

IN THE SUPREME COURT OF VIRGINIA

Record No. 21 _____

COMMONWEALTH OF VIRGINIA et al.,
Defendants/Petitioners

v.

SADLER BROTHERS OIL CO., et al.,
Plaintiffs/Respondents.

PETITION FOR REVIEW
PURSUANT TO CODE § 8.01-626

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT.....	3
ASSIGNMENTS OF ERROR	7
I. The circuit court erred as a matter of law in failing to consider the necessary injunction factors in ruling that an injunction was appropriate. (Preserved Attach. B, Tr. 27–30, Attach. D, at 421–22.).....	7
II. The circuit court erred as a matter of law in enjoining the skill games ban when equity did not favor the plaintiffs. (Preserved Attach. B, Tr. 27–29, 288–89, Attach. D, 433–34.)	7
III. The circuit court erred as a matter of law in concluding that video skills games were speech under the First Amendment. (Preserved Attach. B, Tr. 25, 289–90, Attach. D, at 423–426.).....	7
STANDARD OF REVIEW	7
ARGUMENT	8
I. The circuit court failed to consider the factors relevant to injunctive relief and erred as a matter of law in concluding that equity favored an injunction. (Assignments of Error I and II)	8
A. The trial court utterly failed to weigh or analyze the <i>Winter</i> factors	9
B. The equities did not favor the plaintiffs.....	10
II. The circuit court also erred as a matter of law by holding the video gambling machines constituted speech. (Assignment of Error III).....	12
CONCLUSION.....	15
CERTIFICATE OF COMPLIANCE AND SERVICE.....	17

TABLE OF AUTHORITIES

<u>Cases</u>	Page
<i>Brown v. Entertainment Merchants Association</i> , 564 U.S. 786 (2011)	13, 14
<i>Claytor v. Anthony</i> , 56 Va. (15 Gratt.) 518 (1860).....	1
<i>Commonwealth ex. rel. Bowyer v. Sweet Briar Inst.</i> , No. 150169, 2015 Va. Unpub. LEXIS 22 (June 9, 2015)	1, 11
<i>Dillon v. Northam</i> , 105 Va. Cir. 402 (2020).....	9
<i>Fancher v. Fagella</i> , 274 Va. 549 (2007).....	11
<i>GeoMet Operating Co., Inc. v. CNX Gas Co. LLC</i> , 661 S.E.2d 139 (Va. 2007)	9
<i>Landrum v. Chippenham & Johnston-Willis Hosps., Inc.</i> , 282 Va. 346 (2011).....	8
<i>Levisa Coal Co. v. Consolidation Coal Co.</i> , 276 Va. 44 (2008).....	1
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555, 561 (1992)	14
<i>Mattaponi Indian Tribe v. Commonwealth, Dep't of Env't Quality, ex rel. State Water Control Bd.</i> , 261 Va. 366 (2001).....	14
<i>May v. R.A. Yancey Lumber Corp.</i> , 297 Va. 1 (2019).....	7, 10
<i>School Bd. of Richmond v. Wilder</i> , 73 Va. Cir. 251 (2007).....	9

<i>Stoney v. Anonymous</i> , No. 200901, 2020 Va. Unpub. LEXIS 19 (Aug. 26, 2020).....	7
<i>Taylor v. Northam</i> , ___ Va. ___, 862 S.E.2d 458 (2021)	15
<i>United States v. Burr</i> , 25 F. Cas. 30 (C.C. Va. 1807)	9
<i>Winter v. NRDC</i> , 555 U.S. 7 (2008)	passim

Statutes

Section 8.01-628, Code of Virginia	10
Section 18.2-325, Code of Virginia	3
Section 18.2-325(1), Code of Virginia	3
Section 18.2-325(3), Code of Virginia	3
Section 18.2-325(6), Code of Virginia	3
Section 334.5(8), Code of Virginia (2020)	4

Other Authorities

Brett Hall, <i>Virginia Skill Machine Gamers Return Fast Following Injunction, But Tax Revenue Will Not</i> , wavy.com, Dec. 10, 2021.....	1
Henry J. Friendly, <i>Indiscretion About Discretion</i> , 31 Emory L.J. 747, 784 (1982)	9
Jeremy M. Lazarus, <i>'Skill Games' Back in Business in Convenience Stores, Truck Stops Statewide</i> , Richmond Free Press, Dec. 9, 2021	1
Michael Martz, <i>Electronic Skill Games Are Legal Again in Virginia for Now After Court Blocks State Ban</i> , Richmond Times Dispatch, Dec. 7, 2021	1

