

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF GREENSVILLE

SADLER BROTHERS OIL COMPANY,)
d/b/a SADLER TRAVEL PLAZA,)
SLIP-IN FOOD MARTS, INC. and)
CHN, LLC)

Plaintiffs,)

v.)

Civil Case No. _____

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.)

COMPLAINT

COMES NOW, your Plaintiffs Sadler Brothers Oil Company, Inc. d/b/a Sadler Travel Plaza, Slip-In Food Marts, Inc., and CHN, LLC (“Plaintiffs” or “Sadler”), through the undersigned counsel, states as follows for its Complaint for declaratory judgment and temporary and permanent injunctive relief against Defendants the Commonwealth of Virginia (“the Commonwealth”), His Excellency Ralph Northam (“Governor Northam”), in his official capacity as Governor of the Commonwealth of Virginia, Mark Herring (“Attorney General Herring”), in his official capacity as Attorney General for the Commonwealth of Virginia, and the Virginia Alcoholic Beverage Control Authority (“ABC”), (collectively, “Defendants”):

INTRODUCTION

1. In 2020, in the midst of an unprecedented expansion of gaming in Virginia, including the approval of five casinos, the legalization of sports betting, and the expansion of charitable gaming, the Virginia Legislature passed a bill banning skill games. Skill games have been legal for centuries under the statutory and common law of the Commonwealth of Virginia and virtually every other jurisdiction in the United States, which have distinguished games of skill from gambling devices because the outcome of a skill game is controlled by the skill of the player rather than chance or other factors outside of the player's control. *See* Exhibit A, Chapter 1277 of the 2020 Acts of Assembly ("SB971").

2. Skill games have now recently drawn the ire of the historical horse racing, casino, and sports betting special interests because skill games were a popular form of entertainment in local neighborhood convenience stores, bars, restaurants, and truck stops that kept the revenues in the local communities and threatened to undercut the revenue potential of the out-of-state gaming businesses that the legislature has now invited into the Commonwealth.

3. In response to industry pressures, the Virginia legislature passed the haphazard, nonsensical, and constitutionally infirm SB971, which bans skill games effective July 1, 2021.

4. Sadler is the owner of a truck stop in Emporia known as Sadler Travel Plaza ("the Truck Stop") that has offered its patrons skill games for nearly twenty (20) years and has depended on skill games to weather the COVID-19 pandemic. Additionally, and as more fully explained below, Sadler operates nine other establishments (in addition to the Emporia Truck Stop) throughout southern Virginia that offers skill games to the public who visit its stores. All in all, nearly three million people are estimated to patronize Sadler's ten stores each year.

5. SB 971 is unconstitutional under the Virginia Constitution in two respects. First, the so-called “family entertainment exception” violates Plaintiffs’ free speech rights in three respects:

- a. It restricts the games that Plaintiffs may offer at the Truck Stop and their other businesses and imposes impermissible content-based restrictions on the types of video games permitted to be operated in Virginia;
- b. It discriminates against retail locations, like those of Plaintiffs, that do not primarily advertise and market to families with children, which locations are not permitted to offer skill games to patrons; and
- c. It conditions the permissibility of skill games on the type of marketing that a retail establishment employs, thereby unconstitutionally compelling the speech of skill game purveyors in the Commonwealth such as Plaintiffs.

6. Second, the skill game ban is unconstitutionally vague and overbroad and violates the due process guarantee in the Virginia Constitution insofar as it does not give a person of ordinary intelligence a reasonable opportunity to know or understand what is prohibited thereby, and it includes within its broad sweep unquestionably legal activities and constitutionally protected speech.

7. Defendants have implemented and are charged with the enforcement of the ban, which goes into effect on July 1, 2021.

8. If the ban goes into effect on July 1, 2021, Plaintiffs and many similarly situated convenience store, restaurant, and truck stop owners will lose an invaluable revenue stream all because of unconstitutional legislation that this Court should declare void and unenforceable. Accordingly, Plaintiffs file this Complaint and seeks declaratory and injunctive relief, including

a preliminary injunction, voiding and restraining the enforcement of SB971, and the maintenance of the status quo ante to protect Plaintiffs' constitutional rights.

