In The

Supreme Court of Virginia

THE COMMONWEALTH OF VIRGINIA, ET AL.,

Petitioners – Defendants,

v.

SADLER BROTHERS OIL COMPANY d/b/a
SADLER TRAVEL PLACE, ET AL.,

Respondents – Plaintiffs.

BRIEF AMICUS CURIAE OF COLONIAL DOWNS GROUP, LLC, IN SUPPORT OF THE COMMONWEALTH'S PETITION FOR REVIEW PURSUANT TO CODE § 8.01-626

From the Circuit Court for the County of Greensville
No. CL 21-207

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INTEREST OF *AMICUS CURIAE*

This Brief *Amicus Curiae* is filed by and on behalf of Colonial Downs Group, LLC, a Delaware limited liability company. The Colonial Downs Group, LLC, owns and operates Colonial Downs racetrack and additional satellite facilities throughout the Commonwealth that offer pari-mutuel wagering in accordance with Chapter 29 of Title 59.1, Code §§ 59.1-364 through 59.1-405. The only such licensee in the Commonwealth, Colonial Downs and its pari-mutuel wagering operations are heavily regulated by the Virginia Racing Commission. The General Assembly expanded pari-mutuel wagering in 2018 as a means of resurrecting live horse racing in the Commonwealth. Since 2018, Colonial Downs has invested over $300 million in the Commonwealth, with an additional $400M in planned projects over the next two years.

In 2020 the General Assembly authorized additional, limited forms of gaming, each regulated and taxed for specific purposes. The General Assembly also elected to ban a recently proliferating form of gaming machines known as “skill games” after a one-year grace period during which such machines would be taxed and regulated by the ABC Board to help fund COVID-19 relief. Sadler Brothers Oil Company d/b/a Sadler Travel Plaza, and the other Respondents, challenged that ban, claiming it violates the Free Speech Clause of the Virginia Constitution. The trial court agreed, albeit without explaining why, and temporarily enjoined the ban in its entirety. As a

result, these games are now operating and proliferating throughout the Commonwealth, wholly unregulated and untaxed, in direct contradiction to the wishes of the General Assembly.

STATEMENT OF THE CASE[1]

Gambling "has long been prohibited in Virginia, with the exception of lottery, charitable gaming, and wagering on horse races." Joint Legislative Audit and Review Commission, *Gaming in the Commonwealth* at 1 (Nov. 25, 2019) ("JLARC Report"). Those prohibitions apply equally to gambling via electronic machines, video games, and the like. In particular, before 2020, Virginia law prohibited (among other things) "[a]ny machine, apparatus, implement, instrument, contrivance, board, or other thing, or electronic or video versions thereof …. that, depending upon elements of chance, … may eject something of value or determine the prize or other thing of value to which the player is entitled." Code § 18.2-325(3)(b) (as amended by Acts 2019 ch. 761). The law contained an exception for machines that provide "nothing more than additional chances or the right to use such machine," as well as for "machines that only sell, or entitle the user to, items of merchandise of equivalent value." *Id.* Arcade games and the like thus have long been consistent with Virginia law, while slot machines and the like have long been illegal.

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[1] Colonial Downs adopts the Nature of the Case, Material Proceedings Below, and Statement of Facts of the Commonwealth in its Petition for Review to the extent necessary for the arguments in this brief.

In recent years, some sought to take advantage of a perceived loophole in the Code to begin offering slot-machine-style games. Relying on the fact that Section 18.2-325(3)(b) focuses on games with "elements of chance," various electronic games were created that rely principally on chance, but tack on some mild element of "skill." JLARC Report at 121. For example, one prominent game involves spinning and stopping slot-machine-style wheels to produce a tic-tac-toe board; if the player wins, the player can enter a "bonus" round that involves a basic animated game with a small element of skill, such as trying to "shoot" objects, through which winnings can be increased. *See* Dec. 6, 2021 Hearing Tr. ("Tr.") 130:5-131:8, 165:24-166:11, 284:15-285:25. But according to their purveyors, these games were not prohibited because they involve some degree of skill, not just chance.

That was a dubious proposition from the start. These games have become commonly known as "gray games" precisely because they operate in a "gray" area of the law, exploiting a perceived loophole to offer something not meaningfully different from the kind of gambling that has long been prohibited. JLARC Report at 121. In 2017, the ABC opined that a liquor store could offer them. *Id.* at 123. Over the next three years, these games skyrocketed at "bars, convenience stores, gas stations, and restaurants across the state." *Id.* at 121; *see also* Tr. 67:23-68:2.