INTRODUCTION

“[T]he granting of an injunction is an extraordinary remedy,” *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 60 (2008), which “allows a court to preserve the status quo between the parties while litigation is ongoing,” *Commonwealth ex. rel. Bowyer v. Sweet Briar Inst.*, No. 150169, 2015 Va. Unpub. LEXIS 22, at *3 (June 9, 2015) (citing *Claytor v. Anthony*, 56 Va. (15 Gratt.) 518, 527 (1860) (monographic note) (“[T]he proper purpose of [a temporary] injunction [is] to preserve the present status until a full hearing on the merits shall be had.”)).

Far from preserving the previous state of affairs, the circuit court’s temporary injunction has upended the status quo and resulted in the proliferation of entirely unregulated gambling devices across the Commonwealth.¹ It is now legal in Virginia for a child of any age to go

¹ See Brett Hall, *Virginia Skill Machine Gamers Return Fast Following Injunction, But Tax Revenue Will Not*, wavy.com, Dec. 10, 2021; Jeremy M. Lazarus, *‘Skill Games’ Back in Business in Convenience Stores, Truck Stops Statewide*, Richmond Free Press, Dec. 9, 2021; Michael Martz, *Electronic Skill Games Are Legal Again in Virginia for Now After Court Blocks State Ban*, Richmond Times Dispatch, Dec. 7, 2021. For the Court’s convenience, Attachment A contains copies of these articles.

to a corner store and gamble on so-called video skills games. Attach. B, Tr. 105.² Although the plaintiffs below asked the circuit court to enjoin the General Assembly's recent ban of certain gambling devices and did not object to a return to a system of regulation of those devices, the circuit court's injunction has resulted in immediate and complete deregulation from the bench. Attach. B, Tr. 103, 197–98. The Petition for Review should be granted for three reasons.

First, the circuit court erred as a matter of law in failing to weigh the injunction factors. *Second*, it erred in enjoining the skill games ban because the equities decidedly do not favor the plaintiff. *Third*, the circuit court erred as a matter of law in concluding that the video gambling devices constitute protected expressive speech under the First Amendment.

The Petition for Review should be granted, and the temporary injunction should be vacated.

² A copy of the transcript of the December 6, 2021 preliminary injunction hearing is attached as Attachment B.

STATEMENT

The General Assembly has long determined it to be in the public interest to prohibit gambling, with limited exceptions.³ See Va. Code § 18.2-325 *et seq.* Before 2020, “skill” games, which resemble slot machines but contain an additional component, “the outcome of which is determined by any element of skill of the player,” were not considered gambling devices. Va. Code § 18.2-325(6).

During the 2020 session, the General Assembly voted to add skill games to the definition of “illegal gambling” and “gambling device.” Va. Code §§ 18.2-325(1), (3). However, to provide funds to local and state governments during the pandemic, the Governor proposed, and the General Assembly approved, a one-year delay in the ban, accompanied by an extensive regulation system, with licensing fees paid primarily into a pandemic relief fund.⁴ Senate Bill 971, Amendment in the Nature of a Substitute (Proposed by the Governor Apr. 11, 2020). These regulations

³ Plaintiffs concede that the Commonwealth may use its police power to regulate gambling. Attach. B, Tr. 103 (characterizing the 2020 regulations as a “good regulatory system that had no problems and it ran very well”), Attach. D at 363.

⁴ This one-year regulation system remitted \$88,286,000 in funds to the Commonwealth. Attach. E, Pl. Ex. 9

included a minimum player age requirement, an upper limit on the number of machines that could be present in a location, which locations could host skill games—namely only locations holding an ABC license or truck stops—and a labeling and registration system. Attach. B, Tr. 76–79, 107–08. The regulation system was set to expire, and the ban would go into effect, on July 1, 2021. Va. Code § 334.5(8) (2020).