THE PARTIES

9. Sadler Brothers Oil Company is a Virginia corporation with its principal place of business in Emporia, Virginia. Sadler operates ten gas station/convenience stores as well as restaurants in southern Virginia. These include: the Cox Slip-In in Petersburg; The Franklin Slip-in in Franklin; the Market Drive Slip-In in Emporia; the Sadler Race-In in Petersburg; the Sadler Travel Plaza in Emporia; the Sadler Travel Plaza in Suffolk; the Shell station and store in Kenbridge; the Skippers Slip-In in Skippers; the South Hill Slip-In in South Hill; and the Sunoco station and store in Blackstone.

10. The Commonwealth is a governmental body under the auspices of which SB971 will be enforced.

11. Governor Northam is the Governor of the Commonwealth in whom the chief executive power of the Commonwealth is vested. Va. Const. Art. V § 1. He is sued in his official capacity.

12. Attorney General Herring is the Attorney General of the Commonwealth charged with leading the Office of the Attorney General, "the Commonwealth's law firm," and enforcing the laws of the Commonwealth. He is sued in his official capacity.

13. ABC is a public safety agency in the Commonwealth, charged with the administration of the state's alcoholic beverage-related laws, which has advised distributors and operators of skill games that it will exercise its authority to prohibit gambling devices in ABC-licensed establishments pursuant to Va. Code § 4.1-325 and assist the Office of the Attorney General in the enforcement of the skill game ban.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction over this dispute pursuant to Va. Code § 17.1-513.

15. This Court has personal jurisdiction over Defendants as citizens, government officials, and/or governmental/administrative bodies of the Commonwealth and/or pursuant to Va. Code § 8.01-328.1(A)(1).

16. Venue is proper in this Court pursuant to Va. Code § 8.01-261 because this action seeks an injunction against the enforcement of unconstitutional criminal laws at Plaintiffs' businesses in Emporia, Virginia, and pursuant to Va. Code § 8.01-262 because the cause of action arose and Plaintiffs are located in Emporia, Virginia.

FACTS

A. Plaintiffs

17. Sadler has owned and operated the Truck Stop for forty (40) years, and serves nearly three million customers every year, many of whom are out-of-state travelers passing through Emporia via I-95. Sadler operates ten gas station/convenience stores as well as restaurants in southern Virginia. These include: the Cox Slip-In in Petersburg; The Franklin Slip-in in Franklin; the Market Drive Slip-In in Emoria; the Sadler Race-In in Petersburg; the Sadler Travel Plaza in Emporia; the Sadler Travel Plaza in Suffolk; the Shell station and store in Kenbridge; the Skippers Slip-In in Skippers; the South Hill Slip-In in South Hill; and the Sunoco station and store in Blackstone.

18. In 1980, the Truck Stop, like thousands of other Virginia businesses, added skill games to its roster of arcade games, claw machines, pinball machines etc., providing local Emporia citizens and out-of-state travelers a new source of entertainment at the Truck Stop, as

well as the other convenience stores and gas stations that it owns in southern Virginia.

Specifically, Sadler has the following skill games machines in the following stores that it owns that are accessible for use by the general public during each store's hours of operation: the Cox Slip-In store in Petersburg currently operates three (3) skill games machines on premises; The Franklin Slip-in in Franklin operates seven (7) skill games machines on premises; the Market Drive Slip-In in Emoria operates three (3) skill games machines on premises; the Sadler Race-In in Petersburg operates four (4) skill games machines on premises; the Sadler Travel Plaza in Emporia operates seven (7) skill games on premises; the Sadler Travel Plaza in Suffolk operates four (4) skill games on premises; the Shell station and store in Kenbridge operates three (3) skill games on premises; the Skippers Slip-In in Skippers operates four (4) skill games on premises; the South Hill Slip-In in South Hill operates two (2) skill games on premises; and the Sunoco station and store in Blackstone operates four (4) skill games on premises .