Concerned about the risks that these completely unregulated "gray games" pose to the public—for instance, no regulation or law prevented those under 18 from

playing them, *see* Tr. 105:3-14—the General Assembly took action. It enacted Senate Bill 971, which amended the Code of Virginia in three key ways. First, the Code now defines "skill game" as:

> 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***.

Code § 18.2-325(6) (emphasis added). As the italicized language makes clear, the definition covers such games if *and only if* they offer cash or cash equivalent payouts; a skill game that offers the player the option to play only for fun or bragging rights is not covered. Second, the Code now prohibits "the playing or offering for play of any skill game," so defined. Code § 18.2-235(1). Finally, the Code now makes clear that a device otherwise covered by the definition of "gambling device" is still a gambling device if it "indicate[s] beforehand the definite result of one or more operations but not all the operations" or it "may also sell or deliver something of value on a basis other than chance." Code § 18.2-235(3)(c). In other words, the Code now makes clear that merely appending some mild component of skill to a game of chance does not get a machine out from under its prohibition.

Senate Bill 971 also created an exemption for "family entertainment centers," defined 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." Code § 18.2-334.6(A). A family entertainment center may offer skill games if "the prize won or distributed to a player is a noncash, merchandise prize or a voucher, billet, ticket, token, or electronic credit redeemable only for a noncash, merchandise prize (i) the value of which does not exceed the cost of playing the skill game or the total aggregate cost of playing multiple skill games; (ii) that is not and does not include an alcoholic beverage; (iii) that is not eligible for repurchase; and (iv) that is not exchangeable for cash, cash equivalents, or anything of value whatsoever." *Id.* §18.2-334.6(B).

Finally, the General Assembly did not disturb the exemptions for games that provide "nothing more than additional chances or the right to use such machine" or "that only sell, or entitle the user to, items of merchandise of equivalent value." Code § 18.2-325(3)(b). Thus, while popular games like Pac-Man or Skee-Ball may now qualify as "skill games," they still do not constitute illegal "gambling devices."

While the General Assembly passed SB 971 in 2020, at the Governor's urging, it agreed to allow such games to continue for a one-year grace period, with almost all

revenues directed to Virginia's COVID-19 Relief Fund. On July 1, 2021, when that grace period expired, SB 971's prohibition on gray games took effect. It remained in effect until the trial court in this litigation temporarily enjoined it on December 6, 2021.

ARGUMENT

Regulation of gambling has long been a core police power, and restrictions on gaming have peacefully coexisted alongside the Free Speech Clause of the Virginia and United States Constitutions for centuries.[2] That is because such laws typically do not restrict the offering or playing of games or chance or skill per se; they prohibit only the non-expressive conduct of offering a cash payment or its equivalent. Senate Bill 971 is of a piece with that long tradition: It leaves establishments free to offer any forms of electronic gaming they want, so long as they do not offer a cash payout or the equivalent in exchange for success. It is unlikely that such a law even implicates the First Amendment, but it certainly does not infringe on any First Amendment rights or pose any vagueness concerns.

That alone suffices to demonstrate that the trial court erred by temporarily enjoining Senate Bill 971. An injunction is "an extraordinary remedy." *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008), that may be granted only if the

[2] As Sadler noted in its Motion for Temporary Injunction and Supporting Memorandum of Law (June 21, 2021), this Court has held Virginia's Free Speech Clause to be coextensive with the First Amendment. *See id.* at 11 n.7. For ease of reference, the two together are referenced herein as the "First Amendment."

movant establishes: (1) a likelihood of success on the merits; (2) a likelihood that they will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Sadler failed to satisfy any of these elements, and his request should have been rejected at the threshold because he has not identified any constitutional infirmity in Senate Bill 971. Indeed, the trial court did not even explain why it thought that any of the law's provisions violate the First Amendment, let alone attempt to reconcile its conclusion with decisions from this Court or the Supreme Court of the United States. Tr. 295:7-297:1. Because the trial court erred as a matter of law in concluding that Senate Bill 971 likely violates the First Amendment, it abused its discretion by awarding the extraordinary remedy of an injunction. *Porter v. Commonwealth*, 276 Va. 203, 260 (2008).

I. Senate Bill 971 Does Not Infringe on First Amendment Rights.

In addition to protecting speech, the First Amendment protects "inherently expressive" conduct. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 66 (2006). But time and again, the U.S. Supreme Court has rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). After all, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for

example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Instead, the First Amendment protects only conduct that is "intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1974).