Nine days before the ban was scheduled to go into effect, plaintiffs filed suit, seeking declaratory and injunctive relief, arguing the ban on skill games gambling was an unconstitutional restriction on speech and unconstitutionally vague and overbroad. Attach. C, Compl. ¶¶ 5–6.⁵ At the same time, plaintiffs moved for a temporary injunction to halt the ban, but waited nearly four-months (until October 13, 2021) to notice a hearing on that motion. Attach. D, at 1, 103.⁶

During the December 6, 2021 temporary injunction hearing, the plaintiffs presented evidence on the history of skill games presence in their truck stops, the regulation regime, and the financial outcomes of

⁵ The complaint, filed June 21, 2021, is attached as Attachment C.

⁶ All pleadings related to plaintiffs’ motion for an injunction, and defendants’ opposition, are attached as Attachment D. For this Court’s ease of locating citations, Attachment D has been Bates stamped.

having these games present. A representative from an amusement distribution company testified as to how the games worked. A player inserts money into the bill reader on the game and then selects the “volume” of his bet, and the game converts the money value into points. Attach B, Tr. 166–67. The game starts with a “tic-tac-toe grid,” where the player pushes a button to start the wheels spinning and then the player can either push a button to stop them or allow them to stop on their own. Attach. B, Tr. 166. This is followed by a bonus round where players complete the “skill” portion of the game by performing tasks like following simple patterns, touching pumpkins with their finger, or touching an octopus’s tentacle. Attach. B, Tr. 139–144, 146, 166, Attach E, Pl. Exs. 45, 52, 53.⁷

After hearing the evidence and argument, the trial court explained that of the “materials prepared and presented . . . the one thing that strikes this court is the First Amendment, the constitutional issue.” Attach. B, Tr. at 295.⁸ In analyzing the First Amendment, the circuit

⁷ A complete copy of plaintiffs’ hearing exhibits is attached as Attachment E. Copies of the video files referenced therein have been provided to the Court and counsel via secure file sharing.

⁸ The court also mused, “[a]fter all, whether we’re residents of Emporia, Greensville County, Hampton, Virginia, or anywhere in this

court explained, “[s]o first, I look to the Constitution. The temporary injunction statute . . . quite simple, the old sits there and decisions are handed down. They don’t change the statute. I have the authority to do what I’m about to do.” Attach. B, Tr. 296. The court then explained it would rely on “the standards set forth in the *Winter* case,” where “I first look at whether the movants, in this case the plaintiff, are likely to prevail on the merits. Quite frankly, they are likely to prevail on the merits. It’s a constitutional issue that deals with free speech. It deals with due process.” Attach. B, Tr. 296. As to irreparable harm, the circuit court stated “it doesn’t matter how many days you are denied of your constitutional rights. The fact that you are denied your constitutional right or rights is irreparable harm.” Attach. B, Tr. 296. And, as to the balance of equities, the court stated, “[t]he balance of the equities here clearly fall within favor of the movants in this matter and it most certainly is of the public interest that an injunction be granted.” Attach. B, Tr. 296.

dear Commonwealth or in these United States of America, we are the Constitution. That’s who we are. That’s why we exist, our government, our form of government exists.” Attach. B, Tr. 295

The court also held that the injunction bound the defendants from enforcing the law against any person in the Commonwealth, not only the plaintiffs. Attach. B, Tr. 299. The court issued its order that same day. Attach. F.

ASSIGNMENTS OF ERROR

- I. The circuit court erred as a matter of law in failing to consider the necessary injunction factors in ruling that an injunction was appropriate. (Preserved Attach. B, Tr. 27–30, Attach. D, at 421–22.)
- II. The circuit court erred as a matter of law in enjoining the skill games ban when equity did not favor the plaintiffs. (Preserved Attach. B, Tr. 27–29, 288–89, Attach. D, 433–34.)
- III. The circuit court erred as a matter of law in concluding that video skills games were speech under the First Amendment. (Preserved Attach. B, Tr. 25, 289–90, Attach. D, at 423–426.)