19. Cumulatively, Sadler operates forty-one (41) skill games in the Commonwealth of Virginia. Pursuant to the current statutory regulations and taxation by the Commonwealth, Sadler pays one thousand two-hundred dollars (\$1,200.00) per month, per machine to the Commonwealth of Virginia in order to operate all of the aforementioned machines in these ten establishments, which equals a payment directly to the Commonwealth of Virginia (regardless of the income from each machine) of five hundred and ninety thousand, four hundred dollars per year (\$590,400.00).

20. Plaintiffs, like many other Virginia businesses with skill games, have reinvested the revenue that skill games generated by hiring new employees, renovating, and maintaining current employees during the pandemic.

21. When the COVID-19 pandemic struck in March 2020, skill games proved a life-line for the Truck Stop and Plaintiffs' other businesses. Skill Games continued to attract patrons who might not normally have visited the Truck Stop, and the revenue generated from skill games allowed Plaintiffs to retain employees, stay open and provide free lunches to first responders during the shut-down.

B. Skill Games

22. Skill games are typically a type of coin-operated video game in which the player solves puzzles or plays video games to maximize his or her score or credits. There are many different type of skill games, including 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. These are all examples of skill games that exist in retail establishments throughout Virginia. Players use strategy, knowledge, physical dexterity and experience to play the game and potentially win free replays or other prizes based on their level of skill. 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 poker themes. Skill games, however, 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.

23. Skill games have always been legal in the Commonwealth, whether or not they awarded prizes of cash, merchandise or anything else of value. Moreover, as explained *infra*, skill games were recently regulated by the ABC and taxed by the Department of Taxation.

C. The Virginia General Assembly's Efforts to Ban Skill Games

24. On January 15, 2020, a week after the 2020 General Assembly session convened, SB 971 was introduced in the Virginia Senate.

25. On January 29, 2020, SB 971 passed out of committee containing language which would ban skill games with an exception for so-called "family entertainment centers."

26. SB 971 would amend Va. Code § 18.2-325(1) and (3)'s definitions of "illegal gambling" and "gambling device" to include "skill games," which are defined 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.

Exhibit A.

27. On March 18, 2020, SB 971 passed in both the House and Senate, banning skill games with an exception only for "family entertainment centers."

28. Pursuant to the bill, "family entertainment center" is 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.** (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. *See* Exhibit A.

29. On April 11, 2020, after the Commonwealth began to experience the initial fiscal impacts of the early COVID-19 pandemic, Governor Northam 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 throughout the Commonwealth were taxed and regulated through June 30, 2021. Beginning July 1, 2021, however, skill games would be banned in all convenience stores and bars, but still allowed to operate in so-called “family entertainment centers.”

30. Governor Northam’s substitute bill for SB 971 was approved by both houses of the General Assembly and enacted on April 22, 2020. *See* Exhibit A.

31. Pursuant to the one-year tax and regulate period, skill games have been operating in Virginia, paying significant taxes and fees.

32. During the past year, skill game operators and manufacturers have paid a tax of \$1,200 per machine each month. A portion of the money raised by this tax goes to (1) Virginia’s COVID-19 Relief Fund, (2) Virginia’s Problem Gambling Treatment and Support Fund, and (3) localities where skill games are located.

33. 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.

34. In fact, the skill games have actually contributed approximately \$130 million in tax revenues for the Commonwealth and localities.

35. Skill games have provided a critical source of revenue for beleaguered restaurants, bars, convenience stores, and truck stops allowing owners, who might have otherwise been forced to close their shops, to stay open and continue serving their communities.

36. This is true for Plaintiffs, wherein these skill games provided over seven hundred and fifty-thousand dollars in net revenue that off set the deficits to their businesses caused by the Governor's Executive Orders that restricted movement of the citizens and closures of surrounding businesses during the dark days of the pandemic.