It is doubtful that the games at issue here even implicate the First Amendment, as they involve neither speech nor any obvious expressive content. While Sadler himself suggested otherwise below, *see, e.g.,* Tr. 10:9-13, 274:1-25, he neither explained what message he intends the games he wishes to offer to convey nor endeavored to prove that anyone understands them to convey any such message. Instead, Sadler invoked *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), for the sweeping proposition that videogames are categorically entitled to First Amendment protection. Tr. 274:8-11. In fact, *Brown* merely stated that, when videogames contain expressive content, like "familiar literary devices (such as characters, dialogue, plot, and music) and … features distinctive to the medium (such as the player's interaction with the virtual world)," *that* content is protected. 564 U.S. at 790. Sadler made no effort to demonstrate, and the trial court made no findings, that his own games contain any such content, let alone that a reasonable observer would understand their spinning wheels and other features to communicate

anything beyond whether the player has won or lost. And while Sadler invoked the "enjoyment" his customers derive from playing skill games, the bare fact that someone enjoys an activity does not begin to show that the activity is "intended to be communicative" or "would reasonably be understood by [that person] to be communicative." *Clark*, 468 U.S. at 294.

Ultimately, however, it matters little whether skill games contain some modicum of expressive content, as that expression is not what the General Assembly has regulated. Contrary to Sadler's repeated suggestions below, *e.g.,* Tr. 22:7, 278:4-5, the General Assembly did not prohibit the bare act of offering skill games or single out particular games based on their appearance or themes. It prohibited only skill games 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[.]" Code § 18.2-325(6). In other words, like the ban on electronic sweepstakes machines the North Carolina Supreme Court upheld against a First Amendment challenge, "the law operates irrespective of the content of the video game." *Hest Techs., Inc. v. State*, 749 S.E.2d 429, 437 (N.C. 2012). Venues "are free to provide the video games to their patrons and their patrons are free to play them—and thus make and receive whatever protected message is communicated by the videogame—so long as the games are not associated with the conduct of a payoff." *Id.* Sadler cannot seriously

argue—and, again, the trial court made no finding—that the payoff itself has or would reasonably be understood to have any expressive content.

Nor does regulation of that non-expressive conduct meaningfully burden any expression the game itself may entail. Even when a regulation of non-expressive conduct incidentally burdens speech, that poses no First Amendment problem so long as the law "furthers an important or substantial governmental interest … unrelated to the suppression of free expression" and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. "Courts have long held that the State's police power includes the power to address the health, safety, and welfare concerns presented by gambling operations, as well as activities that implicate the same concerns, even if they cleverly avoid the traditional definition of gambling." *Hest*, 749 S.E.2d at 437-38. That interest is unquestionably important, and it is just as unquestionably unrelated to suppressing expression. And because Senate Bill 971 leaves anyone free to offer skill games so long as nothing of value is offered in exchange, any conceivable restriction on speech is minimal, and certainly "no greater than essential to further" the important interest in restricting gambling.

The "family entertainment centers" exception does not change the analysis in the slightest. For one thing, that exception does not cover many of the kinds of games that Sadler appears to want to offer—e.g., slot-machine-style games that offer

a cash payout. It covers only games that offer prizes "the value of which does not exceed the cost of playing the skill game or the total aggregate cost of playing multiple skill games." Code §18.2-334.6(B). The law thus creates no preferences among providers of games that fail to satisfy that restriction; slot-style "gray games" are now prohibited to everyone. Moreover, the exception does not draw *content*-based distinctions, but rather focuses on the nature of the establishment offering the games, and whether its "primary purpose" is "providing amusement and entertainment to the public." *Id.* That is a *conduct*-based distinction; it does not single out games that offer a particular message, like the ban on only *violent* video games did in *Brown*. 564 U.S. at 588.

In all events, even if the exemption did touch on content, the Supreme Court has long held that even content-based restrictions are permissible if they are designed to regulate the secondary effects of expression, rather than the expression itself, and "reasonable alternative avenues of communication remain[] available." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002). The General Assembly chose to restrict the subset of skill games covered by the exemption to family entertainment centers not because it prefers the speech or expression of such centers to that of truck stops and liquor stores, but because family entertainment centers do not pose nearly as great a risk of bringing about the harms traditionally associated with gambling. And the General Assembly left open to all others the reasonable

alternative of offering whatever expressive content their skill games may entail without offering the prospect of a cash payout. Thus, even assuming the exception implicates some protected speech or conduct, it falls squarely within the General Assembly's police power to regulate the secondary effects of protected expression.

In short, the Commonwealth has not infringed anyone's right to offer or play a skill game; it has merely circumscribed the ability to do so for money. This Court should reject Sadler's strained effort to "disguise [that] conduct with a façade of speech to gain First Amendment protection." *Hest*, 749 S.E.2d at 438.