STANDARD OF REVIEW

This Court “review[s] a circuit court’s decision to grant or deny a temporary injunction for an abuse of discretion.” *Stoney v. Anonymous*, No. 200901, 2020 Va. Unpub. LEXIS 19, at *5 (Aug. 26, 2020) (citing *May v. R.A. Yancey Lumber Corp.*, 297 Va. 1, 18 (2019)). The circuit court “abuses its discretion if . . . its decision was based on erroneous legal conclusions,” *May*, 297 Va. at 18, or when it fails to consider “a relevant

factor that should have been given significant weight.” *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011).

ARGUMENT

This Court should dissolve the injunction pending a resolution of the case on the merits for two independent reasons. *First*, the circuit court erred as a matter of law in failing to weigh the factors necessary to determine than an injunction was proper and in its evaluation of the equities of the injunction. *Second*, the court erred as a matter of law in concluding that the skills gambling games constituted protected speech.

I. The circuit court failed to consider the factors relevant to injunctive relief and erred as a matter of law in concluding that equity favored an injunction. (Assignments of Error I and II)

A temporary “injunction is an extraordinary remedy never awarded as of right,” and a party seeking one “must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20, 24 (2008).⁹ Plaintiffs bear the burden to

⁹ Although “[n]o Virginia Supreme Court case has definitively set out standards to be applied in granting or denying a [temporary]

demonstrate each of these factors for an injunction to be appropriate.

Dillon v. Northam, 105 Va. Cir. 402, 407 (2020).

A. The trial court utterly failed to weigh or analyze the *Winter* factors

Although a trial court has discretion to grant a temporary injunction, like all “discretionary choices” the decision whether to grant an injunction is “not left to a court’s ‘inclination, but to its judgment; and its judgment is to be guided by sound legal principles.’” Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 784 (1982) (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (Marshall, C.J.)).

As a result, this Court has not hesitated to vacate injunctions where “the record does not reflect that the trial court considered the factors necessary for the issuance of temporary injunctive relief.” *GeoMet Operating Co., Inc. v. CNX Gas Co. LLC*, 661 S.E.2d 139, 140 (Va. 2007). That is precisely what happened here when the circuit court paid lip service to the *Winter* factors but failed to set forth any meaningful

injunction,” Virginia courts have generally “followed [the] standards delineated in the four-part test used by the federal courts.” *School Bd. of Richmond v. Wilder*, 73 Va. Cir. 251, 253 (2007).

analysis. The extent of the circuit court’s reasoning was as follows: “Quite frankly, they are likely to prevail on the merits. It’s a constitutional issue that deals with free speech. It deals with due process.” Attach. B, Tr. 296.

That a constitutional issue “deals with free speech” or “deals with due process” identifies the constitutional provisions at issue in a claim. It says nothing, however, about the likelihood of success on the merits of that claim. Were the circuit court’s reasoning here sufficient, an injunction would be proper in *any* case where a constitutional violation is alleged.

By merely naming the causes of action but saying nothing about their merits, the circuit court erred as a matter of law in failing to actually evaluate the merits of the claims the court identified.

B. The equities did not favor the plaintiffs

“Granting or denying a temporary injunction is a discretionary act arising from a court’s equitable powers,” *May*, 297 Va. at 18, and “[n]o temporary injunction shall be awarded unless the court shall be satisfied of the plaintiff’s equity.” Va. Code § 8.01-628.

Without explanation or analysis, the trial court asserted: “The balance of the equities here clearly fall within favor of the movants in this matter and it most certainly is of the public interest that an injunction be granted.” Attach. B, Tr. 296. In doing so, the trial court utterly failed to follow this Court’s directive that “[t]he decision whether to grant an injunction . . . depends on the relative benefit an injunction would confer upon the plaintiff in contrast to the injury it would impose on the defendant. Any burden imposed on the public should also be weighed.” *Fancher v. Fagella*, 274 Va. 549, 556 (2007). See *Winter*, 555 U.S. at 24 (“[C]ourts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief” and “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction”).

The circuit court failed to acknowledge that its temporary injunction would not preserve the status quo between the parties, but instead would entirely deregulate a gambling device throughout the Commonwealth and render it open to use by children of any age. See *Sweet Briar*, 2015 Va. Unpub. LEXIS 22, at *5 (“[A] court must consider the totality of the circumstances and decide whether equity counsels for

the temporary preservation of the status quo.”). When plaintiffs filed suit, these “skill games” were subject to extensive regulation. And it is probative as a matter of equity that, though plaintiffs filed their motion for a temporary injunction that same day, they did not diligently pursue their rights and seek a decision on the injunction until after the ban had gone into effect and the regulatory system was stricken from the Code.