37. On January 8, 2021, the 2021 General Assembly session convened and HB 1880 was introduced in the House of Delegates, proposing an extension of the tax and regulation of skill games through June 30, 2022. Despite the success of the previous year, the bill never left the General Laws Committee.

38. On January 12, 2021, HB 2168 was introduced and permitted localities to enforce gambling device laws against unregulated locations, including skill games.

39. On February 24, 2021, a conference amendment to HB 2168 was proposed, which purportedly allowed any organization that had conducted regulated gaming prior to February 1, 2021 to continue to do so through June 30, 2022. This amendment would have allowed skill games to continue to operate for another one-year period. HB 2168 passed both the House and Senate.

40. This preservation of existing regulated gaming accorded with the trend in Virginia toward liberalizing gaming, including the opening of the state to casinos (HB 4), the legalization of sports betting (HB 896), the expansion of charitable gaming (2020 Acts of Assembly, Ch 982 (SB 936)), and the expansion of historic horseracing facilities (SB 36)—all evidencing a relaxation of the state's police power to enforce gambling.

41. Upon information and belief, while HB2168 was sitting on Governor Northam's desk awaiting his signature, lobbyists for the casino and gaming industry intervened and demanded that the Governor Northam to veto or amend HB 2168.

42. On April 7, 2021, Governor Northam proposed an amendment to HB 2168 removing the extension of “regulated gaming.”

43. The Governor’s amendment was passed by the House and Senate and enacted the same day. The Governor’s amendment effectively bans skill games beginning July 1, 2021.

COUNT I

Violation of the Free Speech Clause of the Virginia Constitution

44. Plaintiffs incorporate all prior paragraphs as though fully restated herein, verbatim.

45. The Virginia Constitution is especially clear that freedom of speech is 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, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

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

46. Electronic and video games are protected speech under the Virginia Constitution.

47. By banning skill games (other than in family entertainment centers), Defendants are infringing upon the free speech rights of Plaintiffs and other businesses that offer skill games but do not meet the requirements of the family entertainment exception by

- a. Restricting the games that Plaintiffs may offer at the Truck Stop and other businesses and imposing impermissible content-based restrictions on the types of video games permitted to be operated in Virginia;

- b. Discriminating against locations that do not advertise and market to families with children, which locations are not permitted to offer skill games to patrons; and
- c. Conditioning the permissibility of skill games on the type of marketing that the establishment employs, thereby unconstitutionally compelling the speech of skill game purveyors in the Commonwealth such as Plaintiffs.

48. During the year in which skill games were taxed and regulated, skill games that had a certain aesthetic or theme (i.e. looked like a slot machine) were regulated and taxed as “skill games.” Skill games that did not have this aesthetic or theme (such as traditional arcade games, crane games, coin-pushers, carnival games, etc.) did not have to pay the \$1,200 monthly tax and were not regulated.

49. Pac-Man and Galaga games in local restaurants were allowed to operate without taxation and regulation despite the fact that they fell within the definition of “skill game.”

50. Skill games at Dave & Busters and Chuck E. Cheese were allowed to operate without taxation and regulation despite the fact that they fell within the definition of “skill game” and the “family entertainment center” exception was not yet effective.

51. Defendants and law enforcement clearly treated one type of skill game different than others. This disparate treatment was based on the speech of the game itself, i.e. its visual aesthetic.

52. Skill games that looked like traditional arcade games, carnival games, and sports games were tolerated and allowed to operate outside of the “skill game” taxation and regulation scheme. Skill games 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 per game tax.

53. SB 971 will ban certain games based on this very same content-based distinction on July 1, 2021. Skill games like skee-ball and pinball arguably fall within the text of the new statutory definition of “skill game” because they are “electronic, computerized or mechanical” contrivances that require the insertion of some form of consideration, that are skill-based (i.e., skill of the player determines the outcome), and that reward something “of value” to the successful player. Even video arcade games fall within this textual definition if they award the player with something of value, such as a free replay.

