-334.5). Courts have previously recognized that similar language is impermissibly vague and subject to arbitrary and capricious enforcement. *See Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573 (9th Cir. 1984) ("The term 'family entertainment' does not, in itself, provide a standard sufficient to limit arbitrary and capricious action by the [City] Council."); *Southeastern Promotions, Ltd. v. City of West Palm Beach*, 457 F.2d 1016, 1020 (11th Cir. 1972) (finding the "family entertainment" standard for approving performances at city venue to be too subjective and arbitrary).

It is unclear what it means for an establishment to market "its business to families with children." A reasonable person may think that a bowling alley is a family entertainment center, but so might be a convenience store or truck stop that serves families throughout the local community and offers skill games or other amusements to patrons. The Commonwealth, however, does not think that truck stops are family entertainment centers given its argument on demurrer, and that ABC guidance as to skill games distinguishes between those types of establishments. Ex. 12, October 12, 2021 Hrg. Tr., 15:6-11 ("Sadler Brothers Oil doesn't have a facility that's primarily devoted to offering amusements to the public. They offer gas, gasoline, and diesel fuel. They have a merchandise shop component, showers for truckers. It's a truck stop"); *Skill Game FAQs*,

Virginia ABC.[24] But the statute does not provide any such guidance as to how much "marketing…to families with children" is necessary to qualify for the exception, what separates a business that markets to families with children from one that merely serves families with children, or whether such establishments that merely serve families with children without expressly advertising thereto are subject to the skill game ban.

Are bowling alleys "family entertainment centers"? On league night or only on family bowling night? Are bars and restaurants family entertainment centers? How much "marketing … to families with children" is necessary to qualify? What if a business also markets itself to other demographics? The answers to these questions are hopelessly obscure because the definition itself is impermissibly vague. Vague and ambiguous statutory language is subject to abuse and arbitrary (and discriminatory) enforcement by law enforcement. Such ambiguity is especially concerning when there are concerns about disparate racial impact or racial animus underlying the ambiguous and vague statutory language. The due process guarantee in the Virginia constitution protects citizens from being subject to such vague and ambiguous laws that can be enforced at the whim of law enforcement without any appreciable or consistent standard.

II. PLAINTIFFS WILL BE IRREPARABLY HARMED WITHOUT TEMPORARY INJUNCTIVE RELIEF

Plaintiffs will suffer irreparable harm if the Commonwealth is not enjoined from unlawfully restricting its ability to offer skill games at its business. The Commonwealth's violation of a constitutional right alone constitutes irreparable harm. *See Elhert*, 105 Va. Cir. 544 ("[T]he temporary violation of a constitutional right is enough" to establish

[24] Available at https://www.abc.virginia.gov/licenses/retail-resources/skill-games/skill-games-faqs

irreparable harm); *see also Lynchburg Range & Training, LLC*, 105 Va. Cir. 159 ("The Court also rules that the temporary violation of a constitutional right itself is enough to establish irreparable harm."); *Dillon v. Northam*, 105 Va. Cir. 402 (2020) ("Plaintiffs could satisfy the irreparable-injury prong by demonstrating that the failure to grant a temporary injunction would lead to a violation of their constitutional rights.). *See also Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citation omitted).

Nonetheless, Plaintiffs will suffer additional harm to its business that cannot be adequately remedied by money damages if the ban on skill games is allowed to go into effect. Virginia courts consider loss of customers, erosion of plaintiff's competitive position in the relevant industry, and the difficulty of calculating monetary damages when deciding whether a plaintiff has shown a sufficient probability of irreparable harm. *See Lynchburg Range & Training*, 105 Va. Cir. 159; *HotJobs.com, Ltd. v. Digital City, Inc.*, 53 Va. Cir. 36 (2000) ("There is substantial support in Virginia for the proposition that irreparable harm is sustained and injunctive relief appropriate, when it would be very difficult or impossible to quantify monetary damages with precision."); *Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 3:20-CV-98, 2020 WL 1844791, at *24 (E.D. Va. Apr. 10, 2020) ("[The threat of permanent loss of customers support[s] a finding of irreparable harm."); *Fred Hutchinson Cancer Rsch. Ctr. v. BioPet Vet Lab, Inc.*, No. 2:10CV616, 2011 WL 1119565, at *5 (E.D. Va. Mar. 1, 2011) ("When the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied."); *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 193 F. Supp. 3d 556, 574 (E.D. Va. 2016) ("[G]enerally

irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate."); *Blackwelder Furniture Co. v. Seilig Manufacturing Co.,* 550 F.2d 189, 196-97 (4th Cir. 1977) (holding that the award of damages based on "past profits" would not adequately compensate Plaintiffs for the damage to goodwill, which was "incalculable"), *overruled on other grounds by Real Truth About Obama, Inc. v. FEC,* 575 F.3d 342, 346–47 (4th Cir. 2009).

Skill games have provided Plaintiffs with a critical source of revenue and attracted new customers that have enhanced Plaintiffs' competitive position. Ex. 4, Sadler Dec. Absent a temporary injunction, Plaintiffs risks losing customers, respective competitive market position, and goodwill. Monetary damages, even if they were recoverable against the Commonwealth, could not compensate Plaintiffs for its loss of good will in the community. Nor would it be possible to quantify with any degree of certainty the measure of monetary damages necessary to offset the loss of future customers and competitive position. For all of these reasons, the irreparable injury to Plaintiffs weighs in favor of a temporary injunction.

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH DECIDEDLY IN FAVOR OF A TEMPORARY INJUNCTION

The balance of equities weighs decidedly in favor of a temporary injunction because the irreparable injury Plaintiffs will suffer far outweighs any harm to the Commonwealth. Moreover, a preliminary injunction is in the public interest. "Generally, where the Government is the opposing party, the requirements that a petitioner show that the balance of equities and public interest are in their favor, merge." *Aslanturk v. Hott*, 459 F. Supp. 3d 681, 700 (E.D. Va. 2020), *citing Nken v. Holder*, 556 U.S. 418, 435 (2009). The public has an interest in protecting and vindicating constitutional rights. *Newsome v.*

Albemarle County Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003) ("Surely, upholding constitutional rights serves the public interest."). *See also Gannett Co. v. DePasquale,* 443 U.S. 368, 383 (1979) (acknowledging public interest in protection of constitutional rights); *United States v. Raines*, 362 U.S. 17, 27 (1960) ("there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights[.]"). A ban on skill games infringes upon Plaintiffs' free speech and due process rights, as well as those of similarly situated businesses and persons in Virginia, and the public undoubtedly has a keen interest in enjoining this curtailment of liberty. "By contrast, the State of [Virginia] is in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011); *see also Joelner v. Vill. of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004) (questioning the "harm to a municipality when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect First Amendment liberties").

Lastly, by granting a temporary injunction, the Court will maintain the status quo prior to the filing of this lawsuit, which included a workable common law distinction between legal games of skill and illegal games of chance. Plaintiffs only ask that the Court's injunction apply to those skill games that were previously taxed and regulated. In other words, the Court should enjoin Defendants from enforcing the Skill Game Ban with respect to those games that were taxed and regulated by the ABC from June 30, 2020 to July 1, 2021. Those games had been regulated and certified by the ABC. Both the ABC and the Attorney General agreed that such games were games of skill and not illegal gambling. Such games are easily identifiable because the ABC maintained a list of the skill

games, their locations, and the manufacturer/operator of each game. Stickers were affixed to each of these games to demonstrate their legality to local law enforcement. By limiting the injunction to those previously approved and regulated games, the Court would avoid the "parade of horribles" that the Commonwealth argues would result from the granting of an injunction. Instead, the Court would merely reinstate the status quo ante prior to the filing of this lawsuit and allow the General Assembly the opportunity to revisit the obviously flawed law. Plaintiffs are not asking the Court to open up Virginia to all types of slot machines. To the contrary, Plaintiffs are asking the Court to strike down an unconstitutional law that is causing irreparable harm to its business and hampering law enforcement efforts against actual illegal gambling.

CONCLUSION

For all the foregoing reasons, this Court should grant Plaintiffs' Motion for Temporary Injunction.

Respectfully submitted,

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I hereby certify that, on November 19th, 2021, I caused a copy of the foregoing to be served via U.S. Mail and Email on the following:

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