The trial court therefore erred as a matter of law in two ways: first in failing to weigh the equities of the parties, and, second, in determining the equities were on the side of an injunction which would do nothing to preserve the status quo ante.

II. The circuit court also erred as a matter of law by holding the video gambling machines constituted speech. (Assignment of Error III)

The circuit court likewise erred in its consideration of another of the *Winter* factors. As the plaintiffs stated, for them to succeed on the merits, “[t]he threshold first issue that the Court must determine is whether or not this speech, these video skill games, are sufficiently imbued with expressive content to qualify as speech at all. Are they even within the ambit of the free speech guarantee?” Attach. B, Tr. 10. The answer to this query must be in the negative for two reasons.

First, the content of these video “skill” gambling devices is not expressive conduct previously considered protected speech. Plaintiffs rely on *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), to contend that the United States Supreme Court extended full First Amendment protection to all games that appear on a video screen. Attach. B, Tr. 10, Attach D, at 365, 385. This conclusion does not follow from *Brown*. The Court extended protection to the games at issue there because those games “communicate[d] 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).” *Brown*, 564 U.S. at 790.

Plaintiffs point to no such “familiar literary devices” in their own games and fail to explain how their games bear any resemblance to the detailed narrative experiences discussed in *Brown*. Indeed, plaintiffs do not articulate *any* message that their games convey, and instead conclude that any game that appears on a video screen must be protected. Repeatedly tapping a screen on “Amigos Locos” so that a caricature wearing a sombrero “picks” hot peppers and has “steam” come

out his ears to earn gambling bonus points is a far cry from the expressive activity in *Brown*. Attach. B, Tr. 139–40, 146, Attach. E, Pl. Ex. 53.

Second, even if the games themselves are entitled to protection, *plaintiffs'* First Amendment rights are not implicated—and plaintiffs lack standing to vindicate the First Amendment rights of others. See *Mattaponi Indian Tribe v. Commonwealth, Dep't of Env't Quality, ex rel. State Water Control Bd.*, 261 Va. 366, 376 (2001) (a plaintiff typically lacks standing unless “the plaintiff is himself an object of the action . . . at issue”) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Unlike in *Brown*, plaintiffs here are not the creators of the games. Nor are they the individuals who desire to play the games. Instead, plaintiffs operate truck stops and gas stations and wish to profit by offering games in their stores. Attach. B, Tr. 274. Though they have argued that they have a constitutional right, they do not to articulate what expressive message *they* intend to communicate by offering these games to the public.

The “skill” game ban represents the General Assembly’s policy choice to restrict gambling, not speech. And, as this Court recently emphasized, “[t]he dominant role in articulation of public policy in the

Commonwealth of Virginia rests with the elected branches.” *Taylor v. Northam*, __ Va. __, 862 S.E.2d 458, 469 (2021) (internal quotation marks and citation omitted). Plaintiffs do not contend that gambling—be it poker, sports betting, a slot machine, or any other form of exchanging money for the prospect of more money—is protected by the First Amendment. That makes sense because if gambling is speech protected by the First Amendment, the Commonwealth would have trouble regulating *any* gambling activity. The circuit court erred as a matter of law holding the video skills games at issue constitute speech protected by the First Amendment.

CONCLUSION

The petition for review should be granted and the injunction vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this petition does not exceed 15 pages and therefore complies with Rule 5:17A(c).

I certify that the portions of the record filed with this petition are accurate copies of the record of the circuit court and contain all information necessary for a review of the petition. In addition, the Greenville Circuit Court has provided a full copy of the record of the proceedings below, as well electronic copies of plaintiffs' video exhibits from the preliminary injunction hearing (available for download at <https://vacourts.box.com/s/6n9f6yiabtte3cn0zsglb2nsq4n90qtk>)

I certify that on December 21, 2021, I will electronically deliver this petition and accompanying attachments, along with the items from the Greenville Circuit Court via hyperlink, to the Court and will send service copies via email and UPS, to counsel for plaintiffs/respondents:

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