54. Certain games will be banned and others allowed to operate based on the content of the respective games’ speech. A pinball machine or video arcade game that does not have a visual theme that can be described as analogous to the “look” of a casino game will be permissible, but a skill game at a truck stop is not.

55. SB 971 effects an unlawful content-based restriction on free speech and unlawful viewpoint discrimination.

56. This is the same as banning the sale of violent video games, a practice which courts, including the United States Supreme Court, have universally found to be an unconstitutional violation of free speech. In both instances, a video game is allowed or banned based on the content or aesthetic of the video game itself. In both instances, the law constitutes impermissible viewpoint discrimination in violation of free speech principles.

57. In addition to discriminating against the content of the game itself, SB 971 likewise infringes upon Plaintiffs’ speech rights by permitting retail locations that market and

advertise to families with children to offer games, but forbidding locations that do not market or speak about themselves in that way from offering games.

58. The Government cannot infringe Plaintiffs' free speech by requiring it to cater to a family friendly clientele or speak in a manner that pleases the government.

59. SB 971 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. This is the same as requiring a store owner to post a sign warning customers about violent video games before selling video games, which is another practice that courts have repeatedly found to violate free speech. Unless Plaintiffs market and advertise their businesses in the particular manner mandated by the State, it will not be allowed to operate skill games under Defendants' interpretation of SB 971.

60. Such government compelled speech is not permitted under the Virginia Constitution, which describes freedom of speech as "among the great bulwarks of liberty." Va. Const. Art. I § 12.

61. For these reasons, the skill game ban is an unconstitutional infringement of Plaintiffs' right of free speech.

62. No justification exists for these restrictions upon Plaintiffs' free speech. If the State deems the games to be somehow inimical or harmful to public safety, allowing *children* to play them at so called family entertainment centers undermines that interest. Moreover, at the same time that Virginia banned skill games, Virginia has allowed the unprecedented expansion of actual gambling in the form of casino gambling, sports betting, charitable gambling, and historic horseracing. The General Assembly and Governor cannot pick and choose winners and losers in such a manner, especially when free speech and due process rights are at issue.

63. It is noteworthy that other parties have complained and challenged the Defendants' regulation of skill games as impermissible discrimination on the basis of race, religion and national origin, given that skill games are operated in convenience stores that are disproportionately owned and frequented by people of color. Disparaging comments were made about the people who play and operate skill games on the General Assembly floor during the skill ban debate. To the extent that these racial, ethnic or cultural stereotypes were the rationale behind the General Assembly's and Governor's actions, such paternalistic and stereotypical thinking is not a permissible governmental interest, much less a compelling interest.

64. Even if there were some articulable government interest or justification for SB 971's ban on skill games, the interest is not compelling, narrowly tailored to effectuate that interest, or substantially effective insofar as SB 971 permits *children* to play skill games at family entertainment centers and the General Assembly has otherwise opened the door to actual gambling in a variety of other contexts.

65. The skill game ban is both over-inclusive and under-inclusive and does not survive strict scrutiny, intermediate scrutiny, rational basis, or any other applicable constitutional standard.

COUNT II

Violation of the Due Process Clause of the Virginia Constitution

66. Plaintiffs incorporate all prior paragraphs as though fully restated herein, verbatim.

67. 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.

68. SB 971's definitions of "skill game" and "family entertainment center" are unconstitutionally vague and overbroad and accordingly offend the due process guarantee in the Virginia Constitution.

69. Legislative enactments must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and what is permitted, so that the person may act accordingly.

70. The definition of "skill game" in SB971 is similar in some respects but departs drastically in other respects from the established definition of a gambling device. SB971 defines a 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.

71. In one interpretation of this language, "skill games" would include pinball machines and nearly all types of video arcade games, all of which are based on the skill of the player and many of which may reward the player with electronic credits or something of value. A free replay – a common feature in pinball video arcade games – would certainly qualify as "anything of value" because it would otherwise cost money in order to play the game again.