II. Senate Bill 971 Is Not Vague.

Sadler also argued below that Senate Bill 971 is unconstitutionally vague. While the trial court does not appear to have reached that claim, it too is unavailing. At the outset, it is far from clear that Sadler has standing to raise the arguments he presses. While he professed confusion below over which games the law covers, he does not appear to dispute that it covers the slot-style games he wants to offer. Tr. 248:3-5. Moreover, while Sadler expressed confusion over the scope of the "family entertainment center" exemption, neither he nor the trial court claim that his establishments could satisfy any plausible reading of that provision. Sadler cannot complain about potential ambiguity that has no impact on him.

To be sure, when a statute restricts speech or conduct protected by the First Amendment, one whose conduct it unquestionably *does* regulate may still bring a

facial challenge regarding uncertainty over *other* applications of the law under the "overbreadth" doctrine. *United States v. Stevens*, 559 U.S. 460, 473 (2010). But that doctrine has no application here because, as explained, this law does not regulate any speech or conduct protected by the First Amendment. At any rate, even under the overbreadth doctrine, perfect clarity is not required. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). A statute survives facial attack so long as it is clear what the statute proscribes "in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 733 (2000). This statute easily meets that test, as everyone agrees it plainly covers the slot-style skill games it targets.

Sadler claims it is unclear whether the definition of "skill games" covers "arcade-style video games, such as Pac Man and Galaga," because "they reward a skillful player with additional rounds of game play or free replays." Mem. ISO Prelim. Inj. 11. But Sadler overlooks the fact that the definition of "illegal gambling device" carves out machines that "return to the user … nothing more than additional chances or the right to use such machine" or "that only sell, or entitle the user to, items of merchandise of equivalent value that may differ from each other in composition, size, shape, or color." Code §18.2-325(3)(b). As the Commonwealth explained below, because this "exclusion remains in the Code even after the addition of skill games to the list of gambling devices[,] Pac Man, pinball, car racing games, and other arcade games awarding additional playing time or a free game to players

are not 'gambling machines' or 'skill games' under Virginia law." Demurrer ¶ 7. And even if there were some uncertainties on that score, that would hardly justify enjoining application of the law to the slot-style games that all agree it covers.

Sadler alternatively complains the Commonwealth may not be enforcing the statute to its fullest extent because it is not banning some games that allow players to exchange tickets for cash prizes. It seems unlikely that these games actually are prohibited once one takes into account both the "family entertainment center" exemption and the "equivalent value" proviso in the definition of "illegal gambling device." But whether they are or are not is a matter of statutory interpretation; that parties may disagree about how best to interpret a law hardly suffices to make it unconstitutionally vague. Moreover, even assuming there were some ambiguity here, selective enforcement does not, in and of itself, render a law vague. If Sadler is right and the ban is being underenforced, the answer is to clarify the correct interpretation of the law so the Commonwealth can correctly enforce it, not to enjoin the law in its entirety.

Finally, Sadler suggests that the definition of "family entertainment center" is vague because it is unclear what it means to "market [one's] business to families with children." Code §18.2-334.6(B). Even accepting that dubious premise, Sadler glosses over the separate restriction that the exemption covers only establishments "established for the primary purpose of providing amusement and entertainment to

the public." *Id.* Read together, it is clear what this exception is designed to cover—and it is just as clear that it does not cover Sadler's establishments. And in all events, any infirmity in the exception would be a reason to jettison the exception, not to invalidate the entirety of Code § 18.2-325. The trial court's reflexive resort to the most draconian relief possible is flatly inconsistent with the principle that courts should invalidate duly enacted statutes only as means of absolute last resort.

CONCLUSION

For these reasons, the Court should grant the Commonwealth's Petition for Review and vacate the trial court's order entering a temporary injunction.

Dated: December 21, 2021

Respectfully submitted,

/s/ Robert W. Loftin

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CERTIFICATE OF SERVICE

I certify that the foregoing complies with the requirements of Rule 5:30, and further certify as follows:

1. The *Amicus Curiae* is Colonial Downs Group, LLC, a Delaware limited liability company.

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3. The Petitioners are: (a) the Commonwealth of Virginia; (b) Ralph Northam, in his official capacity as Governor of the Commonwealth of Virginia; (c) Mark Herring, in his official capacity as Attorney General for the Commonwealth of Virginia; and (d) the Virginia Alcoholic Beverage Control Authority.

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5. The Respondents are: (a) Sadler Brothers Company, d/b/a Sadler Travel Plaza; (b) Slip-In Food Mart, Inc.; and (c) CHN, LLC.

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7. On December 21, 2021, I caused the foregoing to be filed and served electronically in the Clerk's Office of the Supreme Court of Virginia pursuant to this Court's Rules and VACES Guidelines. On the same day, I also caused the foregoing to be served electronically on the above-listed counsel for Petitioners and Respondents.

/s/ Robert W. Loftin

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