72. Indeed, the General Assembly had specifically addressed this ambiguity in the definition of illegal "gambling device" in Va. Code § 18.2-325. The definition of "gambling device" is similar to the definition of "skill game" and contains the same language about awarding the player with "something of value." But the "gambling device" statute then clarifies that "provided, however, that the return to the user of nothing more than additional chances or the right

to use such machine is not deemed something of value within the meaning of this subsection.” Va. Code § 18.2-325(3)(b).

73. Such clarifying language does not exist in the General Assembly’s new definition of “skill game” in SB 971, thus leaving video game manufacturers, operators, players, and retailers like Plaintiffs to guess as to whether the General Assembly has outlawed all pinball machines or video arcade machines that award free replay. It appears that perhaps that is what the General Assembly has done in its overzealous attempt to ban skill games.

74. The ambiguity in the definition of “skill game” is evident from the ABC’s enforcement of skill games during the previous year’s tax and regulate statutory scheme. The definition of skill games was exactly the same during the “tax and regulate” year. Defendants enforced that statute by collecting the \$1,200 per month tax and regulating certain types of skill games, but not others, based on the aesthetic of the game itself. Defendants did not collect the tax or prosecute retail locations that operated arcade games or pinball games, despite the fact that those games fell within the technical definition of “skill game.”

75. 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.

76. Moreover, the statutory scheme in SB 971 eviscerates 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.

77. Under Va. Code § 18.2-333, Virginia law expressly exempts contests of skill from the Commonwealth’s ban on gambling. That provision remains the law of the land, and yet SB

971 purports to proscribe skill games. The legislation is therefore nonsensical, in addition to being vague and overbroad.

78. Similarly, the definition of “family entertainment center” is unconstitutionally vague and ambiguous.

79. 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 statute does not provide 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.

80. Vague and ambiguous statutory language is subject to abuse and arbitrary (and discriminatory) enforcement by law enforcement. Such ambiguity is especially concerning when there is disparate racial impact or racial animus underlying the ambiguous and vague statutory language. When “everything” is illegal, law enforcement can more easily discriminate against people and businesses in an unconstitutional manner.

81. The definitions of “skill game” and “family entertainment center” are hopelessly vague and ambiguous. The textual definition of “skill game” encompasses numerous lawful games which were allowed to operate tax free during the “tax and regulate” period and presumably will be allowed to operate after July 1, yet purports to ban all “skill games.”

82. A reasonable person, let alone a sophisticated, experienced businesses like Plaintiffs, cannot decipher what is illegal or legal under the definitions. The statute is therefore unconstitutional as a violation of Plaintiffs' due process rights.

COUNT III

Request for Temporary and Permanent Injunctive Relief

83. Plaintiffs incorporate all prior paragraphs as though fully restated herein, verbatim.

84. Temporary injunctive relief is necessary to preserve the *status quo ante* pending litigation.

85. Moreover, Plaintiffs have been and will continue to be irreparably harmed absent the issuance of a temporary and permanent injunction.

86. Plaintiffs have no adequate remedy at law.

87. Defendants will not be harmed if a temporary and/or permanent injunction is granted.

88. Plaintiffs are likely to succeed on the merits.

89. The public interest in the preservation of the Virginia Constitution's guarantees of equal protection, due process, and free speech, and the principle that no one should be required at peril of life, liberty or property to speculate as to the meaning of penal statutes is served by the issuance of a preliminary and/or permanent injunction.

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Enter a declaratory judgment in Plaintiffs' favor declaring that SB 971 is unconstitutional and void;

- B. Enter a temporary and permanent injunction prohibiting Defendants from enforcing the ban on skill games encompassed in SB 971; and
- C. Award Plaintiffs reasonable attorney's fees and costs and all such further relief as the Court deems just and equitable.

Dated: June 21, 2021

Respectfully submitted,

Counsel for Plaintiff

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